



Construction Liens

By *Brian Madigan*

If you are planning on any renovations or you are building a new home, then you need to know about the *Construction Lien Act*.

First, there is a lien which can be registered by anyone who provides work or services or supplies materials which are used for your property. The lien has to be registered within 45 days of the last work being performed or the last supply of goods. Then, the lien has to be “perfected” within 90 days of that same date by instituting an action and registering that on title as well. Many liens are registered but never perfected.

Second, there is a statutory holdback under the Act. Every person responsible for payment is required to holdback 10% of the amount for 45 days to ensure that there are no liens. If you pay this amount, and a lien is registered, then you may have to pay this again. So, be careful!

Third, there are other provisions for liens under the Act, in excess of the 10%. If a sub-contractor gives written notice of a claim for a lien, then that full amount (not just 10%) must be heldback. This is the most risky situation for homeowners.

Many contractors will tell you that you have no right to hold back any money because it’s not in the contract. But, don’t worry, the Act has you covered. Every contract is deemed to be amended so as to be in conformity with the *Construction Lien Act*. So, even if it’s not in there, it’s still part of the contract, and not only do you have the right, but you also have the obligation to holdback sufficient funds.

Let’s assume that you are having a hot tub installed. Your price was \$10,000.00, so you are obligated to holdback \$ 1,000.00 for 45 days, but you receive written notice of a lien from the manufacturer for \$ 6,000.00 and one from the installer for \$ 1,500.00. So, how much do you holdback? The answer is \$ 8,500.00. The full amount of the written notices together with the statutory holdback. But, if you’re actually in this situation: don’t pay anything! You may still hear from the electrician and the gas installer, both

of whom may still have claims. Better safe than sorry, make sure everyone has been paid and get proper releases and authorizations signed. This is a good time to involve your lawyer.

The purpose of the *Construction Lien Act* is to protect all the suppliers and workmen down the line, so that they all will be paid. It is an Act intended to benefit sub-contractors from the general contractor. It is also designed to protect the general contractor from you if you don't pay. As a lien, it has priority over both unregistered and unsecured interests and it follows mortgages (provided the funds have been advanced) and taxes which have a higher priority.

So, where does title insurance fit in? If you have a valid title insurance policy, then you will be covered for any claims of the manufacturer or installers. You did not have a direct contract with them. However, you may not be covered for the general contractor's claim. You have a contract here, and you may not have lived up to your side of the bargain. If you were supposed to pay in installments, and you failed to do so, then this whole lien mess, may be your fault. If you're in breach of your obligations under the contract with the supplier, then title insurance won't save you. However, maybe they brought the wrong unit and you were quite within your rights to refuse payment. Here, title insurance will be helpful.

There are a couple of matters that are important considerations under the Act. What is the last day work was performed and material was supplied to the property? Who certified completion? What wage rates are paid to the workmen? Have all payments been paid to date? What about WCB payments? Is there a performance bond? If these issues arise, then you will have to see a lawyer. The Act can be tricky and somewhat complicated in parts.

It is also important to note that you can't use any of the holdback moneys for defects or repairs. Those funds are constituted as "trust funds" and may only be used for the purposes of the trust. If you borrowed money from a bank to finance the hot tub, then those funds may be subject to the trust provisions under the Act. It would be better just to arrange a general loan from the bank. It's far less risky! It's bad enough not to get what you paid for, but it's even worse to have to pay twice.

Ultimately, if a homeowner refuses to pay for proper work, services or materials supplied, the Court has authority to order the sale of the property. Before this occurs, the mortgagee will likely have intervened. And, there's an interesting provision contained in the mortgage, they have the right to pay the claim and add it to your mortgage with interest.

Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty, Brokerage 905-796-8888, BRMadigan@rogers.com or visit www.OntarioRealEstateSource.com