



The Construction Lien Act and Contract Administration

Glenn Ackerley
Ontario Association of Architects
Admission Course 2013



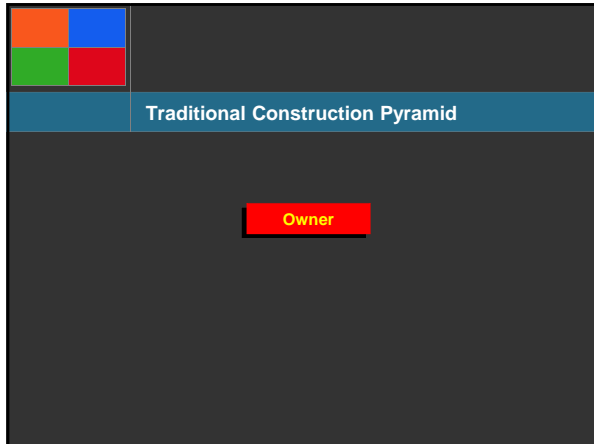
Overview

- What we'll cover ...
 - The *Construction Lien Act* overview
 - Purpose
 - Definitions (old AND new)
 - Essential lien basics:
 - Substantial Performance
 - Timing of Lien Rights
 - Holdbacks
 - Distribution of monies

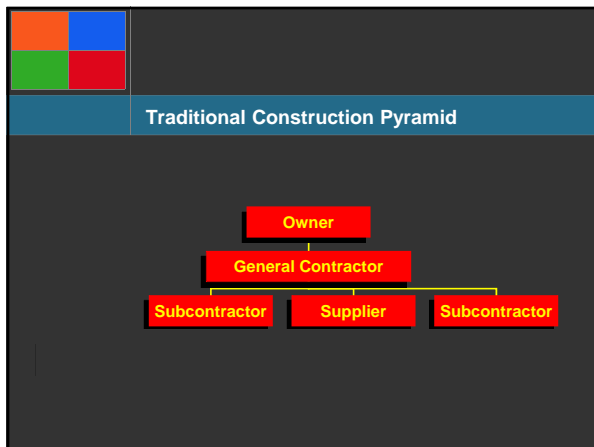


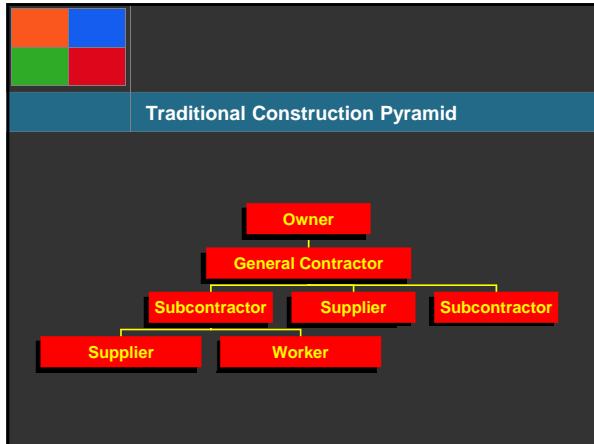
Overview (Cont'd...)

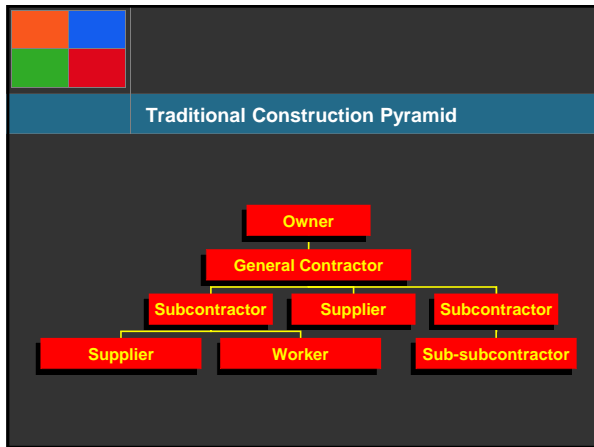
- What we'll cover ...
 - Construction trusts:
 - trust basics
 - the different trusts: Owner's/Contractor's/
Subcontractor's trust obligations
 - personal liability of trustees
 - Do's and Don'ts
 - s.39 Information Rights

