

# The Construction Lien Act

Robert Kennaley  
McLauchlin & Associates

Landscape Ontario Congress  
January 11, 2012

# THE CONSTRUCTION LIEN ACT

- The Act Applies to all “Improvements”
- includes any alteration, addition or repair to, or any construction, erection or installation on any land ...
- and the demolition or removal of any building, structure or works or part thereof.

# THE “IMPROVEMENT”

- All contracts and subcontracts related to “improvements” are deemed to be in conformity with the Act;
- You cannot contract out of the Act’s application!

# THE “IMPROVEMENT”

- Issues Surrounding the Definition of “Improvement”:
  - Maintenance vs. Repair
  - Installation vs. Fixture
  - the plain meaning of “improvement”

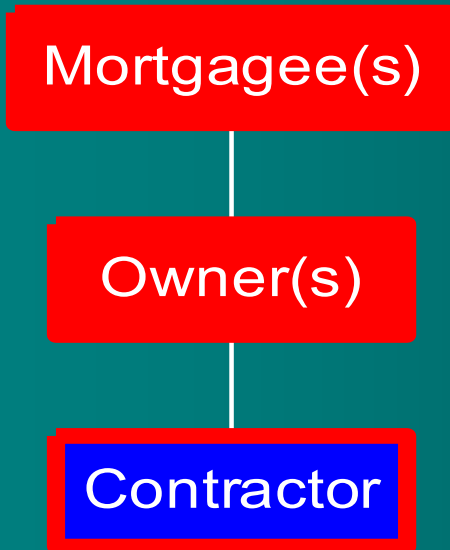
# THE PLAYERS

- Mortgagees
- Owners
- Contractors
- Subcontractors

# THE “OWNERS”

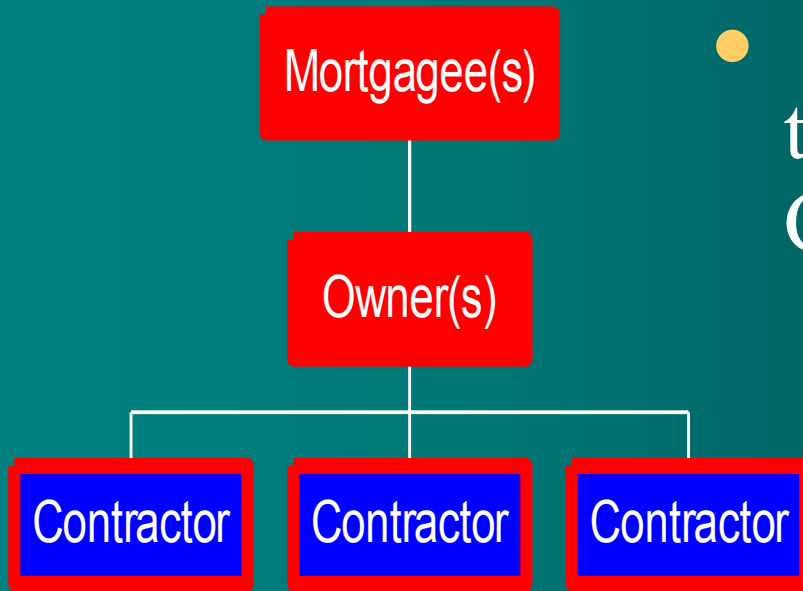
- any person *having an interest in the premises* at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, an improvement is made.
- There can be more than one “Owner” of a Premises

# THE “CONTRACTORS”



- For the purposes of the Lien Act, anyone who is in contract with an Owner and supplies services or materials to an Improvement is a “Contractor”
- Thus Architects, Engineers and other consultants can be “Contractors” under the Act

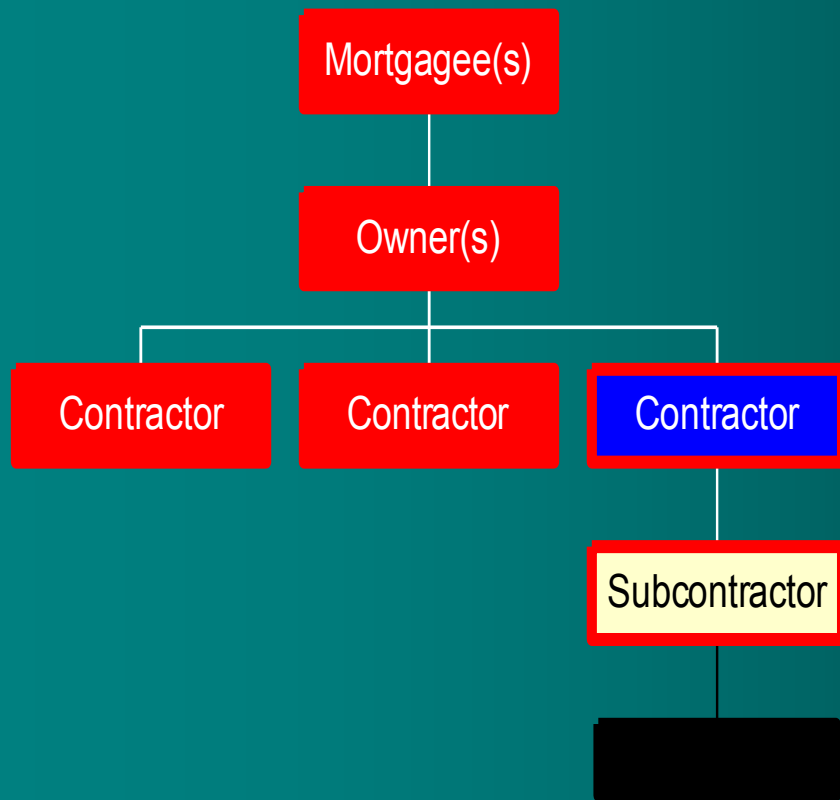
# THE “CONTRACTORS”



