

2024 Notable Case Update: Manitoba Court of Appeal Clarifies the Test to Vacate Builders' Liens Without Posting Security

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published 10/17/2024

In a recent decision, the Manitoba Court of Appeal has confirmed the test to be applied on an application to vacate a builders' lien without posting security.

In Manitoba, when a party has not been paid for the work, materials or services they have provided to a construction project, *The Builders' Lien Act* (the "Act") allows for them to file a builders' lien against the land the project is located on. A lien provides the claimant with an interest in the project lands.



Once filed, a builders' lien can have significant impacts on a project, such as holding up construction financing and further payments to contractors. To address this, and to allow for the project to resume while the dispute giving rise to the lien is resolved, the Act provides a number of ways in which parties can have a lien discharged. Commonly, parties will utilize section 55(2) of the Act, which allows a party to pay the amount claimed in the lien into court or into trust to stand as security in place of the project lands. In this scenario, the lien claimant's security then attaches to the funds in court, allowing the lien to be discharged from the title of the project lands.

In the case of *Sterling Parkway Residences Inc v Gypsum Drywall Interiors Ltd*, the Manitoba Court of Appeal had the opportunity to consider section 55(3) of the Act, which allows for the court to discharge a lien on grounds "other than" in section 55(2) (i.e., without posting security). Both sections 55(2) and 55(3) are meant to provide a summary process by which a lien can be vacated.

Sterling Parkway Residences Inc. was the owner of a multiunit residential complex project being constructed in Winnipeg (the "Project"). Sterling hired a general contractor (the "GC") for the Project, which in turn subcontracted certain works to Gypsum Drywall Interiors Ltd. pursuant to two separate subcontracts.

At a certain point during construction, Sterling terminated its contract with the GC and took

over the role of general contractor on the Project itself. As work progressed, Gypsum raised concerns with Sterling that it had not been paid for work completed prior to the GC being terminated. Sterling responded by stating it had paid for all of Gypsum's invoices by virtue of it having paid all of the GC's invoices prior to the termination of the GC's contract.

Gypsum proceeded with filing a lien against the Project. Sterling brought an application to have the lien vacated under section 55(3) of the Act, arguing, primarily, that as it had already made payment to the GC for the work that was the subject of the lien, it could not legally be required to pay again. It therefore asked the court to discharge the lien on a summary basis. Alternatively, Sterling agreed to post security to have the lien vacated pursuant to section 55(2).

The application judge who originally heard the matter disagreed with Sterling's argument as to why the lien ought to be discharged under section 55(3), finding that Gypsum had a valid lien right. The judge noted Sterling had the option to pay the full amount of the lien into court as security to vacate the lien under section 55(2), which Sterling did thereafter. Sterling appealed this decision to the Manitoba Court of Appeal.

The Court of Appeal ultimately agreed the lien could not be vacated under section 55(3), but for reasons different than those outlined by the application judge.

Before conducting its analysis, the Court conducted a thorough review of the applicable test under section 55(3), including a review of the history and purpose of the section. The Court noted that, unlike section 55(2), which allows for security to stand in place of the lien, "[a]n order vacating a lien under s 55(3) dispenses with any security, thus depriving the lien claimant of a significant right. A high bar is required to ensure that a lien claimant is not deprived of such a right in a summary proceeding except in a very clear case."

The Court outlined that section 55(3), being a summary process proceeding by way of court application (where judges generally only rule based on affidavit evidence rather than oral testimony which is considered in the context of a regular trial) is not meant to apply to situations where there are material facts in dispute between the parties which would require the Court to weigh evidence or make findings of credibility. Applications where material facts are in dispute can generally only be determined by affidavit evidence in the "clearest of cases." If there are substantial factual disputes between the parties, as there often are in contested lien claims, those issues ought to be referred to trial.

The Court ultimately confirmed the test to be considered on a section 55(3) application, stating: "an order vacating a lien under s. 55(3) of the Act on other grounds (without posting security) should be granted only in the clearest of cases where there are no material facts in dispute and it is patently demonstrable that no builders' lien exists" (i.e., the strict requirements of the Act have not been complied with).

In this case, there were significant factual disputes between the parties. There was ongoing litigation between Sterling and the GC wherein the GC denied it failed to pay Gypsum and the other subcontractors with the funds paid to it by Sterling. It was also in dispute whether Gypsum and Sterling were in a direct contractual relationship.

In applying the test to the case before it, the Court therefore concluded: "... this is not a case where there are no material facts in dispute and where it is patently demonstrable that the lien is not valid. Accordingly, it was not open to the application judge to vacate the lien under s 55(3) of the Act."

The Court of Appeal's decision provides clarity that liens can only be vacated without posting security under section 55(3) if the lien is clearly invalid or other procedural requirements under the Act were not followed. Examples of this include the lien being filed out of time or the lien expiring as a result of the lien claimant failing to commence a court action to "perfect" the lien within two years of the lien being filed.

In circumstances where the lien is being disputed on "other grounds" which will require the court to consider material facts that are in dispute between the parties, a party wishing to have a lien discharged will therefore generally be required to post security as contemplated by section 55(2).

For more information regarding builders' liens in Manitoba, **please see the following article.**

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