

ENFORCING AND DEFENDING BUILDERS LIENS:

What Contractors and Owners Need to Know in
Times of Economic Uncertainty

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CLARK WILSON

Speakers: Dan W. Melnick, Partner
Carter Moe, P.Eng., Associate
Kim Do, Associate

Agenda

1. **Prompt Payment and Adjudication:** overview and key timelines
2. **The Claim of Lien:** what a lien is, what it does, and why it matters
3. **The Lienable Interest:** the types of land on which you can, and cannot place, a lien
4. **Quantum of Liens:** determining how much you can lien for and if a lien may be inflated
5. **Time Limits for Filing A Lien:** how to determine when a claim of lien must be filed and the events that can trigger the lien filing period
6. **The Holdback:** the legal and practical purposes of a holdback, and the risk of not retaining one
7. **The Trust:** what are trust monies, why they are important, and consequences for failing to comply with the trust requirements of the Builders Lien Act
8. **Lien Enforcement:** what steps a lien claimant must take to enforce their claim of lien
9. **Discharge of Liens:** mechanisms to remove claims of lien from title and property
10. **Strict Compliance with the Builders Lien Act:** what does this mean?

Prompt Payment and Adjudication

Carter Moe

604 643 3126 | cmoe@cwilson.com

Construction Prompt Payment Act

- Prompt payment and adjudication legislation has been implemented across Canada.
- Bill 20 (introduced on October 7, 2025) proposes the enactment of the *Construction Prompt Payment Act* (the “**CPPA**”) in BC
- Bill 20 received Royal Assent on November 27, 2025, but it is not yet in force.
- Intent of the legislation is to:
 - establish a scheme for prompt payment to alleviate payment delays down the construction pyramid, and
 - allow for timely, accessible adjudication in the construction industry.

What is Prompt Payment?

- If a party provides services or materials to an **improvement** and issues a **proper invoice** for their work the owner **must** pay the contractor within **28 days** after the invoice date.
- Parties down the construction contract chain (subcontractors, sub-subcontractors, material suppliers) are to be paid within **7 days** of the party above them having received payment.

What Constitutes an 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 demolition or removal of any of those things** and any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

What Constitutes a Proper Invoice?

A proper invoice must include:

- the name and address of the contractor;
- the date of the invoice;
- the period of time / milestone to which the invoice relates;
- information identifying the contract or purchase order;
- a description of the services or materials;
- the amount payable and the payment terms;
- the information in the contract relating to how payment is to be made or, if none is specified, the name of the person or office to which payment is to be sent;
- any prescribed information; and
- meets any requirements set out in the contract.

Other Prompt Payment Provisions

- Party is obliged to invoice monthly, unless the contract provides otherwise (i.e. achievement of milestone).
- Any contract provision that makes a proper invoice conditional on certification by a payment certifier or the approval of the owner is void.
- Interest provisions are legislated, providing that interest begins to accrue on amounts not paid at the higher of a) a rate to be prescribed under the ***Builders Lien Act (the “BLA”)***, or b) the rate set out in the contract.
- BLA does not amend the holdback requirements under the BLA and any payment is still subject to the required holdback.

Payment Disputes

- If an owner disputes an invoice, the owner can issue a notice of non-payment.
- An owner is not required to pay an invoice if they give the invoicing party written notice of non-payment in the prescribed form within 14 days after the invoice date.
- Down the construction chain, a contractor or subcontractor must provide notice of non-payment by the earlier of:
 - a) 7 days after the person receives a notice of non-payment, or
 - b) the person's calculated payment date for the invoice.

Adjudication

- A disputed invoice could sit in limbo after a notice of non-payment is issued or a party may refer the dispute to adjudication.
- Adjudication process involves one party providing written notice as dictated by the CPPA.
- The notice must include, but is not limited to, a brief description of the dispute, the nature of the remedy sought, and the name of a proposed adjudicator.

