

THE BUILDERS' LIENS ACT

A MODERNIZED APPROACH



The Manitoba Law Reform Commission has completed an extensive review of *The Builders' Liens Act of Manitoba*.

What is *The Builders' Liens Act*?

The Act is **remedial legislation enacted for the benefit of participants in the construction industry**. Every Canadian province and most territories have similar forms of legislation seeking to fill gaps in the tiered contract structure which characterizes the complex business model unique to the construction industry.

Under the current Act, persons who contribute to the improvement of land have access to two remedial schemes:

1. **lien rights** and the power to secure payment claims against project funds and, in most cases, against title to the land improved; and
2. **statutory trusts**, intended to keep project funds within the construction contract pyramid for each project until all those rightfully entitled to payment have been paid.

Separate provisions for lien and trust remedies developed in 2 previous statutes: *The Mechanics Liens Act* and *The Builder and Workers Act*, which were combined in the current single Act in 1982.

Why is Change Needed?

Judicial criticisms have identified the need for **clarification of legislative intent** throughout the Act and the specific need to better provide for effective interaction of lien and trust remedies in the Act.

In the 36 years since the Act came into effect, **the construction industry has evolved** with significant changes to project delivery models, forms of contract, risk profiles and inter-jurisdictional activity.

Manitoba, like other Canadian jurisdictions, has received reports of a **progressively worsening culture of non-compliance** with agreed payment terms and resulting construction industry demands for introduction of remedial legislation designed to enforce **prompt payment** of construction contract accounts from the owner down the entire payment chain.

The full report is available at:
manitobalawreform.ca



What Are the Recommendations?

The Commission makes a series of recommendations aimed at refocusing the Act on its original purpose, namely clarifying and enhancing the statutory mechanisms provided in the Act for collection of payments properly due to those who provide work, services or materials within the construction contract pyramid.

In making its recommendations, the **Commission considered the broad goals of:**

1. Improving the **scope** and **clarity** of the Act;
2. Improving **uniformity** between jurisdictions;
3. Responding to the widespread issue of delays in payment within the construction industry while seeking to **strike the optimal balance** between legislative intervention and freedom to contract; and
4. **Modernizing** the Act to contemplate modern forms of contracts, business structures and construction methods.

The Review Process

July 2017: The Commission began its review of the Act.

February 2018: Consultation Report released, identifying 46 issues for discussion.

March to June 2018: Consultation with industry stakeholders, professional associations, legal profession, and other affiliated bodies, which included face-to-face meetings, written submissions and presentations.

November 2018: Final Report released.



KEY RECOMMENDATIONS

A full list of the recommendations can be found in the Final Report.

“PROMPT PAYMENT”

The Commission recommends **remedial legislation to address payment delays in the construction industry**, which is a hot topic across Canada. Ontario is the only province to have enacted a prompt payment regime to date, but the issue is currently being considered elsewhere in Canada and is already widely accepted in the US.

The Commission recommends modernizing the Act by creating a statutory response to the reported issue of widespread, economically damaging payment delays within the construction industry: it recommends that Manitoba adopt the approach recently introduced by Ontario to **incorporate statutory timelines for payments and prescribed penalties for payment delay** (i.e. “prompt payment reforms”) within the Act.

The Commission recommends the creation of a **private adjudication system** with necessary regulatory oversight similar to that currently under development in Ontario. Such an adjudication process would have tight timelines for determination of payment disputes and minimal disruption while the construction project is ongoing.

ENHANCEMENT OF THE TRUST PROVISIONS

The Commission recommends enhancements to the statutory trust remedy in the Act to better achieve the purpose of **keeping project funds within the construction contract pyramid for each specific project**, including changing the statutory trust from one whereby owners, contractors, and subcontractors hold all funds received as payments on account of a contract price for listed beneficiaries to a privity model whereby trustees hold project funds in trust for only those it has contracted with directly. This aligns Manitoba’s statutory trust provisions with those of other jurisdictions including Ontario, Nova Scotia, Saskatchewan, and British Columbia.

The Commission recommends codifying the statutory trust remedy by expressly providing for creation of the trust, increased transparency during the payment certification process, clarification of deposit requirements, explicit trustee rights and obligations, penalties for breach of trust, etc. It is the Commission’s hope that limiting the trust relationship to one based on privity while codifying the entire trust remedy will lead to greater understanding of the role and legal liabilities of trustees to improve compliance by owners and project participants within the industry.

IMPROVED INTERCONNECTION BETWEEN THE TRUST AND LIEN PROVISIONS OF THE ACT

Both trust and lien rights under the Act are based on a **claimant's contractual right to be paid for work, services or materials provided** to improve the value of an owner's land and they arise and co-exist for a period of time.

In 2016 the Supreme Court of Canada pointed out that **the current Act does not provide any guidance on the intended interaction of the lien and trust remedies in a case where a claimant sought double security for its account** basing its claims on separate arguments – one for each remedy with overlap of lien and trust remedies.¹ The Commission recommends a series of reforms that would address this issue including the recommendation that the trust model be converted to a privity of trust model.

INTRODUCING A MANDATORY BONDING REQUIREMENT OF PUBLIC PROJECTS

The Commission recommends the **legislating of mandatory bonding requirements on all public construction contracts**. This would serve to increase the funds available to complete a failing project where a contractor defaults in its obligations to perform its contract with the owner (performance bond) and/or defaults in payment to its subcontractors (labour & material payment bond).

While private projects might benefit from mandatory bonding, **the Commission chose not to recommend denying private owners their freedom to contract into or out of bonding**.



Manitoba Law Reform Commission

The Manitoba Law Reform Commission is Manitoba's independent voice on law reform. The Commission makes recommendations to the provincial Minister of Justice and Attorney General to improve, modernize and reform the laws of Manitoba. It has been operating since 1970.

Contact the MLRC at:

432-405 Broadway, Winnipeg, MB R3C 3L6
Email: mail@manitobalawreform.ca
Phone: (204) 945-2896 Fax: (204) 948-2184

For More MLRC News:

Web: manitobalawreform.ca
Twitter: @MBLawReform

¹ *Stuart Olson Dominion Construction Ltd v Structal Heavy Steel*, 2015 SCC 43 (CanLII).