

BUILDERS' LIENS

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March 2, 2007

Introduction

On January 1, 2005, the old Mechanics' Lien Act, R.S.N.S. 1989, c. 277 was significantly revised by Bill 58 which even changed the name of the Act to the Builders' Lien Act. Also of significance are the changes to lien practice resulting from the coming into force of the Land Registration Act. The following paper hopefully provides a basic outline as to what steps and documents are required to file and sustain a lien on behalf of a contractor and how to deal with liens from an owner's perspective (or a potential owner's perspective), which occasionally is necessary in the course of a property transaction.

Filing Liens from a Contractor's Perspective

When filing a Builders' Lien, there are a number of steps that must be taken as well as information and documentation that must be prepared. Please note that a sample lien is attached as Appendix A to this paper.

1. The lien must be prepared for filing in the county where the land is situate.
2. The full and proper name of the lien claimant should be listed as well as the full name of the owner and any contractors in between the owner and the lien claimant in the construction chain or pyramid (i.e. if the lien claimant is a sub-contractor, you should name the general contractor with whom the sub-contractor had a contract as well as the owner).
3. The Property Identification ("PID") Number of the property in question should be determined and included in the lien along with a general description of the property (just in case an issue arises as to the land being liened). It should be remembered that limitation periods in lien matters cannot be extended: therefore, if in doubt, include as much information as possible.

4. You must include the date of the last time which the lien claimant performed any work on the project.
5. The amount of the claim must be included. The amount should specifically state whether it includes or excludes HST.
6. The lien should not be signed by a lawyer but only by an officer, director, manager, etc. of the lien claimant. This is because an Affidavit must be attached to the lien from the person who signs the lien stating that they have full knowledge of the facts set out in the lien and that the amount claimed is accurate. The lien claimant's lawyer is unlikely to have this direct knowledge.
7. **The appropriate land registry form must be attached to the lien.** You will have to determine whether the property has been **migrated or not**. If it has been migrated, you must attach a Form 26; otherwise, you attach a Form 44. Samples of Forms 26 and 44 are attached as Appendix B.

A lien claimant now has 60 days (formerly 45 days) from the last day of supply of labour and materials to a project to register a lien. Once the lien is registered, the lien claimant now has 105 days (formerly 90 days) from the last day of work to "perfect" its lien by starting a court action and registering a Certificate of Lis Pendens at the appropriate Registry of Deeds. It should be noted that the 105 day period for filing a Lis Pendens begins to run from the last day of work: for example, if a lien claimant has filed a lien 5 days after his last day of work, he would then have 100 days to start his court action and file his Certificate of Lis Pendens.

A sample Statement of Claim as well as a sample form of Certificate of Lis Pendens now required (Form 19) are attached as Appendix C. Both documents are required for all lien claims. The Statement of Claim and the Certificate of Lis Pendens are sent to the Prothonotary's office to be issued. Once both documents are returned, the Certificate of Lis Pendens, only, is then registered at the appropriate Registry of Deeds (i.e. for the county in which the land is located).

There are no longer any “sheltering” provisions in the Builders’ Lien Act. Therefore, if a potential claimant has failed to register a lien within 60 days of his last day of work or, having registered a lien, fails to “perfect” his lien by registering a Lis Pendens within 105 days of his last day of work, he will no longer have any lien rights. Claimant A who fails to register or perfect a lien can no longer hope that Claimant B has commenced a lien action and filed a lis pendens during the 60 day period in which Claimant A should have filed his lien. Previously in such circumstances, all Claimant A had to do was file an Affidavit of Sheltering with the Prothonotary in Claimant B’s action (said affidavit did not even have to be registered at the Registry of Deeds!) and suddenly Claimant A was back in business. This can no longer be done.

It should be noted that Section 3(7)(b) of the Limitation of Actions Act specifically states that the ‘saving grace’ / time limitation extension provisions of the Limitation of Actions Act do not apply to time limitation provisions in the Builders’ Lien Act.

It should be noted that the Builders’ Lien Act now applies to the Provincial Crown, although it still does not provide to the Federal Crown. The Act has always applied to municipalities. However, the Act will not permit a lien to attach to Crown Property. Instead, the lien will only constitute a charge on the “lien fund” (including the **holdback**) that the Provincial Crown must now maintain. Thus, the question becomes what has to be done to provide notice of a lien against the lien fund held by the Provincial Crown?

It would be pointless to register such a lien at the Registry of Deeds since a lien claimant has no right to claim against Provincial Crown **land**: in fact, Section 3(2) of the Act forbids any such registration. However, a lien claimant still has to give notice to the Crown containing the same information and within the same time period as if it had registered a lien. The Act also states that notice is to be provided to the Minister of Justice: this can be accomplished by writing to one of the various lawyers in the Department of Justice who are designated as recipients for such notices. I would suggest that the best practice to give notice is to prepare a Builders’ Lien in the form one would normally use and simply send it off to the Department of Justice instead of

filing it at the Registry of Deeds. Remember, the notice of lien must be provided to the Provincial Crown within 60 days of the lien claimant's last day of work.

Furthermore, an action to perfect a lien must be commenced within 105 days of the claimant's last day of work and a Certificate of Lis Pendens confirming that an action has been commenced must be provided to the Provincial Crown.

However, there is one added complication. Since in order to perfect the lien one has to commence a court action and the action will have to name the Province as a party, Section 3(7) of the Act requires that the Province be provided with 30 days "notice of intended action" prior to any action being commenced. This in effect creates another deadline, one which is not specifically set out in the Act: within **75 days** of the last day of work on a project involving the Province, a notice of intended action must be provided to the Province, following which one has to wait 30 days before starting an action to perfect ones lien.