Adjudication

- Adjudication may be commenced during the construction project but cannot be commenced more than 90 days after the contract between an owner and contractor is completed, abandoned or terminated.
- With respect to any subcontracts, an adjudication cannot be commenced more than 90 days after the earliest of the following events:
 - the date the contract between the owner and the contractor is completed, abandoned or terminated;
 - the date the subcontract is certified under section 7(3) [*certificate of completion*] of the *BLA* as completed; or
 - the date the subcontractor last supplied services or materials for the improvement under the subcontract.

The Adjudicator

- If the parties cannot agree on an adjudicator, the adjudication authority, appointed by the Minister, may appoint an adjudicator.
- Parties cannot appoint an adjudicator in advance, by way of their construction contract or otherwise.
- The adjudicator will charge a fee which is split among the parties equally, unless the adjudicator determines that one party must pay the fee or some other apportionment is appropriate.

Powers of the Adjudicator

- The adjudicator has broad powers to:
 - Determine whether a party has failed to make a payment as prescribed by the CPPA.
 - Determine the value of services or materials.
 - Determine if payment is required for a change order, whether approved or not.
 - Issue directions in relation to the conduct of the adjudication.
 - Ascertain the relevant facts and law.

Powers of the Adjudicator

- The adjudicator has broad powers to:
 - Conduct an on-site inspection of the improvement.
 - Obtain the assistance of an accountant, building contractor, architect, engineer or other person, to determine the fact in question and the adjudicator can direct the parties to pay for the cost of same.
 - Make determinations as to whether the dispute may be the subject of an adjudication and if the adjudicator has jurisdiction to conduct the adjudication.

Adjudicator's Determination

- The adjudicator must make a written determination within **30 days** of receiving certain records prescribed by the CPPA, or as otherwise agreed to by the parties and adjudicator.
- Unless the parties consent, the time to make a determination cannot be extended and a determination issued after this timeline is considered void.
- An adjudicator's decision is binding on the parties, but the matter can still be tried in an arbitration or in court.

Adjudicator's Determination

- Any amount a party may be ordered to pay must be paid within **15 days** after the determination is issued.
- The payment or adjudicator's determination cannot be stayed simply because a party has chosen to have the matter determined by an arbitrator or the courts.
- A dispute can be referred to adjudication even if the dispute is the subject of an existing legal proceeding or arbitration.

Judicial Review

- An adjudicator's decision can be judicially reviewed if a party takes the position that the adjudicator did not have the proper authority to make the determination or if the determination was unfair or unreasonable.
- Unless the adjudicator acts in bad faith, no legal proceeding for damages lies against an adjudicator arising from the performance of their duties under the CPPA.

Amendments to the *Builders Lien Act*

- Abolishes the *Shimco* lien – a mechanism unique to B.C. where a party has an independent lien against the required holdback in addition to a lien against the land.
- The *Shimco* lien has been the subject of much debate in the B.C. construction industry, and many construction professionals disagree with this alternate lien scheme.
- Where a construction contract is entered into before the CPPA comes into force, lien rights and priority issues remain governed by the former BLA regime, including the *Shimco* framework, notwithstanding that the dispute or lien registration may occur after the CPPA's effective date.

The Claim of Lien | The Lienable Interest

Dan W. Melnick

604 891 7718 | dmelnick@cwilson.com

The claim of lien: what it is, what it does, why it matters

- **The purpose of the BLA** is to ensure payment to contractors, suppliers, consultants and workers for their labour, materials and services which are an improvement to the owner's property.
- **The lien creates an *in rem* claim for an interest in land.**
 - Including where there is no privity of contract between the owner and the lien claimant.
 - Separate from contractual claim for non-payment, with different remedies.
- **Once on title, the lien will typically cause financing problems for the owner.**
 - The BLA creates mechanisms for discharging the claim of lien in exchange for cash security or a lien bond.

Core Features of the Builders Lien Act

- **Lien against land**
 - A claimant can file a lien for work performed and materials supplied in connection with an improvement to land, even if the claimant has no contract with the owner
 - Lien can be satisfied from court-ordered sale of lands but rare as payment disputes usually resolved before sale of land
 - Must file claim of lien in prescribed form in the land title office within strict time limit
 - To enforce lien the claimant must commence an action in Supreme Court and file a certificate of pending litigation in one year
- **Holdback**
- **Statutory trust**

Who can file a lien?