- There can thus be more than one Contractor on a Construction Project

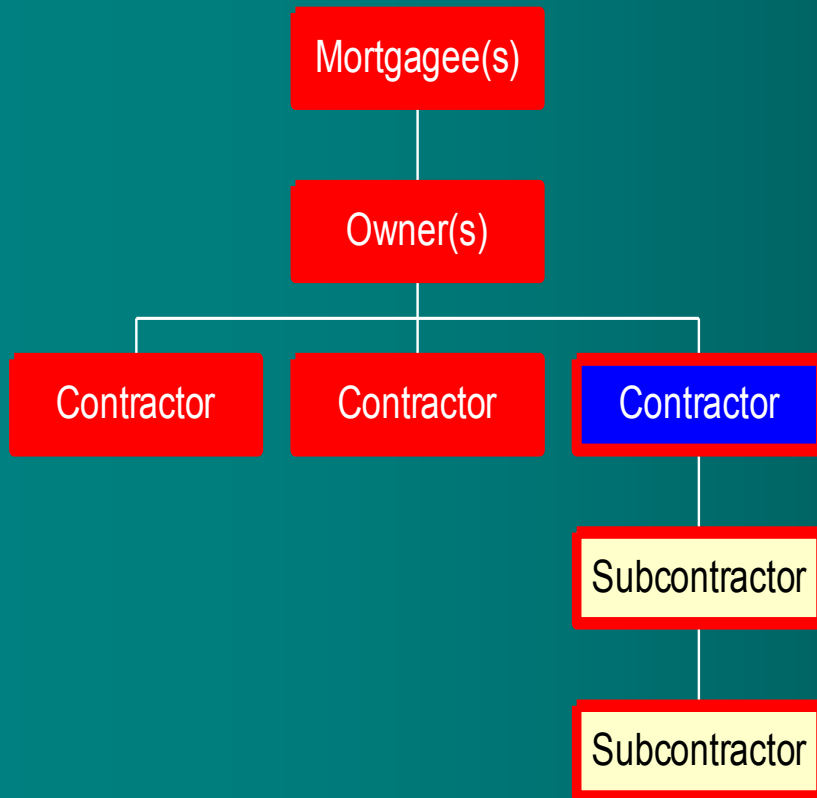


# THE “SUBCONTRACTORS”



- Anyone who supplies Services or Materials to a Contractor is a “Subcontractor” under the Act.

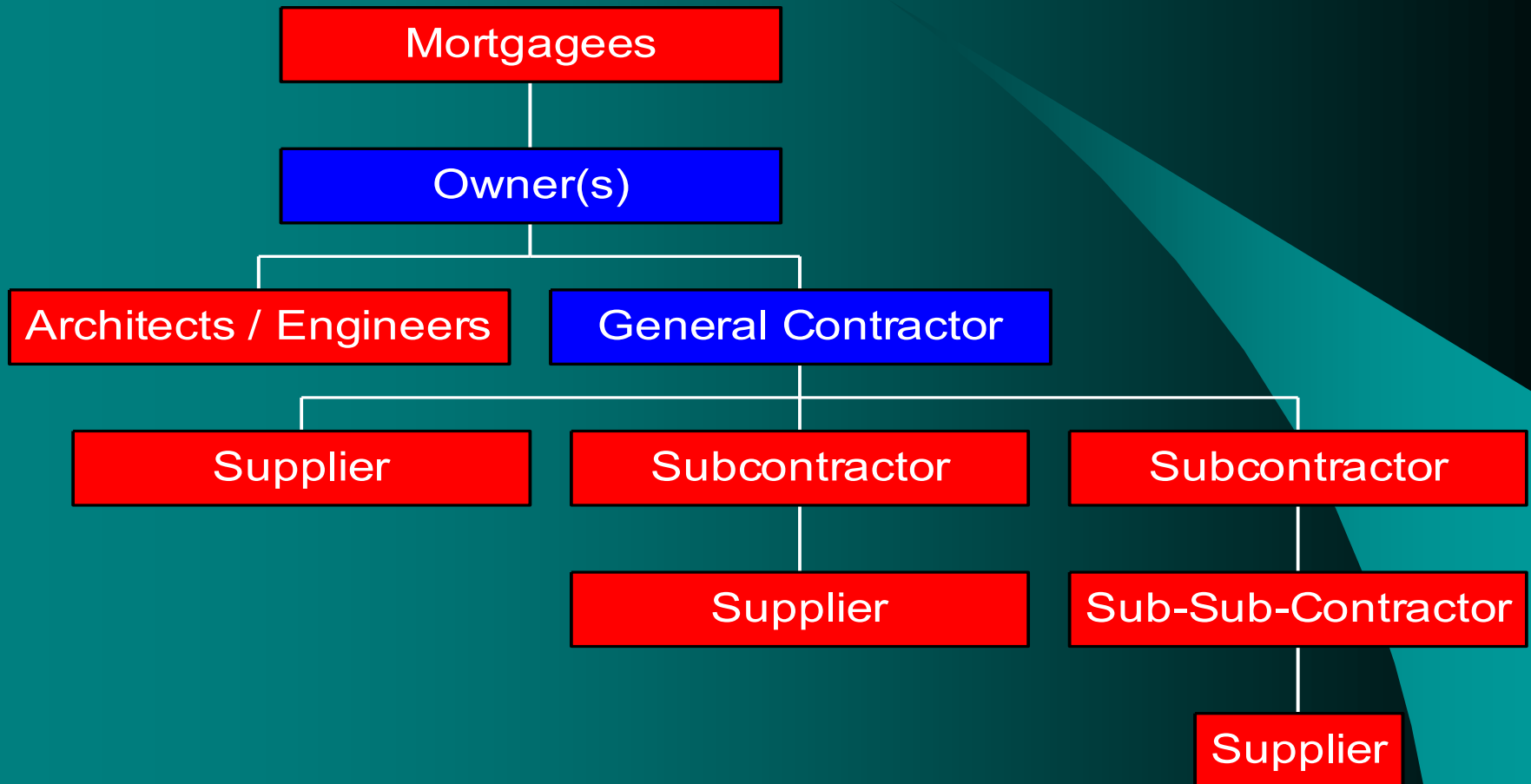
# THE “SUBCONTRACTORS”



