

Reference Guide

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Builders' Liens

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BUILDERS' LIENS:

A QUICK REFERENCE GUIDE TO THE PAST FIVE YEARS OF JURISPRUDENCE

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It has been just over five years since the last LESA program focusing on builders' liens.¹ Since that time, the Alberta Courts have rendered approximately fifty reported decisions relating to the *Builders' Lien Act*.² Several of those decisions provide excellent overviews of the *Act* and serve as a good starting point for practitioners unfamiliar with this area of law. Others are useful because they affirm dated jurisprudence or shed light on important topics such as the right to lien, priorities between types of claimants, burdens of proof and procedural deadlines. There are also a handful of decisions that unfortunately create some uncertainty that will undoubtedly lead to future litigation.

This paper is intended to provide highlights from the last five years of builders' lien related cases in Alberta.

Cases Dealing with Affidavits Proving Lien

In *Northern Dynasty Ventures Inc. v. Japan Canada Oil Sands Limited*,³ the Court set out the minimum content requirements for Affidavits Proving Lien. Under Sections 48 and 52 of the *Act*, parties can file and serve a Notice to Prove Lien on any lienholder requiring that lienholder to file affidavit evidence providing detailed particulars of the lienholder's claim.

T and ND were engaged by JCO to supply equipment and materials, respectively. A dispute arose over payment and T and ND registered liens totaling \$2 Million against JCO's mineral interest. JCO brought an application to post letters of credit as alternate security and have the liens discharged. JCO also served Notices to Prove Lien on both lienholders. The responding affidavits were very vague containing only 4 or 5 paragraphs detailing what type of business each lienholder was in and stating that JCO was the equitable and beneficial recipient of \$2 Million.

The learned Master held that the affidavits were clearly deficient. In his reasons he established the following minimum content for Affidavits Proving Lien:

¹ For a comprehensive overview of the *Builders' Lien Act*, see E. Jane Sidnell, "Builders' Liens" (Paper delivered at the LESA Construction Law Seminar, Calgary, 7 April 2009 and Edmonton, 16 April 2009).

² *Builders' Lien Act*, RSA 2000, c B-7, [the *Act*].

³ *Northern Dynasty Ventures Inc. v. Japan Canada Oil Sands Limited*, 2014 ABQB 727.

1. A statement that the lien claimant did the work or supplied the materials;
2. Disclosure of who requested the work and materials (which would be especially important if the owner did not make the request directly);
3. Sufficient particulars about the work or materials to allow the owner to make a reasoned judgment about payment; and
4. Finally, if there are pleadings, the affidavit should, ideally, address the issues raised in the defence.

In the end, the learned Master permitted the lien claimants additional time to provide further and better affidavits because JCO was well aware of the particulars of the claim having contracted directly with T and ND. That being said, filing insufficient affidavits was noted to be a “risky venture”.

Cases Dealing with Procedural Deadlines

A lot of counsel, either through misunderstanding or to simplify discussions with clients, suggest that the time to register a lien terminates 45 (or 90 in the case of oil or gas wells) days from the last day that services or materials were supplied. That suggestion is only partially true.

Section 41 of the Act says:

41(1) A lien for materials may be registered at any time within the period commencing when the lien arises and

(a) subject to clause (b), terminating 45 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned, or

(b) with respect to improvements to an oil or gas well or to an oil or gas well site, terminating 90 days from the day that the last of the materials is furnished or the contract to furnish the materials is abandoned.

Accordingly, the time to register a lien ends 45 (or 90) days from the day that services or materials were last supplied or from the day the contract was abandoned, whichever is later.

In *Equinox Electric Ltd. v. Progress Construction & Development Ltd.*,⁴ the Court affirmed the earlier decision of *Kershaw Financial Corporation v. Jehan Holdings Ltd.*⁵ where the learned Master

⁴ *Equinox Electric Ltd. v. Progress Construction & Development Ltd.*, 2014 ABQB 552.

⁵ *Kershaw Financial Corporation v. Jehan Holdings Ltd.*, 1988 CanLII 3853.