BLA, s. 2.

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

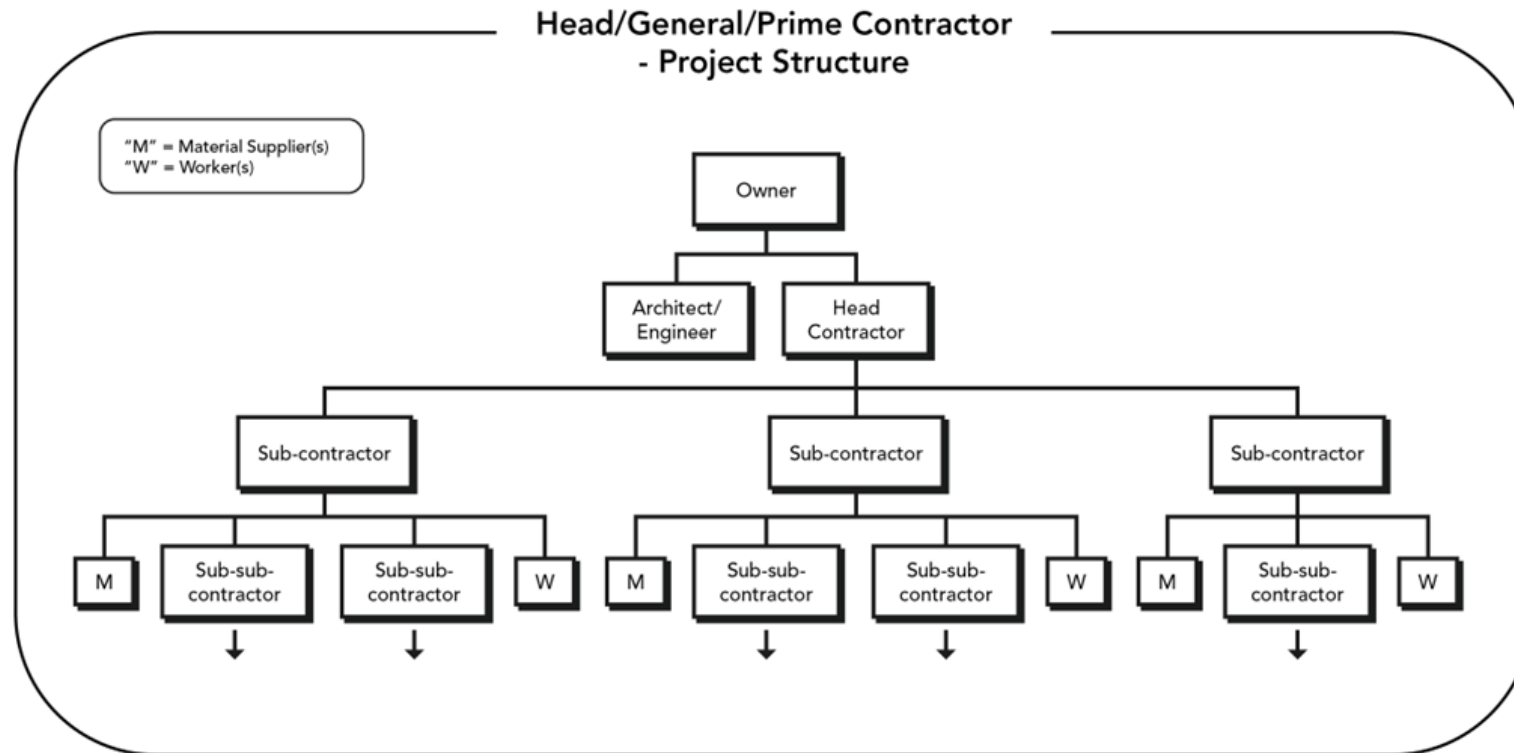
has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
- (e) the improvement itself;
- (f) the land in, on or under which the improvement is located;
- (g) the material delivered to or placed on the land.


