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Introduction

The Purpose of *The Builders’ Lien Act*

The purpose of the legislation is to ensure that those parties who contribute work and/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] 86 D.L.R. (4th) 716, 93 Sask. R. 278, 49 C.L.R. 1 (C.A.), Cameron, J. states:

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 made under contract to the owner, to the contractor engaged by the owner, or to any subcontractor.

… 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.

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.
**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.

**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.

**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 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.
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 which 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.

Parties and Definitions

This chapter will deal in large part with Part I – Title and Interpretation of The Builders’ Lien Act. As with most intricate statutes, a good working knowledge of the definition section is essential to an understanding of the statute as a whole. Many of the terms are defined in peculiar ways unique to the operation of the construction industry.

Parties

Owner – section 2(1)(k)

“Owner” is defined in The Builders’ Lien Act in section 2(1)(k), as follows:

“Owner” includes a person having an estate or interest in land other than an encumbrance, at whose request, express or implied, and:

i) on whose credit;

ii) on whose behalf;

iii) with whose privity and consent; or

iv) for whose direct benefit;

an improvement is made to the land.
This definition has not changed and, therefore, decisions which were rendered under *The Mechanics’ Lien Act*, S.S. 1978, c. 62 are still applicable. The term “owner” in the definition is not limited to registered owner, but includes any person having an estate or interest, other than an encumbrance, in the land. The most common “owner,” other than a registered owner, is a tenant.

Once it has been determined that a person has an estate or interest in land, other than an encumbrance, that is not wholly determinative of “ownership”; the party must have expressly or impliedly requested the work. In *Allied Lumberland Ltd. v. Brewer*, [1989] 3 W.W.R. 473, 72 Sask. R. 57, 32 C.L.R. 234 (Q.B.) goods and materials were supplied at the request of the defendant’s husband who was not the registered owner of the land. The defendant did not expressly request the supply of goods and services. The issue was whether the defendant impliedly requested the goods and services through her agent, the non-owning spouse.

Barclay J. concluded that there is no presumption of agency between spouses other than as provided in section 30 of *The Builders’ Lien Act* which creates a presumption of agency where the land is owned jointly or in common with another person. Barclay J. held that “the defendant did not play any part in the formation of the contract. She did not concur in the decisions of Brewer (the non-owning spouse), and she did not deal directly with Allied (the lien-claimant – contractor).”

The first hurdle, therefore, is to establish that the owner has either expressly or impliedly requested the work. Once the request has been established, it is essential that one of the four conditions, as listed in the definition section, be established. These conditions are very difficult to distinguish one from the other. In *John A. Marshall Brick Co. v. York Farmers Colonization Co.*, [1916] 28 D.L.R. 464, (Ont. C.A.) and affirmed by the Supreme Court of Canada at 36 D.L.R. 420, Mr. Justice Anglin in the Supreme Court of Canada stated:

> While it is difficult, if not impossible, to assign to each of the three words ‘request’, ‘privity’ and ‘consent’, a meaning which will not, to some extent, overlap that of either of the others, after carefully reading all of the authorities cited, I accept as settled law … that ‘privity and consent’ involve “something in the nature of a direct dealing” between the contractor and the persons whose interest is sought to be charged … mere knowledge of, or mere consent to, the work being done, is not sufficient …
This decision was followed by the Saskatchewan Queen’s Bench Court in Chernipeski v. Martin and Compac Enterprizes Ltd., [1986] 46 Sask. R. 131, 19 C.L.R. 247 (Q.B.). The Chernipeski decision was overturned by the Saskatchewan Court of Appeal on a factual ground: [1987] 64 Sask. R. 216.

Estate or Interest

The words “estate or interest” used in the definition of owner are defined in section 2(1)(e) of The Builders’ Lien Act as follows:

includes a statutory right given or reserved to the Crown to enter any lands or premises for the purpose of doing any work, construction, repair or maintenance in, on, through, over or under any such lands or premises ….

