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Bridging the Gap: Construction Liens and Legal Hypothecs Webinar



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Legal Hypothecs of Construction in the Province of Québec

Introduction

Purpose of the Presentation

- This presentation offers an overview of the legal framework governing legal hypothecs of construction in the province of Quebec and in the rest of Canada.

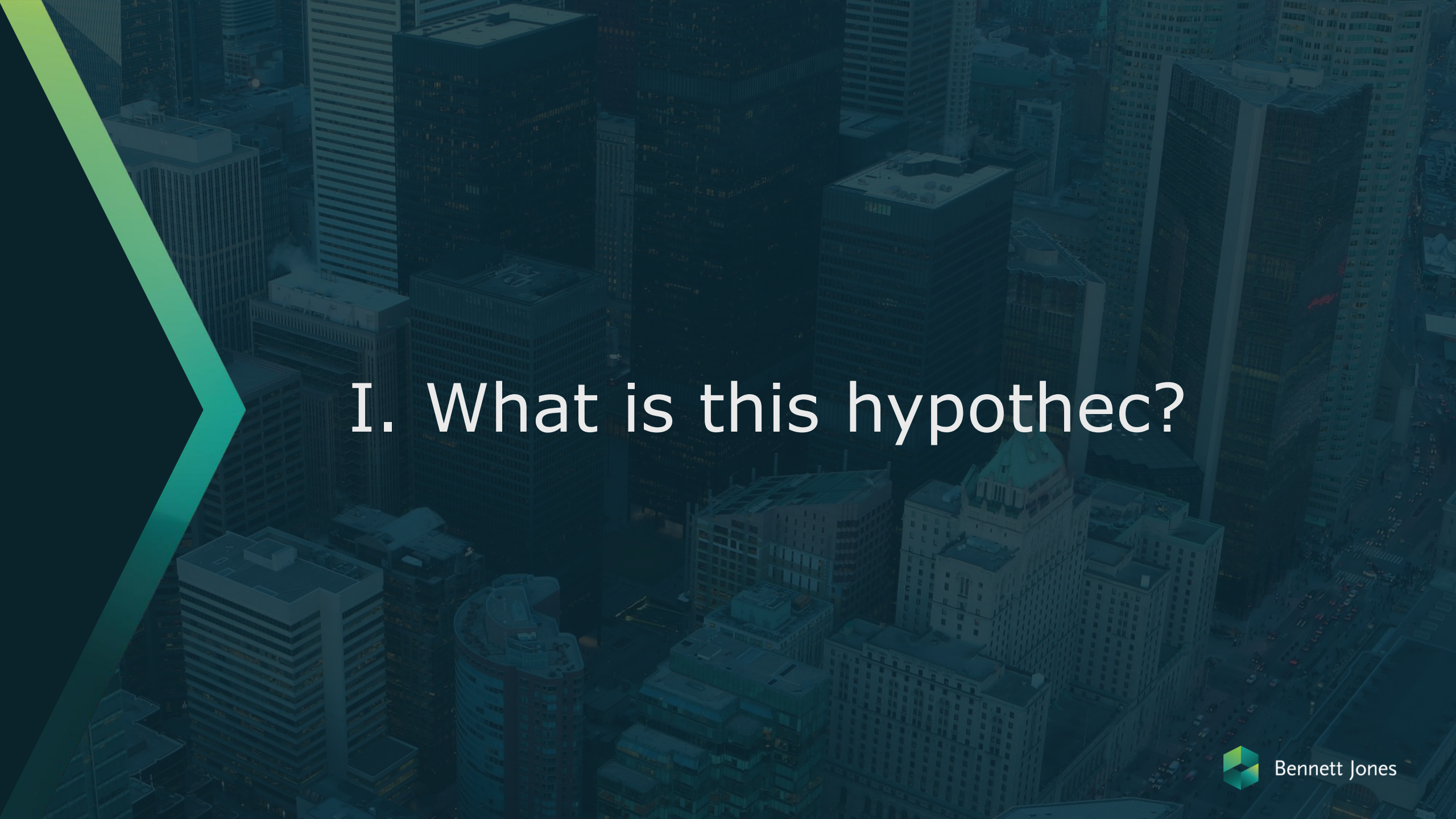
About Bennett Jones

- Full-service business law firm, with deep roots in Canada's oil and gas industry
- Expanded, to support industries that drive the Canadian economy now and into the future
- Offices in Calgary (Alberta), Edmonton (Alberta), Vancouver (British Columbia), Toronto (Ontario), Ottawa (Ontario), Montreal (Quebec), New York