(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

What is a claim of lien?

- Example of a typical contractual chain in construction projects: Head/General/Prime Contractor Project Structure



What does a lien look like and how is it filed?



Builders Lien Act
Claim of Lien
Province of British Columbia

Application

Dan W. Melnick
900 - 885 W. Georgia Street
Vancouver BC V6C 3H1
6046875700

I, John Doe of 123 Main Street, Vancouver BC V6C 3H1, agent of the lien claimant state that:

1. ABC Corporation, Inc No BC123456
of 123 Main Street, Vancouver BC V6C 3H1 claims a lien against the following land:

PID/Plan Number	Legal Description
000-000-000	LOT 1 DISTRICT LOT 1 GROUP 1 NEW WESTMINSTER DISTRICT PLAN LMP12345

2. A general description of the work done or material supplied, or to be done or supplied, or both, is as follows:
Supply of materials and labour on construction site

3. The person who engaged the lien claimant, or to whom the lien claimant supplied material, and who is or will become indebted to the lien claimant is:
Wood Working and Carpentry Ltd.

4. The sum of \$10,000.00 is or will become due and owing to ABC Corporation on 2024-01-30

5. The lien claimant's address for service is:
Clark Wilson LLP 900 - 885 W. Georgia Street, Vancouver BC V6C 3H1

Signature

Date (YYYY-MM-DD)

I,

Note: Section 45 of the Builders Lien Act provides as follows:
45 (1) A person who knowingly files or causes an agent to file claim of lien containing a false statement commits an offence.
(2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of \$2,000 and the amount by which the stated claim exceeds the actual claim.

Electronic Signature

Your electronic signature is a representation that you are a designate authorized to certify this document under section 168.4 of the Land Title Act RSBC 1996 c.250, that you certify this document under section 168.41(4) of the act, and that an execution copy, or a true copy of that execution copy, is in your possession.

Daniel Melnick
F3RL6N

Digitally signed by
Daniel Melnick F3RL6N
Date: 2024-01-30
08:40:52 -08:00

Key components of the Form 5 Lien

PART #	DESCRIPTION
Part 1:	<ul style="list-style-type: none">• the lien claimant's name and address; and,• the legal description of the lands to be liened.
Part 2:	<ul style="list-style-type: none">• the general description of the work of materials supplied.
Part 3:	<ul style="list-style-type: none">• the person who engaged the lien claimant, or who is indebted to the lien claimant.
Part 4:	<ul style="list-style-type: none">• the amount owing and when it is due.
Part 5:	<ul style="list-style-type: none">• the lien claimant's address for service.

The Lienable Interest



What Lands can be Liened?

Lienable Lands	Non-lienable Lands
<ul style="list-style-type: none">• Lands registered in the land title office or gold commissioners office	<ul style="list-style-type: none">• Lands that are NOT registered in the land title office or gold commissioners office
<ul style="list-style-type: none">• Provincial crown lands	<ul style="list-style-type: none">• Federal lands (including Indigenous reserve lands)
<ul style="list-style-type: none">• Municipal lands	<ul style="list-style-type: none">• Highways / certain ferry properties
<ul style="list-style-type: none">• Schools and other public facilities	<ul style="list-style-type: none">• Improvements by the Minister of Forests and forest service roads

Special Categories of Lands and Lienable Interests

- A lien can be filed against registered leasehold interests and easements
- In a phased strata plan, a lien can only be filed against the strata lots in the phase in which the material was supplied or the work was done
- Where an improvement spans several properties, a lien can be filed on each of those properties for the full amount of the lien
- A lien can be filed on mining properties held under the *Mineral Tenure Act* but many minerals excluded (coal, petroleum, natural gas)
- Mineral Titles Branch maintains a registry of petroleum and natural gas interests and will accept liens but on an information basis only. Such liens can not be enforced to sell the property.