- Anyone who supplies Services or Materials to a Subcontractor is also a Subcontractor under the Act.
- This includes suppliers

# THE CONSTRUCTION PYRAMID

## and the Problems the Act seeks to Correct



# THE CONSTRUCTION PYRAMID

## and the Remedies the Act seeks to Provide

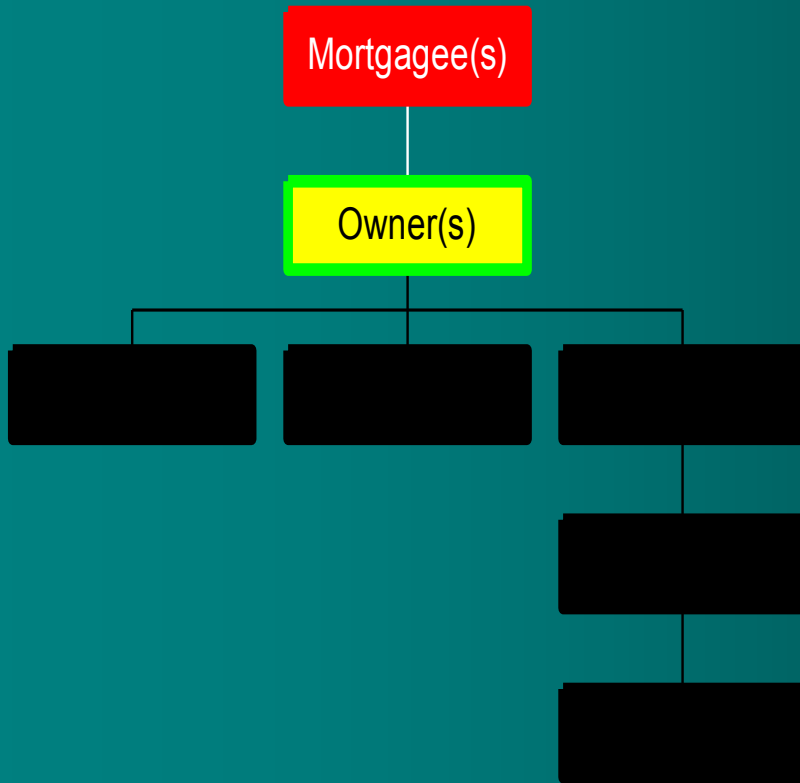
- The Construction Lien Act controls the flow of funds through the Construction Pyramid
- through two Mechanisms:
- the Lien Holdback and the Trust

# THE CONSTRUCTION TRUST

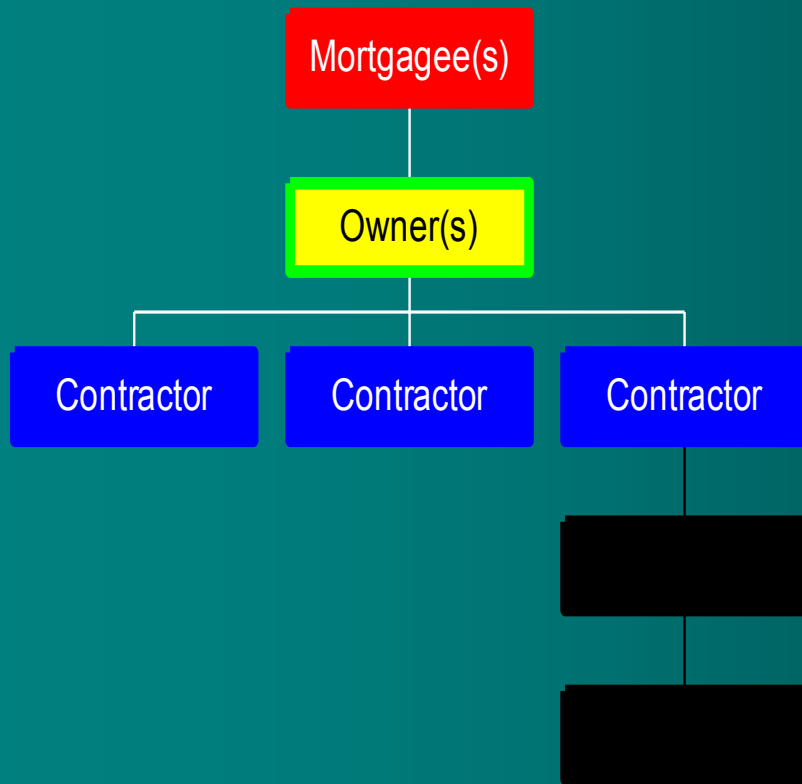
- The Act imposes trust obligations on any person who is owed or receives money for the supply of services or materials to an Improvement *and* who owes another person for their supply of services or materials.

# THE CONSTRUCTION TRUST

- An Owner who receives funds intended to pay for an Improvement ...

