

A PRACTICAL GUIDE TO THE BUILDERS' LIENS ACT (MANITOBA)

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The right to security against the land and improvements, for those supplying labour and materials, (the mechanics' lien) is a creature of statute. It comes to us by way of the United States as a derivative of Roman Law. The right to lien first became law in Manitoba in 1873 and was supplemented, 10 years later, by *The Builders and Workers Act*. The latter, established a trust fund in favour of those improving the land in addition to the lien rights. In the past one hundred and ten years the legislation was amended on numerous occasions. However by the 1960's it became apparent that the Manitoba legislation was far out of date and has practically outlived its usefulness in its then current form.

As a result one of the earliest tasks of the Manitoba Law Reform Commission was to recommend on the Manitoba legislation affecting mechanics' liens. The Commission's final report titled, *Report on Mechanics' Liens Legislation in Manitoba*, was published as Report No. 32 in August 1979. The report recommended implementation of substantial changes to the then existing legislation. The result was the enactment of *The Builders' Liens Act*¹ which embodied practically all the recommendations put forth by the Manitoba Law Reform Commission.

The report is recommended to the reader as it provides much of the background vital to the understanding of the *Act*. *The Builders' Liens Act* came into effect on September 28, 1981 and was substantially amended on August 1, 1982. *The Builders' and Workers Act*, *An Act to Amend the Builders and Workers Act* and *The Mechanics' Liens Act* were repealed on September 28, 1982. Although many of the concepts of the now repealed legislation have been carried forward in *The Builders' Liens Act*, the writer will base the following analysis entirely on the new *Act*.

Definitions

The *Act* contains an exhaustive list of definitions to which strict regard must be paid as they extend the usual meaning of the words being defined (sections 1, 2, 46 and subsection 43(6)). Specifically the broad definition of Crown and Crown Agency must be examined. Holdback and holdback accounts are defined and especially note that the holdback account is an interest bearing account in the joint names of the owner and contractor. Payment certifier is defined but the definition is broad enough to include either the owner, the contractor or sub-contractor as the payment certifier so long as the contract so provides. Services are defined to include all work in connection with the improvement of the land including for example, demolition, landscaping and rental of equipment (with or without an operator). The *Act* specifically exempts Architects or Engineers who are not employees of the owner, contractor or the sub-contractor and these persons do not have a right to lien (section 36 and 1).

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1. S.M. 1980-81; am. S.M. 1982, c. 47 (c. B92) (hereinafter referred to as the *Act*).

Substantial performance is dealt with in section 2 (which is a deeming section) and is a concept which is of fundamental importance to the *Act*. Section 2 provides that a contract or sub-contract is conclusively *deemed* substantially performed when;

1. The structure or a substantial part thereof is ready for use or is being used for the purpose intended *and*
2. The work is capable of completion or correction at a cost no more than 3% of the first \$250,000.00, 2% of the next \$250,000.00 and 1% of the balance of the contract price.
3. In the alternative sub-section 2 (2) provides that where the work cannot be completed for reasons beyond the control of the contractor or the sub-contractor the value of the work remaining to be done must be subtracted from the contract price in calculating substantial performance.

Other definitions provided in the *Act* are of equal importance and the reader is advised to review them in detail.

Organization and Intent of the Act

The purpose of the *Act* is to ensure that those contributing to the improvement of land in any manner are paid. This purpose is fulfilled as follows:

1. By trust provisions (sections 4 through 9) which provide that all money received by an owner, contractor or sub-contractor are held in trust and cannot be appropriated for their own use until suppliers of materials, services and labour, and Workers' Compensation are paid and provisions for other just claims are made.
2. By preventing anyone from contracting out of or avoiding the *Act* (sections 11, 12, 27(2.2), 29 and 34 (4)).
3. By giving the right to file liens against the land upon which the services or work were performed or to which the supplies were delivered. The right of lien is given to contractors, sub-contractors, suppliers, and workers with special priority given to workers to the extent of forty (40) days wages. It must be noted that both the tenant's interest and the landlord's interests may be subject to a limited lien (specifically see section 18). Special provisions are provided for liens against the Crown and Municipalities themselves rather than against the land. A specific and separate lien is provided to suppliers for supplies which are not yet incorporated into the structure (sections 2 (3) and 35 (3)).
4. By providing for a holdback and for providing payment into a holdback account (the latter, at the time of this writing, only for contracts in excess of \$200,000.00). It is to be noted that there are two separate holdbacks envisaged by the *Act*:
 - (a) A holdback prior to substantial performance; and
 - (b) A holdback post-substantial performance.

5. By providing priorities as between competing encumbrances (including liens) against the land and the holdbacks.
6. By providing that certain records must be kept and entitling interested parties to information respecting the instrument under which the lien rights are derived.
7. By providing methods of registration and enforcement of liens. In this regard specific attention must be paid to the forms provided in the Schedules to the *Act*.
8. By providing onerous civil and quasi-criminal penalties for breaching the sections of the *Act* relating to trusts, maintaining and providing information, filing grossly exaggerated liens, and for providing improper certificates of substantial performance.

Having reviewed in general terms the *Builders' Liens Act* what follows will be an analysis of the relevant provisions as they relate to the various parties contemplated by the *Act*. Rather than proceeding through the *Act* in numerical order the analysis will be from the point of view of the individual parties' particular perspectives.