Special Categories of Lands and Lienable Interests

- Indigenous Lands
 - In rare circumstances you can place a lien on Indigenous lands where:
 - Labour or materials were provided to lands covered by a leasehold interest
 - Fee simple lands owned by an Indigenous person or an Indian Band under the *Indian Act*.

What land can be liened?

- Can you lien lands where the owner did not request the work?
 - Answer: YES.
- S. 3 of the BLA states:
 - (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

What land can be Liened?

- However, s. 3(2) of the BLA states:
 - (2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office for leasehold property.
- Notice of Interest
 - placed on title by owner
 - Provides protection from liens for improvements made after the notice is filed (*unless* the owner approved the work in question).

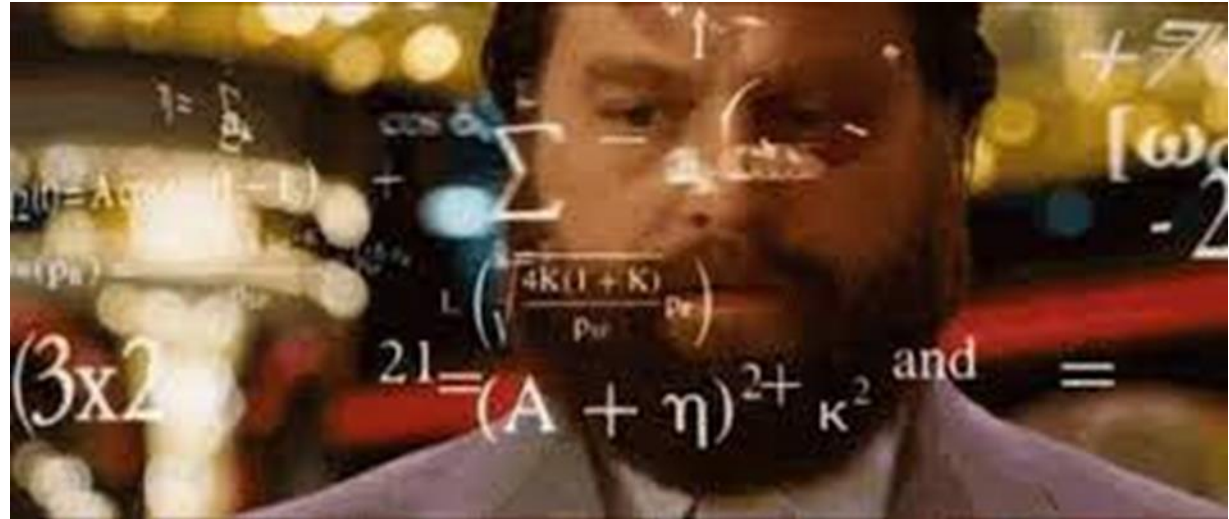
Quantum of Liens

Carter Moe

604 643 3126 | cmoe@cwilson.com

Quantum of Liens

- Price
- Interest
- Damages
- Improper liens



Price

Act, s. 2(1)

Lien for work and material

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement, ...

*has a lien for the **price of the work and material, to the extent that the price remains unpaid** ...*

Price

Disputed amounts due and owing

- The amount in dispute – unpaid invoices, holdback, extras, bond premiums, taxes, etc.
- How much is ***due when you lien?***
- Work actually done = is or will become due

No fixed price

- Contract terms?
- Calculate based on value of the work / materials provided (i.e., *quantum meruit*)
- Cost-plus contract, verbal contract, extras performed under a change directive, etc.

Interest

- Interest not allowed in calculating lien
- Claim against a *thing (in rem)* = improvement, land, material delivered or incorporated
- Interest is allowed for other claims that accompany the lien
- Claim against a *person (in personam)* = breach of trust or breach of contract

Damages

- Damages in addition to the unpaid price of the work or material are not included in a lien
- S. 2(1) ... *a contractor, subcontractor, or worker... has a lien for the **price** of the work and material to the extent that price remains unpaid...*
- Price is *not* lost profits, breach of contract per se, tort damages, etc.
- Damages that are connected to the price can be included
- Price *may* include delay if it:
 - represents the price of work or material provided, or
 - is closely connected to the price.
- Overtime: extra time worked on top of normal hours.