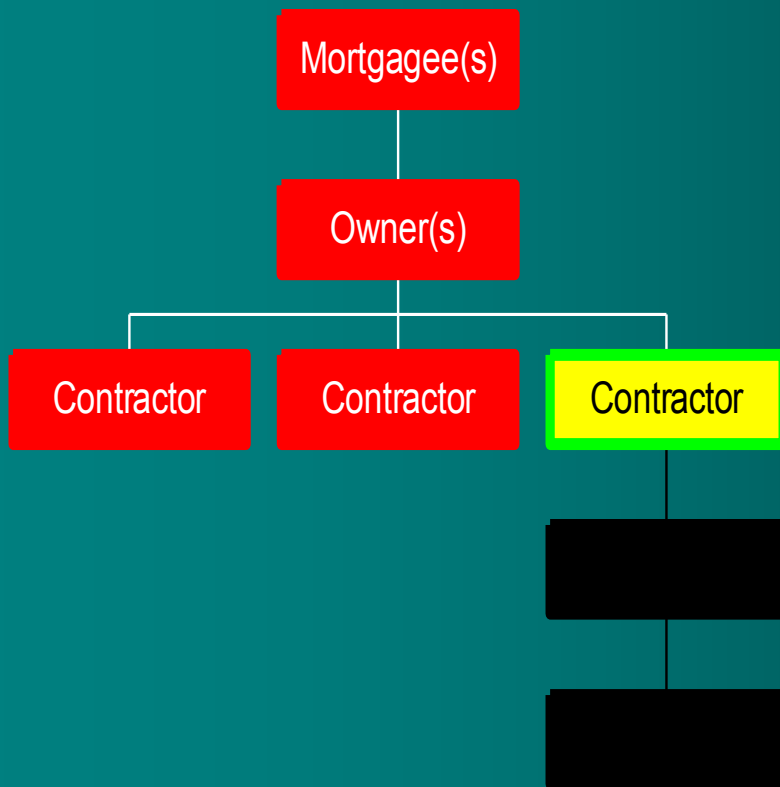


# THE CONSTRUCTION TRUST



- ... holds those funds in trust for those Contractors below him in the pyramid who have not been paid.

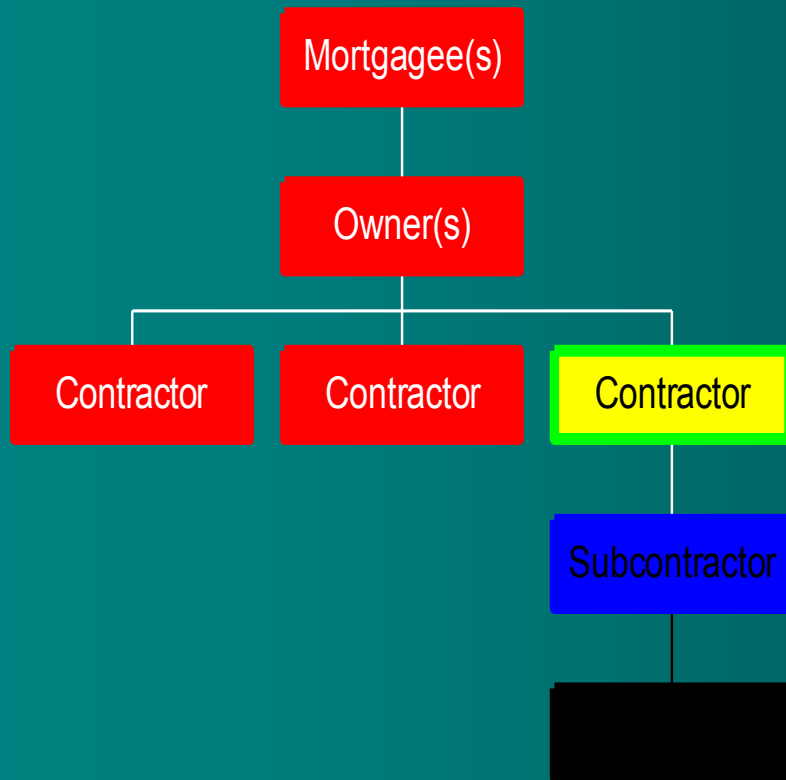
# THE CONSTRUCTION TRUST



- Similarly, Contractors who are owed or receive monies for the supply of services or materials to an Improvement...