I. Owners

An owner is defined in section 1 of the *Act* as any person having any estate or interest in the structure and the land occupied thereby, or in the lands upon which work is done or services provided at whose request and upon whose credit on whose behalf or with whose privity or consent or for whose direct benefit the work is done.

Sub-section 5 (1) imposes a trust on the owner where sums become payable to the contractor on the basis of a certificate of a payment certifier. It is not clear under sub-section 5 (1) whether the trust is imposed only upon monies received by the owner for the specific purpose of the contract or whether all monies at the time of the certification in the hands of the owner are impressed with a trust up to the amount of the certificate. Both interpretations are viable and the preferred interpretation must by necessity await judicial determination. It should be noted that there are no similar trust provisions for monies in the owner's hands where there is no payment certifier.

Pursuant to sub-section 5 (2) all monies received by the owner under a mortgage or under any financing for the structure are impressed with a trust.

Sub-section 5 (3) sets out the obligations of the trustee of the above trust. The sub-section provides that the owner shall not appropriate or convert any part of the trust funds for his own use or for any use not authorized by the trust until the contractor has been paid and provision for the payment of the other affected beneficiaries of the trust have been made. It is unclear what "provisions" are being contemplated by the *Act*. Perhaps, by way of an example, contract terms directing payment or some form of bonding may be required. Although it is not clear from the *Act* who the other affected beneficiaries of the trust are, it is the writer's interpretation that paragraphs 5(1)(a), 5(1)(b), and 5(1)(c) appear to exhaustively define the beneficiaries of the fund. However,

this interpretation is not without its problems. Sub-section 5 (4) provides an exception to the above trust where the owner has himself paid sums to certain parties. These parties are defined in paragraphs "a", "b", "c" and "d" of sub-section 5 (4) and although "a", "b" and "c" appear to exhaust the definition of the effected beneficiaries provided for in sub-section 5 (1), it additionally names "other affected beneficiaries" in 5(4)(d). By having specified recipients in detail and then adding "other affected beneficiaries" this sub-section casts doubt upon the foregoing interpretation as to who the other affected beneficiaries under sub-section 5(3)(b) might be. At this stage it appears difficult to define as to when the owner may appropriate funds for his own use pursuant to sub-section 5 (3). (Similar problems arise in attempting to determine beneficiaries of the trust in the hands of the contractor and sub-contractor pursuant to section 4.)

Sub-section 5 (4) appears to provide an exception to the owner holding back funds that have been paid previously by him. It is the writer's submission that this section is in fact illusory since he cannot retain any monies until all beneficiaries of the trust entitled under him have been paid in full. Therefore it is not clear to the writer why sub-section 5 (4) has been enacted and it appears for all practical purposes to be superfluous.

Finally, with respect to trust funds in the owner's hands, the *Act* is silent as to whether refunds from the contractor to the owner for work not completed within the allowable time parameters are trust funds or not. Both interpretations are feasible and owners must act cautiously, especially where sub-trades may be unpaid and funds are returned by the contractor.

Section 21 provides that the proceeds of any insurance monies received takes the place of the structure destroyed and after satisfying prior encumbrances is subject to the claims of all lien holders to the same extent as if the monies were realized by the sale of land and action to enforce the liens.

The amount of lien against the land (subject to retention of the appropriate holdback pursuant to section 27 (1.1)) is limited to the amount payable by the owner to the contractor (sub-section 22 (1)). Similarly (subject to section 27 (1.1)) a lien other than by a contractor is limited to the amount owing to the party under whom the lien is derived (section 23). It is now clear (August 1, 1982 amendments) that if the holdback is not made, liability to the extent of the holdback amount may attach over and above the contract price.

Section 24 provides for the holdbacks to be maintained by a person primarily liable for payment under a contract.

It is submitted that since the 1982 amendments the *Act* is clear in that it is the owner who retains the holdback and that there is only one holdback (the one between the contractor and the owner).

Section 24 *inter alia* provides that as work progresses, services are provided or materials are supplied under the contract, the owner shall deduct from each of the payments to be made by him and shall retain for at least forty (40) days after certificate of substantial performance is issued or after the work has been completed or abandoned, whichever first occurs, 7.5% of the value of the work services and materials actually done, provided or supplied in the performance of the contract to the time of making of each payment. In practical

terms the owner must not pay any more than 92.5% of the value of the progress of the work at any given time and must retain the balance for at least forty (40) days after the issuance of the certificate of substantial performance has been provided pursuant to section 46. Sub-section 24 (2) provides for a similar holdback to commence upon substantial performance. In practical terms this means that each and every payment under sub-section 24 (2) must not exceed 92.5% of amount due and payable and that the remaining 7.5% must be held for forty (40) days after actual completion or abandonment.

Sub-section 24 (3) provides for payment into a holdback account, which account is to be interest bearing and in the joint names of the contractor and the owner where the contract price exceeds \$200,000.00. (The \$200,000.00 figure is established by the regulations passed under the *Act*.) At the time of this writing there appears to be a problem obtaining the interest bearing account from chartered banks where either party is a corporation. It is expected this will be resolved shortly. It is also of special note that for contracts below \$200,000.00 the *Act* does not provide that the interest is to be paid to the contractor. Therefore, unless the contract so provides, the owner need not, in these instances, pay interest on the holdback amounts.