Improper Liens

- Precision is key = bad math will cost you

Liability for wrongful filing

19 *A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.*

Offence

45 *(1) A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence.*

(2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of \$2,000 and the amount by which the stated claim exceeds actual claim.

Improper Liens

- Abuse of process can result in:
 - cancellation of the lien, and
 - claim for damages
- Wholly unsupported claim and improper ulterior motive
- In practice: inflated liens = reduced by amount justified
- Future: harsher treatment of inflated liens?
- *Darwin Construction (BC) Ltd. v PC Urban Glenaire Holdings Ltd.*, 2023 BCCA 436
 - \$3M+ lien cancelled = no evidence to support the *right* to lien or the *quantum*

Time Limits For Filing A Lien

Kim Do

604 643 3901 | kdo@cwilson.com

Triggering Events

- S. 20 of the BLA → Must file the claim of lien no later than 45 days after the earliest date of the following triggering events:
 - Issuance of certificate of completion
 - Completion, abandonment or termination of the head contract
 - Completion or abandonment of the improvement
- Also transfer of strata lot title from owner-developer to purchaser
- Failure to file in time = claim of lien extinguished (s. 22 of the BLA)

(1) Issuance of Certificate of Completion

- Certificate of Completion issued by the “payment certifier”
- Who is the payment certifier?
 - Look to the BLA which points to the contract → An architect, engineer or any other person identified in the contract or subcontract as the person responsible for payment certification
 - Contract will set out who is payment certifier. E.g., consultant in CCDC 2
- No payment certifier identified? Then:
 - Owner acts as payment certifier alone with respect to amounts due to contractor; or
 - Owner and head contractor acts together as payment certifier with respect to amounts due to subcontractor

(1) Certificate of Completion Cont'd

- Certificate of Completion cannot be issued unilaterally, MUST be issued at request of contractor or subcontractor
- S. 7 of the *BLA* requires that, on request of a contractor or subcontractor, the Payment Certifier must determine whether the contract/subcontract is complete. If so, the Payment Certifier must issue a **certificate of completion** within 10 days.
 - If a certificate of completion is issued, **notice** of the certificate must be posted on the project site within 7 days.
 - S. 20(1) of the *BLA* provides that a claimant must file a claim of lien no later than **45 days** after the certificate of completion is issued.
- *Clough Pacific Joint Venture and PPM Civil Contractors, ULC v AECOM Canada Limited*, 2025 BCSC 164

(1) Certificate of Completion Cont'd

- Follow the prescribed form rather than drafting own certificate to avoid issues down the road that it was not properly issued or defective (or make sure has the same information in prescribed form)
- NOTE that issuing the certificate of completion does not restart the time limits to file lien if has already been started by another triggering event

Prescribed Form – Certificate of Completion

Form 3

Builders Lien Act

(Section 7 (10))

Certificate of Completion

I Gomez Addams, of 123 Shaughnessy Heights, Vancouver, British Columbia, certify that, for the purposes of the *Builders Lien Act*, the following contract or subcontract was completed on October 31, 2023.

Street address or other description of the land affected by the improvement:

PID: 000-123-456 Lot 1, District Lot 2, New Westminster District, Plan 12345

Brief description of the improvement:

Supply and materials for roofing and installation of smiling gargoyles.

