## THE TRUST AND LIEN REMEDIES

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A. THE TRUST (SECTIONS 6-21)

The thrust of the new trust provisions have not changed; they are still an attempt to protect the integrity of the construction pyramid by ensuring that funds intended for use in the construction project will flow through the project. This is insured through civil and criminal sanctions against certain key people in the pyramid and further by setting up priorities over the funds in an attempt to guard the funds against interference by third parties. With these goals in mind the new statute has been drafted in an attempt to remove some of the ambiguity and superfluity of the old statute and to toughen the sanctions which already exist.

The proposed legislation has been drafted so as to set up three distinct trusts; these trusts are:

a) the owner's trust (s.6)
b) the contractor's trust (s.7)
c) the subcontractor's trust (s.8)

Although the intent of this change was to aid in the clarification of the statute (in this case clarifying the need for privity in trust claims) it has had some other effects as well. These will be seen as we proceed through the sections.

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section 6 deals with the Owner's Trust. Under the old legislation the owner was only imposed with a trust in two situations:

i) financing situations (s.3(4) and

ii) certification (s.3(3)).

In the new legislation the Owner is imposed with a trust in financing situations but also when he provides his own capital; the moneys in his hands or received by him for payment under the contract constitute a trust as soon as the amounts become payable to the contractor (s.6(2)).

Another situation which will exist under the new Act is that if the Owner sells his interest in the improvement the net proceeds of the sale are imposed with a trust for the contractor.

Section 6(4) is the legislative restriction on the use of the funds which are imposed with a trust in the hands of the owner - he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner."

It should be noted that as a result of severance of the trusts into their individual components each specific trust
has its own group of beneficiaries. In the case of the Owner's trust the sole beneficiary under The Builders' Lien Act is the Contractor.

Section 7 contains the provisions relating to the contractor's trust. There are two specific situations set out in the statute which give rise to a trust in which the contractor will be the trustee. These are set out in s.7(1):

7(-l) All amounts:
(a) owing to a contractor, whether or not due or payable; or
(b) received by a contractor on account of the contract price of an improvement constitute a trust fund

This is again an attempt to clarify the specific trust, however once again we have an expansion of the existing law. At present only money which has actually been received by the contractor gives rise to a trust in which the contractor is the trustee.

It should also be noted that this new section gets rid of the argument surrounding the status of funds which are not due and owing as a result of a contractual dispute.

A key aspect of this section is the list of beneficiaries. They are contained in s.7(1)(c)&(d):

(c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
(d) labourers who have been employed by the contractor for the purpose of performing the contract.

Due to the use of the expression "a contract" in s.7(c) and
the expression "the contract" in ss.(d) one wonders whether there will be a different standard to qualify as a beneficiary if you are a labourer as opposed to a subcontractor, serviceman or materialman.

As with the Owner's trust section the Contractor's trust portion ends with the trustee clause in which the contractor is restricted in his use of the trust funds until "all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor."

Section 8 is the Subcontractor's trust and it is identical to Section 7 except it applies one step down in the pyramid.

In summary, what we see with the trust creation sections that is different from the existing legislation is that there are no blanket list of beneficiaries which apply to all trust funds which can arise. As a result of this there are two rather notable exclusions from the class of beneficiaries under the new legislation; they are the owner and the Workers' Compensation Board. The theory on the exclusion of the W.C.B. was that sections 133 and 159 of The Workers' Compensation Act 5.5. 1979 Chapter W-17.1 imposes its own liability regardless of the Lien Act. The difficulty in excluding the Board as a beneficiary is that one may have a tendency to forget it completely when advising clients. I
suppose the argument there is that you will only forget once.

The reasoning behind the inclusion of the owner as a beneficiary was that in the event of abandonment the owner could make a claim as a beneficiary for damages for completion of the contract as well as for deficiencies. The new legislation dealt with this problem in Section 13:

13 Subject to the requirement to maintain a holdback, a trustee may retain from trust funds an amount that, as between himself and the person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, that are related to the improvement.