Sub-section 24 (4) provides that upon the Order of a County Court judge, notwithstanding that the contract price is less than \$200,000.00, the holdback amount be paid into the holdback fund. This section may be utilized by a contractor where the contract is silent on interest. Similarly when an owner fails to pay monies into a holdback account as required, a judge may order the owner to pay into the holdback account the sums required along with interest prescribed by regulation. (See sub-section 24 (5)).

Section 25 allows for release of part of the holdback funds forty (40) days after completion, abandonment or substantial performance of the contract or a subcontract. Sub-section 25 (1) applies in case of a contract and sub-section 25 (2) applies in case of a sub-contract. The net effect of sub-section 25 (1) is that forty (40) days after a certificate of substantial performance is given, the holdback account shall be reduced by 7.5% of the contract price for the contract less the value of the work which remains to be completed. In effect this section achieves a speedy release from the holdback of those amounts which are referable to substantially performed contracts. Sub-section 25 (2) is of a similar effect with respect to sub-contracts. Of similar effect as well are sub-sections 25 (3) and (4) with respect to reduction of payout of the holdback retained after substantial completion.

Sub-section 27 (1) provides that all payments made under a contract in excess of the holdback (i.e. 92.5%) prior to registration of a lien as well as payments made under section 25 discharge all liens to the amount of such payments. Practically speaking this means that all payments made prior to registration of liens from whatever source operate to reduce the lien by a percentage equal to the percentage that the payment amounts bear to the actual contract price.

Sub-section 27 (1.1) removes any doubt as to the liability of the owner in the event proper holdbacks have not been made. Now the maximum liability of the owner is the amount which should have been retained so long as payments are made in *good faith*.

Sub-section 27 (2) provides that payment of the holdback can be made so as to discharge all liens after the expiration of the forty (40) day period provided for after substantial performance, actual completion or abandonment unless at the time that payment out of the holdback is to be made there are liens registered against the land. In the event there are liens registered, the holdback can be paid out to discharge the lien unless an action has commenced to enforce the lien. The *Act* is unfortunately silent as to whom payment may be made. It is submitted that out of an abundance of caution payment be made into Court.

Sub-section 27 (2.2) relates to corporate owners and provides that the directors and officers of the corporation who knowingly acquiesced in the failure to retain the holdbacks are personally liable for the amount which should have been retained.

Sub-section 27 (3) provides that the owner cannot use the holdback fund as a set off against any person providing services which were not properly provided or for any other purpose other than for satisfaction of liens.

Section 30 allows an owner to make payments to any person providing services where that owner so chooses for whatever reason, (even though that person has no privity with the owner) so long as the owner gives notice within three (3) days to the person with whom the payee has privity. The amount of the payment is conclusively deemed to be payment to the person with whom the payee has privity of contract. The owner making payments under this section must retain the necessary holdback. The wording of this section is unfortunately vague and the question remains whether an owner can with notice pay a worker or sub-contractor of a sub-contractor and have the payment reduce his liability under his contract.

Section 47 provides that where a certificate of substantial performance must be given it is not effective unless it is given to the owner and to the contractor.² In addition, in the case of a sub-contract it must also be given to the sub-contractor. This section is important since the forty (40) day period for retention of the holdback in most cases will run from the time a certificate of substantial performance is given.

In the event a lien is registered against the land, the owner may make application to the court to vacate the same. Sections 55 (2) and 55 (3) provide the mechanism of having the liens vacated through the courts. Sub-section 50 (1) provides for a mechanism to compel the lienholder to take action within thirty (30) days or lose his lien. Sub-section 56 (2) requires that the full holdback be maintained during the continuation of construction notwithstanding that monies have been paid into court.

Pursuant to section 58 any person entitled to a lien may in writing at any time demand from the owner information relevant to the work upon the land such as: copy of contract, statement of accounts, location and status of holdback account. Sub-section 58 (1) describes the information to which the prospective lienholder is entitled to. Sub-section 58 (4) allows the owner to charge the reasonable cost of making the copies or preparing the statements

2. This is further discussed *infra*.

requested to the person requesting them. In the event the owner fails to provide the requested information within a reasonable time and after payment of any reasonable costs he is liable to the person making the demand for the amount of any loss occasioned by that failure.

Sub-section 59 (1) provides that where a *notice* of substantial performance of a contract is given to the owner, the owner shall give a true copy of the *notice* to all persons who may be entitled to a lien and who have requested the owner, in writing by personal service with a return address, to give them a copy of the *notice*. If the *notice* of substantial performance is not provided as requested or is given knowing the *notice* is false, the owner is liable to the person who sustains loss because of the failure or because of the false *notice*. It is to be noted that sub-section 59 (3) provides an exception in that an individual owner need not provide a true copy of the *notice* where the contract price is less than \$200,000.00 and the contract relates to a structure occupied by him as a single family residence. It is the writer's submission that since the 1982 amendments were enacted this section is of no effect. This is due to a legislative oversight in not having amended the section to read *certificate* of substantial performance instead of *notice* of substantial performance. Technically, there is no such thing under the *Act* as a *notice* of substantial performance. However, out of an abundance of caution compliance with the spirit of the section is recommended.

