



Builders' Lien Essentials



Collin K. Hirschfeld

November 22, 2012

Presented to: Law Society of Saskatchewan
Continuing Professional Development

SASKATOON:
374 Third Avenue South
Saskatoon, SK S7K 1M5
Tel: (306) 653-2000

REGINA:
500 - 2200 12th Avenue
Regina, SK S4P 0M8
Tel: (306) 565-6500

 **McKercher** LLP
BARRISTERS & SOLICITORS

www.mckercher.ca



Agenda

Overview of the Act

1. Trust provisions
2. Lien provisions
3. Holdback provisions

Case Law Update

Practical Considerations



Overview of *The Builders' Lien Act*

Preliminary Thoughts

Pay attention to the definitions and concepts under the Act, like:

Contract

Subcontract

Substantial performance
(section 3)

Completion (section 4)



Overview of *The Builders' Lien Act*

1. Trust provisions

- Three types:
 - Owner
 - Contractor
 - Subcontractor
- If have non-monetary consideration, its value is deemed to be funds for the benefit of the respective beneficiaries



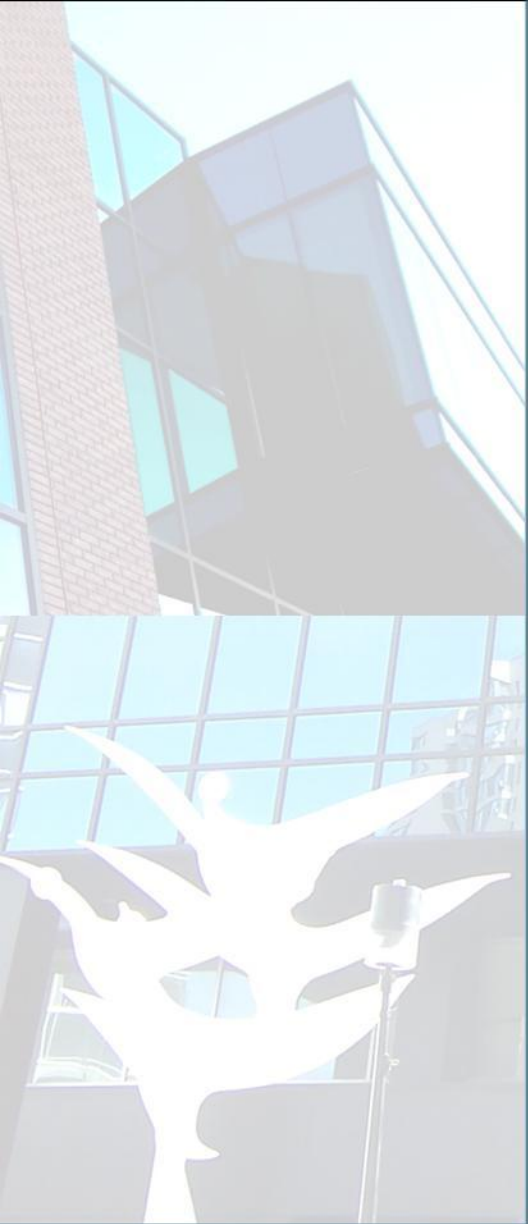
Overview of The Builders' Lien Act

1. Trust provisions (cont'd)
 - Set off is allowed
 - Trustee is discharged on every payment (subject to the holdback requirements)



Overview of *The Builders' Lien Act*

1. Trust provisions (cont'd)
 - Directors and others in control can be personally liable for breach of trust
 - *Have to assent to or acquiesce in conduct that the director knows or reasonably ought to have known*



Overview of The Builders' Lien Act

1. Trust provisions (cont'd)
 - One year limitation period from when contract completed or abandoned
 - Is remedy separate and apart from lien remedy



Overview of *The Builders' Lien Act*

- Owner's trust
 - Contractor is beneficiary
 - Includes all amounts received by Owner to be used in financing of project
 - Can apply to own capital



Overview of *The Builders' Lien Act*

- Contractor's Trust
 - Applies to amounts owing whether due or payable or received by contractor
 - For benefit of subcontractors and labourers of contractor
- Subcontractor's Trust
 - Same as Contractor's trust