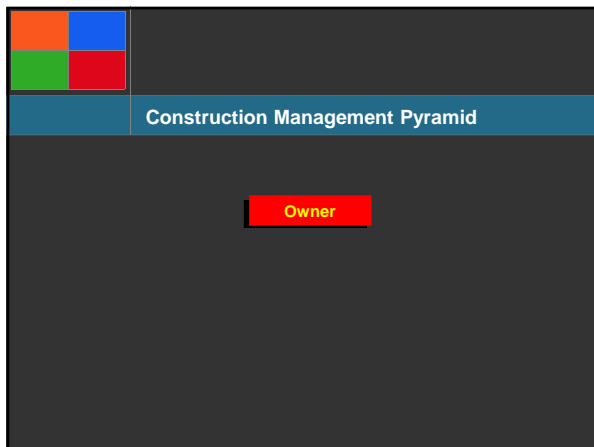


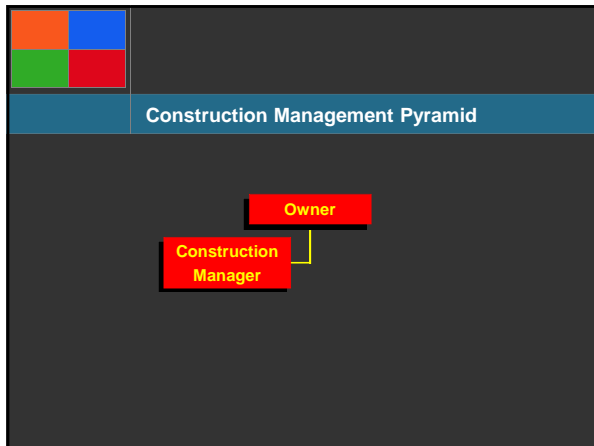


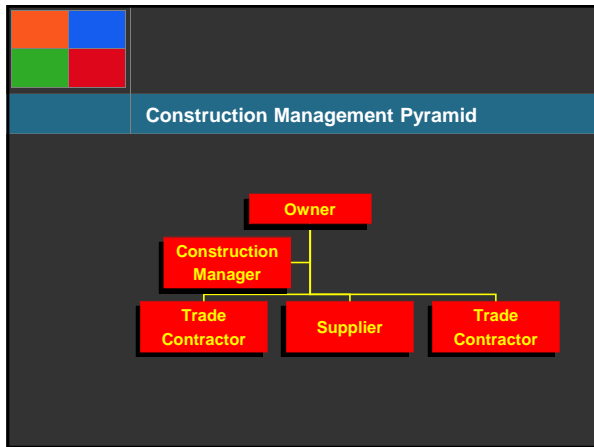


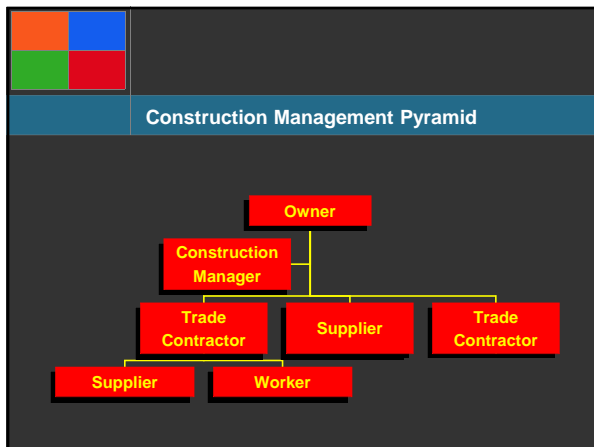


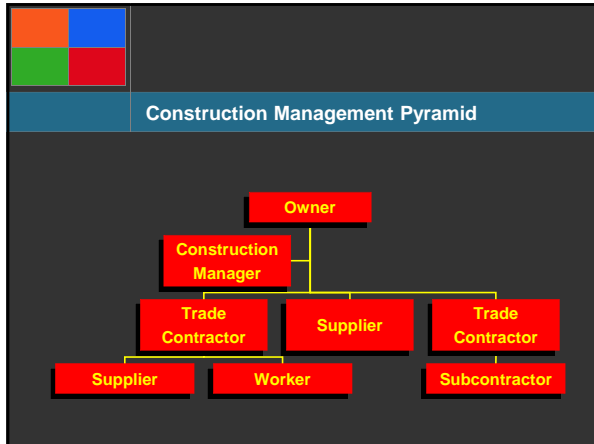


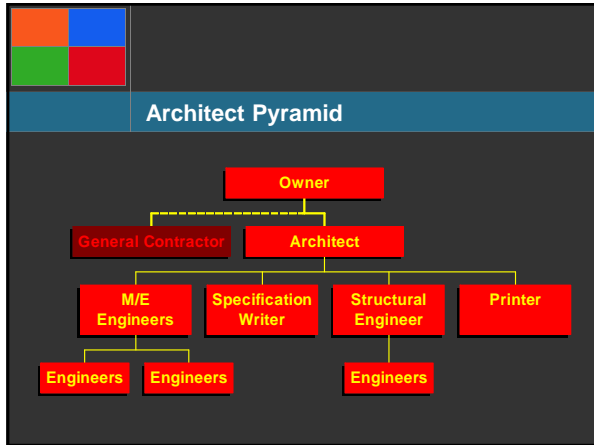


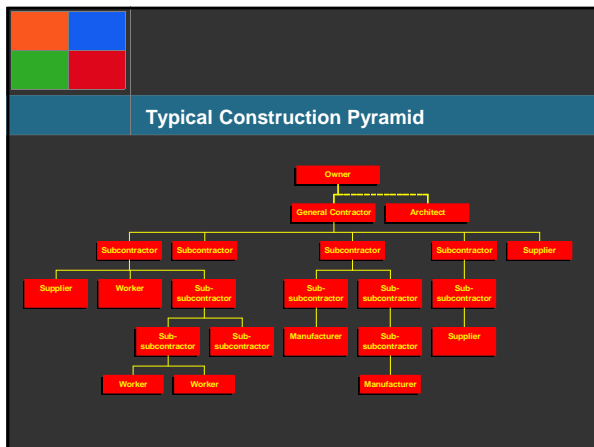


















	
	The Construction Lien Act
	<ul style="list-style-type: none">• What is the purpose?<ul style="list-style-type: none">• Provide a degree of security of payment for trades and suppliers on a construction project:<ul style="list-style-type: none">• lien rights• trust rights• Provide contractors, trades and suppliers with rights to information


	
	The Construction Lien Act
	<ul style="list-style-type: none">• How does CLA protect payment?<ul style="list-style-type: none">• creates a scheme for pooling funds for the benefit of those lower in the pyramid, with the funds secured by the project lands<ul style="list-style-type: none">- LIEN RIGHTS• prevents monies for project flowing out of the pyramid while contractors, trades and suppliers remain unpaid<ul style="list-style-type: none">- TRUST RIGHTS


	
	The Construction Lien Act
	<ul style="list-style-type: none">• Why is it important for Architects to understand?<ul style="list-style-type: none">• your contract administration responsibilities under client/architect agreement:<ul style="list-style-type: none">• holdbacks• substantial performance• knowing your own lien rights and trust obligations under the <i>CLA</i>

	
	The Construction Lien Act
	<ul style="list-style-type: none">• The basic CLA principles:<ul style="list-style-type: none">• you cannot contract out of lien and trust rights• contracts and subcontracts are deemed to be amended so as to comply with the CLA• the rights available are "strictly construed", i.e. you must fit within the rules or lose the benefit


	
	The Right to Lien
	<p>Who has a right to lien?</p> <ul style="list-style-type: none">• A person who <i>supplies services or materials to an improvement for an owner, contractor or subcontractor</i>, has a lien upon the interest of the owner in the <i>premises improved for the price</i> of those services or materials


	
	The Lien Claim
	<ul style="list-style-type: none">• Key Definitions:<ul style="list-style-type: none">• supply of services• supply of materials• improvement• owner, contractor, subcontractor• premises• price


	
	“Supply of Services”
	<ul style="list-style-type: none">• “Supply of “Services” means...<ul style="list-style-type: none">• “any work done or service performed upon or in respect of an improvement”• project/construction managers?• site security services?• transportation of materials?


	
	Supply to an Improvement
	<ul style="list-style-type: none">• Architect’s Supply of “Services”...<ul style="list-style-type: none">• Based on definition, design work for the “improvement” supports right to lien for work performed• other services, such as feasibility studies, may or may not support right to lien depending on connection to the improvement


	
	Supply to an Improvement
	<ul style="list-style-type: none">• Architect’s Supply of “Services”...<ul style="list-style-type: none">• if project not begun, includes drawings, plans and specifications that enhance the value of the land• <i>1246798 Ontario Inc. v. Sterling (2000) (Ontario Divisional Court)</i><ul style="list-style-type: none">• services rendered to obtain site plan approval may increase value of land and support lien


	
	“Supply of Materials”
	<ul style="list-style-type: none">• “Materials” are movable property which...<ul style="list-style-type: none">• becomes part of the improvement• is intended to become part of the improvement• is used to make the improvement• is used to assist in making the improvement<ul style="list-style-type: none">• e.g. lumber, equipment rental, fuel


	
	“Supply of Materials”
	<ul style="list-style-type: none">• “Supply of Materials” occurs when...<ul style="list-style-type: none">• materials are placed on the land where the improvement is being made• materials are placed on designated lands adjacent to the project• materials are incorporated or used in making the improvement


	
	The “Improvement”
	<ul style="list-style-type: none">• what is an “Improvement”?• definition changed in 2010 through <i>Open for Business Act, 2010</i> (Bill 68)


	
Bill 68 - Construction Lien Act Amendments	
	<ul style="list-style-type: none"> • updates definition of “home buyer” • revises definition of “improvement” • creates notice requirement prior to registering condominium • removes requirement for Affidavit of Verification • changes cross-examination on lien • clarifies sheltering procedure