II. Purchaser

A purchaser, although in part an owner, has priority over all unregistered liens to the extent of any payments made (section 31). However, any liens registered prior to payment have priority over the purchaser. Therefore, it will be prudent to search at the Land Titles Office for prior registrations before paying any money on account of a purchase and to register a purchaser's caveat against the title at the earliest opportune moment (see section 32). This is of special significance to purchasers of newly constructed or newly reconstructed buildings.

III. Leasehold

Sub-section 18 (1) provides that where the estate of the owner is a leasehold estate, the lien may attach to the estate of the owner's landlord and in the event the owner's landlord's estate is a leasehold then to the estate in fee simple. The right to the lien arises where:

- (a) the person entitled to the fee simple or the owner's landlord or both consented to the work *and* the work provided was for the direct benefit of the person entitled to the estate in fee simple or the owner's landlord; or
- (b) where the owner is required by his lease or other agreement with his landlord or with the holder of the fee simple to provide the services or work or supply the materials giving rise to the lien.

The amount of the lien created cannot exceed the value of the holdback that the owner was required to withhold.

Section 19 provides that no forfeiture or cancellation of the lease except for non-payment of rent deprives the person entitled to the lien of the benefit of the lien. The person entitled to the lien may pay any rent accruing after he becomes the lienholder and the amounts so paid may be added to his claim for lien. However, the additional amount so added to the lien can only be enforced as against the leasehold and not against the estate or interest of the owner's landlord or against the estate in fee simple.

The net effect of the foregoing is that in the future a landlord must provide in his lease indemnification against builder's liens arising out of work done by the tenant. He must not only require that under any work done by the tenant the appropriate holdback be retained but as well provide a mechanism to ensure that this is done.

IV. Crown

Under section 3, the Crown or Crown Agencies and all Boards, Commissions and bodies performing any duties or functions under an Act of Legislature on behalf of the Crown are bound by the *Act*. Crown and Crown Agencies are defined in section 1.

Section 16 provides that where a lien arises the lien does not attach the interest of the Crown in the land but constitutes a charge on amounts required to be retained under the holdback. Therefore a lien cannot be registered against Crown land and only a notice of the lien may be given to the Crown.

Sub-section 24 (6) provides that the Crown need not pay holdback amounts into the holdback account but where the value of the work or the contract price exceeds the amount prescribed by regulation, it is required to pay interest on the holdback account at the rate prescribed by regulation. The current rate, in effect since December 20, 1982 is 7.75%. Earlier, the rate of 15½% applied from September 28, to December 13, 1981 and a rate of 13.75% applied from December 14, 1981 to June 13, 1982, and the rate of 12% applied from June 14, 1982 to December 19, 1982.

Where the notice of a lien has been given, the person given notice must retain out of amounts payable by him to the person under whom the lien is derived an amount equal to the amount claimed in the notice.

A lienholder must give notice of his claim to the Crown by personal service upon the individual named in the *Act* or the Regulations. In this regard, see sub-section 45 (3). The nature of the notice and its contents are provided for in sub-section 45 (5).

Pursuant to sub-section 49 (3), if notice of a lien is not given or if not given within the time required under sections 43 and 44, the right to a lien ceases to exist. Furthermore, pursuant to sub-section 49 (4), every lien which has not been proceeded with within two (2) years of notice expires.

By virtue of section 45 (1), sections 37, 38 and 39 do not apply to the Crown and pursuant to section 52, sections 50 and 51 also do not apply to liens against the Crown.

V. Lenders

Of prime importance to lenders is the fact that waivers of liens are no longer effective (section 11).

Sub-section 5 (2) provides that monies advanced to owners specifically for the purchase price of lands, buildings to be improved, for discharge of prior encumbrances and other specified purposes are not subject to the trust fund provision. All other funds that are to be used in the furnishing of a structure or improving the land are subject to a trust in favour of the contractor, the sub-contractor, workers, suppliers and the Workers' Compensation Board. The importance of this provision is that if a lender desires to rely on the trust provisions, he must specify that the funds are not to be used for purposes other than improving the land or buildings.

Sub-section 6 (1) is of specific interest to lenders who provide bridge financing. This section provides that where funds are used to pay those parties to whom an owner, contractor or sub-contractor would otherwise be responsible the trust monies received (such as mortgage financing or proceeds under a contract) may be applied to repay the loan without breach of trust.

Sub-section 6 (2) provides that monies which when paid would be subject to the trust provision of the *Act* cannot be garnished.

Sub-section 6 (3) provides that no assignment by the contractor or sub-contractor is valid as against any lien or trust created under this *Act*. Therefore, under any assignment, funds which are received pursuant to a contract under which a lien may arise are subject to, upon receipt by the lender, the same trusts as if the monies were received by the person assigning the funds.

Section 15 provides that a lien takes effect from the date of commencement of the work or services or from the date which materials were first supplied irrespective of the date of actual registration of the lien. However, this section must be read in light of sections 20, 21 and 31.

Sub-section 20 (1) provides that a prior encumbrance (being an encumbrance that is registered prior to commencement of the construction or improvement) has priority over a lien under the *Act* to the extent of the actual value of the land at the time work or service or supplying of the materials were begun as the case might be. It may be prudent therefore to obtain an appraisal of the subject lands on the date of commencement of work. The important effect of this section is that if monies are advanced in excess of the actual value of the land the excess will not have priority over the lienholders.