The general sections relating to the trust, such as the trust for insurance proceeds section(9), the nonmonetary consideration section(10) and the trustee making direct payment sections(11 & 12) are substantially the same as under the present legislation. I am not going to deal with those sections any further except to say that they are all subject to the maintenance of the holdback thus establishing the fact that the holdback has the same nontouch status it had previously.

Section 14 is entitled "When trustee discharged". It simply states that the trustee is discharged to the extent of the payments made to the person to whom he is liable (subject to the holdback).

Section 15 is the section that deals with the priority between beneficiaries and third parties. There is an attempt
to maintain the same priorities as under the existing legislation and therefore this section reads very much like section 5 in *The Mechanics' Lien Act*. There are two very notable changes:

i) there is no longer a reference to a lien upon the trust fund; and

ii) there is no longer a requirement to pay the beneficiaries on a *pro rata* basis.

Sections 16 through 21 deal with the civil and criminal aspects of breach of trust. As was indicated earlier the thrust of these sections is to beef up the sanctions, against a breach of trust. One of the methods used to beef up the sanctions was the inclusion in each section creating a trust a specific nonconversion clause (s.6(4), s.7(2) and s.8(2)). Section 16 is therefore an expansion of these clauses in relation to corporate trustees. Section 16 expands the existing law in that it spreads the liability not only to directors and officers but also to, "---any person, including an employee or agent of the corporation who has effective control of the corporation or its relevant activities;".

Another way that Section 16 has expanded the liability is that it not only applies to he "---who knowingly assents to or acquiesces in any such offence by the corporation---", but also to "conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation---".
One must really wonder how far this section could be stretched; could it reach to a person such as the solicitor of the corporation?

Subsection 2 sets out that the concept of "effective control of a corporation or its relevant activities" is a question of fact and then sets out the power of the court to pierce the corporate veil and/or ignore the form of any agreement in an attempt to determine this question.

Subsections 3 and 4 creates joint and several liability between the persons included in subsection 1 and provides for, contribution between the other persons found liable.

Section 17 sets out the right to go to court in the event of the need for a summary disposition of dispute concerning trust money. This section is the same in effect as Section, 7 of The Mechanics' Lien Act in that the same people have the right to make the application. Under the present legislation however, the application was to have the court determine the dispute in a summary way (s. 41). Under the new act a person may only apply for directions.

Section 18 is the "criminal" section. The offence is created in exactly the same wording as the existing legislation. The penalty has been raised from $5000 and/or up to 2 years to
$50,000 and/or up to 2 years. The two significant differences are that the limitation period for laying an information will be 2 years rather than 6 months and no longer will the consent in writing of the Attorney General be required.

The 120 day limitation period for commencing a trust action has been removed. The limitation period now is 1 year after the contract is completed or abandoned. It should be noted that "contract" is defined in Section 2 as the contract between the owner and the contractor. The expiry of the 1 year also marks the end of the 'obligations of the trustee/s with regard to the project (s. 19). Unlike the present legislation there is no ability to apply for an extension of time.

Sections 19(2) and 20 merely clarify that the expiry of the right to commence a trust action does not affect the ability to bring a prosecution, nor is the right to bring a trust action affected by the expiration of the limitation period for registering a claim of lien.

Section 21 sets out the fact that a trustee is not in breach of his trust for retaining or paying out from trust as authorized or required under the Act.

Before leaving the trust provisions under The Builders'
Lien Act, a reference should be made to Section 79 (distribution in trust action). This Section sets out the fact that once a court has determined certain monies to be trust funds pursuant to Part II they "shall be distributed among the lien claimants who have proved their claims according to the priorities established by Part VI notwithstanding that such parties have not registered a claim of lien or a certificate of action." This is consistent with Section 20 in that your trust action exists irrespective of a registered claim of lien.