	
The “Improvement”	
	<ul style="list-style-type: none"> • definition of “improvement” has been recently replaced with new definition • most significant change to the <i>CLA</i> under Bill 68 • arises out of the <i>Kennedy Electric</i> case <small><i>Kennedy Electric Limited v. Dana Canada Corporation, 2007 ONCA 664 (CanLII)</i></small> • result of lobbying by trade contractors


	
The “Improvement”	
	<p>(Former) Definition – “improvement” means</p> <ul style="list-style-type: none"> • any alteration, addition or repair to, or • any construction, erection or installation on, <p>any land, and includes demolition or removal of any building structure or works or part thereof</p>


	
	Bill 68 – “Improvement”
	<ul style="list-style-type: none">• new definition created to include the <i>Kennedy</i> situation within the scope of available lien rights• grants a lien in circumstances where the work involves installing machinery and equipment which is critical to the business “housed” in the building


	
	Bill 68 – “Improvement”
	<p>“improvement” means, in respect of any land, any alteration, addition or repair to the land,</p> <ul style="list-style-type: none">(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or(c) the complete or partial demolition or removal of any building, structure or works, on the land


	
	Bill 68 – “Improvement”
	<ul style="list-style-type: none">• (b) any construction, erection or installation on the land, <u>including the installation of industrial, mechanical, electrical or other equipment</u> on the land or on any building, structure or <u>works</u> on the land <u>that is essential to the normal or intended use of the land, building, structure or works</u>


	
	Condominiums
	<ul style="list-style-type: none">• new section (33.1) created to address problem in <i>Cityplace v. Vanbots</i>:• Owner registers condo and closes purchases before contractor can register liens• cost of registering against units for "common elements" work


	
	Condominiums
	<ul style="list-style-type: none">• <i>Now</i>: Owner of condo lands must publish intention to register condo declaration at least 5 and not more than 15 days (excluding Saturdays and holidays) prior to registration, in construction trade paper


	
	Condominiums
	<ul style="list-style-type: none">• the notice must include:<ul style="list-style-type: none">• Owner's name and address• description of the premises• if Owner knows or believes work done by Contractor in the last 90 days, the Contractor's name, address and, if known, address for service (s.33.1(3))


	
	Condominiums
	<ul style="list-style-type: none">• By giving notice, the contractor has an opportunity to lien before registration becomes very expensive (for common elements) or ownership transferred• If the owner fails to do so, the owner is liable to anyone entitled to a lien who suffers damages as a result

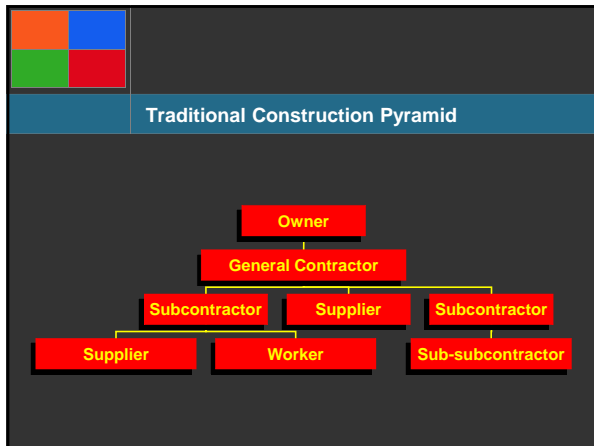
	
	Bill 68 – Status of Amendments
	<ul style="list-style-type: none">• October 25, 2010 – Bill 68 received Royal Assent• “homebuyer” and “improvement” are in force• Other amendments are still awaiting proclamation

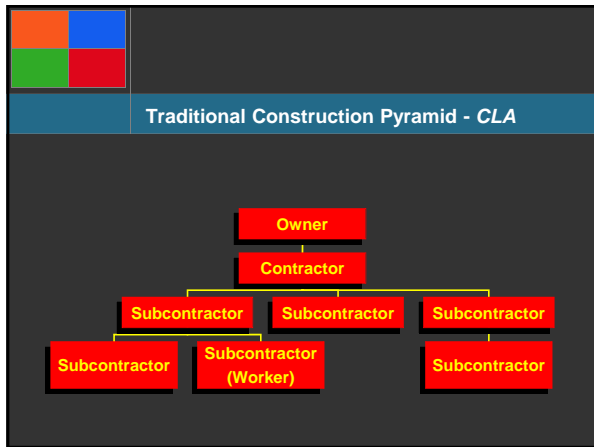
	
	The “Owner”
	<ul style="list-style-type: none">• Who is the “Owner”?<ul style="list-style-type: none">...a person:<ul style="list-style-type: none">• who requested work to be doneAND<ul style="list-style-type: none">• on whose behalf work is done, or either who gave credit for, contracted for, consented to, or directly benefited from the work• not necessarily the registered owner of the property (could be tenant, mortgagee, etc.)

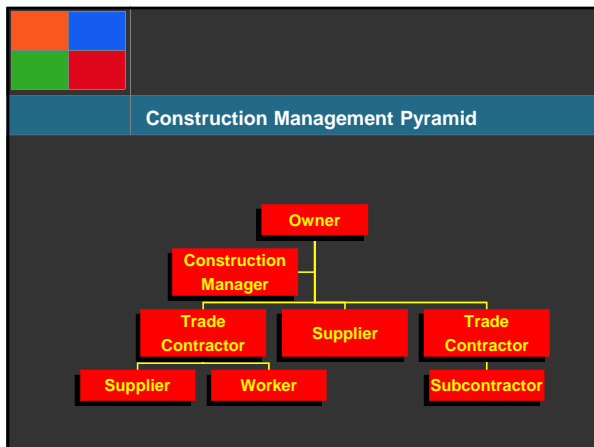
	
	The "Owner"
	<ul style="list-style-type: none">• Other "Special Owners" ...<ul style="list-style-type: none">• Federal Government and federal works are not affected by <i>Construction Lien Act</i>• Provincial Government & Crown Agencies – all property is exempt from registration of liens• Municipalities – for roads only...otherwise like any other private owner subject to liens

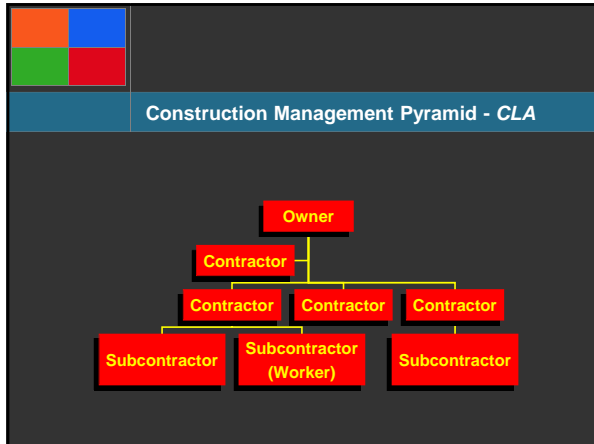
	
	The Contractor
	<ul style="list-style-type: none">• Who is the "Contractor"?<ul style="list-style-type: none">• A person who contracts with or is directly employed by the owner, or the owner's agent• Where an architect contracts with the owner, the architect is a "Contractor" under the <i>CLA</i>