The construction legal hypothec

- I. What is this hypothec?
- II. Conditions to be able to benefit from a such legal hypothec
- III. What to do to preserve it?
- IV. The concept of the end of work



An aerial view of a dense city skyline, likely New York City, with numerous skyscrapers. A large, teal-colored arrow graphic points from the left edge towards the center of the image.

I. What is this hypothec?



What is this hypothec?

- **A legal hypothec**
- **In favour of the persons having taken part in the construction or renovation of an immovable**
- **May not charge any other immovable**
- **Only exists in favour of the architect, engineer, supplier of materials, workman and contractor or subcontractor for the work requested by the owner of the immovable, or for the materials or services supplied or prepared by them for the work**
- **It is not necessary to publish a legal hypothec for it to exist for a certain period of time**



What is this hypothec?

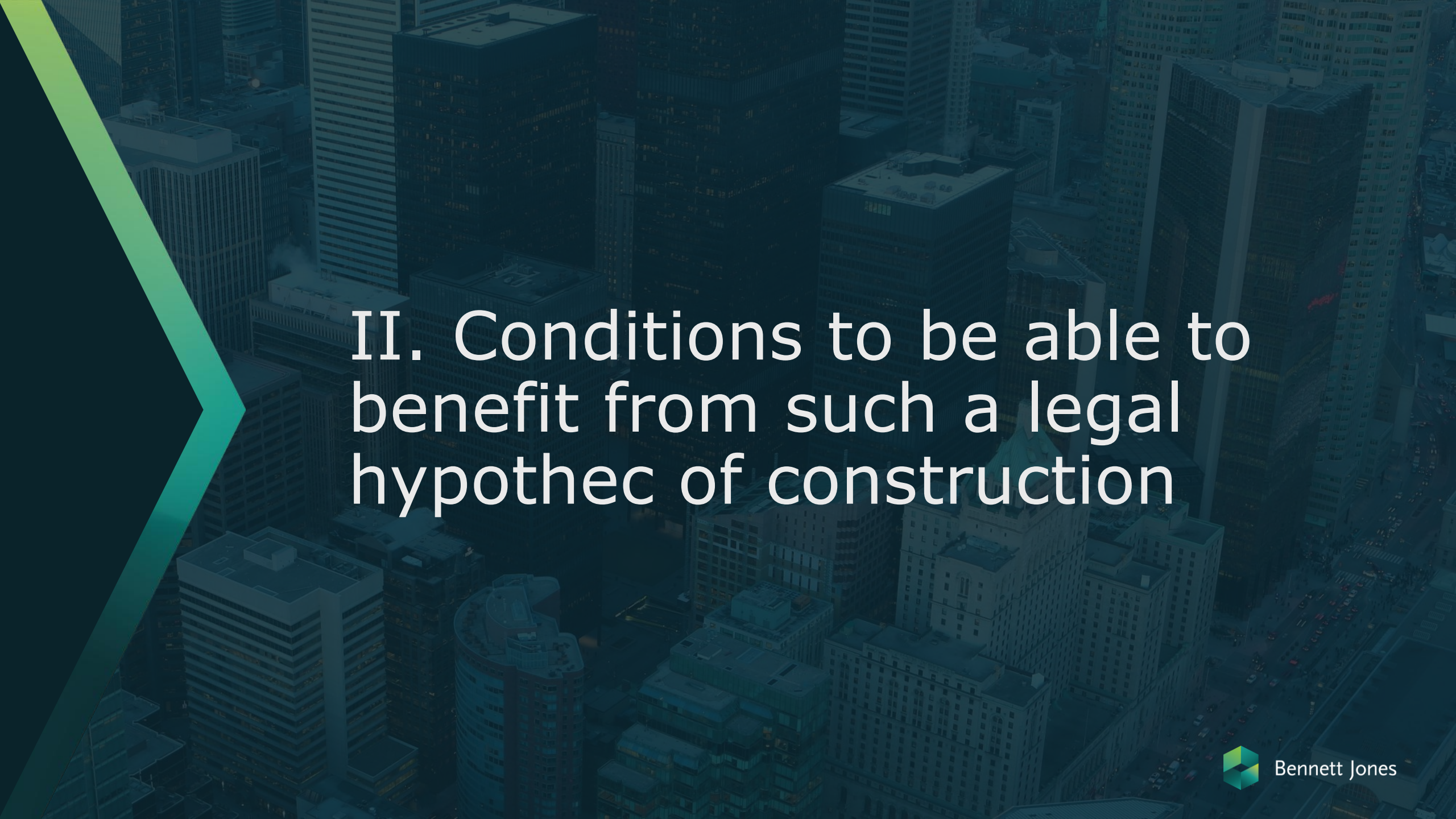
- **A legal hypothec of construction arises solely by operation of the law**
- **Provided for by the *Civil code of Quebec* to protect persons and businesses involved in construction or renovation work on an immovable which increases its value**
- **Security for the payment of the claim which attaches to the immovable that was the object of the construction work**
- **The legal hypothec of construction thus enables its beneficiaries to protect their claim since they have a real right in the immovable on which the construction work was done**