Sub-section 20 (2) provides that a subsequent mortgage (being a mortgage registered prior to commencement of work under which advances are made after work has commenced) may secure future advances subject to section 31. Section 31 provides that a lien has priority over all payments or advances on account of any mortgage after registration of a claim for the lien, but all payments made before registration of the claim for lien on account of a conveyance or mortgage have priority over the lien.

It is submitted that the net effect of sections 20 (1), 20 (2) and 31 is as follows:

1. The prior mortgagee has priority to the extent of the value of the land.
2. All subsequently registered lienholders have priority to the extent of advances made over and above the value of the land at the time work commenced.
3. The prior mortgagee has priority for the balance of the funds advanced under the prior mortgage.
4. The subsequent mortgagee has priority for the amounts of all advances advanced prior to registration of a lien.
5. The lienholders have priority over all judgements, executions, assignments, attachments and garnishments issued or registered after the effective date of the lien (which is the commencement of the work).

Section 21 provides that a mortgagee has first priority on all insurance monies and that a lienholder can only claim as to the excess, based on his aforesaid priority.

Section 50 provides that a mortgagee may require the registrar to give a lienholder notice to proceed within thirty (30) days upon his lien and where the lien is not proceeded with, the right of lien ceases to exist and the lien is vacated.

Sub-section 58 (3) provides that any person entitled to a lien may in writing at any time demand of any mortgagee information regarding the terms of the mortgage and a statement showing the amounts advanced under the mortgage. The cost of providing these copies may be charged to the person requesting the same. In the event the statement is not provided or the statement is knowingly false, the mortgagee is liable to the person making the demand for any amount of loss as a result thereof. Finally, sub-section 58 (6) allows a judge to order the mortgagee to make available for inspection the mortgage to any person who may be entitled to a lien.

VI. Lienholders

The lien arises by virtue of section 13 of the *Act* which provides any person doing work, providing service or supplying materials has by virtue thereof a lien for its value. Section 14 provides that there are no liens for a claim of less than \$300.00. Pursuant to section 15, a lien becomes effective upon registration but takes retroactive effect from the date of the commencement of the work, services or the supply of the materials. It is to be remembered that the lien is not only a lien against the land but is also a lien against any holdback.

As indicated before, subject to section 27 (1.1), a lien cannot be for any amount greater than the amount payable by the owner to his general contractor (sub-section 22 (1)). Furthermore, a lien by other than a contractor, subject to section 27(1.1), is limited to the amount owing to the person under whom the lien is derived (section 23). The liens are a charge upon the holdback in favour of lien claimants whose liens are derived under persons to whom the holdback is required to be paid (section 26).

In general, there is no priority amongst lienholders and all lienholders rank *pari passu*. Of notable exception is the preferential lien for workmen provided in the *Act*.³

It is worth reiterating that Architects and Engineers do not have a lien unless the relationship of an employer and employee is created between the Architect and Engineer and the owner or contractor (section 36).

The sections relating to registration of lien (sections 37 through 45) are, largely self-explanatory. In general, a lien must be registered at a Land Titles Office where the land is situated, must be on a specific form and contain the necessary information. Of specific interest is section 40 which provides that where a grossly exaggerated claim is submitted the claimant or the person filing the claim is liable to any person who suffers damage as a result unless he can satisfy the Court (either County Court or the Court of Queen's Bench) that the registration and calculation of the lien was in good faith and without negligence. This section may be of vital importance to lawyers who file liens on behalf of their clients. It is absolutely essential that these lawyers satisfy themselves that the lien is proper and that they make the necessary enquiries prior to filing. Failing that, they may find themselves liable to the owner or other parties suffering damage on account of the negligently filed lien.

The *Act* provides liens to be filed either before, during or within certain limits after the time the work has been performed. In this respect, the substantial performance concept becomes vitally important for the workings of the *Act*. The reader may recall the definition of substantial performance provided in section 2 of the *Act*. The relevant time periods as applicable to the various lienholders will be discussed later. At this stage it must be remembered that there are two different times which are of significance in filing liens:

- (a) The time of substantial performance; and
- (b) Completion or abandonment.

The reason these times are of significance is that generally speaking the right of lien for work done prior to substantial performance lapses forty (40) days after the time of substantial performance notwithstanding that work, services or supply of materials continues unabated.

It must be remembered that a lien does not attach as against Crown lands and in order to enforce a lien against the Crown one must proceed by way of notice. The various notice provisions which have been canvassed herein are contained in section 45 and are, again, largely self-explanatory.

A lien which is not registered within the allowed time period (see sections 43 and 44) ceases to exist on the expiration of the time allowed for registration (sub-section 49 (1)). Furthermore, a lien that has been registered but has not been proceeded with within two (2) years after the date of registration expires (sub-section 49 (2)). Similarly, if notice has not been given or notice has been given but not proceeded with within two (2) years, any lien against the Crown expires (sub-sections 49 (3) and 49 (4)).

3. This is discussed *infra*.

Sub-section 27 (2) provides that payments of the holdbacks may be validly made forty (40) days after substantial performance, if there are no liens registered against the land. Pursuant to sub-section 27 (2.1) holdbacks may be validly paid out to discharge the liens (the *Act* is silent as to whom) unless an action has been commenced under the *Act*. Therefore, registration of the lien in itself is no guarantee to the lien claimant that they will have a right of recovery against the land where there are several lien claimants and only a limited holdback remains.