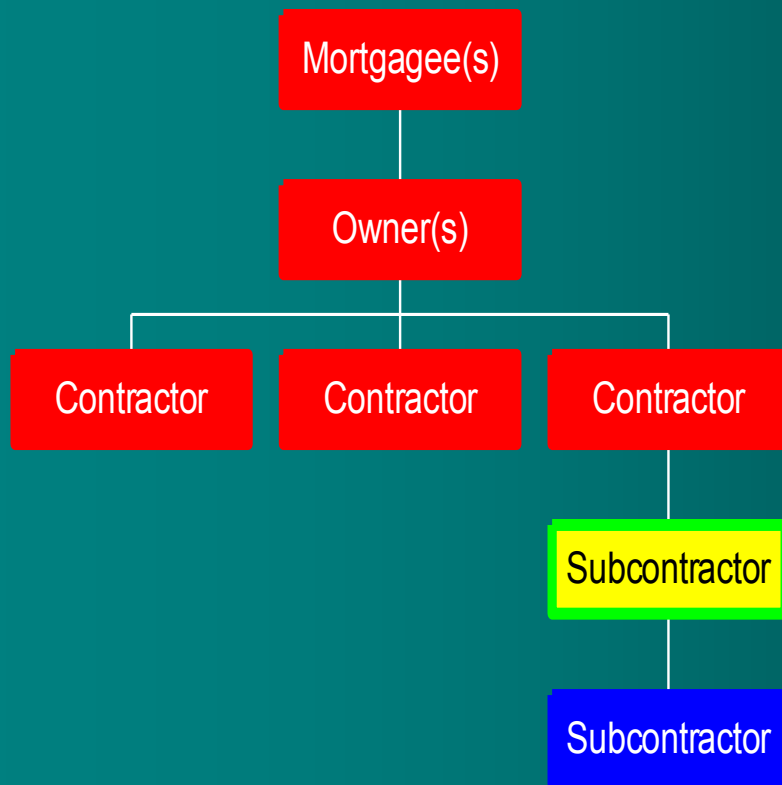


# THE CONSTRUCTION TRUST



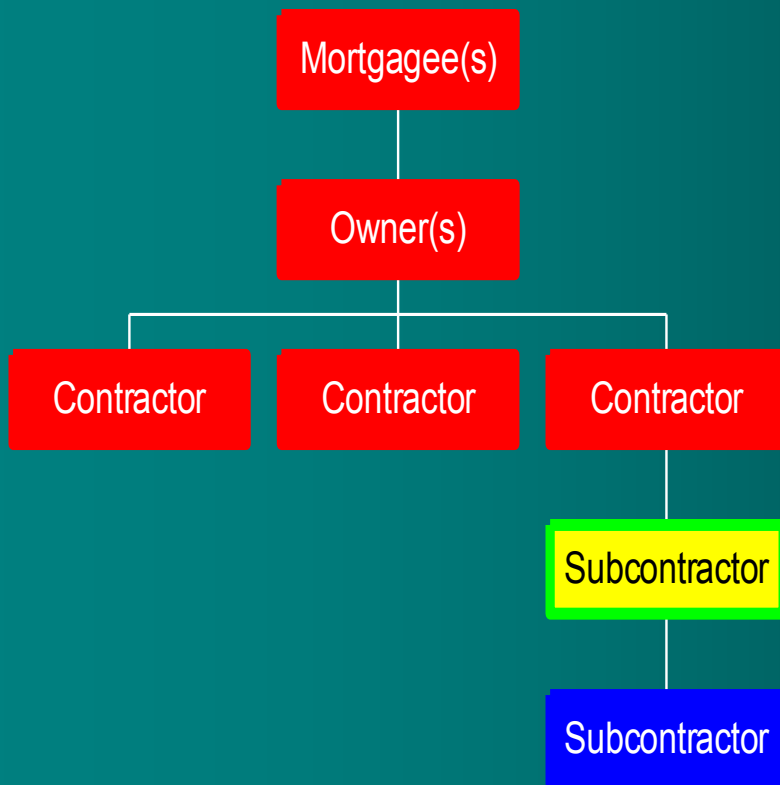
- ... hold those monies in Trust for the Subcontractors below them in the pyramid who have not been paid.

# THE CONSTRUCTION TRUST



- ... and Subcontractors who are owed or receive monies for the supply of services or materials to an Improvement...

# THE CONSTRUCTION TRUST



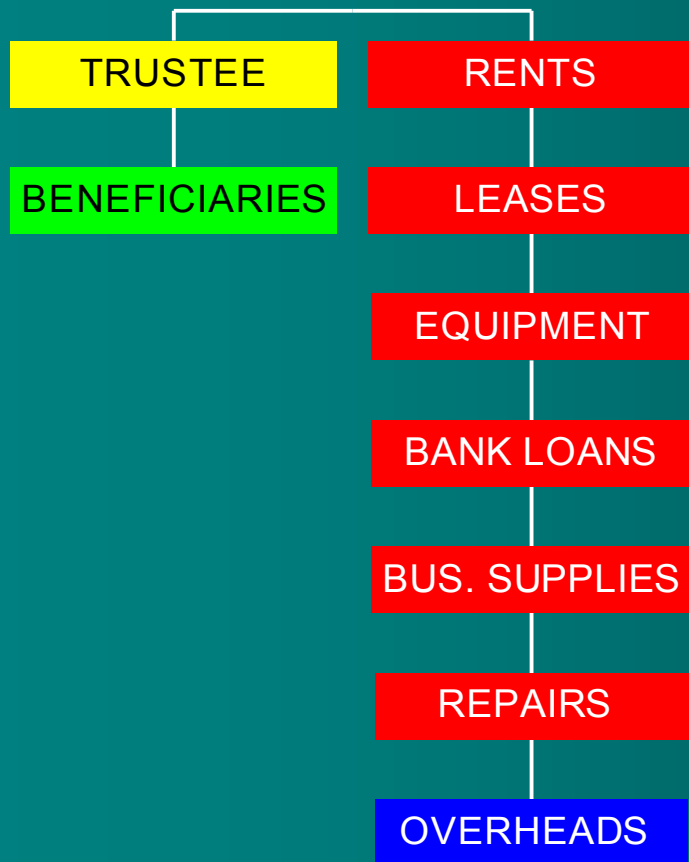
- ... hold those monies in Trust for the Subcontractors below them in the pyramid who have not been paid.

# THE CONSTRUCTION TRUST

- There is generally only one way to distribute Trust Funds in accordance with the Act:  
  
    pay those below you before you  
    pay yourself or anyone else.

# BREACH OF TRUST:

## First Means First



- If a Beneficiary is owed monies, it is a Breach of Trust to pay for:  
Rents, Leases, Equipment  
Bank Loans, Supplies,  
Repairs, **any Overheads**

# BREACH OF TRUST

- The Act does allow the potential trustee to apply “set-off” against amounts owed to beneficiaries under the Act;
- This set-off can reduce or eliminate the trust obligation.

# BREACH OF TRUST

- The Onus to Account for Trust Funds:

your unpaid subcontractor only needs to establish that you received monies from the person above you in the pyramid and the onus falls to you to account for where those monies went ...

# BREACH OF TRUST

- The Onus to Account for Trust Funds:

... if you cannot meet the onus of showing that all trust funds went to proper beneficiaries, breach of trust is proven!



# BREACH OF TRUST

- The Consequences of Breach of Trust :

Officers, Directors and others who assent to or acquiesce in the breach of trust of a corporation are liable for the breach of trust of that corporation!

# BREACH OF TRUST

- The Consequences of Breach of Trust :  
also, Breach of Trust Survives Bankruptcy!