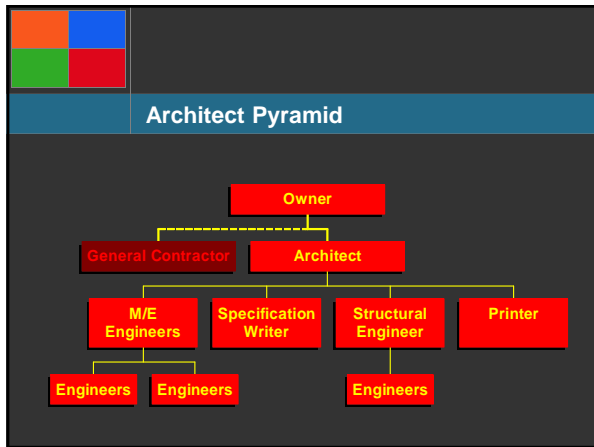
	
	The Subcontractor
	<ul style="list-style-type: none">• Who is a "Subcontractor"?<ul style="list-style-type: none">• A person contracting with a contractor or another subcontractor, but not with the owner• Where an architect contracts with someone other than the owner, the architect is a "Subcontractor" under the <i>CLA</i>

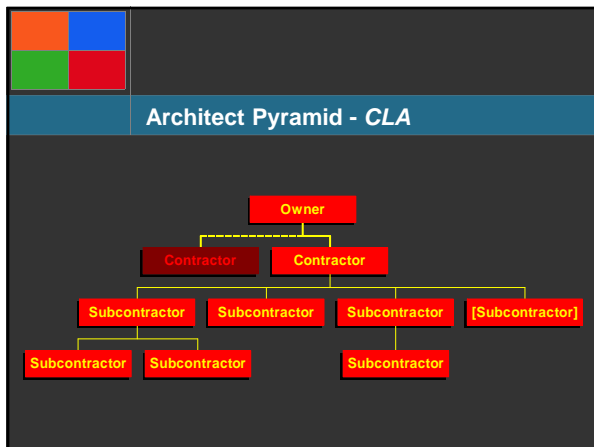






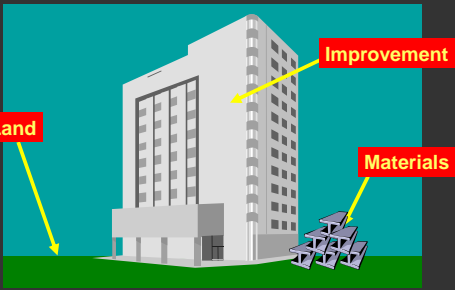



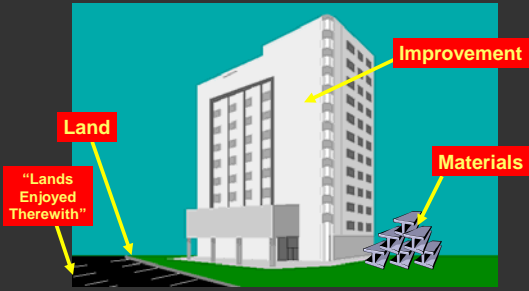








	
The "Premises"	
	<ul style="list-style-type: none">• What is the lien claimed against?<ul style="list-style-type: none">• Lien attaches to the land, building, materials and related lands "enjoyed therewith"• Only the <i>owner's</i> interest in the premises can be subject of the lien• e.g. if the "owner" is a tenant, the lienable interest may be just a tenancy


	
The "Premises"	
	

	
The "Premises"	
	

	
Price of Services or Materials	
<ul style="list-style-type: none"> • How is "price" determined? <ul style="list-style-type: none"> • "Price" is the contract or subcontract price: <ul style="list-style-type: none"> • agreed on by the parties, or • where no agreement, the actual value of the supply of services or materials • if contract or subcontract not yet complete, involves estimate of value based on total price 	

	
Price of Services or Materials	
<ul style="list-style-type: none"> • How is "price" determined for architects? <ul style="list-style-type: none"> • Depends if client-architect agreement based on fixed fee, percentage fee, or hourly rate • when contract not yet finished, calculation of "price" usually based on value of the services provided as a percentage of the fees for the total services anticipated under agreement 	

	
"Substantial Performance"	
<ul style="list-style-type: none"> • Key Milestone... <ul style="list-style-type: none"> • Certified by the payment certifier for the project or agreed between owner and contractor if no payment certifier • Certificate (Form 6) published in the <i>Daily Commercial News</i> <i>www.dcnonl.com/csp/</i> • If CSP not published, not effective! 	




Substantial Performance

- When is it reached?
 - Qualitative test:* improvement or a substantial part is ready for use or being used as intended

AND


- Quantitative test:* 3-2-1 formula is satisfied for remaining work and known defects



Substantial Performance

- What is the 3-2-1 formula? *Assume \$1.4M contract price...*
 - 3% of first \$500,000 *...\$15,000*
 $(\$1,400K - \$500K = \$900K)$
 - 2% of second \$500,000 *...\$10,000*
 $(\$900K - 500K = \$400K)$
 - 1% of balance of contract price *...\$4,000*
 $(1\% \text{ of } \$400K)$

Total: \$29,000 (97.9%)



Substantial Performance


- What is the 3-2-1 formula? *Assume \$750K contract price...*
 - 3% of first \$500,000 *...\$15,000*
 $(\$750K - \$500K = \$250K)$
 - 2% of second \$500,000 *...\$5,000*
 $(\$250K)$
 - 1% of balance of contract price *...\$0*
 $(1\% \text{ of } \$0)$

Total: \$20,000 (97.3%)


Substantial Performance
<ul style="list-style-type: none"> What is the 3-2-1 formula? <i>Assume \$10.5M contract price...</i> <ul style="list-style-type: none"> 3% of first \$500,000 <i>...\$15,000</i> <small>(\$10.5M - \$500K = \$10M)</small> 2% of second \$500,000 <i>...\$10,000</i> <small>(\$10M - 500K = \$9.5M)</small> 1% of balance of contract price <i>...\$95,000</i> <small>(1% of \$9.5M)</small> <p style="text-align: right;">Total: \$120,000 (98.9%)</p>


Completing the CSP
<ul style="list-style-type: none"> Either the lien claim is to be registered against the title to the property (Line A completed) <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> The lien claim is to be delivered to applicable government office (Line B completed) It's one or the other!