Brief description of the contract or subcontract, including the date of the contract and the names of the parties to it:

Contract Between : Shady Acres Contracting and Gomez Addams
Contract Date: October 31, 2022

(1) Certificate of Completion Cont'd

- Once certificate of completion issued, then within 7 days, payment certifier must:
 - Deliver a copy to (1) owner (2) head contractor (if applicable) and (3) contractor/subcontractor that requested certificate
- Payment certifier must then produce a Notice of Certification of Completion and deliver to those that requested the certificate of completion
- Then payment certifier must post the Notice in a prominent place on the improvement
- Payment certifier may be liable for damages

Prescribed Form - Notice of Certification of Completion

Form 2

Builders Lien Act

(Section 7 (4))

Notice of Certification of Completion

NOTICE: Re Haunted Mansion – 123 Shaughnessy Heights, Vancouver, BC

Take notice that on October 31, 2023 a certificate of completion, or court order to that effect, was issued with respect to a contract (or subcontract) between

Gomez Addams

and

Shady Acres Contracting Ltd.

in connection with an improvement on land described as follows:

PID: 000-123-456 Lot 1, District Lot 2, New Westminster District, Plan 12345

for the provision of:

Supply and materials for roofing and installation of smiling gargoyles.

All persons entitled to claim a lien under the *Builders Lien Act* and who performed work or supplied material in connection with or under the contract are warned that the time to file a claim of lien may be abridged and section 20 of the Act should be consulted.

(2) “Completion” of the Head Contract

- Where no certificate of completion (or defective for failure to adhere) then look to the date of the (1) completion (2) abandonment or (3) termination of the head contract
- To determine completion of head contract, look again to 3-2-1 formula – occurs when “substantially performed”:
 - S. 1(2) → For the purposes of the Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
 - a. 3% of the first \$500 000 of the contract price,
 - b. 2% of the next \$500 000 of the contract price, and
 - c. 1% of the balance of the contract price.

(2) “Abandonment” of the Head Contract

- Abandonment of the head contract -> deemed to have occurred if no work takes place with respect to the contract or improvement for 30 days
- Some exceptions (strike, lockout, sickness, etc.):
 - S. 1(5) of the BLA →
 - For the purposes of the Act, 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.
- Presumption can be rebutted if evidence the owner and contractor had a real intention to complete

(2) “Termination” of the Head Contract

- “Termination” is not defined in the BLA
 - *Frontier Kemper Constructors, Inc. v. Rio Tinto Alcan Inc.*, 2022 BCSC 868
- So to determine what is “termination”, look to the terms of the contract surrounding same
- Termination could be in writing
- Termination can be inferred from the parties’ course of dealings
- Note it is only termination of the head contract that triggers deadline NOT termination of any subcontractors, even if majority of work has been subcontracted

(3) “Completion” of the Improvement

- Third triggering event → where no certificate of completion and no head contract, look to the date improvement is completed or abandoned
- When completed? Improvement is “completed” when improvement is, or a substantial part of it, is in use or ready for use
 - Seen in standard form contracts, e.g., CCA 1

Section 1 ...(3) For the purposes of this Act, 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.

(3) “Abandonment” of the Improvement

- Abandonment of the improvement -> same as abandonment of head contract
 - S. 1(5) of the BLA → For the purposes of the Act, 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.**
- Look to abandonment by the owner

(4) Strata Lots

- Separate triggering event to consider with respect to strata lots
- Applies when an owner-developer conveys a strata lot to a purchaser
- S. 88(1) of the *Strata Property Act* → Claim of lien under the BLA must be filed before the earlier date of:
 - The date on which the time for filing a claim of lien under the BLA expires
 - The date which is 45 days after the date the strata lot is conveyed to the purchaser

Holdbacks | Trust Monies

Carter Moe

604 643 3126 | cmoe@cwilson.com

Holdbacks

- Purpose
- Lien against the holdback
- Practical consequences



What is a Holdback?

Section 4 of the BLA

Person paying an account (to a contractor or subcontractor) must hold back at least 10% of the greater of:

(a) the value of the work or material as they are actually provided under the contract or subcontract; and

(b) the amount of any payment made on account of the contract or subcontract price.

- Payor is withholding 10% of the amount payable to payee

Purpose of the Holdback

- Holdback charged with payment of liens and held in trust for the contractor
- Owner's interest = discharge of liens
- Contractor's interest = monies held in trust
- Holdback mandatory regardless of contract terms
- S. 5: *“establish at a savings institution a holdback account for each contract under which a lien may arise”*

Lien against the Holdback – *Shimco* Lien

- Lien against the holdback monies – *in rem*
- *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, aff'd 2003 BCCA 193
- Distinct from lien against the lands
- Impact on lien filing period = may extend past 45-day clock
- Holdback funds must exist to lien
- Incoming CPPA will abolish the *Shimco* lien – however, *Shimco* lien principles continue to apply to pre-CPPA contracts.