It is suggested that the best practice is to provide the Province with a Notice of Intended action at the same time one files a notice of lien with the Province thus killing two birds with one stone. A sample letter which would constitute a notice of intended action is attached as Appendix D.

Getting Rid of Liens - An Owners/Buyers Perspective

In order to discharge a lien prior to a lien claimant commencing an action and filing a Certificate of Lis Pendens, all that is required is that a Receipt and Discharge of Lien be filed by the lien claimant. This is one document that can be signed by the lien claimant's lawyer since the lawyer will have personal knowledge of the settlement of the lien claim. A sample Receipt in Discharge of Lien is attached as Appendix E.

If a lien has been filed more than 60 days after that lien claimant's last day of work, or if no Certificate of Lis Pendens has been registered with 105 days of the last day of work stated in the lien, then the lien is no longer valid. However, it will remain on title until a court application is made pursuant to Section 29(4) of the Builders' Lien Act

to discharge the lien. This is a very simple application to make and when the only issue is lack of a Certificate of Lis Pendens, can be made on ex party basis and only requires a certificate from a solicitor certifying that no certificate of lis pendens was filed in the required time.

However, once a lien has been “perfected” (i.e. a Statement of Claim has been issued and a Certificate of Lis Pendens has been registered), the only way to have the lien vacated is to obtain an Order from the Court. Consent of each party listed in the lien will normally have to be obtained.

Please note that when filing either a Receipt in Discharge of Lien or an Order vacating a Lien and Lis Pendens, a Form 27 “Request to Cancel the Recording of an Interest” must be filed as well. A sample Form 27 is attached as Appendix F.

It should be noted that Section 58(2)(d) of the Land Registration Act provides that a Certificate of Lis Pendens may be removed upon the expiration of 5 years since recording. However, the Registrar General has indicated that this provision only relates to land that has already been migrated. In other words, if a Lis Pendens has been on file for more than 5 years on a migrated parcel, it can be removed by simply filing the necessary form with the Registrar. The issue of old Certificates of Lis Pendens often arises during the migration process. In such circumstances, a Court Application must be made to discharge the Lis Pendens. Notice will have to be given to everyone listed therein. Sometimes this is difficult because one or more of the parties may no longer be in existence.

Often, there are insufficient funds available to discharge a lien and/or the amounts claimed under the lien are disputed. Nevertheless, it will be necessary to have the lien vacated in order for a property transaction to occur. In those circumstances, security will have to be posted with the court to cover the value of the lien plus an allowance for court costs, which is usually around 25% of the face value of the claim. The form that the security can take differs from a lien bond (issued by a surety company), to a letter of credit from a bank or a certified cheque. Sample forms of security are attached as Appendix G.

Holdbacks

Lien holdback requirements are governed by Section 13 of the Builders' Lien Act. In particular, Section 13(2) provides that the personal liable under a construction contract (often, the owner) must maintain a holdback of 10% of the value of the work performed for 60 days after **substantial performance**. Section 13(3) provides that after these 60 days have passed, the holdback may be reduced from 10% to 2.5%. This "finishing" or "completion" holdback must be maintained until 60 days have passed after total completion of the project.

The test for when substantial performance has been achieved is set out in Section 13(1) of the Act and requires two things: (a) that the project is ready to be used for its intended purpose; **and** (b) that the balance of the work under the contract can be completed for less than 2 ½ % of the contract price (i.e. the project is 97.5% complete).

A party seeking to file a lien can do so for up to 60 days after that party's last day of work. In other words, a project could be 99.99% complete and the person driving the last nail could still file a lien up to 60 days thereafter. This, of course, creates a problem in that there is an apparent inconsistency between the lien period and the holdback period. As previously set out, the holdback is maintained for 60 days after substantial performance (i.e. 97.5% completion). However, the 10% holdback is often released before the project is totally complete. In other words, a lien can be filed after the holdback is released.

The answer to this apparent conundrum is the 2.5% completion holdback. As long as the Owner maintains that 2.5% until 60 days after total completion, the Owner will have met its obligations under the Builders' Lien Act and will not be liable to a third party lien claimant (i.e. someone without a direct contract with the owner) for more than the 2.5% completion holdback.

Often, buildings are still under construction at the time of sale or 60 days have not passed since substantial performance. Title may pass and then an unpaid

subcontractor files a lien. What is a buyer to do to protect themselves from such circumstances?

The answer is that the holdback should be maintained from the purchase price 10% of the contract price of the project. Often, the purchaser will not know what this is. Therefore, to be on the safe side, the purchaser should maintain a 10% holdback of the purchase price which will inevitably be greater than the actual holdback requirement (i.e. the purchaser usually will pay more for the property than the cost to construct).

As to who should maintain the holdback is really a question for real-estate lawyers. Ten percent should be maintained in trust by either the purchasers or vendors lawyer to be held until 60 days have passed from substantial performance and then reduced to 2.5% to be held until 60 days after total completion.

Finally, you may have encountered situations where lenders maintain a 10% hold back. This is because there is caselaw indicating that a party who finances a construction project can be considered to be an “owner” of that project under section 2(d) of the Builders’ Lien Act. This usually depends on the degree of involvement of the lender in the project. The higher the degree of involvement, the more likely that the lender could be considered an owner.

Summary

It is very important in Builders’ Lien matters to be accurate and timely. The “saving grace provisions” contained in the Limitation of Actions Act with respect to missed limitation periods specifically do not apply to the Builders’ Lien Act. Furthermore, the forms required by the new Land Registry System must be accurately filled out or the lien could be rejected. Sometimes the rejection will take place after the time limit for filing a lien has expired. Hence, timelines and accuracy are more important than ever when dealing with lien related matters.