# BREACH OF TRUST

- The Consequences of Breach of Trust :  
you could lose your House!

THE LIEN HOLDBACK  
and  
THE CONSTRUCTION LIEN

**McLauchlin & Associates: A Construction Law Practice**

# THE HOLDBACK



- The Holdback is a Fund created by the Act.

# THE HOLDBACK



- The Holdback Fund is created and grows as each **Payer** in the pyramid is required to retain the statutory holdback

# THE HOLDBACK



- each **Payer** in the pyramid is required to hold back 10% “of the price of the service or materials as they are actually supplied under the contract or subcontract”

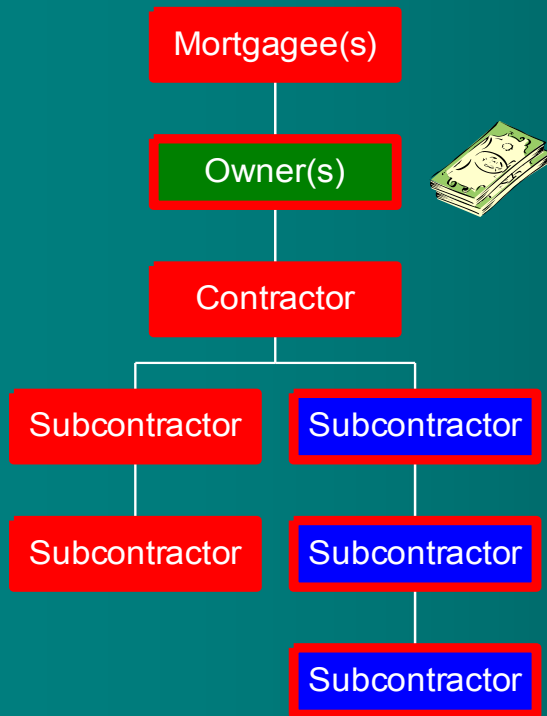
# THE HOLDBACK



- in practice each **Payer** retains 10% of the amounts to be paid to the party beneath them in the pyramid

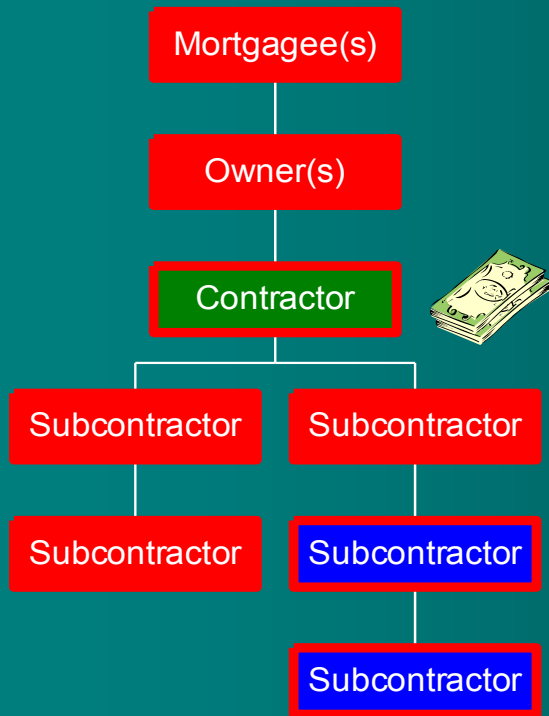


# THE HOLDBACK



- The 10% retained by the Owner from the payments to the Contractor is held for the benefit of the subcontractor(s).

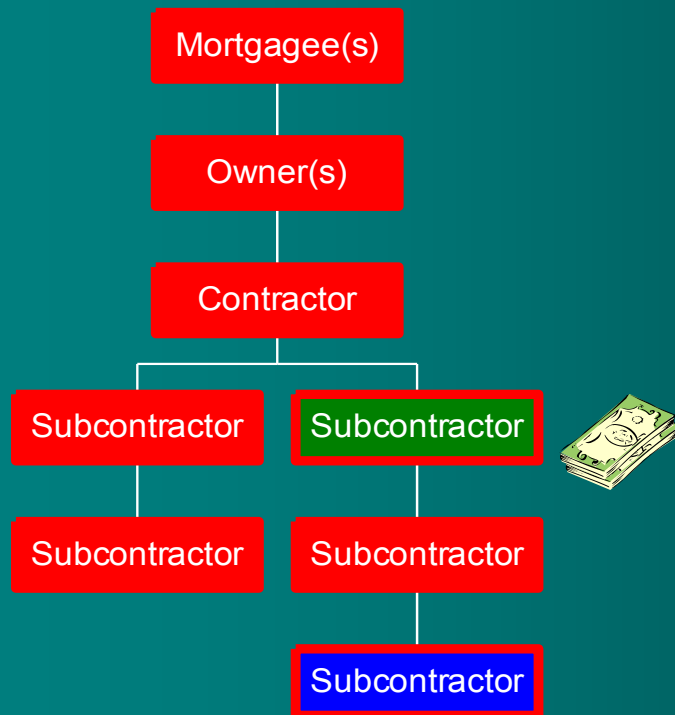
# THE HOLDBACK



- The Contractor then retains 10% of the value of the services and materials supplied by the Subcontractors for the benefit of their Subcontractors

# THE HOLDBACK

- ... and each Subcontractor in turn does the same for the benefit of those further down the pyramid.



# THE HOLDBACK



- Payers are also required to retain “Notice Holdback”, in addition to the 10%

# THE HOLDBACK



- Where a Payer has received written notice of a claim for lien, it must also retain an amount sufficient to satisfy that lien

# THE HOLDBACK



- Subject to the Act, the Holdback must not be released unless and until all liens have either been resolved or expired

# THE CONSTRUCTION LIEN

- A Claim for Lien is a Charge:
- (i) Against the Holdback
- (ii) Against the Interest of the Owner in the Premises

... unless the Owner is the Crown or the lands are railways or municipally owned public streets or highways

# THE CONSTRUCTION LIEN

- Anyone Who **Supplies Services or Materials** to an Improvement has a Claim for Lien for the **Price** of those Services or Materials.