Timing of Lien Rights
<ul style="list-style-type: none"> It's a two-step process to claim a lien... <ul style="list-style-type: none"> "Preserve" the lien within time - CLAIM FOR LIEN <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> "Perfect" the lien within time - LIEN ACTION if neither step is taken, the lien is no longer valid

	
Timing of Lien Rights	
	<ul style="list-style-type: none">• How is "preserving" done?<ul style="list-style-type: none">• By registering a Claim for Lien against title to premises, usually by electronic registration, within the 45-day time period• against "Special Owners"... serve Claim for Lien without registration:<ul style="list-style-type: none">• Provincial Government projects• Municipal roads


	
Timing of Lien Rights	
	<ul style="list-style-type: none">• How is "perfecting" done?<ul style="list-style-type: none">• Lien action must be started in the courts within 45 days after lien period would have expired• If lien still registered on title, "Certificate of Action" registered within 45 day time period to prove action started• May be possible to "shelter" under another lien action without starting own action


	
Timing of Lien Rights	
	<ul style="list-style-type: none">• How do you calculate time periods?• Key definitions<ul style="list-style-type: none">• "Substantial Performance"• Contractor:<ul style="list-style-type: none">• "Deemed Completion"• "Abandonment"• Subcontractor:<ul style="list-style-type: none">• "Date of last supply"


	
	Timing of Lien Rights
	<ul style="list-style-type: none">• Contractors...<ul style="list-style-type: none">• For work up to "substantial performance":• Lien expires 45 days after the earlier of...<ul style="list-style-type: none">• Date Certificate of Substantial Performance is published• Completion• Abandonment


	
	Timing of Lien Rights
	<ul style="list-style-type: none">• Contractors...<ul style="list-style-type: none">• For work post-"substantial performance" or where no certificate is published• Lien expires 45 days after the earlier of...<ul style="list-style-type: none">• Completion• Abandonment


	
	Completion
	<ul style="list-style-type: none">• How to determine if contract is "completed"...<ul style="list-style-type: none">• <i>CLA</i> created "deemed completion" (s.2(3)) to simplify analysis• time starts running on lien expiry period even if contract is not actually finished• applies only to contracts, not subcontracts



	
“Deemed Completion”	
	<ul style="list-style-type: none">• When is the contract deemed to be finished?<ul style="list-style-type: none">• Value of work left to complete or correct is lesser of \$1,000 and 1% of contract price <p><i>Ex. 1: a \$1.4M contract is “deemed to be completed” when \$1,000 left to do</i></p> <p><i>Ex. 2: a \$45,000 contract is “deemed to be completed” when \$450 left to do</i></p>

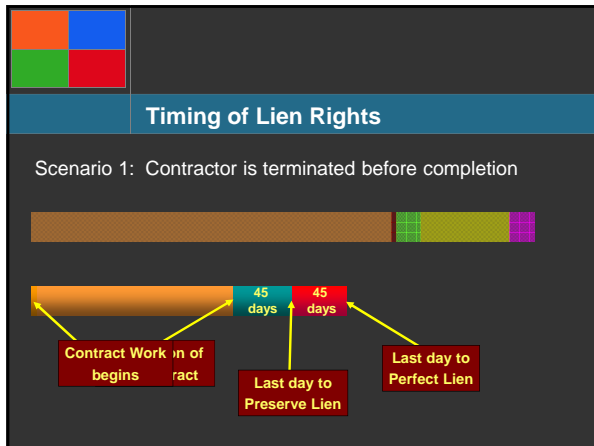
	
“Deemed Completion”	
	<ul style="list-style-type: none">• What’s less than \$1,000?<ul style="list-style-type: none">• BOTH<ul style="list-style-type: none">• the value of work left to completeAND• the cost of correcting known defects and deficiencies <p>must be taken into account in calculating “deemed completion”</p>

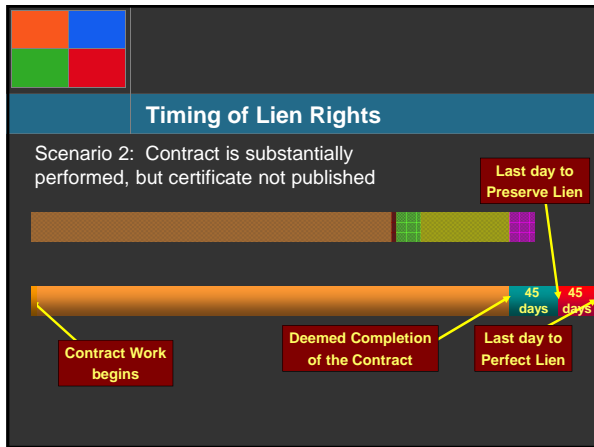
	
“Deemed Completion”	
	<ul style="list-style-type: none">• How does it apply to architects?<ul style="list-style-type: none">• When the value of services under client-architect agreement is less than the threshold, the contract is deemed to be complete, and the 45-day period to lien begins to run

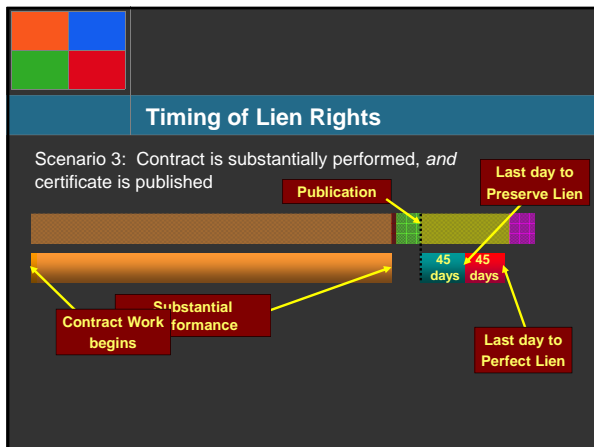
	
“Abandonment”	
	<ul style="list-style-type: none">• When has the contract been abandoned?<ul style="list-style-type: none">• point when it's clear contract is at an end• mere suspension of work not enough• not necessarily the last date actually worked<ul style="list-style-type: none">• e.g. may be when termination letter sent by owner• when contractor makes clear no intention of returning to complete the work

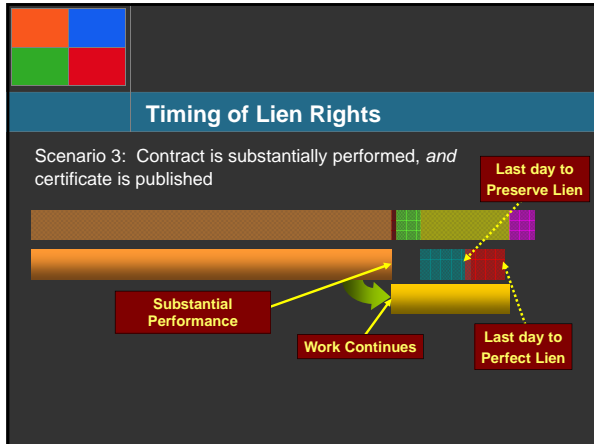
	
“Abandonment”	
	<ul style="list-style-type: none">• How does it apply to architects?<ul style="list-style-type: none">• When the client-architect agreement has clearly come to a premature end, the 45-day period to lien begins to run

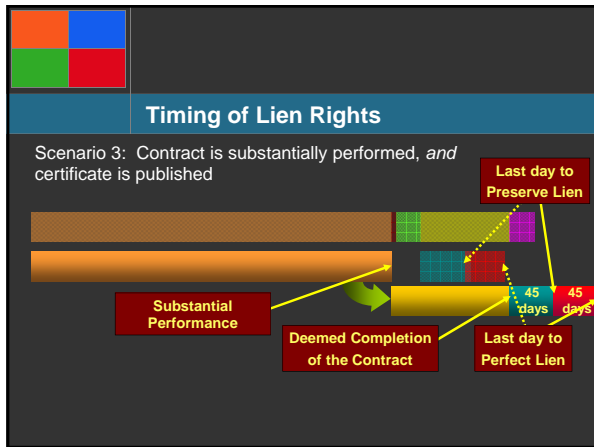
	
Timing of Lien Rights	
	
Typical project timeline	














- Timing of Lien Rights**
- Subcontractors...
 - For work up to "substantial performance":
 - Lien expires 45 days after the earlier of...
 - Date Certificate of Substantial Performance published
 - Date of last supply of services/materials
 - Date subcontract was certified complete

