

Overview of the *Builders Lien Act*

Historical Development

The concept of a “builders lien” did not exist, historically, in English common law. The builders lien was created by legislation for the first time in North America in 1791, and now all common law provinces, including British Columbia, have legislation similar to the British Columbia *Builders Lien Act* (the “*Act*”).

The significance of the lien right being created by legislation is that the courts have no discretion to correct or rectify the parties’ failure to meet the requirements set out in the legislation. This means that the Owner and the lien claimant must exactly comply with the *Act*.

Purposes of the Act

There are two main purposes underlying the *Act*:

1. with respect to a contracting owner, the *Act* addresses the issue of security for creditors. It creates a priority class of creditors to provide security or preference to those who contribute to the value of the contracting owner’s land through work or services; and
2. with respect to a non-contracting owner, the *Act* ensures that the owner does not unfairly benefit from work or services to its land without adequate compensation to the person providing the work or services.

The Statutory Holdback

Owners commonly retain deficiency holdbacks from contractors at the end of a contract. However, the *Act* creates an obligation on the part of owners, contractors, and subcontractors to retain a separate holdback, generally 10%, of the amount of any payment made on account of a contract or subcontract. The purpose of the holdback is to limit the liability for liens to the amount of the holdback or the amount owing on account of a contract or subcontract. If those higher up in the contractual chain fail to pay those further below, and a lien is filed, the holdback funds will be available to the lien claimants.

An owner’s failure to pay funds into a holdback account constitutes default under the contract and, pursuant to the *Act*, the contractor is entitled to cease work on the project on 10 days notice (s. 5(7)). To determine if an owner is meeting its obligations, a contractor or subcontractor is entitled to information regarding the balance of the holdback account to ensure sufficient funds are being deposited by the owner (s. 41(1)).

Where an owner takes the position that a contractor is in default of its contractual obligations (deficiencies, delay, abandonment), an owner may wish to set off its damages against the holdback. There can be no set-off as against the 10% statutory holdback until the possibility of any liens arising under the contractor are exhausted (s. 6(1)). This does not apply to any monies held in excess of the required holdback (s.6 (3)).

Remedies

There are three remedies which are available under the *Act*:

1. lien against the lands and improvement;
2. lien against the holdback monies; and
3. claim for breach of trust.

Lien against the lands and improvement

The lien against the lands and improvement is perhaps the best known remedy under the *Act*. It is created by s. 2 of the *Act*:

A contractor, subcontractor or worker who, in relation to an improvement, performs or provides work, supplies material, or does any combination of those things has a lien for the price of the work and material, to the extent that the price remains unpaid.

Lands registered in the land title office are generally lienable. The following special categories of lands are also lienable:

1. provincial crown lands;
2. municipal lands; and
3. schools and other public facilities.

Lands that are generally not lienable include:

1. lands that are not registered in the land title office or gold commissioners office;
2. federal lands including Indian reserve lands;
3. highways and certain ferry properties; and
4. improvements by the Minister of Forests and forest service roads.

The *Act* provides no mechanism for the registration of liens against petroleum and natural gas interests. The Ministry of Energy, Mines and Petroleum Resources maintains a register of

petroleum and natural gas interests and will accept liens and certificates of pending litigation for filing on an information basis only. As there is no statutory authority for these liens, any transfer of title will not be encumbered by the lien.

The persons who are entitled to make a claim of lien against the lands and improvement are:

1. contractors;
2. subcontractors;
3. workers; and
4. material suppliers.

Each of these groups of claimants is defined in s. 1 of the *Act*:

1. *contractor*: means a person engaged by an owner to do one or more of the following in relation to an improvement: (a) perform or provide work; (b) supply material;
2. *subcontractor*: means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement: (a) perform or provide work; (b) supply material; but does not include a worker or person engaged by an architect, an engineer or a material supplier;
3. *worker*: means an individual engaged by an owner, contractor or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect and engineer; and
4. *material supplier*: means a contractor or subcontractor who supplies only material in relation to an improvement.

Architects, engineers and other consultants that perform construction design and project management functions are entitled to lien claims but they must satisfy the following criteria:

1. the consultant must be a contractor, subcontractor, or worker;
2. the consultant must perform or provide work; and
3. the work must be done in relation to an improvement.

Site supervision services constitute "work done on an improvement". Preparing plans used in construction projects have also been held to constitute "work done on an improvement".

There are additional requirements that a material supplier must meet in order to be entitled to a claim of lien against the lands and improvements:

1. the material must be movable property;
2. the material must be delivered to the land on which the improvement is located; and
3. the material must be intended to become part of the improvement.

Additionally, the definition of material specifically includes equipment rented without an operator (s. 1).

The definitions noted above contain words which are also specifically defined in s. 1:

1. *improvement*: includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunneling, filling, grading or ditching of, in, on or under land;
2. *services*: includes (a) services as an architect or engineer whether provided before or after the construction of an improvement has begun, and (b) the rental of equipment, with an operator, for use in making an improvement; and
3. *work*: means work, labour or services, skilled or unskilled, on an improvement.