B. THE LIEN (SECTIONS 22 - 33)

Before dealing with the substantive sections of the lien, it is worth taking a look at some of the definitions under the proposed legislation since these definitions determine whether a lien arises at all and if it does, when the lien arises.

The definition of "improvement" is substantially the same as existed under The Mechanics' Lien Act. The one addition to the definition is that contained in Subsection (ii) - "the demolition or removal of any building, structure or works or part thereof;"

The definition of "material" is again substantially the same, however further detail has been added. As opposed to being
simply moveable property, the proposed definition refers to "every kind of moveable property that becomes or is intended to become, part of the improvement, or that is used to facilitate directly the making of the improvement;".

The definition of "services" and "work" have been combined into the definition of "services".

Section 22 of the proposed legislation is the Section which defines what creates a lien and who is entitled to claim the lien. It should be pointed out that this Section although reworked is substantially the same (taking into account the change in definition of services and materials) as Section 12 of the existing statute. As a result of this, the same issues will exist with regard to remoteness of the supply of services or materials; that is, that the person supplying materials and/or services must not be supplying them on a general revolving account but must have an intention to benefit the specific improvement to be liened.

Another issue which has always been present in The Mechanics' Lien Act is that which is contained in Section 14 of that act. And that is the deemed furnishing of materials. This concept has been included and expanded in The Builders' Lien Act. The expression rather than furnished is "provided". This issue is dealt with in Section 2 (ii) and provides for three situations in which lien rights will arise:
a) when materials are placed on the land to be improved; 
b) placed on designated land in the immediate vicinity; 
c) in any event once-the materials have been incorporated into the improvement, the lien rights arise.

The only real change here is that a proviso is placed in the b) portion in that the act states "but placing materials on the land so designated does not, of itself, make that land subject to a lien;". One has some trouble wondering why a lien claimant would want to claim a lien against designated property rather than the property upon which the improvement is located.

As an addition as well to this issue, The Builders' Lien Act has included a further Subsection (Section 2 (iii)) in which an owner, contractor or subcontractor (including agents) may sign an acknowledgment of receipt and that will be prima facie proof of delivery. It should be noted that there are certain requirements to be contained in the receipt for the deeming Section to apply. These would be what materials (by implication), that the materials are intended for an improvement and the named address of the improvement.

It should also be pointed out that the restriction that no materials giving rise to a lien shall be removed to the prejudice of the lien has been continued in Section 101 of the new act.
It should also be pointed out that Section 22 (ii) of the new act pertains to liens which arise with regard to mineral rights and this section is substantially the same as Subsection 12 (ii) (iii) and (iv).

An issue which has always plagued lawyers in the area of builders liens, is the position with regard to architects and engineers. Sections 23 of the new statute has simply excluded architects or engineers or their employees who supply architectural or engineering services. It should be noted that this is carefully worded so that this only applies to an architect or engineer who is performing architectural and engineering services.

The minimum limitation for liens has been raised to $100.00. It should also be noted that the $100.00 must be pure principal as Section 25 of the new statute sets out that there is no lien claim for interest.

Section 26 of The Builders' Lien Act governs the lien rights with respect to Crown land. It should initially be pointed out that a concept of public work will no longer exist under the new statute, however the Crown still exists and is defined in substantially the same terms as is found under The Mechanics' Lien Act. It should be noted that The Private Ditches Act and The Municipal Public Works Act
have been deleted from the definition of owner and The water Corporation Act and The Northern Municipalities Act have been included.