It is to be noted that a lien may be assigned and that the assignee may register the claim for the lien (sections 53 and 54).

Any person entitled to a lien has certain rights as to information regarding particulars of the contract, sub-contract and mortgage (section 58). The cost of providing this information is to be borne by the person requesting it.

Subject to comments previously made with respect to the validity or the effect of section 59, if requested by personal service upon the owner in writing with a return address endorsed thereon, the potential lienholder is entitled to receive a true copy of any notice (sic) of substantial performance received by the owner. This may be of significance to all persons supplying work, services or material as the time for filing a lien often will run from the owner's receipt of notice (sic) of substantial performance. Notwithstanding that the effect of section 59 is in question, demand on the owner with respect to any certificate of substantial performance should be made.

The lien may be enforced by action in County Court originated by Statement of Claim. All actions regarding builder's liens or any action as a result of builder's liens shall be in County Court. The powers of the Court and the procedures are set out in sections 60 through 79 of the *Act*.

Finally, pursuant to section 29 and sub-section 81 (2), all contracts in existence at the time the new *Act* came into effect are deemed to be under the new *Act*, the holdback may be reduced to the holdback required under the *Act* and the balance shall be paid out in accordance with the contract or sub-contract.

Having reviewed the position of lienholders in general, the writer now intends to discuss the position of the specific types of lienholders.

1. Suppliers

Sub-section 2 (3) is a deeming provision regarding the supply of materials in the performance of a contract or sub-contract. Materials are *deemed* to be supplied where:

- (a) they are delivered to the land;
- (b) they are delivered to some other land which is in the immediate vicinity *and* which has been designated by the owner or his agent;
- (c) if they were made to specifications under the contract and were delivered to the contractor for the purpose of being used.

Section 17 provides that notwithstanding that the materials have not been supplied in strict accordance with sub-section 2 (3), if they are incorporated or used in the construction then a lien is created in favour of the supplier.

Sub-section 35 (3) provides for a special lien in favour of material suppliers. It provides that materials supplied are subject to a lien in favour of the person supplying them until incorporated in the structure or the land under the contract. There is conflicting judicial dicta from jurisdictions where sections of similar nature have been in effect as to whether this section creates an additional, separate, distinct and unique lien in favour of material suppliers or it restricts the right of lien against the material rather than against the land until such time as the materials are incorporated. It is submitted that this section provides an additional form of lien rather than a restriction of lien. This conclusion is aided by the fact that an "anticipatory" lien can be filed on the strength of a supply contract against the land pursuant to other provisions of the *Act*. Whether the sub-section 35 (3) lien need be registered or whether there is a time limit for its registration is unclear and is also subject to conflicting dicta. It is submitted the lien arises automatically and requires no registration.

Sub-section 35 (1) provides that during the continuance of the lien (and it is not clear whether it is the materials lien or the builder's lien) no portion of materials affected by a lien may be removed from the site.

Sub-section 43 (3) provides that a lien for materials supplied prior to substantial performance or abandonment by the general contractor may be registered: (i) before or during supplying of the materials; or (ii) within forty (40) days after substantial performance or abandonment of the contract; or (iii) within forty (40) days after supplying the last material; whichever first occurs. Sub-paragraph 44 (c) provides that for any supply of materials after substantial performance of the general contract a claim may be registered at any time up to and including forty (40) days after the last supply of materials. However, it must be noted that this section reduces any lien to the amount of the materials remaining to be supplied after substantial performance. As stated earlier these two sections point out an important and fundamental provision of the *Act* which applies not only to suppliers but to all lienholders. That is, that there are two distinct and separate lien periods. The first period is from commencement to substantial performance and any lien arising during this period must be registered within forty (40) days of substantial performance of the general contractor or the right to lien is barred notwithstanding the fact that work may continue unabated. The *Act* provides a second period for filing a lien (from substantial performance to completion or abandonment) but the lien arising during this period is restricted to the value of the work performed or material supplied during this period.

There are three additional points to be considered by a supplier:

- (a) In order to ensure he can enforce his lien against the materials prior to incorporation he might consider registration under *The Personal Property Security Act*⁴ in addition to maintaining his lien under the *Act* (in fact this may be the only manner of registering the material lien). In this consideration regard must be had to section 36 of the *PPSA*.

4. S.M. 1973, c. 5 (P35) (hereinafter referred to as the *P.P.S.A.*).

- (b) The section regarding liability for exaggerated or knowingly incorrect claims (section 40) may be of special importance if the job site is unknown or supply is on a project where several sites are being supplied concurrently. Through error the supplier may lay an exaggerated claim or an incorrect claim against one or another of the parcels and be liable for any damage occasioned thereby. A practical way of perhaps avoiding this problem is to ensure that the job site designation appear on each delivery slip.
- (c) Since the time of filing a lien is in part a function of the date of substantial performance of the general contract, all suppliers, notwithstanding previous comments with reference to the effect of section 59, should automatically give notice to the owner pursuant to sub-section 59 (1) that they require certificates of substantial performance in order to ensure that they will be aware of the commencement of the limitation of time for filing their lien.