The use of the word “includes” indicates that the definition is not exclusive. The definition clearly creates an ownership interest in crown easements and rights-of-way. This was dealt with in the case of Blackhawk Diamond Drilling Inc. v. Uranerz Exploration & Mining Ltd., [1990] 3 W.W.R. 246, 82 Sask. R. 169, 38 C.L.R. 305 (Q.B.).

Crown – section 2(1)(d)

The definition of “Crown” as set out in section 2(1)(d) in the Act covers three broad categories:

(d) "Crown" means:

(i) Her Majesty in right of Saskatchewan;

(ii) an agent of Her Majesty in right of Saskatchewan, including The Workers’ Compensation Board;

(iii) a board, local authority or municipal corporation that is created by or under [the list of statutes contained in section 2(1)(d)].

The definition of “Crown” has been expanded so that there is no longer any dispute as to whether or not a certain agency or board is the Crown. Section 5(1) makes the restrictions, rights and obligations, as contained in the Act apply to the Crown except where excluded in the Act. This is in compliance with The Interpretation Act, S.S. 1993, c. I-11.1.
Merely because a provincial Crown is brought under *The Builders' Lien Act*, it does not follow that it stands on a totally equal footing with any other owner. The process for claiming a lien against the Crown is different [section 52(1)]. A lien claimant does not register a claim of lien in a Land Titles Office. In addition, there is an overriding restriction involving selling of Crown lands.

Section 5(2) sets out specific situations to which the *Act* does not apply. These are in situations under *The Highways and Transportation Act*, S.S. 1983-84, c. H-3, or involving any construction or improvement of streets or highways owned by the Crown.

It should be noted that the definition of Crown deals only with the provincial Crown and nothing makes *The Builders' Lien Act* applicable to the federal Crown. Any property owned by the federal Crown is not subject to lien and/or sale since any legislation purporting to do this unilaterally would be *ultra-vires*: *B.A.C.M. Ltd. v. Parkland Builders Contracting Ltd.*, [1971] 18 D.L.R. (3d) 377 (Sask. Q.B.).

This does not, of course, prevent the Parliament from legislating that federal land is subject to any provincial statute. This has been done in the *National Energy Board Act*, R.S.C. 1970, c. N-6. Merely because the federal Crown or a federal Crown Agency is the owner of a project does not mean that *The Builder's Lien Act* will not apply to that particular project. The other parties to the project are still subject to the obligations under the *Act*.

In projects which are not specifically federal Crown projects but which are clearly a federal work or undertaking, the issue of lienability will be determined on the basis of public policy. If the particular project which would be the subject of the lien is essential to the purpose of the federal undertaking, it is not lienable. In *Canadian National Railway Co. v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 322, 66 D.L.R. (3d) 366, 7 N.R. 603, the project was a quarry which was adjacent to the railroad lines. The Supreme Court held that, since the quarry was not essential to the purpose of the federal undertaking of the rail line, it was liable to be liened. This issue was also dealt with in *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, 3 D.L.R. 481, however, the Court arrived at a different conclusion.
**Contractor – section 2(1)(b)**

“Contractor” is defined in section 2(1)(b) as “a person contracting with or employed directly by the owner or his agent to provide services or materials to an improvement, but does not include a labourer.” This term does not necessarily have the same definition in the construction industry. It is clear from the definition that a contractor is the party normally referred to as the general contractor.

The contractor is the link between the owner and the rest of the project. However, nowhere in the Act is there a restriction on the number of contractors that may be involved on any particular project. Therefore, any party who supplies services or materials to an improvement and contracts directly with an owner or the owner’s agent is a “contractor” under the Act. Reference is often made to an owner who is acting as his or her own contractor.

Under the Act a party cannot wear more than one hat. Consequently, an owner who purports to be acting as his or her own contractor remains an “owner” who deals with several “contractors.”

Another aspect of this definition which is often overlooked is the fact that a contractor need only supply services (other than pure labour) or materials. Therefore, a contractor may simply be a party who supplied a service other than labour or some material directly to the owner. The key element in the definition of contractor appears to be the direct contractual relationship between the contractor and the owner or the owner’s agent. This broad definition of “contractor” has some very serious consequences in the context of holdbacks and the concepts of “materialman” and “serviceman.” These will be dealt with later under the heading of “Materialperson or Serviceperson.”