Basically section 26 indicates that a lien cannot be claimed or registered against Crown land, however where the Crown is not the owner, the lien may attach to the estate or interest of the other person in the land. It should also be noted that as is presently the situation, the lien does not attach to the land but constitutes a charge against the holdback and the act, applies without requiring the registration of a lien. Section 52 (i) of The Builders Lien Act indicates that where the Crown is the owner, a claim of lien may be given together with an Affidavit of Verification as set out in Section 50 (iii). The Affidavit of Verification shall be in the prescribed form (Section 2 (i) (v) and executed by the "lien claimant, his assignee, or agent and verified by an affidavit of the lien claimant, or an assignee or agent who has informed themself of the facts set out in the claim, and the affidavit of the lien claimant, agent or assignee shall state that he believes those facts to be true." It is interesting to note that in Section 52 of The Builders Lien Act there is no time given within which the written notice of claim of lien must be served. The only reference is to the fact that it may be served personally or by registered mail, and in the case of registered mail it is deemed to be served two days after the date in which it is mailed. Similar to
the present legislation, the requirements for who must be served with the written notice is the agent, board or local authority as set out in the definition who are the owners of the property or the proper department of the Government of Saskatchewan in the event that her Majesty in right of Saskatchewan is the owner.

It should be noted that section 51 deals with the situation where the claim of lien effects Minerals held from the Crown and suffice it to say that this is substantially the same as the present Section 35 (i) of The Mechanics' Lien Act.

Section 27 simply sets out the law as it is presently and that is that "a person's lien arises and takes effect when he first provides his services or materials to the improvement". Section 28 indicates that a person cannot be liable for a greater amount than the amount of their contract subject of course to the holdback which is sacred. Once again this Section goes on to establish the right of set off over and above the holdback amount.

One of the additions in the new statute is the concept of the "general lien". The general lien as set out in Section 29 of the statute is merely a mechanism whereby a lien claimant may register a lien against several pieces of property which are the subject of a single contract and not be required to allocate the amount of services relating to each of the
pieces of property. Reference should be had to Section 67 in the priority section of the statute in that as much as that Section indicates that if one or more of the parcels of land are sold before registration of the claim of lien, or if the claim of lien against one or more parcels is discharged or vacated, the general lien continues for the full amount of the lien against those parcels that have not been sold, or against which the lien has not been discharged. This would therefore seem to indicate that in those circumstances at least there will be no regard whatsoever to the actual value of work done vis a vis each individual piece of property. There is some question as to whether there will be any reference to the value of work done should none of the properties be sold or liens vacated. It should be pointed out that Section 67 is subject to the priority section being Section 76. Section 76 indicates that the general lien only ranks on par with other liens "to the extent of the amount obtained when the total value of the general lien is divided by the total number of parcels of land to which the person having the general lien provided services or materials under his contract or subcontract;". Section 76 goes on to indicate that the balance of the general lien outstanding shall rank next in priority to all other liens against the land whether or not of the same class. It should be noted that Section 73 indicates that the ranking on par with the other liens is as set out in 73 which simply indicates that only liens of the same class shall rank on a par and no
members of the same class shall rank in priority to other members of the same class; a class is designated by persons claiming against the same payer (s. 72).

Section 73 goes on to indicate that monies to be paid to a class shall be paid ratably to the members of that class, and also indicates that "the lien of every member of a class has priority over the lien of the payer of that class".

Another element of security which has been added in the new statute for the lien claimant is that with regard to joint or common interests. Section 30 indicates that where the land is owned jointly or in common with another person, "who knew or ought reasonably to have known of the making of the improvement," the other interest is subject to the lien unless "the contractor receives actual notice, before the first lien arises on the improvement, that the person having the joint or common estate or interest assumes no responsibility for the improvement to be made."

Section 31 is another effort to give additional security to the lien claimants in the area of leasehold interests. The new section places the onus upon the Landlord after being served by a notice by the contractor. It should be indicated that the contractor must serve the Landlord before the first lien arises with a written notice which shall contain the following items:
a) general nature of the contract;
b) particulars of the improvement to be made;
c) the name of the person with whom the contractor is contracting in relation to the improvement;
d) legal description or civic address of the land to which the improvement is to be made; and
e) any address for service.