	
	Timing of Lien Rights
	<ul style="list-style-type: none">• Subcontractors...<ul style="list-style-type: none">• For work post-"substantial performance" or where no certificate is published• Lien expires 45 days after the earlier of...<ul style="list-style-type: none">• Date of last supply of services/materials• Date subcontract was certified complete

	
	"Last Supply"
	<ul style="list-style-type: none">• Q: When did subcontractor last supply?<ul style="list-style-type: none">• Consider whether the work was:<ul style="list-style-type: none">• necessary for improvement• supplied in good faith• not separate "extra" to original subcontract• fact supply is trivial value not the issue

	
	"Last Supply"
	<ul style="list-style-type: none">• When does this apply to architects?<ul style="list-style-type: none">• If client-architect agreement is not with owner:<ul style="list-style-type: none">• with a prime consultant• with a design-builder, etc.• then the timing related to subcontractors applies..."when was work last done?"

Completion of Subcontract

- Why certify a subcontract complete?
 - Early subcontractors don't want to wait until end of project to receive holdback
 - Contractor may be obliged to release holdback to completed subcontractor before receiving funds from owner

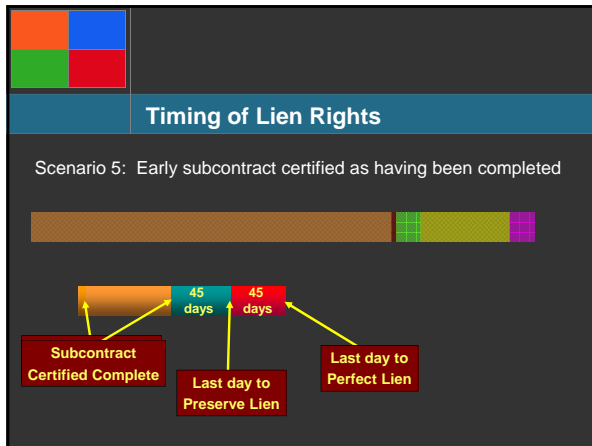
Completion of Subcontract

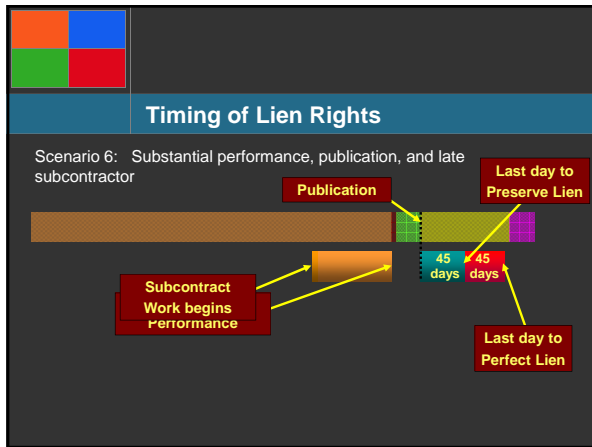
- What is the process?
 - Subcontractor declares last supply (Form 5)
 - Contractor requests payment certifier to certify subcontract is complete (Form 7)
 - Owner releases holdback "early" for specific subcontract after time to lien has expired
 - Contract has to provide that it is mandatory

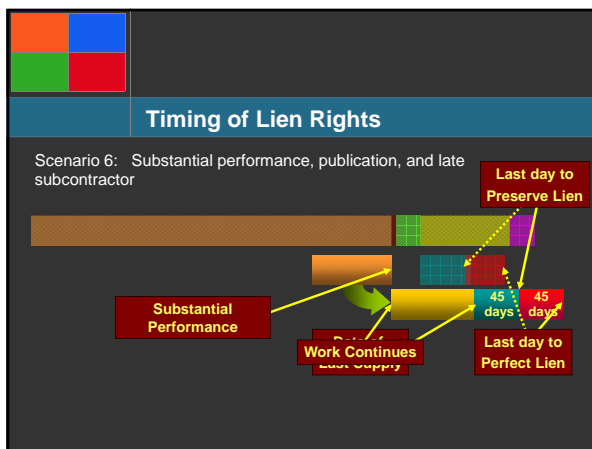
Timing of Lien Rights


Scenario 4: Subcontractor work prior to substantial performance


The diagram shows a horizontal timeline bar with a brown section on the left and a green section on the right. Below the bar, a red box labeled 'Subco Date of Last Supply' has an arrow pointing to a red box labeled 'Last day to Preserve Lien'. A double-headed arrow between these two boxes is labeled '45 days'. Another arrow points from the 'Last day to Preserve Lien' box to a red box labeled 'Last day to Perfect Lien', with a double-headed arrow between them labeled '45 days'.











	
Holdback	
<ul style="list-style-type: none"> • How much is the lien for? • Depends on size of available "pot" <ul style="list-style-type: none"> • the claim of a lien claimant is made against funds held in the owner's hands composed of: <ul style="list-style-type: none"> • Holdbacks <li style="text-align: center;">PLUS • Contract monies owed, if any 	


	
Holdback	
<ul style="list-style-type: none"> • What is the holdback obligation? <ul style="list-style-type: none"> • Each payer on a contract or subcontract must hold back 10% of the price of the services or materials supplied under the contract or subcontract • Owner is personally liable for holdback • Failure to retain may lead to double pay-out 	


	
Holdback	
<ul style="list-style-type: none"> • How does it come about? <ul style="list-style-type: none"> • Holdback funds accumulate over course of project • 10% deducted from each progress payment made • Don't need to hold back from bottom of the pyramid if no possible lien claimants further below 	


	
	Contract Monies
	<ul style="list-style-type: none">• What if there is more owing (“contract monies”) than just holdback?<ul style="list-style-type: none">• Lien is a “charge” against ALL monies owing by payer to defaulting contractor or subcontractor, not just holdback• Payer can deduct own claims against the contract monies; holdback monies must stay intact


	
	Distribution of Monies
	<ul style="list-style-type: none">• How is the money released when there are <i>no</i> lien claims?<ul style="list-style-type: none">• Title search is done after time to lien has passed to ensure no liens registered• If title is clear, remaining holdback monies are released by owner to contractor; contractor pays subcontractors