**Subcontractor – section 2(1)(t)**

The definition of subcontractor in section 2(1)(t) is identical to the definition of contractor. A “subcontractor” is a party who supplies goods or services not including labour. However, the contractual link involving a subcontractor is either with a contractor or with another subcontractor and not the owner.
**Materialperson or Serviceperson**

There is no specific definition of these terms in the *Act*. The concept of materialperson or serviceperson has been developed in the case law and in Saskatchewan, in particular, in *Robinson v. Estevan Brick Ltd.*, [1967] 60 W.W.R. 671, 62 D.L.R. (2d) 756 (Sask. C.A.).

The creation of “materialperson” and “serviceperson” was necessary to limit the operation of the statute. If every person who supplies material to a contractor or a subcontractor is himself or herself a subcontractor, then, providing that person could show that he or she intended to improve a specific project and that his or her materials were provided to that project, he or she would be a contractor and anyone would have the right to claim through them and have a lien against the project. This could result in the absurd position that a manufacturer of building materials would have the right to lien a project and make a claim against the holdback.

To prevent this, it was necessary to envision a person who would provide services or materials, and thus have a lienable right under section 22 of the *Act*, but at the same time who would not be a contractor. The issue becomes how to distinguish between a contractor, who must maintain a holdback, and a materialperson or serviceperson who need not.

The Court in *Robinson v. Estevan Brick Ltd.* concluded that this issue turns upon the fact that a contractor or subcontractor obtains the right under the *Act* by reason of having a contract or subcontract. Hall, J.A. stated at page 674:

> In the instant case, there was between the bankrupt and the contractor a prevenient arrangement or entire contract under which the bankrupt agreed to supply and did supply all of the bricks required by the contractor in the performance of its contract. Under these circumstances, the bankrupt was a subcontractor …

As previously pointed out, the mere provision of goods or materials, although a requirement to have a lien arise, may not itself be sufficient to give rise to lien rights. There must still be the intention by the supplier of improving a specific piece of land. (see: *Stephens Paint Co. v. Cottingham*, [1916] 10 W.W.R. 627 (Man. K.B.)).
Architects – section 2(1)(a) and Engineers – section 2(1)(d.1)

“Architect” is defined in section 2(1)(a) to mean an architect registered pursuant to The Architects Act, R.S.S. 1978, c. A-25 and includes a corporation licensed to practice architecture pursuant to the bylaws of the Saskatchewan Association of Architects.

“Engineer” is defined in section 2(1)(d.1) to mean a member of the Association of Professional Engineers of Saskatchewan practicing professional engineering as defined in The Engineering Profession Act, R.S.S. 1978, c. E-10 and includes a partnership, association of persons or corporation that holds a certificate of authorization to practice professional engineering pursuant to The Engineering Profession Act.

Historically, if architects and engineers did work relating to an improvement, they could claim a lien only if the project proceeded to the stage where an actual improvement occurred. They could not claim a lien where there was no improvement upon which to base that lien claim. See, e.g.: P.R. Collings & Associates Ltd. v. Jolin Holdings Ltd., [1978] 3 W.W.R. 602 in which the Saskatchewan Court of Queen’s Bench refused to recognize a lien for construction supervisory services where no construction occurred.

As a result of a strong lobby by architects and engineers they were wholly excluded from The Builders’ Lien Act which came into force in 1986. This meant that architects and engineers had no lien rights whatsoever when they were supplying services of an architectural or engineering nature.

In 1989, The Builders’ Lien Amendment Act S.S. 1989-90, c. 29, was passed and architects and engineers were brought back under the scheme of The Builders’ Lien Act through the inclusion of architectural and engineering services through the definition of “improvements.” In an attempt to alleviate the effect of the Collings decision, the definition of “improvements” was expanded to not only include a thing constructed, etc., but also a thing intended to be constructed. This definition was intended to cover a party who has done specific services with regard to an intended improvement, regardless of whether or not that improvement actually proceeded.
Labourer – section 2(1)(i)

Labourer is defined in section 2(1)(i) as “… a person who is employed for wages to perform labour of any kind, whether employed under a contract of service or not.”