What is this hypothec?

- **This hypothec ranks ahead of any other hypothecary claim for the increase in value of the immovable (art.2952 CCQ)**
- **Since the legal hypothec charges the immovable, the creditor retains a hypothecary recourse against the immovable in whatever hands it may be**
- **The construction legal hypothec grants an important protection for the persons involved in the construction work. Hence, the conditions giving rise to this legal hypothec are interpreted restrictively.**





II. Conditions to be able to benefit from such a legal hypothec of construction



Conditions to be able to register a legal hypothec of construction

- 1. A person who has participated in the construction or renovation work**
- 2. Valid claim**
- 3. Existence of construction or renovation**
- 4. Increase in value resulting from this work**
- 5. The work carried out must have been requested by the owner of the immovable or must have been disclosed to the owner**
- 6. Must concern an immovable**
- 7. Must be a seizable property**



II. Conditions

Valid Claim

- Of a person who participated in the construction or renovation work
- If the claim of the person who participated in the work is extinguished by payment, discharge or otherwise, the legal hypothec cannot continue to exist
- The hypothec is only used to guarantee the payment of a claim (art. 2661 CCQ)

Construction or Renovation

- Construction work: the erection of a new building or the extension of an existing one
- Renovation work: refurbishing of a building or work related to its structure

II. Conditions

Increase in Value resulting from the work or renovation:

- Increase in value= the value added to the building by the construction work performed
- Economic concept that, in theory, corresponds to the difference between the fair market value of an improved building and the fair market value it would have without that improvement
- If there is no increase in value resulting from the work, the court will cancel the registration of the hypothec notice, as the hypothec will not be considered valid without this condition present
- There is a presumption that the building's value increased by an amount at least equivalent to the value of the construction work carried out on the building
- This presumption is rebuttable by the owner



II. Conditions

Examples of types of work creating an increase in value or not:

Increase in Value	NOT an Increase in Value
Construction of a new building	Repair work essential to the proper operation of the building
Renovation to a building	Maintenance work
Tree cutting	Amounts claimed for waiting time or costs of accelerating work
Landscaping and entrances for pedestrians or vehicles	Removal of stumps and sand
Tree planting	Snow removal
	Loss of profit
	Other minor repairs