After service is effected on the Landlord, the Landlord must return the Notice within ten days to the contractor at the address for service indicated, indicating that he assumes no responsibility for the improvement. In the event that he does not return the said Notice as prescribed, then the Landlord's interest in the property is subject to the lien. This lien is however limited to the value of the holdback that the owner is required to retain.

It should be noted that Subsection 4 of Section 31 indicates that where the lien attaches to the interest of the Landlord no forfeiture of the lease or termination of the lease by a Landlord will defeat a lien claimant.

Section 32 deals with liens in respect of condominium property. It should be noted that the intent of the amendments to this area is to tie the lien more closely to the property benefited rather than to the person who ordered
the work. The **Builders Lien Act** provides for two situations as follows:

a) services, materials provided in respect of a unit - registration against the certificate of **title** for the unit;
b) service and materials provided in respect of the common property - lien registered against condominium plan;

The final section in the area of the lien is Section 33. That Section indicates that "every lien is a charge on the holdback required to be retained by Section 34, (the holdback). To this point there is no change in the present legislation. The Section goes on however, and indicates that subject to the right of setoff, every lien is also "a charge upon any additional amount owed in relation to the improvement a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of **service** or materials giving rise to the lien." This portion of the Section would seem to change the law dramatically in as much as the simple registration of a lien at land titles would appear to intercept funds flowing through on the contract as well as all subcontracts and therefore would be a charge on those funds. The difficulty here of course is that it is highly unlikely that a subcontractor will have any type of notice of a registered lien before he pays out the next advance under his contracts.
As under The Mechanics' Lien Act, The Builders' Lien Act recognizes a labourer's lien. A labourer under The Builders' Lien Act will have a priority over the other lien claimants for forty ordinary working days wages exclusive of overtime. To obtain this, he need not register a lien and need not prove that all of the wages were earned on the land to which the lien applied if the labourer provided the services on the land and was employed by the owner, contractor or subcontractor. In the event that the labourer is owed more than the forty ordinary working days wages he is entitled to obtain this sum out of his employer "who must be the owner, contractor or subcontractor" and-to share pro rata with any other lien claimant.

It should be noted that all devices to defeat the priority of the labourer is void and that this section applies notwithstanding of The Labour Standards Act.

One of the difficulties that has always arisen under the lien legislation is the effect that a third party claim has vis à vis the lien. The priority Sections of The Builders' Lien Act are contained in Part Six being Sections 65 through 76.

Some of these have already been dealt with throughout the course of this paper and several of them simply restate sections that exist in the present legislation and they will not be dealt with herein.
Section 7 is the general Section which provides a priority for liens over executions, garnishments, attachments etc. The important thing to note in this area is that the lien takes "priority over all judgments, executions, attachments, garnishments and receiving orders except those executed or recovered on before the first lien arose in respect to the improvement." It should be noted that the key point in time under The Mechanic's Lien Act was the registration of the claim of lien.

Section 71 deals with the priorities between mortgages, conveyances or other agreements and liens. The rule in this regard is that the first registered wins. Section 71 (2) deals with the agreement for sale wherein the purchase money or part thereof is unpaid and the land has not as yet been transferred. In this situation the purchaser shall be deemed to be a mortgagor and the seller a mortgagee whose mortgage was registered on the date of the agreement for sale. Section 71 (3) indicates that subject to the trust provisions the lien "has priority in respect of all payments or advances made on account of any conveyance or mortgage after written notice of the lien has been given to the person making the payments or advances or after a claim of lien is registered;" and "...if no written notice of the lien is given or if no claim of lien as registered, all of the payments or advances have priority over the lien."
It should be pointed out that "registered" is defined in Section 2 (1) (0). This definition is an expansion of the definition contained in the present legislation. As far as registered lien, there is no change in as much as the legislation defines registered within the meaning of The Land Titles Act and "includes filed when no certificate of title is issued for the land affected." The expansion is that in terms of claim against mineral rights registered means filed with the records office and in the case of a claim against the Crown, it means given to the Crown.