Lien Against the Holdback Monies

The second remedy available under the *Act* is a claim against the holdback monies, pursuant to s. 4(9) of the *Act*:

Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

This remedy is addressed in the British Columbia Supreme Court decision, *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, which was upheld on appeal (2003 BCCA 193). For this reason, some people refer to the lien against holdback monies as a “Shimco lien”.

It is important to note that the lien against the holdback is a separate claim from a lien against the land. Significantly, the lien against the holdback is not filed in the Land Title Office. Rather, in order to claim a lien against the holdback, the lien claimant must start a law suit in the Supreme Court of British Columbia alleging its lien before the holdback monies are paid out. This means that the 45 day lien period used in the lien against the land does not apply to the lien against the holdback. A claimant that failed to take steps to perfect its lien against the land, can still assert a claim of lien against the holdback. The claimant would be entitled to share pro-rata in the holdback funds with all other lien claimants.

The lien against the holdback is dependent on whether the holdback funds were ever kept or have been paid out. Payment out of the holdback can be made after the expiry of the 55 day holdback period provided a claim of lien against the land has not been filed and no proceeding has been commenced to enforce a lien against the holdback (s. 8). Since *Shimco*, our Court of Appeal has confirmed that where there is no holdback, or a holdback has been wrongfully paid out, a person whose land lien has been extinguished cannot later commence proceedings to enforce a lien against a nonexistent holdback: *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26.

Accordingly, a claimant should commence its action claiming a lien against the holdback prior to the expiry of the 55 day holdback period. This would guarantee a claimant that the holdback funds have not been paid out.

Claim for Breach of Trust

The *Act* also creates a trust, for the benefit of the subcontractors and material suppliers. In particular, section 10(1) reads:

Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

As a result, such monies can only be used for specified purposes authorized by the trust. They may not be used by the recipient to pay its own overhead or to pay its subcontractors on other projects until all of its sub trades are paid in the project in question.

Section 11 of the *Act* sets out the consequences of misappropriating trust monies. If a company breaches the trust provisions, it is liable for a fine of up to \$10,000 and its officers and directors may also face imprisonment for up to two years.

Time for Filing a Claim of Lien against Lands and Improvement

Section 20 of the *Act* sets out a specific time period in which a claim of lien against the lands may be filed. Such a claim of lien must be filed in the Land Title Office the earlier of:

1. 45 days after the date on which the Certificate of Completion was issued; or
2. if there is no Certificate of Completion, 45 days after the head contract has been completed, abandoned or terminated; or
3. if there is no head contract, 45 days after the improvement has been completed or abandoned.

With respect to those contracts falling into the first category, the Certificate of Completion is addressed in s. 7 of the *Act*. A Certificate of Completion is issued by the payment certifier

(usually the consultant, such as the architect or engineer), and a notice of such certificate must be posted on site.

With respect to those contracts falling into the second category, the *Act* defines (in s. 1) what “completed” means “if used with reference to a contract or subcontract in respect of an improvement”:

substantially completed or performed, not necessarily totally completed or performed.

Section 1(2) further defines substantial performance of a contract as when the work to be done under that contract is capable of completion or correction at a cost of not more than:

1. 3% of the first \$500,000 of the contract price;
2. 2% of the next \$500,000 of the contract price; and
3. 1% of the balance of the contract price

(this is sometimes called the “3-2-1 Formula”).

With respect to those contracts falling into the third category, s. 1(3) of the *Act* states that an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

In terms of abandonment, s. 1(5) provides this guidance:

a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.

With respect to termination, it is only termination of the head contract that is relevant and termination of a subcontract will not trigger the time for filing a lien. Termination is not defined in the *Act*.

If the claim of lien is not filed in the Land Title Office within the time set out in s. 20, the lien against the lands and improvement is extinguished. As the right to a lien against the lands and improvement is created by statute, and does not exist at common law, the courts do not have the power to extend the time for filing a claim of lien, even by 1 day.

Enforcement

Simply filing a claim of lien in the Land Title Office does not give the lien claimant the right to payment. It still must start an action in the Supreme Court of British Columbia, and prove its claim. It also must file a Certificate of Pending Litigation ("CPL") in the Land Title Office.

There is another strict time limit set in the *Act*. The lien claimant has only one year within which it must start its action and file its CPL. If it fails to do so within that time, the claim of lien is extinguished.

Oftentimes, Owners may wish to leave the claim of lien on title for that year. The strategy (particularly if the claim of lien is small) is to wait to see if the lien claimant will start its action within the year. If it does not, there is a simple form Owners can file in the Land Title Office to remove the claim of lien.

Owners may also wish to force the lien claimants hand and serve a "notice to commence an action" (s.33(2)). The claimant will be required to commence the action and register the certificate of pending litigation within 21 days after service of the notice. A lien claimant that has already commenced an action can also serve a "notice to commence an action" on any other lien claimant that has not commenced their action. This is important because a lien claimant cannot resolve its lien claim until all lien claims against a particular holdback are dealt with.

Conclusion

The *Builders Lien Act* contains many time limits and specific filing requirements. Since the builders lien does not exist outside of the *Act*, those wishing to benefit from the provisions of the *Act* must be sure to comply with all the requirements, otherwise the claim will most likely fail.

The information provided herein is of a general nature and is not intended as legal advice. Should you wish to discuss the provisions of the *Builders Lien Act* as they relate to your particular circumstances, please contact the authors.

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