One of the difficult issues with regard to labourers is the distinction between a labourer and someone who may well be a contractor. The definition of contractor or subcontractor includes someone who simply performs services. The importance of the distinction is that a labourer is not defined as a payer and, therefore, need not maintain any holdback. Further, a labourer maintains his or her lien rights regardless of registration [see: section 75(1)] and, a labourer’s lien has certain priorities over other regular lien claimants [section 75(2)].

The distinction between a labourer and contractor or subcontractor is that a labourer works under the direction or supervision of another party, whereas, a contractor or subcontractor performs in accordance with the terms of a contract: Rendall, MacKay, Michie Ltd. v. Warren & Dyell, [1915] 8 W.W.R. 113, 21 D.L.R. 801 (Alta. T.D.); Stafford et al v. McKay et al, [1919] 2 W.W.R. 280 (Alta. T.D.).

A labourer works for wages, and the term “wages” is defined in section 2(1)(u) in the broadest sense possible to include benefits, overtime, holiday pay, and any monies required to be paid under The Labour Standards Act, R.S.S. 1978, c. L-1, or under any collective bargaining agreements.

Payer – section 2(1)(l)

The term “payer” is defined in section 2(1)(l) as follows: “… owner, contractor, or subcontractor who is liable to pay for the services or materials provided to an improvement under a contractor or subcontractor.”

Only payers must maintain holdbacks [see section 34(1)]. Therefore, any party who falls outside of this category of payer need not maintain any holdbacks and, consequently, may have no one claiming from underneath them in the builders’ lien pyramid.

The payers are the key parties in a construction project from the point of view of cash flow. The obligations on them to maintain holdbacks and to pay out funds under specific circumstances are extremely critical to the smooth running of the project. The payer has an obligation to pay money on the contract without
interruption pursuant to the contract or subcontract which is in force. An implied term of every contract is the obligation of the payer to maintain the holdback.

The Act itself specifically designates the methods by which the payment of these contract funds may be interrupted. Section 40 of The Builders’ Lien Act specifically allows for the payment of 90% of the contract or subcontract price unless “… prior to making payment, the payer receives written notice of a lien.” The holdback provisions of sections 43, 44, and 45, set out when the payer shall pay out the holdback and indicate that the payment of the holdback may only be stopped by the registration of a lien.

Payment Certifier – section 2(1)(m)

The “payment certifier” is defined in section 2(1)(m) as “being an architect, engineer, or any other person on whose certificate payments are made under a contract or subcontract.”

It is clear that this definition was designed to reflect what occurs in the construction industry. In a major commercial contract, different engineers and architects certify payments depending on which subcontract is involved. In a small residential construction, an agent or employee of a lending institution who is doing mortgage inspections may be the payment certifier. In many situations, there will be no payment certifier.

The concept of a payment certifier is very important since the lien period itself very often will begin to run from a designation of substantial performance by a payment certifier. The key sections involving payment certifiers are sections 41 and 42. There are certain obligations placed on payment certifiers which are enforced through the liability for damages [see section 42]. Once the payment certifier certifies that the contract is substantially performed, completes a certificate under section 41, and serves the certificates under section 41(2), the forty clear day lien period under section 43 begins to run and the process of releasing the holdback commences. If there is no payment certifier, the Act allows the owner and contractor to jointly issue these certificates and serve the notices.
Key Definitions

Improvement – section 2(1)(h)
An “improvement” is defined in section 2(1)(h) as

… anything constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled, or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into land, except a thing that is not affixed to the land and includes:

i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

ii) the demolition or removal of any building, structure or works or part thereof, in, on or under land;

iii) services provided by an architect or engineer and improved, has a corresponding meaning.

It is clear from this definition that improvements may not only be constructive improvements, but may well be destructive in nature. The key to an improvement is that it is work done or a project involved with land.