II. Conditions

- **The work carried out must have been requested by the owner of the immovable or must have been disclosed to the owner**
 - **2728 CCQ** The hypothec secures the increase in value given to the immovable by the work, materials or services supplied or prepared for the work. However, where those in favour of whom it exists did not themselves enter into a contract with the owner, the hypothec is limited to the work, materials or services supplied after written notice of the contract to the owner. (...)
- **The court can cancel hypothecs registered on buildings whose owners had no knowledge of the work being undertaken**



The Subcontractor

- **The subcontractor cannot register a legal hypothec and has no hypothecary recourse unless he has previously disclosed his subcontract to the owner of the immovable**
- **Disclosure :**
 - Not necessary to do right after the conclusion of the subcontract but recommended
 - Done by the subcontractor
 - Must state:
 - The owner
 - The identity of the subcontractor
 - The existence of the subcontract
 - The fact that the disclosure is made pursuant to section 2728 CCQ
 - The nature of the works, materials or services
 - The name of the contracting party
 - The price of the contract
 - The subcontractor's intention to eventually register a legal hypothec in case of nonpayment
 - Subcontractor has the burden of proving that disclosure was made



The Subcontractor

- **The disclosure:**
- **The hypothec is limited to the work, materials or services supplied after written notice of the contract to the owner**
- **Allows the owner to withhold a sufficient amount on the amount owed to the general contractor to cover potential claims of suppliers or subcontractors (art. 2123 C.C.Q.)**
- **Failure to disclose gives rise to the cancellation of the hypothec (unless there was confusion on the owner's identity or when he takes an active part in the work)**
- **If the owner was to waive his right to obtain the disclosure from a subcontractor, this waiver would have to be clear and obvious or else, the court will not conclude that the owner waived that right**

The Subcontractor

- **Disclosure : Form and Content**

1. Must be in writing
(art. 2728 C.C.Q.)

Can be a simple letter
and typically is

2. Must identify the
subcontractor

Must state the amount
of the contract
awarded to the
subcontractor

3. Must be clear that
the subcontractor may
eventually register a
legal hypothec and
exercise hypothecary
rights on the property

II. Conditions

Immovable

Leads to a Hypothec	Does NOT Lead to a Hypothec
Immovables by nature	Movables that have not become a permanent immovable
Immovables by incorporation or attachment	Movables that have not been materially attached to or united with the building
	Movables that keep their individuality and are not incorporated into the immovable
Examples: ventilation, heating and gas systems	Example: mirrors in a hairdressing salon



II. Conditions

Seizable Property

Public Domain

- General rule is that not seizable
- Hypothec is not possible except if a statutory provision allows for the registration of a legal hypothec

Private Domain

- General rule is that it is seizable
- Hypothec is possible



III. What to do to preserve it?



III. What to do to preserve it?

1. Origination of the Hypothec



2. Provisional Conservation



3. Final Preservation



III. What to do to preserve it?

- **A legal hypothec in favour of persons having taken part in the construction or renovation of an immovable subsists, even if it has not been published, for 30 days after the work has been completed**
- **It subsists if, before the 30 days expire, a notice of legal hypothec is registered**
- **It is extinguished six months after the work is completed, unless, to preserve the hypothec, the creditor institutes a Claim against the owner of the immovable or registers a prior notice of the exercise of a hypothecary right**

III. Formalities

2. Provisional Conservation

Publication of a notice of legal hypothec within 30 days of the end of work

Security is preserved for 6 months after the end of work

Institute an action against the owner of the immovable or register a prior notice of exercise of a hypothecary right

III. What to do to preserve it?

2. Provisional Conservation

Publication of the Notice of legal hypothec within 30 days from end of work:

- Describe the immovable (art. 2727(2) C.C.Q.)
- Indicate the amount of the debt (art. 2727(2) C.C.Q.)
- Includes the name of the creditor
- Signature of the creditor (art. 2991 C.C.Q.)
- Accompanied by a certified application for registration

Service of the notice to the owner of the immovable and registration of the notice at the land registry