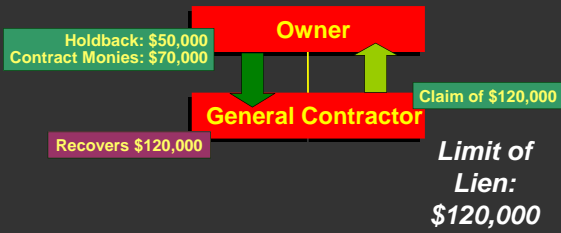
	
	Distribution of Monies
	<ul style="list-style-type: none">• Do architects have to wait until the end of the project to get their holdback?<ul style="list-style-type: none">• Possible to “split” client-architect contract into two separate agreements:<ul style="list-style-type: none">• Design (~75% of total work)• Contract administration (~25% of total work)• Holdback is released once each is completed


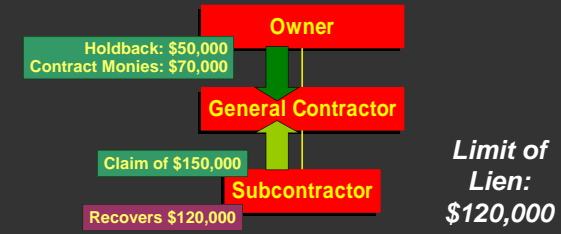
	
Distribution of Monies	
	<ul style="list-style-type: none">• How is the money distributed <i>with</i> lien claims?<ul style="list-style-type: none">• Usually the result of a lien action in the courts• Lien claimants with proven liens share <i>pro rata</i> with those others at the same level with the same payer• those lowest on the pyramid are paid first

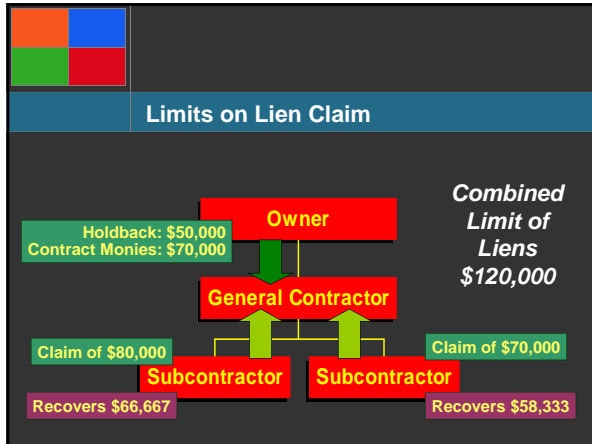
	
Distribution of Monies	
	<p><i>Liens have priority over:</i></p> <ul style="list-style-type: none">• judgments• executions• assignments• attachments• garnishments• receiving orders

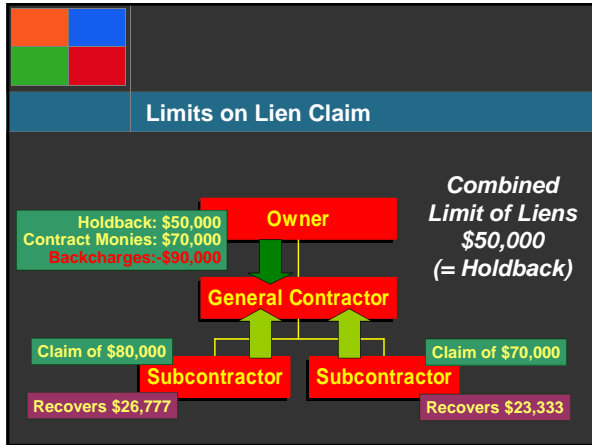
	
Distribution of Monies	
	<p><i>Liens have limited priority over:</i></p> <ul style="list-style-type: none">• mortgagees<ul style="list-style-type: none">• lien claimants may have priority for any holdback shortfall• depends on date of registration and timing of advances

	
	Distribution of Monies
	<ul style="list-style-type: none">• How much is recovered through the lien claim?• Regardless of amount claimed to be owing, lien claimant cannot recover no more than the amount owing to "payer" of lien claimant, including holdbacks

	
	Limits on Lien Claim
	

	
	Limits on Lien Claim
	








What's Next?


What other remedies are available to deal with the "shortfall"?


- normal civil lawsuit
- breach of trust action under the *Construction Lien Act*


	
	What is a Trust?
	<i>Basic trust principles...</i> <ul style="list-style-type: none">• Fund held by a one party (Trustee) for the benefit of others (Beneficiaries) for a purpose• Monies do not belong to the Trustee; monies belong to the Beneficiaries• If the Trustee takes the funds for his or her own use or against purpose = breach of trust

	
	What is a Trust?
	<i>Trusts and the Construction Lien Act...</i> <ul style="list-style-type: none">• Trust obligations are found in "Part II" of the <i>CLA</i>: Sections 7 to 13


	
	The Trusts
	<i>The essential definitions:</i> <ul style="list-style-type: none">• "Owner", "Contractor", "Subcontractor"• "Improvement"• "Substantial Performance"


	
Lien Claim vs. Trust Claim	
<i>What's the difference?</i>	
<ul style="list-style-type: none">• The lien claim is:<ul style="list-style-type: none">• security against the premises for the value of the services and materials supplied• subject to 45 day timing issues• potentially limited to holdback fund• may be shared with other lien claimants	

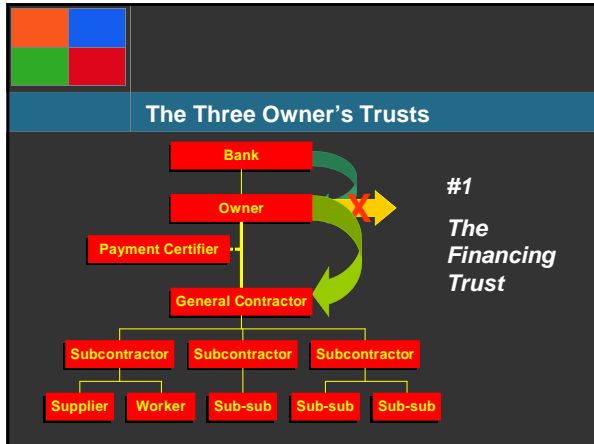
	
Lien Claim vs. Trust Claim	
<i>What's the difference?</i>	
<ul style="list-style-type: none">• The trust claim is:<ul style="list-style-type: none">• a direct personal claim against the trustee• for the total amount owing• pursued to judgment in a separate non-lien action	

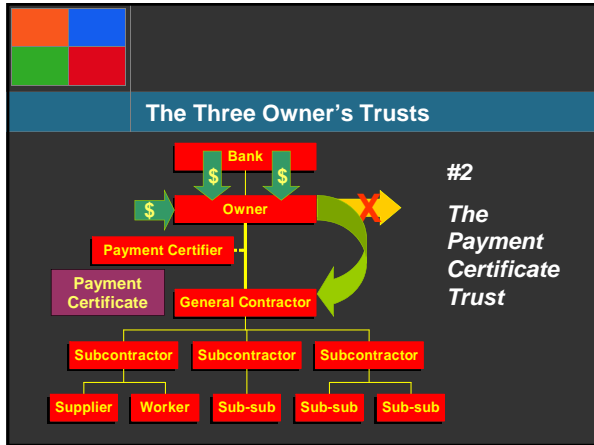
	
Lien Claim vs. Trust Claim	
<i>What's the difference?</i>	
<ul style="list-style-type: none">• With the trust claim...<ul style="list-style-type: none">• timing of trust claim not limited to 45 day period• amount of claim may be reduced by backcharges claimed by trustee• action may be brought directly against the trustee's officers, directors and managers in addition to trustee	

