

Introduction

The Purpose of
The Builders' Lien Act

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Pyramid

The Holdback

Part of the focus of this update was to pull in relevant Saskatchewan case law that has developed since the first edition of this publication. Therefore, the focus is on an attempt to refer to what Saskatchewan case law is out there. For reference to the law regarding similar provisions in other Canadian jurisdictions, reference should be had to publications that are focused on those matters.

The Purpose of *The Builders' Lien Act*

The purpose of the legislation is to ensure that those parties who contribute work or material to a project are paid for their work and at the same time provide some security and predictability for owners. In *Town-N-Country Plumbing & Heating (1985) Ltd v Schmidt* (1991), 93 Sask R 278 (CA), Cameron, J, states at paras 26 to 27:

[26] The Statute is primarily concerned with the commercial interests of the persons who, under contract and on credit, contribute service or material to the improvement of real property, whether under contract to the owner, to the contractor engaged by the owner, or to any subcontractor.

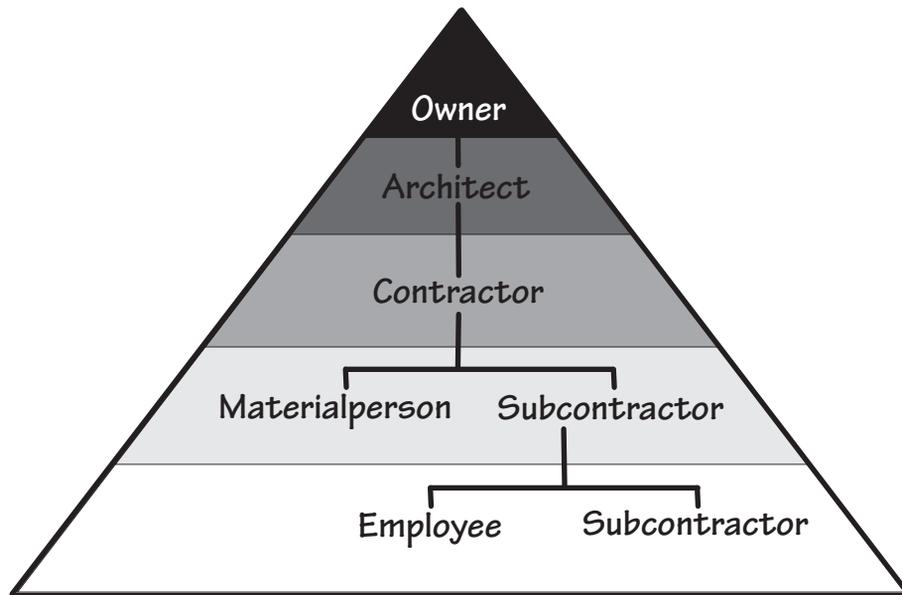
[27] ...It is also concerned with the commercial interests of others, including the owner and the financier, if any, of the improvement. In their interests, as well as in the interests of the contractor and the subcontractors, extensive provision

was made allowing for monies to flow down the contractual chain without risk of liability to those providing the materials or services. The purpose of these provisions—and hence the secondary purpose of the *Act*—is to ensure business efficacy.

These themes have been cited several times by the courts, and this balance between the interests of the claimants and the owners is reflected in the *Act* by the lien rights given to the claimants and the holdback obligations placed on the owners.

The Construction Pyramid

The structure of the statute becomes more understandable if a construction project is visualized as a pyramid.



1. Privity

Contract law is not adequate to deal with the type of structure in a construction project. In North America, the owner enters into a contract with the contractor, who in turn enters into contracts with subcontractors, who in turn contract with

sub-subcontractors. The difficulty in contract law is that a sub-subcontractor will only have a contractual claim against the subcontractor, but has no claim against the owner. The lien provisions of the *Act* were introduced to relieve claimants from the effect of the doctrine of privity. The *Act* has not removed contractual remedies. If a dispute arises between the contracting parties, they may well have contractual remedies as well as the remedies provided under the *Act*.

2. The Lien Remedy

The lien remedy allows any lien claimant to make a claim directly against the owner's interest in the real property. In other words, a sub-subcontractor has the right to claim against the owner's interest in land even though that sub-subcontractor has no contractual claim against the owner. This lien claim is an *in rem* remedy; it runs with the land and, ultimately, could entitle a lien claimant to have the land sold to satisfy its claim.

The person performing work or supplying materials to a project is given an interest in the project. That interest increases in value as the work or material supplied increases in value and decreases as payment is received.



in rem
(in rem), adj.
[Latin “against a thing”]
Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.

3. The Trust Remedy

The purpose of the trust provisions is to ensure that the funds to be used for the project, and which are put into the pyramid at the top, remain in the pyramid and flow down from layer to layer to the bottom. In other words, the purpose of the trust provisions is to guarantee that the parties entitled to the funds will receive them without interference from third-party claims such as judgment creditors. The trust provisions are also in place to guarantee that a person who has received funds for the benefit of claimants



“... the funds to be used for the project... remain in the pyramid and flow down from layer to layer to the bottom.”

below him or her will pay those funds to those claimants and not divert them to a personal use, or a use inconsistent with the trust.

The Holdback

The danger with the lien provisions is that the owner's land remains at risk to any lien claimant regardless of whether or not that particular claim was caused by the owner. For example, if a subcontractor refuses to pay its contracting parties or goes into bankruptcy, those unpaid claimants have a right to lien the owner's interest in the land. The owner, therefore, would be in constant fear of losing his or her interest in the land. The protection for the owner lies in the holdback provisions. The *Act* requires that an owner maintain a holdback fund that stands in place of the land, and the lien claimants may only claim against that fund. The compliance with the holdback provisions by the owner, therefore, prevents any potential loss of the owner's land.