

The Builders' Liens List: What is the after 3:00 p.m. search and why should you perform one?

published 06/27/2022

A builders' lien is different than most other encumbrances like a mortgage or caveat. *The Builders' Liens Act* prescribes that a registered lien serves as a placeholder for all unregistered builders' liens for work in progress and gives unregistered liens the same priority as the registered liens.



As long as one builders' lien remains registered against title, a lender has no way of knowing whether other unregistered lien claims exist that might take priority or the amount of those lien claims. The registered lien also takes priority over any advances made by a lender.

This priority over advances means that lenders cannot merely maintain the value of the registered lien, but instead should withhold all advances until the discharge of all liens from title. A clear title is only way to ensure that the lender's priority is not impacted or "bumped" by the lien.

To make sure title is clear, a special search often referred to as an "after 3:00 p.m. search" is required. This is because a regular title search may not show all liens submitted to the Land Titles Office ("LTO") for registration that day - there is often a gap in time between the submittal of a lien and registration on title. This means that there may be registrations that affect a lender's priority interest in respect of the subsequent advancement of progress draws and the lender would be unaware.

Registrations (of all types, including builders' liens) are permitted to be made in the LTO up to but not after 3:00 p.m. pursuant to the *Land Titles Office Regulation of The Real Property Act* of Manitoba.

Immediately after 3:00 p.m. each day, the LTO will generate a list of liens which have been entered in the register but are not yet registered on title. This is called the Unaccepted Builders' Liens List. It is available from the LTO as a pdf free of charge.

We recommend that lenders (or their counsel) conduct an "after 3:00 p.m. search" on the day that the lender wishes to advance funds to determine whether there are any interests registered but not yet appearing on the title that would have priority over the lender's subsequent advancement. This is a mechanism to protect the lender's first-priority interest (by virtue of the registered construction loan mortgage in its favour) against unknown or unquantified liens that would otherwise take priority over progress draws subsequently advanced.

If you would like to know more, or have another construction law matter to discuss, please contact someone **in the TDS Construction Law group**.

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