Overview of *The Builders' Lien Act*

2. Lien provisions

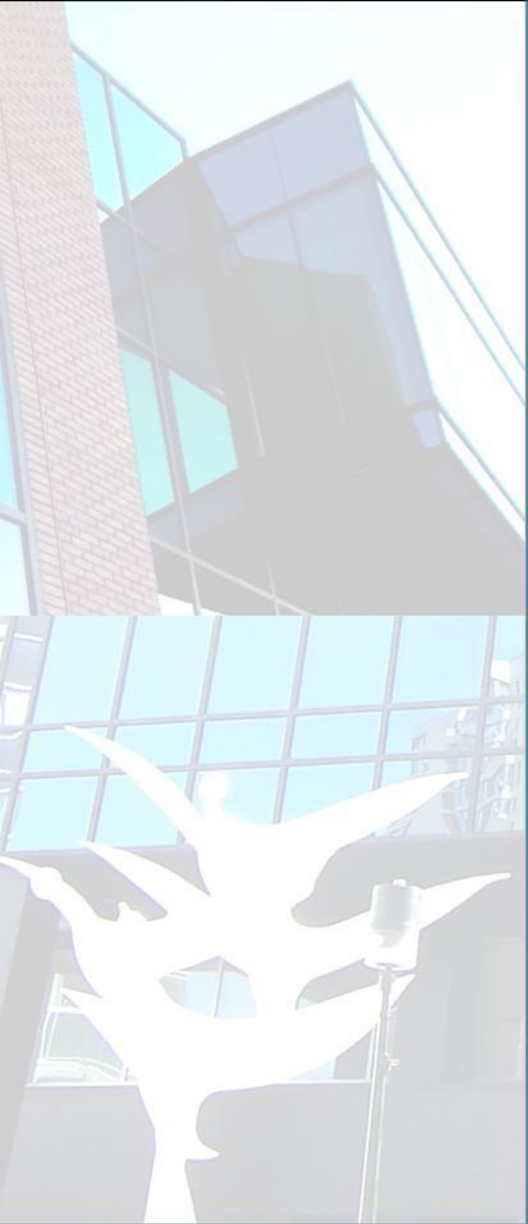
- Arises as soon as work or materials are provided to the project
- Is a lien on the estate and the materials for as much of the price as remains unpaid
- Can have a general lien on more than one parcel



Overview of *The Builders' Lien Act*

2. Lien provisions (cont'd)

- Joint property is charged unless notice is given by the other joint tenant
- Is a charge on the holdback AND any additional amounts owing in relation to the improvement



Overview of *The Builders' Lien Act*

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Overview of *The Builders' Lien Act*

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Overview of *The Builders' Lien Act*

2. Lien provisions (cont'd)

– Leasehold Interests

- Landlord is bound unless gives notice that they assume no responsibility
- Landlord only liable to value of holdback



Overview of *The Builders' Lien Act*

2. Lien provisions (cont'd)

– Condominiums

- If the unit is worked on, lien attaches to unit and the unit holder's interest in the common property
- If work on the common property, lien attaches to the common property and to all owners' units



Overview of *The Builders' Lien Act*

3. Holdback provisions

- Each payer in pyramid is to retain a holdback
- Applies irrespective of payment terms under contract
- Mortgagee may retain
- Is inviolable
- Can be sued if fail to release



Overview of *The Builders' Lien Act*

3. Holdback provisions (cont'd)
 - Owner is only one actually required to maintain an actual trust account
 - Crown is excluded from this and other parts of the Act
 - Any interest that might accrue is dealt with as per contract; if silent goes to owner



Overview of *The Builders' Lien Act*

- ### 3. Holdback provisions (cont'd)
- Written notice of lien
 - Binds the other 90%
 - Effective in stopping project, but cuts both ways
 - Can still pay the 90% less the amount of the value of the lien
 - Can withdraw and reserve VS claim of lien, which, once discharged, there is no turning back



Case Law Update

Thunderbrick Ltd. v. Yorkton (City), 1995 CanLii 3944 (SKCA)

Cannot set off against those with whom you don't have privity with

Final Answer?



Poll Question

You have a client who wants to sell the house they built five years ago. They proceed to sell it privately with no conditions. Possession date is two weeks away and the purchaser is getting financing.

A title search shows your client forgot about some liens. The client advises all they ever saw was a claim of lien document from the drywaller and the painter and nothing more. The sale price is not sufficient to pay off the mortgage and builders' liens.

What do you do?



Case Law Update

Syed v. 612565 Saskatchewan Ltd.,
2009 SKQB 141

- 2 year limitation period under *The Limitations Act* applies
- Didn't matter on facts before the Court if time started running from when filed lien OR when work last supplied as both had passed



Case Law Update

RGR Enterprises Ltd. v. Allsteel Builder (2) Limited, 2012 SKQB 254

- Same conclusion as *Syed* **BUT** only affects ability to commence own proceedings
- Can pursue in context of an action of the other lien claimant
- *Obiter* suggests can even do in a judicial sale
- One of 5 decisions on liens by Justice Scherman since appointment



Case Law Update

Penner v. Hupka, 1995 CanLii 5939
(Sask. Q.B.)