2. Workers

Workers are entitled to liens as previously discussed. Again the dual nature of the claim for lien must be noted (see sub-section 43 (5) and subparagraph 44 (e)). The time for filing and the restriction on the amount of lien are the same as those applicable to suppliers.

Although there is no priority amongst lienholders (section 33), there is a notable exception regarding workmen. Section 34 provides that every worker who has a lien for wages or work done has to the extent of forty (40) days wages priority over all liens that are not for wages. The priority is only over those liens that are derived through the worker's contractor or sub-contractor to the extent of and on the holdback (but not the land) to which the worker's employer through whom the lien is derived is entitled to. Sub-section 34 (2) provides that the worker is entitled to enforce the lien in respect of a contract or sub-contract not completely fulfilled. It is submitted that the *Act* is not clear as to whether sub-section 34 (2) takes priority over sections 43 and 44 and that the time for filing a lien for wages carries through substantial performance and will not be barred forty (40) days thereafter. It is submitted that even if that interpretation of sub-section 34 (2) is correct the protection is merely illusory. It must be remembered that sub-section 34 (1) provides that the lien is only to the extent of the holdback and in certain cases pursuant to section 25 the holdback may be paid out forty (40) days after substantial performance. It follows that the lien for wages thereafter can attach only to the holdback requiring post-substantial performance.

Finally, sub-section 34 (4) provides that every device or attempt to defeat the foregoing priority to the worker is void.

3. Contractors

The *Act* imposes obligations on contractors as well as providing rights of lien to them. The obligations will be discussed separately from the rights.

(a) **Obligations**

Section 10 provides that every contractor shall maintain a correct record in respect of each contract he enters into under which or by virtue of which a lien may arise. Section 10 sets out what records must be maintained, where the records must be maintained and for how long they must be retained. It also provides for a fine of not more than \$500.00 or imprisonment for a term of not more than three (3) months for breach of this section. In addition the contravention is a separate offence for each day that it continues. Needless to say the penalties for breaching the requirements respecting the maintaining of records are onerous. On advising contractors, and especially in the light of current practice in the construction trade, one must take specific care to point out the requirements of section 10.

Sub-section 4 (1) provides that all sums including interest on holdback received by a contractor on account of a contract price constitutes a trust fund for the benefit of the sub-contractor, suppliers of materials, persons providing services under the contract, the Workers' Compensation Board, workers who have been employed by the contractor for the purpose of performing the contract and for the owner for any set-off or counterclaim relating to performance of the contract. Sub-section 4 (2) provides a similar trust fund for sub-contract receipts in the hands of the sub-contractor.

Sub-section 4 (3) provides that the contractor is a trustee of the trust fund and he shall not appropriate or convert any part of the fund for his own use or for any other use not authorized by the trust until all persons who are beneficiaries of the trust have been paid. Practically this means that, prior to using the funds for purposes other than payments under the specific contract or sub-contracts thereunder, the contractor must have paid all sub-contractors money then owing, ensure the Workers' Compensation Board has been paid all reasonable assessment, pay all workers employed by him and make provisions for other "affected beneficiaries". Earlier comments with respect to whom may comprise the "affected beneficiaries" under sub-section 5 (3) are also applicable to sub-sections 4 (3) and 4 (4). Sub-section 4 (4) imposes the same duties on sub-contractors with respect to use of the funds.

Section 7 provides the penalties for breaching the trust imposed by section 4. This comprises, on summary conviction, a fine not to exceed to \$50,000.00 or imprisonment for a term not to exceed two (2) years or both. In addition, a director or officer of a corporation who knowingly assents or acquiesces in an offence by the corporation under this section, in addition to the corporation, is guilty of the same offence and liable on summary conviction to a similar penalty. The importance of advising contractors to the effects of the trust provisions and the penalties for breach thereof cannot be over stressed, especially since the adverse cash flow position resulting from the mandatory payments and the uncertainty as to the ultimate beneficiaries may be strong disincentive for complying with the trust.

On the other hand, this section may be *ultra vires* in view of the *Criminal Code* provisions dealing with breach of trust. The magnitude of the penalties raises a similar problem.

(b) Rights

Sections 11 and 12 provide that the waivers of lien are no longer valid and are void being against public policy. This is an important change in light of previous universal practice which was to obtain waivers of lien in advance or during the course of the contract.

Section 24 provides the establishment of the holdback. The term "the person primarily liable for payment under a contract" may be confusing but by virtue of the definition of "contract" this can only mean the owner or his agent. It now appears that even where the owner fails to retain the requisite holdback, a contractor need not do so. The amount to be held back is 7.5% of the value of the work as it progresses. (Usually, though not always accurately, this is measured by the amount of progress payments). The establishment of the holdback account (for contracts in excess of the amount prescribed by regulation⁵) is of specific significance to the contractor insofar as it is to be in the joint names of the contractor and the owner. (This is further evidence to support that the *Act* contemplates no holdback by other than the owner.)

Section 25 (previously discussed) provides for the release from the holdback the amount held back in respect of any contract which is substantially performed, completed or abandoned.

The right of lien is created by section 13. A lien by a contractor may be registered before, during or within forty (40) days after the substantial performance or abandonment of the contract, as the case may be (sub-section 43 (1)). Furthermore, paragraph 44 (a) provides that a lien by a contractor respecting any work post-substantial performance necessary to complete the contract may be registered during the performance of the work or within forty (40) days after completion or abandonment of the contract. Again note the dual nature of the liens.