# THE CONSTRUCTION LIEN

- The Claim for Lien arises at the time of the first supply of materials or services to the Improvement.

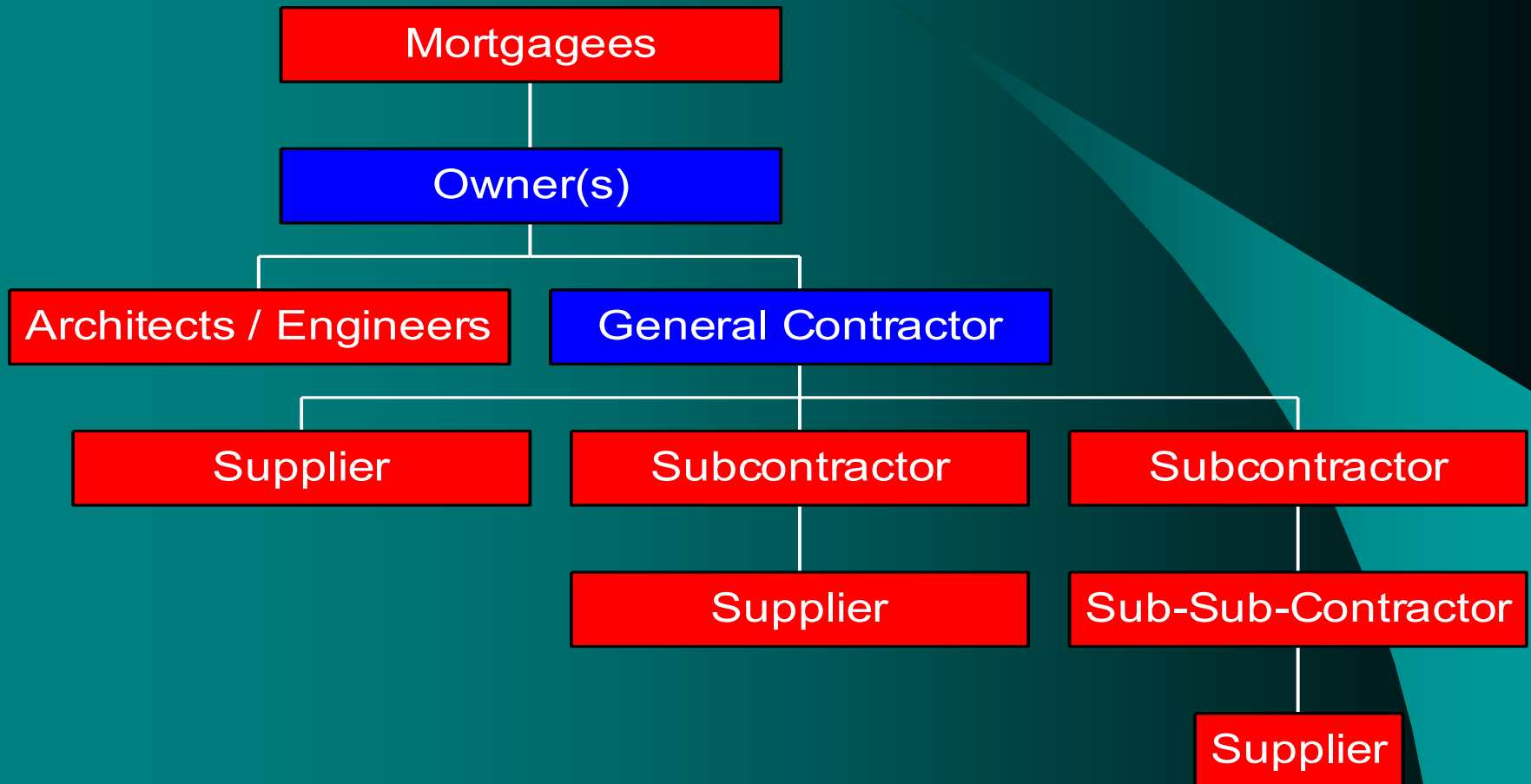
# THE SUBCONTRACTOR LIEN

- Where a Claim for Lien is proven, subcontractor lien claimants have a claim against the Holdback Fund.

# THE SUBCONTRACTOR LIEN

- If the Fund is insufficient to pay the claimants, it is distributed on a pro-rata basis ...
- with the lowest-tier lien claimants being paid first, followed by the next lowest, and so on

