



The Art of A Builders Lien

BUILDEX Vancouver
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The Art of a Lien

1. Overview of the Act
 - a) Deadline to file a lien
 - b) The lien claim form requirements
 - c) Removal of a lien
 - d) Enforcement
 - e) Collection/priorities

2. Q & A

A. Deadline to File a Lien

- i. 45 days after the date on which the certificate of completion was issued
- ii. If no certificate, 45 days after the head contract was completed, abandoned or terminated
- iii. If no head contract, 45 days after the improvement was completed or abandoned

A. Deadline to File a Lien (cont'd)

i. Certificate of Completion

- Payment certifier (“PC”) must determine completion
- If complete, PC must issue certificate within 10 days
- If PC fails or refuses, can obtain court order for declaration of completion
- Court can order costs
- PC liable to anyone who suffers loss or damage for refusal or failure to issue a certificate

A. Deadline to File a Lien (cont'd)

ii. Completion of Head Contract

- Can request particulars of whether a certificate has been issued from the PC
- No repercussions to PC for failure to provide particulars
- Completed means substantially completed, not necessarily totally completed or performed
- Apply 3-2-1 formula to determine if head contract is substantially performed (3% of the first \$500,000, 2% of the next \$500,000, 1% of the balance)

A. Deadline to File a Lien (cont'd)

- iii. Completion or Abandonment of the Improvement
 - Completion is measured by whether the improvement or a substantial part of it is ready for use or is being used for the purpose intended
 - Abandonment is deemed on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, with the exception of strike, lockout, sickness, weather, court order, shortage of material or other similar cause

B. The Lien Claim Form Requirements

- Parcel identification number
- General description of the work done or material supplied
- Person who engaged the lien claimant
- Amount of lien claim – price unpaid inclusive of taxes but not interest, damages, lost profits, and financing charges

C. Removal of a Lien

- i. Post Security – Section 24
 - Post value of lien as security and lien against land is removed (cash or bond)
 - Paid into court or, by agreement, held in lawyer's trust account
 - Determination of any amount payable can be made at a later date but owner achieves clear title to allow financing, sales etc.

C. Removal of a Lien (cont'd)

- ii. Pay Undisputed Amount into Court – Section 23
 - Where party under whom lien is filed cannot clear title (i.e. insolvency)
 - Owner, or the next solvent party, can clear title by paying any undisputed amount still owing into court (i.e. holdback)
 - Pay lesser of total amount of lien or holdback
 - Owner discharged from any liability

D. Enforcement

- Commence Supreme Court action to enforce lien against holdback/Shimco lien before holdback paid out (55 days)
- Commence Supreme Court action within one year of filing lien or else lien is extinguished
- File CPL unless lien removed or discharged pursuant to s. 23 or s. 24
- Settle or prove lien claim in court
- Force sale of land unless undisputed amount (holdback) paid into court and owner discharged of liability

E. Collections/Priorities

- i. Sale of Land
 - 1st – registered mortgagee for all amounts advanced in good faith before lien filed (monies advanced after lien filed, rank behind the lien unless court orders otherwise)
 - 2nd – costs incurred by all workers and subcontractors
 - 3rd – workers share holdback pro-rata
 - 4th – subcontractors share holdback pro-rata
 - 5th – headcontractor, persons engaged by the owner and the owner share the remainder

E. Collections/Priorities (cont'd)

ii. The Holdback

- 1st – costs incurred by all workers and subcontractors
- 2nd – workers share pro-rata
- 3rd – subcontractors share pro-rata

E. Collections/Priorities (cont'd)

ii. Government

- Federal – Canada Revenue Agency
- Provincial – WCB, Employment Standards, Social Services
- Municipal – Property Tax

Q & A – Question 1

Project is coming to an end and subcontractor, ABC Co., responsible for civil works has not been paid. ABC Co. and GC have good working relationship. GC is having payment issues with owner, which is unusual, but has promised ABC Co. payment soon. ABC Co. might have to file a lien and asks PC whether a certificate of completion has been issued for GC's contract. Eleven days have passed and no response from the PC.

Q & A – Question 1 (cont'd)

What should ABC Co. do:

- a) wait for payment;
- b) continue to follow up with PC; or
- c) file a lien.

Q & A – Question 2

ABC Co. realizes late Friday night that its lien filing period expires 2 days later on Sunday. ABC Co. does not have a lawyer and will not be able to file its lien until Monday.

Will ABC Co. be out of time if it files its lien on Monday?

Q & A – Question 3

An owner/developer is building a residential project. There is no GC and the owner contracts directly with trades with the assistance of a CM. ABC Roofing Contractor worked on Friday but failed to return to the site. The following Thursday, the owner issued a termination letter to ABC.

Q & A – Question 3 (cont'd)

What is the time limit for ABC's suppliers to lien:

- 75 days after Friday, date of abandonment;
- 45 days after Thursday, date of termination; or
- none of the above.

Q & A – Question 4

ABC Co. filed lien and XYZ Co. wants to post security to remove the lien. ABC opposes XYZ's court application stating that ABC wants an affidavit from XYZ setting out which invoices it takes issue with and why.

Is ABC entitled to an affidavit and can the court make such an order?

Q & A – Question 5

ABC Co. filed lien and XYZ Co. wants to post security in the form of a lien bond to remove the lien. ABC Co. consents to the removal of the lien but only if XYZ Co. posts cash.

Can ABC Co. insist on cash over a lien bond?

Q & A – Question 6

Window Co. supplied windows to a project and filed a lien for unpaid work. Window Co. misstated the general description of the work, indicating that Window Co. supplied and *installed* the windows.

Can the owner or GC have the lien struck on the basis that the general description of the work is incorrect?

Q & A – Question 7

ABC Co. failed to file its lien in time but commenced an action to claim a Shimco lien against the holdback.

Will ABC Co. share the holdback with the other lien claimants that filed liens in time?

Q & A – Question 8

ABC Co. agrees to carry out landscaping work for owner XYZ Ltd. There is no formal contract but correspondence between the parties indicates the owner and developer of the project is XYZ Industries. The lien claim form requires that the lien claimant list the party that engaged it.

Who should ABC Co. list on the lien claim form?

Q & A – Question 9

ABC financing company advances a loan to the XYZ developer. XYZ defaults on the loan before completion and many liens are filed against the property. ABC can either realize on its security and liquidate the asset/project or it can lend further monies in the hopes that completing the project will increase the likelihood of full repayment of the loan.

Q & A – Question 9 (cont'd)

If ABC lends more money on the loan, will the additional funds advanced rank in priority to the previously filed builders liens?

Q & A – Question 10

Concrete Co. is a formworks contractor on a large project for Done Right Developer. Concrete Co. is insolvent, leaves many subs unpaid, is in arrears with CRA and carried out deficient work. The subs file liens. Done Right retained a holdback that is in excess of the liens. From the holdback funds, Done Right seeks to pay the full amount of the liens into court and keep the excess.

What claim does CRA have over the holdback?

Please direct inquiries or comments to:

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THANK YOU