III. What to do to preserve it?

3. Final Preservation



Hypothecary right

- **A creditor intending to exercise a hypothecary right has 4 different options:**
 - 1) Taking the property in payment
 - 2) Taking possession for purposes of administration
 - 3) Sale by the creditor
 - 4) Sale under judicial authority
- **The creditor must decide what he wishes to exercise in terms of hypothecary right**

Hypothecary right

- **A prior notice of the exercise of a hypothecary right must disclose any failure by the debtor to perform his obligations, and contain a reminder, where applicable, that the debtor or a third person has the right to remedy the default**
- **It must also disclose the amount of the claim in capital, and in interest, if any, and the nature of the hypothecary right which the creditor intends to exercise, furnish a description of the charged property, and demand from the person against whom the hypothecary right is to be exercised that he surrender the property before the expiry of the period specified in the notice which for an immovable is 60 days**





IV. The notion of the end of Work



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IV. End of Work

- **There is only one end of work for all the stakeholders:**
- **If there is a contract and/or plans and specifications:**
 - End of work = full execution of the work provided for in the contract/plans and specifications
- **If there are no contract, plans or specifications:**
 - End of work = the date on which the construction is ready for the use for which it was intended
- **Distinction between work to be completed and deficiencies to be fixed:**
 - Deficiencies to be fixed will not delay the end of work



IV. End of Work

Does NOT necessarily correspond to the end the Work	Does NOT Delay the End of Work
Owner occupancy	Defects/deficiencies in the work performed
The owner's bankruptcy (UNLESS the trustee has ordered the work to be stopped for good)	Performing certain tests after the work is done
The contractor's bankruptcy	
The death of a party (the decision is made by the heirs or successors)	



V. End of work

- **Suspension and Abandonment**

- **Suspension**

- The interruption with the intention of resuming work
- When the resumption of work is and remains foreseeable
- Suspension and end of the work are not equivalent, unless the date of resumption is so indeterminate that suspension is equivalent to abandonment
- If there is a suspension of the work, the 30-day delay to register the notice of legal hypothec would not start running as the end of the work did not occur



V. End of work

- **Abandonment**

- **2 conditions :**

1. Work must be stopped
permanently

2. The creditor must know
the owner's intention to
abandon or the owner has
shown incompatible
behaviour with continuing
the work

- **Example 1 : the suspension of work extends beyond a reasonable time due to a lack of funds or for any other reason.**
 - **Example 2 : if the parties agree to subject the resumption of suspended work to a condition that does not materialize.**

End of the work

Abandonment:

- If the project is not completed, the date of the end of the work corresponds to the date of abandonment of the work
- Final abandonment of the work, brought to the attention of the creditors, is equivalent to the end of the work
- Hence, the 30-day delay to register the notice of legal hypothec will start running

Questions?



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Introduction

- **Purpose of Construction Liens**
- **Creation of Construction Liens**
- **Registering and Enforcing Construction Liens**
- **Valuing Construction Liens**
- **Questions**

Purpose of Presentation

TEEHIKE



- **Intended for Owners, Contractors, Subcontractors and Suppliers**
- **Purpose is to tell you:**
 - **What you can use**
 - **What might be used against you**





PURPOSE OF CONSTRUCTION LIENS

Purpose of a Construction Lien

- **Creature of Statute**
- **Intended to be a simplified process**
- **Intended to quickly resolve construction payment disputes**
- **Intended to balance the interests of Owners, Contractors, Subcontractors and Suppliers**



CREATION OF CONSTRUCTION LIENS

When can a Construction Lien arise?

- **Available when a Contractor, Subcontractor or Supplier**
 - **Performs Work**
 - **Rents Equipment**
 - **Supplies Materials**
 - **In relation to an Improvement**

What is an Improvement?