# THE CONSTRUCTION PYRAMID



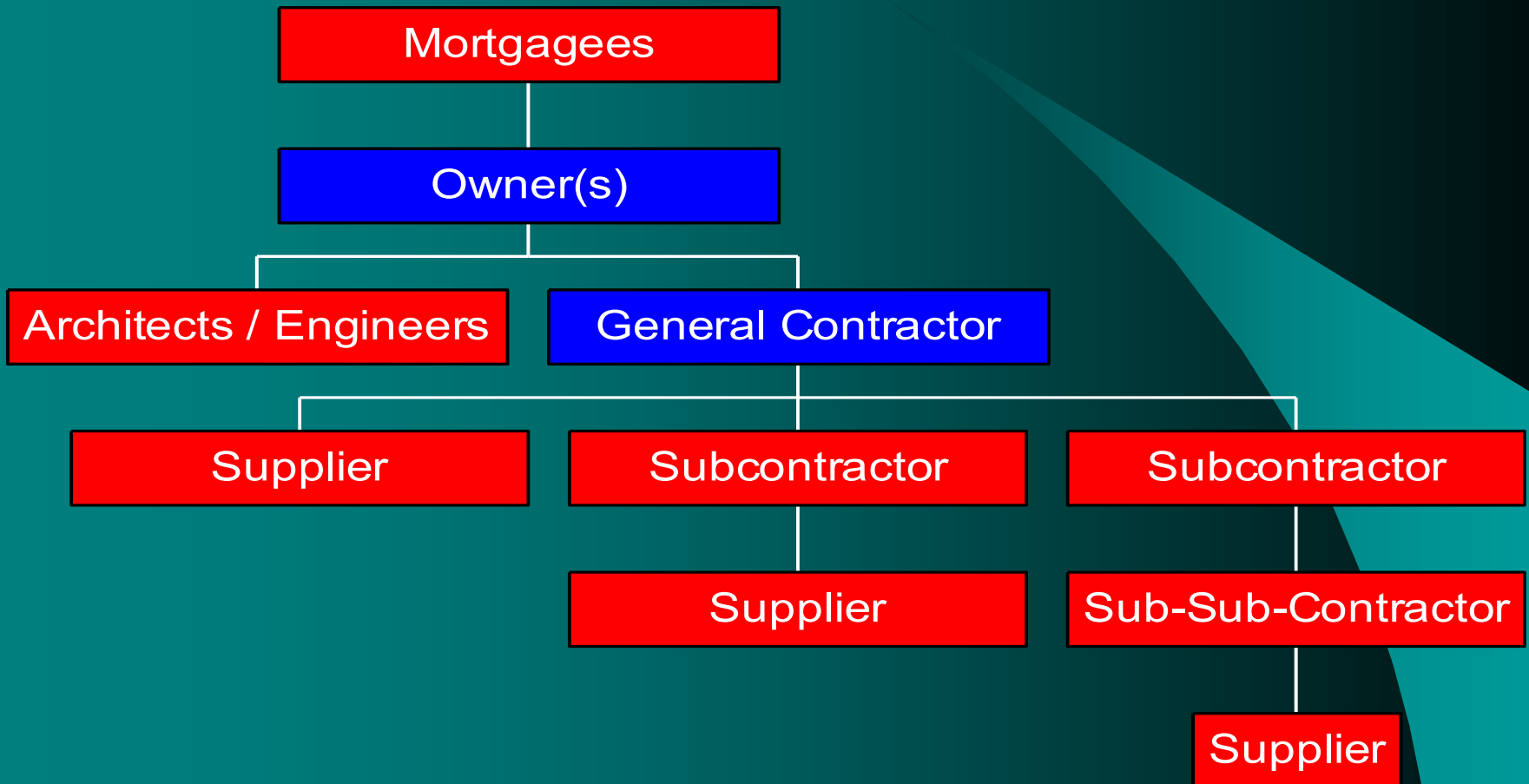
# THE SUBCONTRACTOR LIEN

- Where the holdback fund has not been properly retained, the Owner's interest in the premises may in many circumstances be sold to make up the deficiency

# THE CONTRACTOR'S LIEN

- Where the Lien attaches to the Premises, the Contractor does not need the charge against the Holdback because those funds are owed to him under the contract in any event.

# THE CONSTRUCTION PYRAMID



# The Expiry of the Lien Claim

- The Claim for Lien will expire unless it is ‘preserved’ in accordance with Act ...
- Where the lien attaches to the premises, it must be registered against the premises within timeframes established under the Act.



# The Expiry of the Lien Claim:

where no certificate of substantial performance

- The Lien must be preserved within a 45 day time frame of the earliest of any one of several “triggering” events.
- For a Contractor:
  - 45 days following completion or abandonment of the Contract

# The Expiry of the Lien Claim:

where no certificate of substantial performance

- The Lien must be preserved within a 45 day time frame of the earliest of any one of several “triggering” events.
- For a subcontractor:
  - 45 days following last day of supply; or
  - 45 days from deemed subcontract completion

# The Expiry of the Lien Claim:

where a certificate of substantial performance

- Where there *is* a Certificate of Substantial Performance:
  - 45 days following from the publication of the Certificate in a daily trade newspaper

# The Expiry of the Lien Claim:

where a certificate of substantial performance

- To be effective, Certificates of Substantial Performance must be published in a Construction Trade Newspaper;
- In Ontario it is the “Daily Commercial News”.

# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

A two part test for Substantial Completion:

- 1. a substantial part of the Improvement must be either used or is ready to be used for the purposes intended; and

# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

A two part test for Substantial Completion:

- 2. The Contract must be capable of being completed for no more than:
  - 3% of the first \$500,000.00 of the Contract Price
  - 2% of the next \$500,000.00 of the Contract Price
  - 1% of the remainder of the Contract Price

... (there is a 'winter work' exemption)

# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

- The Publication of the Certificate allows the “Basic Holdback” funds that have been accumulating since the start of the Project to flow.

# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

- For those performing finishing work, a “Finishing Holdback” is created whereby 10% of all payments are retained.
- These are retained in a new, smaller holdback fund that starts from scratch.



# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

- Participants who work towards the end of Commercial Projects must beware.
- They may have performed most of their work at the time of Substantial Performance but be no where near finished.

# THE CERTIFICATE OF SUBSTANTIAL PERFORMANCE

- If a claimant does not Register within 45 days of Publication, he will lose his lien rights in relation to all work performed prior to Substantial Performance!
- Section 39 Requests

# The Construction Lien Act

Robert Kennaley  
McLauchlin & Associates

155 University Avenue  
Toronto, Ontario M5H 3B7  
(416) 368-2522

154 Norfolk Street South  
Simcoe, Ontario N3Y 2W4  
(519) 426-2577

[kennaley@mclauchlin.ca](mailto:kennaley@mclauchlin.ca)