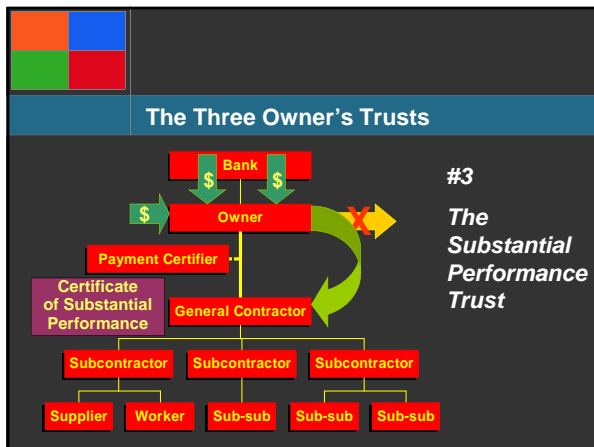
	
The Trusts	
	<p><i>The Rules...</i></p> <ul style="list-style-type: none">• Project monies must stay within the project pyramid• Those at the bottom of the construction pyramid get paid first• Trustee and beneficiary are in direct contractual relationship


	
The Trusts	
	<p>The Trusts:</p> <ul style="list-style-type: none">• The three Owner's trusts• The Contractor's trust• The Subcontractor's trust• The Vendor's trust


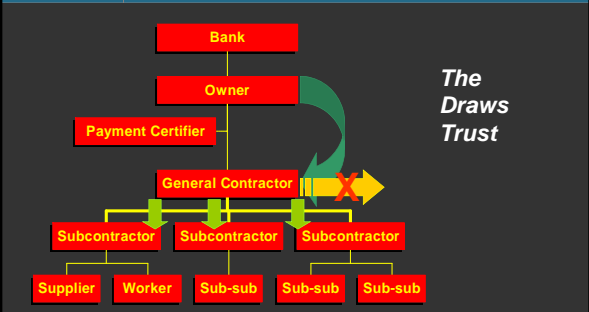
	
The Three Owner's Trusts	
	<p><i>The trust funds held by the Owner</i></p> <ul style="list-style-type: none">• #1: All amounts received by an Owner that are to be used in the financing of the improvement• #2: All amounts which are certified as payable under a payment certificate• #3: All amounts owing when substantial performance is certified




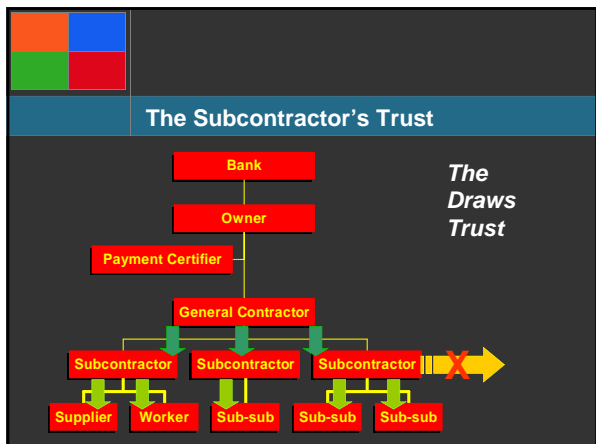




	
The Contractor's Trust	
<i>The Draws Trust (s.8(1))</i>	
<ul style="list-style-type: none">All amounts owing to and received by a Contractor on account of the contract are a trust fund for the benefit of subcontractors who are owed money by the Contractor	

	
The Contractor's Trust	
 <p><i>The Draws Trust</i></p>	

	
The Subcontractor's Trust	
<i>The Draws Trust (s.8(1))</i>	
<ul style="list-style-type: none">All amounts owing to and received by a Subcontractor on account of the subcontract are a trust fund for the benefit of subcontractors who are owed money by the Subcontractor	



The Vendor's Trust


Sale Proceeds Trust (s.9(1))


- If the Owner sells the property, the sale proceeds (after deducting reasonable expenses and any vendor take-back mortgage) are a trust fund for the benefit of the Contractor


Trustee's Obligation


General prohibition against misusing trust funds:


Trustee cannot "appropriate or convert" any part of the trust fund for trustee's own use or a use inconsistent with the trust until all beneficiaries of the trust are paid all amounts owing in relation to the improvement


	
	Permitted Uses
	<i>Exceptions to the General Rule...</i> <ul style="list-style-type: none">• Paying a beneficiary of the trust (s.10)• Retaining from trust an amount used to pay for the improvement which are not subject to a trust (s.11(1))• Paying a lender back out of the trust fund monies borrowed for the project (s.11(2))


	
	Permitted Uses
	<i>Exceptions to the General Rule (Cont'd.)</i> <ul style="list-style-type: none">• Retaining an amount equal to all outstanding debts, claims or damages, against the beneficiary whether or not related to the improvement (s.12)


	
	Personal Liability
	<i>Who could be on the hook (s.13(1))?</i> <ul style="list-style-type: none">• Those who allow a breach of trust by the corporation ("...assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust...") are also personally liable for the breach of trust:<ul style="list-style-type: none">• every director and officer of a corporation• any person who has effective control of a corporation or its relevant activities


	
Personal Liability	
<p><i>Sections 13(2)-(4)</i></p> <ul style="list-style-type: none"> • question of "effective control" is one of fact without regard to the form of any transaction or separate corporate existence • individuals are jointly and severally liable • each individual's contribution may be equal or shared on some other proportionate basis 	


	
Personal Liability	
<p><i>What the Courts say...</i></p> <ul style="list-style-type: none"> • dishonesty does not have to be shown • good character or sincerity of the individual is irrelevant • fact the individual may be unaware of the trust provisions of the CLA is not a defence • it is a matter of "strict liability" 	

	
Breaches of Trust	
<p><i>Typical Breaches</i></p> <ul style="list-style-type: none"> • breaches by contractor <ul style="list-style-type: none"> • mixing project accounts • payment of overheads • breaches by owner <ul style="list-style-type: none"> • misapplication of monies received after substantial performance 	

	
	Section 39 Request for Information
	<ul style="list-style-type: none">• Can ask the owner and others for info...<ul style="list-style-type: none">• Who are the parties to the contract?• What is the contract price?• What is the state of accounts?• Is there a Labour and Material payment bond?• Do liens expire on lot-by-lot basis?

	
	Summary
	<p><i>The Top Ten...</i></p> <ul style="list-style-type: none">• Know who the "owner" is• Know what the "improved premises" are• Know how to calculate substantial performance...don't forget deficiencies!• Make sure proper holdback is retained• Make sure there are no liens before releasing holdback

	
	Summary
	<p><i>The Top Ten (cont'd...)</i></p> <ul style="list-style-type: none">• Keep watch on your own lien rights• Don't be afraid to use the lien process if necessary• Do not allow diversion of funds from project or your firm, in breach of trust• Know when to claim a breach of trust by the owner• Know your rights to information

	
Questions	
<ul style="list-style-type: none">• Any Questions?	