- Under old limitations legislation
- **BUT** interprets section similar to s. 12 of new Act dealing with charges on land and says that the ten year period applies
- Court also says don't have to decide if claim arises when last supplied work OR when register lien because both passed on facts before Court



Case Law Update

Roy Howden Construction Ltd. v. Dewitt, [1994] 1 W.W.R. 617

- S. 55 requires action to be set down within 2 years of action being commenced
- Court held it has ability to extend time to send down for trial even if two years has passed from when claim commenced



Case Law Update

101050094 Saskatchewan Ltd. v. Terramax Sitework Ltd., 2007 SKCA 123

- Court very critical of *Roy Howden* at paras 15 -17
 - Basically inviting someone to revisit
- at para 18 the Court puts onus on lien claimant to move the action because of extraordinary remedy



Case Law Update

Woodland Home & Building Products Ltd. v. Chessall, 2009 SKQB 221

- Counsel attempted to invite the Court to follow the Court of Appeal
- *BUT*
 - the Court felt it was bound by *Roy Howden*



Case Law Update

Majestic Contractors Ltd. v N.C.L. Contracting Ltd. (1993), 117 Sask. R. 12 (Q.B.)

- Sets out the principles to be considered in s.56(4) application
- Arguably sets out s.56(2) considerations as well



Case Law Update

*Cornerstone Developments Inc. v.
Sawtooth Custom Homes Inc.*

2011 SKQB 223

2011 SKQB 224

2011 SKCA 105

2011 SKQB 461

Court of Appeal undated leave to
appeal decision



Case Law Update

Cornerstone Developments Inc. v. Sawtooth Custom Homes Inc.

2011 SKQB 223 and 224

- Had two separate motions to remove liens on title, one with contractor (ss.56 and 60) and one with other lien claimants (s.57)
- Chambers judge held that lien claimants were bound to evidence and determination of contract price in application between owner and contractor
- S. 57 only available if could otherwise release holdback; but Court switched to s.56
- Pay when paid clause
 - *Winfield Construction Ltd. v B.A. Robinson Co.* (1996), 134 D.L.R. (4th) 99



Case Law Update

Cornerstone Developments Inc. v. Sawtooth Custom Homes Inc.

Court of Appeal undated leave to appeal decision

- Leave to appeal s. 56 application not required because is final determination



Case Law Update

*Cornerstone Developments Inc. v.
Sawtooth Custom Homes Inc.*

2011 SKCA 461

- Had little difficulty finding that the procedure followed was not appropriate and sent it back down
- All lien claimants should have been at one application



Case Law Update

Section 60 cases

- Allows the Court some flexibility

Ro-Edd Agencies Ltd. v. Western Caissons Limited,
2010 SKQB 477

- dismissed lien that had expired

Dibco Underground Ltd. v. Weldon's Concrete Products Ltd. (1998), 162 Sask. R. (Q.B.)

- Reduced amount of lien for stockpiled material

Balzer's Canada Inc. v. Atco Power Canada Ltd., 2004
SKQB 104

- Determination of owner

Lang's Enterprises Ltd. v. Town and Country Homes International Ltd., 2007 SKQB 344

- lien lapsed and re-registered

Tessier v. Ripplinger, 2011 SKQB 157

- Whether mileage was claimable
- Court allowed discharge on payment in



Case Law Update

*D&K Horizontal Drilling (1988) Ltd.
(Trustee of) v. Alliance Pipeline Ltd.,
2002 SKCA 145*

- Contractor bankrupt; owner paid money into Court under s.56 and s.57
- Issue was whether this money was the property of bankrupt or not
- Contract provided if liens filed owner could withhold payment
- Money held to be in Court because of owner's obligation to lien claimants



Case Law Update

Deloitte & Touche v. Merit Energy, 2004
SKCA 124

- Receiver contested validity of general liens
- Land sold and funds took its place
- If s. 100 doesn't cure defect, Act still accords sufficient status to lien claimants to defeat unsecured creditors
- Act extends protection to unregistered lien claimants (for e.g. subsec. 88(2) and(4); subsec. 56(8) "all lien claimants")
- Priority dispute between unsecured creditor and unregistered lien claimant depends on when lien arises, not registration
- S.20 confirms that failure to register does not affect trust claim



Practical Considerations

Ways to deal with liens

- Lapse under LTA
- S. 47 direct payment on notice
- S. 56 ex parte or on notice
- S. 57 if can release holdback
- S. 82 right to request information
- S. 83 right to examine on lien



Practical Considerations

Can't contract out of the Act
(s.99)

S. 100 – Substantial compliance

Some judges seem willing to deal with on summary basis, while others do not



Practical Considerations

- When to release holdback funds
 - Payment certified contracts
 - How do you do this on house project?
 - Non-payment certified contracts
 - Abandonment
 - Late registered liens (section 49(5))



Practical Considerations

- Two Holdbacks?
- General liens/Condominium properties
- Mortgagee concerns on release of funds
 - Written notices; searches
- Difficulties of trust conditions
- Progressive Release of Holdback?



For Further Information:

- Law Society Practice Checklists: Litigation: Builders' Liens
- Builders' Lien Act: A Practitioners' Manual by Brent Gough
 - Being updated
- Construction, Builders', and Mechanics Liens in Canada, 7th Edition (Carswell)

SASKATOON:
374 Third Avenue South
Saskatoon, SK S7K 1M5
Tel: (306) 653-2000

REGINA:
500 - 2200 12th Avenue
Regina, SK S4P 0M8
Tel: (306) 565-6500

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