

Lien Waivers - Can't Do It, Don't Try

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In the past year, I've received more calls than ever about contracts with provisions that call for one or both parties to waive certain protections afforded to them under *The Builders' Liens Act* (the "Act").

Perhaps it is indicative of people taking a "DIY" approach to contract drafting, or the abundance of precedent contracts (from foreign jurisdictions) available on the internet, but I've definitely noticed an uptick in the presence of these clauses.

There's only one problem with lien waiver clauses - they are prohibited in Manitoba.

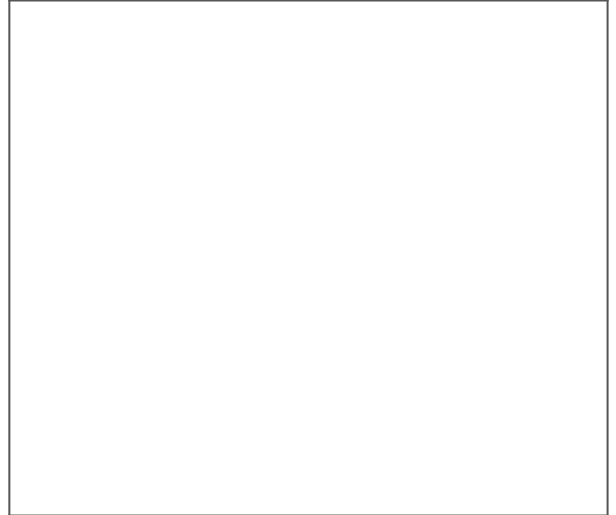
Sections 11 and 12 of the Act state that every agreement purporting to make the Act inapplicable or waiving rights under the Act, or any device or payment made for the purpose of defeating or impairing a lien or trust, is against public policy and therefore void. The sections are expansive and designed to cover any attempt to avoid the requirements of the Act.

One of the many reasons that lien waivers are banned in Manitoba is the Government's desire to ensure that differences in bargaining power or sophistication do not result in smaller and less powerful parties waiving important rights provided to them under the Act. Simply put, the Manitoba Government considers any attempt to circumvent the Act contrary to public policy, and therefore void.

Sections 11 and 12 of the Act make it relatively easy to comment on contract provisions which specifically purport to waive rights under the Act: any provisions that purport to alter holdback requirements or abridge the time period in which a party can register a lien are clearly void.

However, the application of the non-waiver provisions of the Act becomes a little more convoluted when one considers the dispute resolution provisions of many contracts.

The Act has its own provisions dealing with the enforcement of lien and trust claims. Under the Act, lien claimants are required to register pending litigation orders and commence litigation in the Court of Queen's Bench within 2 years of the registration of the claim for lien. The Act allows owners to issue a notice requiring a lien claimant to commence an action to



enforce the lien within 30 days. The common thread that binds all of the enforcement provisions of the Act is that the only venue for adjudicating disputes is the Manitoba Court of Queen's Bench.

As the trend towards alternative dispute resolution ("ADR") has accelerated, it has become increasingly common to see mandatory mediation and arbitration provisions inserted into contracts. The Act does not contemplate these alternatives to litigation, and therefore any contractual provision that calls for the use of a *mandatory* ADR process (including mediation, arbitration or any combination thereof) which would displace the Court's role in a lien or trust claim is void.

There may still be some room for ADR processes in lien and trust claims, especially where contracts make mediation or arbitration optional. If they choose to engage such processes, parties should be aware that an arbitrator may not have the jurisdiction to order certain remedies that are only available under the provisions of the Act (unless the parties expressly agree to give the arbitrator this jurisdiction).

One question that has yet to be determined is whether a contractual condition which requires disputing parties to attempt mediation prior to commencing a Court action would be contrary to sections 11 and 12 of the Act. Although such a provision would not block access to the Court, it would delay a lien claimant's right to bring the action in Court and could therefore arguably be seen as "impairing" rights conferred under the Act.

In conclusion, all parties should be aware of the protections afforded and restrictions imposed by sections 11 and 12 of the Act, especially when considering form contracts from parties that do not ordinarily carry on business in Manitoba.

*Jonathan M. Woolley has been appointed a Judge of the Court of King's Bench of Manitoba in Winnipeg and is no longer at TDS. Please contact **Meghan Ross** at mcr@tdslaw.com to connect with a lawyer on this topic.*

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