The importance of this definition is that it defines one of the basics for establishing lien rights. To have a lien, an individual must be “a person who provides services or materials on or in respect of an improvement …” (section 22). A potential lien claimant must be able to show that his or her services or materials were not merely supplied to a particular party, but were supplied in respect of one of the aspects of the above definition pertaining to a specific piece of land.

Provided – sections 2(2) and (3)
The definition of “provided” in sections 2(2) and (3) sets out the time when the lien rights arise for the supply of services or materials. In other words, until materials or services are provided, no lien rights arise. Section 2(2) deals only with the supply of materials since the lien claimant providing services will be on the job site personally doing the work. The difficulty normally arises in this area with a supply of material since the actual supplier of
those materials may very well never be anywhere near the job site.

Section 27 of *The Builders’ Lien Act* states:

A person’s lien arises and takes effect when he first provides his services or materials to the improvement.

Under section 2(2), materials are “provided” when they are as follows:

a. placed on the actual land of the improvement;
b. placed on designated land in the immediate vicinity;
c. incorporated into, used in the making or facilitating directly, the making of the improvement.

Section 2(3) provides for a signed acknowledgement of receipt of materials stating materials are received for inclusion in an improvement at a named address. Once the receipt is signed, materials are *prima facie* deemed to have been delivered to the land described by that address.

**Substantial Performance – section 3**

Substantial performance occurs at certain stages of the construction project which begin the running of the statutory period of 40 clear days, and ultimately result in the payment out of the holdback. Substantial performance is defined in terms of dollar amounts being a percentage of the total contract or subcontract price. It exists when the improvement is ready for use or is being used for the purposes intended, and is capable of completion or, where there is a known defect it may be corrected, at a cost of not more than the aggregate of the following:

1. 3% of the first $500,000.00;
2. 2% of the next $500,000.00;
3. 1% of the balance of the contract price.

Section 3(2) sets out what is sometimes referred to as the second holdback pertaining to seasonal work or work agreed not to be performed. This section provides that the value of such work does not form part of the contract price used in the definition of Substantially Performed.
Completion

“Completion” is defined in section 4. It is an additional point later in the construction project at which it is determined that the price of completion, correction of a known defect, and the last provision of services and materials is not more than 1% of the contract price or $1,000.00, whichever is less.

As a result of section 44, if there is no payment certifier and no agreement between owner and contractor, then the statutory period only commences to run at completion.

Contract and Subcontract – sections 2(1)(a.1) and (s)

Under section 2(1)(a.1) of the Act the term “contract” is a term of art inasmuch as it refers only to the specific agreement between the owner and a contractor, or any amendment to that specific agreement. Any other agreement between the contractor and a subcontractor, or between two contractors or two subcontractors, in other words, any agreement between contractors or subcontractors not involving the owner and relating to the provision of services or materials is defined as a “subcontract” in section 2(1)(s).

Registered Liens – sections 2(1)(o)

There are three types of liens which are defined as “registered liens” in section 2(1)(o):

(o) “registered” means:

(i) in the case of a claim of lien mentioned in section 50 and in the case of any other registrable interest, registered as an interest pursuant to The Land Titles Act, 2000 or filed in the Abstract Directory pursuant to that Act where no title has been issued for the parcel of land affected;

(ii) in the case of a claim of lien mentioned in section 51, filed with the Records Officer, Department of Energy and Mines;

(iii) in the case of a claim of lien mentioned in section 52, given to the Crown;

and “registering” and “registration” have corresponding meanings …

There is one type of lien that is not a “registered” lien, as defined under The Builders’ Lien Act. This is merely a written notice of claim of lien.
Written Notice of Claim of Lien – section 2(1)(v)

A “written notice of lien” as defined in section 2(1)(v) is not a “registered lien” under section 2(1)(o). The significance of a written notice of lien is that, unlike registered liens, it does not merely attach to holdback funds. The written notice of lien is used to stop a payer from making payments on a contract or subcontract of funds over and above the holdback.

As a result of the all-inclusive wording in section 33, every lien, including a written notice, is a charge on the holdback.