Builders' Lien F.A.Q.

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Construction projects are often complex and involve numerous parties, including owners, general contractors, sub-contractors, architects, engineers, labourers and material suppliers. Often, conflict between the parties on a project is inevitable and can result in the withholding of funds. In this environment, a builders' lien is a critical tool for a contractor, sub-contractor or supplier to ensure that they get paid. It can also be a hazard for a party who doesn't understand their obligations. In this F.A.Q., we will cover some of the key points with respect to builders' liens in Manitoba.

1. What is a builders' lien?

A builders' lien is a statutory creation of *The Builders' Liens Act* (the "Act"). Any person who performs work or services or the placing or supplying of materials to improve real property has a lien for the value of the work, services or materials. This lien attaches to the interest of the owner in the land – meaning title to the property.

The lien has a limited existence and expires unless preserved by registration of a builders' lien. The person who files the builders' lien is often called a "lien claimant".

A builders' lien is a powerful tool that enables unpaid contractors, sub-contractors and suppliers to seek compensation directly from the owner of the property to which they contributed work, services or materials.

2. Who can register a builders' lien?

A builders' lien can be registered by almost any person who does any work, provides any services or supplies any materials in the performance of a contract or sub-contract related to construction or other improvements to the real property.

Many of these terms are defined in the Act and shed light on the question of who can register a builders' lien:

- "Person" includes individuals (including heirs and executors) and corporations.

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- "Services" is defined to include the administration of a contract; inspections performed under a contract and the rental of equipment, with or without an operator.
- "Materials" are defined as "every kind of movable property" but must be identifiable and supplied for a specific project. A contract for the general supply of materials (e.g. general materials supplied to a contractor's premises) does not count.
- "Contract" means a contract entered into with the owner for construction; for improving land; for work or services provided in construction or improving land; or for the supply of materials to be used in construction or improving land.
- "Construction" is defined as the making, building, construction, erection, fitting, placing, alteration, improvement or repair of a structure.
- "Improving land" means doing work that improves the character of the land. Most importantly, this must be a lasting benefit to the land. A fleeting benefit (e.g. snow removal from a driveway) is unlikely to be sufficient.

There doesn't have to be any direct contractual relationship between the person who registers the builders' lien and the property owner.

There is no builders' lien rights for claims under $300.00.

3. What can I register a builders' lien against?

Builders' liens can be placed on virtually any privately held interest in land, including leasehold interests. It is easier to identify land that is not subject to a builders' lien, which land includes:

- Reserve lands;
- Federal government lands;
- Manitoba Hydro contracts; and
- Highways, bridges, air strips, dock and ferry terminals (quasi-lien rights are available to sub-contractors under *The Infrastructure Contracts Disbursement Act*).

4. When can I register a builders' lien?

There is a crucial catch to builders' liens – lien rights expire through the passage of time. A builders' lien must be registered within 60 days after the earliest of:

- the issuance of a certificate of substantial performance; or
- the date that a contract or sub-contract is completed, abandoned or terminated.

5. What do I need to do to file a builders' lien?

Manitoba has a builders' lien form appended to the Act and the lien claimant fills in the required information:

- Who did the work, the type of work they did, for whom;
- Legal (not civic) description of the land worked on and who owns that land;
- Whose interest is being liened (registered owner or leaseholder);

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- Amount owed; and
- Last day of work on site.

It is important to note that if you are registering a builders' lien against the Government of Manitoba, a Crown Agency or municipalities, a special process is used – a Notice of Claim for Lien. This is delivered to the Officer prescribed by the Regulations to the Act, or in the case of a municipality, the City Clerk. This type of builders' lien is not filed against title to the property.

6. What if I made a mistake on my builders' lien?

The Act has a provision that may save a builders' lien that contains a mistake. It provides that "substantial compliance" with the requirements of form and content in the Act may be enough, unless, in the court's opinion, a party is prejudiced by the mistake.

While this curing provision is reassuring, there is significant question of what substantial compliance is and what is not. Each case is decided based on its specific facts. For example, in one case, registering the builders' lien against the right lands but mistakenly identifying the wrong owner was held by the court to be "substantial compliance" with no prejudice to anyone resulting from the mistake. However, registering the builders' lien against the wrong property would certainly be fatal to the builders' lien.

7. What do I need to do after I register a builders' lien?

After the lien is registered, it needs to be "perfected" (or enforced) within two years of the date of registration. To "perfect" a lien means starting an action in the Manitoba Court of Queen's Bench to prove entitlement to the funds and registering a Pending Litigation Order on title to the property, as proof that an action has been started.

The Act is complex and there are many other requirements and exceptions to these provisions. Substantial compliance is required for maintaining a valid builders' lien. If a lien claimant has not followed the correct procedure, the builders' lien may be invalid and removed from the title to the property.

8. How do I remove a builders' lien from a property title?

There are two primary ways to discharge a builders' lien: consent and payment into court.

If the dispute can be resolved and an agreed amount paid to the lien claimant, then the lien claimant can register a discharge of the builders' lien from title. If you can't resolve the dispute, you might be able to agree to have a lawyer hold an agreed upon amount as security for the builders' lien until the dispute is resolved, and have the lien claimant register a discharge of the builders' lien.

Alternatively, a party can pay the amount of the builders' lien into court. The court will then

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provide an order discharging the builders' lien. Most often, the full amount of the builders' lien is paid into court. If a party has strong evidence that the builders' lien is excessive, that party can ask the court to substitute a lesser amount. However, this is a lengthier process that requires court attendance and arguments from all parties.

Where funds are held in trust or paid into court, they will be held until both parties agree to the disposition or the court orders how the funds should be distributed.

9. Final thoughts

Builders' liens are complex and unforgiving. This F.A.Q. has only touched on the broad strokes of the Act and there are many other obligations on parties to a builders' lien matter. If you find yourself requiring a builders' lien or in a builders' lien dispute, you should speak to a lawyer with experience in builders' liens to help you deal with the situation and avoid any possible complications or adverse outcomes.

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