

MEANING OF THE BUILDERS' LIEN TERM "ABANDONMENT"

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TIME FOR REGISTERING LIENS

In Manitoba contractors, sub-contractors, their suppliers and employees must act within **40 days** of various events to be in time for registering valid claims for Builders' Liens.

Depending upon the particular circumstances, the 'event' that starts the period running for timely exercise of lien rights is the earliest of:

- issuance of a Certificate of Substantial Performance
- *abandonment* of the contract/sub-contract under which the lien right arose
- last date of supply by the claimant supplier
- completion of the provision of services by a service provider (i.e.: equipment rental, employment services, etc)

From time to time, contractors or sub-contractors walk away from a job-site and then questions arise – did they 'abandon' and if so when did the abandonment occur. Determination of the answers to these questions may be required to find whether related Builders' Liens were or were not filed within time.

ABANDONMENT - A MATTER OF INTENTION

The issue of whether there has been an abandonment or not resolves around the **intention** of the party ceasing to perform under its contract or sub-contract. Evidence of the intent to abandon is sometimes unequivocal, simply being provided by word or deed. For example, the subject party may:

- verbally state or write giving notice that it is abandoning the project
- fall subject to a receiving order or bankruptcy proceeding which renders the party incapable of continuing to work
- remove signs, equipment and/or materials from the unfinished site signaling, impairing and/or ending its ready ability to further perform on the project
- neglect or refuse to return calls, provide a schedule, have materials delivered, provide labour, attend to completion or correction of its work, etc. in the face of demands and its contrary contractual duties

What is more challenging, however, are circumstances where the intention of the party ceasing to perform on a jobsite is not made clear. Frequently disputes arise, working conditions deteriorate due to bad weather, lack of labour or materials, or regular payments are suspended. In such cases, the cessation of work may be the consequence of natural events or the actions of one of more others involved in the project. The party ceasing to work may actually be ready and willing, when able, to continue to perform.

Another circumstance which is rather common arises when a party ceases to work under a threat or condition such as 'We will not resume our work unless and until overdue payments are received, shop drawings are processed, or extra claims are approved', etc. In such circumstances the lien claimant would likely say it did not abandon, but instead had every intention of continuing 'provided that...'

Where standard written contracts are in place, terms will normally guide the parties to resolution of such an impasse and will further assist a court in determining whether such a conditional cessation of work constitutes abandonment or a breach of the contract or not. Where no contract has been executed, the parties are likely to face costly court proceedings with the need for vive voci (verbal) evidence to unravel the tangle of such disputes and any resulting questions respecting the validity of builders' liens filed after the work stopped.

ONUS OF PROOF

It is to be noted that lien claimants carry the onus of proving that their cessation of work more than 40 days prior to registering a lien did not constitute an abandonment.

COLOURABLE ATTEMPT TO REVIVE EXPIRED LIEN RIGHT

An old Manitoba case which is still good law is worth noting in the context of this discussion. The facts of the case involved a contractor who delivered most required materials and ceased all work on a project in September of a given year, making no attempt to finish its work until the following January when it delivered a small quantity of flooring materials. The contractor then proceeded to register a claim for lien. The court found the intervening period of inactivity constituted 'abandonment' in September. The late delivery of materials was called 'a colourable attempt' to revive the contractor's expired lien right. The lien and action for its enforcement were therefore dismissed.

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