As previously stated, there are no liens against Crown lands. Instead note the specific requirements as to notice of lien against the Crown.

The information section (section 58) applies to contractors as well as owners, and the penalties for non-supply of the information are the same. The contractor may in addition to his lien rights enforce his claim to trust monies in the owner's hands under section 5.

4. Sub-contractors

Under the *Act* a sub-contractor is under the same obligation respecting the trust, for keeping records and supplying information as is the contractor. All rights and obligations of the contractor also are the rights and obligations of the sub-contractor as hereinbefore described with the following exceptions:

- (i) Pursuant to section 43(2) the sub-contractor can register his lien: (i) before or during the performance of the sub-contract; or (ii) within forty (40) days after substantial performance or abandonment of the general contract; or (iii) forty (40) days after the substantial performance or abandonment of the sub-contract; *whichever first occurs*. The

importance of this section is not to be overlooked. In essence it places the sub-contractor in a difficult position. The contract may be substantially performed prior to the sub-contractor substantially performing his contract and he may lose his right to a portion of his lien. Therefore, notwithstanding previous comments regarding section 59, it is of great importance that the sub-contractor take advantage of sub-section 59(1) and request the owner to provide him with a true copy of the certificate of substantial performance of the general contract. Pursuant to sub-paragraph 44(b) a claim for lien by a sub-contractor respecting any work to complete the sub-contract may be registered before, during or within forty (40) days after the completion or abandonment of the sub-contract. Again note the dual nature of the lien and the provisions for the notice of lien respecting the Crown.

- (ii) The sub-contractor may enforce his claim against the trust funds under sections 4 and 5 against both the owner and the contractor.

VII. Certificates of Substantial Performance

Section 46 provides for certificates of substantial performance and sub-section 43 (6) defines the meaning of substantial performance as it relates to the time requirements for filing of a lien under that section *only*.

The essence of section 46 is that within seven (7) days after a contract or sub-contract has been substantially performed a certificate must be given to the owner and to the contractor and if applicable also the sub-contractor. This provision applies irrespective of whether there is a payment certifier under the contract.

For persons who are in a position to provide certificates of substantial performance sub-section 46(5) (the offence section) is of special significance. This section provides that a person who willfully gives or causes to be given a certificate of substantial performance that is fraudulent is guilty of an offence and on summary conviction liable to a fine not exceeding \$10,000.00 or imprisonment for a term of not more than two (2) years or both. Directors and Officers of a Corporation who knowingly assent to or acquiesce in an offence are, in addition to the Corporation, guilty of the same offence and liable on summary conviction to a fine of not more than \$5,000.00 or imprisonment for a term of not more than two (2) years or both.

Section 47 provides that a certificate of substantial performance is not effective unless it is given to the contractor, the owner and, where applicable, to the sub-contractor. It has been argued that this provision creates difficulty in establishing the effective date of the certificate in that there may be delays between giving the certificate to the owner, the contractor and the sub-contractor. It is submitted by the writer that this difficulty does not arise. The section provides that the certificate of substantial performance is not effective unless it is given to the contractor *and* the owner *and* the sub-contractor (where applicable). Therefore until the certificate is given to the last of those persons the previous certificates appear to be of no effect. Therefore it is submitted that a certificate of substantial performance can only become effective from the date it is given to the last person required to be served.

The effect of a certificate of substantial performance given by a contractor where it is later discovered that due to omissions by the contractor (unknown to both the contractor and the owner) the amount necessary to complete the contract is in excess of the percentage provided in clause 2(1)(b) has now been decided. It has been held by Jewers J. in *Raymond Massey Builders Ltd. v. Sachdeva*⁶ that once the certificate (the notice under the *Act* prior to August 1982 amendments) issues, it is good forever. His Honour, however, specifically made no comment with respect to certificates issued in violation of sub-section 46(5).

It is important to note that sub-section 43(6) provides a restrictive definition of substantial performance for the purposes of section 43 only. The effect is far reaching in that where the certificate is not given, the right of a contractor (section 43(1)) or a sub-contractor (section 43(2)) to register a lien for work performed up to the time of substantial performance, as that term is defined by section 2, is terminated upon ceasing the performance of the contract or sub-contract. Therefore, contrary to common opinion that lack of a certificate extends the time for registration of the contractor's or sub-contractor's lien. It is submitted that where a certificate is not issued, the time for filing the lien, depending on when the work is completed, may be abridged since it expires immediately upon completion or abandonment. The right to file a lien for work post-substantial performance remains unaffected and section 44 continues to govern. Needless to say, the fact that up to 97% of the value of the work may become non-lienable immediately on completion or abandonment will be a major concern to all those affected.

This paper has attempted to provide only a practical guide for the use of the *Act*. It must be emphasized that a builders' lien is purely a creation of statute and therefore the *Act* will be strictly construed by the Courts. The writer has raised some, but by no means all, of the inconsistencies and ambiguities in the *Act*. Because the Manitoba *Act* differs in its wording from similar legislation in other jurisdictions, great care must be exercised in applying decisions from other jurisdictions. Clarification and interpretation of the *Act* must by necessity await Legislative action and Judicial determination.

6. Man. Co. Ct. unreported, Feb. 18, 1982.