- **Not the act of improvement**
- **Physical thing**
- **Attached to Land or is intended to be part of Land**
 - **Structure**
 - **Something attached to a structure**
 - **Something dug into the Land**



The Creation of Lien Rights - The supply of work and materials

- **A lien right arising from:**
 - **the performance of work**
 - **the performance of work and the supply of materials**
- **Arises when the work is performed**
- **Issuance of an invoice does not create lien rights**



The Creation of Lien Rights - Rented Equipment

- **A lien right arising from the renting of equipment arises when**
 - **the equipment is rented to an Owner, Contractor or Subcontract**
 - **the equipment is at the construction site or in the immediate vicinity of the construction site**
 - **Lien for the "reasonable and just rental of the equipment while it is used or is reasonably required to be available"**



The Creation of Lien Rights – The supply of materials

- **A lien right arising from the supply of materials arise when the materials are "furnished"**
- **Materials are furnished when they are delivered to:**
 - **the land on which they are to be used; or**
 - **a place in the "immediate vicinity of the land" that it designated by the Owner, Contractor or Subcontractor**
- **Lien rights for a supplier will also arise when the materials are incorporated into the Improvement**



What is created?

- **When construction lien rights arise, they are**
 - **a charge against the land "in respect of which the Improvement is being made"**
 - **"for so much of the price of the work or materials as remains due"**



REGISTERING AND ENFORCING LIENS

Registering Liens

- **Once construction lien rights arise, those rights must be registered against the land where the Improvement is located or else the lien rights will expire**
- **There are different deadlines and triggering events throughout Canada**

Lien Registration Deadlines – British Columbia

- **Triggering event is a Certificate of Completion:**
- **If a Certificate of Completion has been issued:**
 - **45 days from the issuance of the Certificate of Completion**
- **If a Certificate of Completion has not been issued**
 - **45 days after the Prime Contract has been completed, abandoned or terminated**
 - **the Improvement has been completed or abandoned**

Lien Registration Deadlines – Alberta

- **Triggering event is:**
 - **the completion of the scope of work and/or scope of material supply;**
 - **abandonment of the contract**
- **Deadline is 60 days following the completion of the scope of work, the scope of material supply or abandonment**
- **Deadline is 90 days following the completion of the scope of work, the scope of material supply or abandonment if related to:**
 - **oil or gas well or oil or gas well site;**
 - **concrete**



Lien Registration Deadlines – Ontario

- **Triggering event is the completion of the scope of work, the scope of material supply, the issuance of a Certificate of Substantial Performance or the abandonment or Termination of the Contract**
- **Registration deadline is 60 days from the earlier of the above events**

Enforcing Liens

- **Once a construction lien is registered, it must be enforced by:**
 - **commencing a lawsuit to enforce the lien;**
 - **registering a Certificate of *Lis Pendens* against the Lands that were liened**
- **Deadlines for enforcing liens differ throughout Canada**

Lien Enforcement Deadlines

- **British Columbia:**
 - **1 year from registration of the Construction Lien;**
- **Alberta:**
 - **180 days from registration of the Construction Lien**
- **Ontario:**
 - **90 days after the last day on which the Construction Lien could have been registered**



VALUING LIENS



Valuing Liens

- **Liens create liability that would not normally exist such as liability:**
 - **between an Owner and a Subcontractor**
 - **between a Contractor and a Sub-Subcontractor**
- **Consequently:**
 - **the maximum liability of an Owner in a lien action is the value of the Lien Fund;**
 - **a Sub-Subcontractor cannot access the whole of the Lien Fund**



The Lien Fund

- **There is only 1 Lien Fund**
- **Determined by the:**
 - **Ultimate value of the Prime Contract**
 - **Amount owed by the Owner to the Contractor**
- **The Lien Fund has two parts:**
 - **Part A**
 - **Part B**



Calculating the Lien Fund

- Part A / The Statutory Holdback
 - 10% of the value of the materials that were actually performed or the materials that were actually furnished
 - no ability to set off for deficient work or defective materials
- Part B / Amounts due and owing but not paid
- Amounts owed for unpaid Progress Claims
- Part B can be reduced for:
 - Setoffs for defective work or deficient materials
 - Good Faith Payments made when no Lien is registered on title



Questions?



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Thank you for
joining the session.

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