Trust Monies

- What are trust monies?
- Consequences for breach of trust



What Are Trust Monies?

- Money should flow in an orderly and timely fashion down the contract chain
- S. 10 creates a trust on money payable under a contract or subcontract:

10 *(1) 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.*

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

Consequences for Breach of Trust

- The party holding trust funds is the “trustee”
- Section 11(3) of the BLA – mechanism for a direct claim against the breaching company AND director/officer
- Director/officer liability if they:
 - take it upon themselves to possess and administer the trust property and commit a breach of trust in doing so (constructive trust);
 - knowingly assist in the breach by the trustee; or
 - knowingly receive or apply trust property to their own benefit.

Lien Enforcement

Kim Do

604 643 3901 | kdo@cwilson.com

Limitation Period – 1 year

- S. 33(1) → After filing claim of lien, lien claimant must do the following within 1 year:
 - Commence an action in BC Supreme Court (not small claims) of the lien against title; and
 - Register a certificate of pending litigation against title to the lands
 - Certificate of pending litigation is not required if lien has been discharged or secured pursuant to s. 23 or 24 of the BLA
- Failure to enforce lien = lien extinguished

21 Days → Notice to Commence an Action

- S. 33(2) of the BLA → An owner may speed up the 1 year limitation period by delivering to a lien claimant a Notice to Commence an Action to enforce the lien claimant at the address for service found on the claim of lien
 - Beware; if the notice is mailed, it is deemed to be served on the 8th day after depositing with Canada Post (s. 33(4))
- If properly served, the lien claimant must commence their lawsuit to enforce the claim of lien within 21 days of service (not within 1 year).
- Failure to commence action = lien extinguished, so act QUICKLY
- Great mechanism for owners to deal with liens with little merit quickly without waiting 1 year to see if lien claimant otherwise enforces claim of lien

Where to File Action

- Lawsuit must be commenced in jurisdiction of the court registry where the land of the improvement is located
- BC Supreme Court, not small claims
- S. 27 of the BLA
- S. 21 of the *Law and Equity Act* → Every foreclosure proceeding must be commenced in the jurisdiction of the court registry where the land is located.
 - New Port Coquitlam Registry

Naming Parties in Action

- In the lawsuit, lien claimant must identify and name the proper parties including:
 - Party that the lien claimant contracted with to perform the work on the lands
 - Owners
 - Necessary parties, even if there is no contractual relationship with lien claimant because lien is an *in rem* claim
 - *Paramount Drilling and Blasting Ltd v North Pacific Roadbuilders Ltd.*, 2004 BCSC 622
 - *Primex Industries v The Owners Strata Plan LMS 1751*, 2016 BCSC 2092
 - If lien is against strata lots, name all individual owners whose interest are subject to the claim of lien

Discharge of Liens

Kim Do

604 643 3901 | kdo@cwilson.com

S. 24 – Security

- Can be used for disputed claims of lien
- Can be done by way of application, consent order, letter agreement
- Section 24 of the BLA allows a party to apply to court to cancel a claim of lien where the lien claim is in dispute, by posting sufficient security for the lien.
 - Usually the full amount of the lien claim but can be less
 - Security can be posted in form of:
 - Cash
 - Lien bond
 - Letter of credit
- Security is paid into court or lawyers trust account and stands in place of land
- Applicant is at liberty to later dispute the lien claimants' entitlement to lien and payment (lien claimant must prove its claim to obtain monies)
- Note prompt payment legislation may create double security risk

S. 23 – Payment Into Court

- Section 23 of the *BLA* allows a party to remove a lien and secure a discharge of the owner's liability for the lien, where the party did not contract with the lien claimant, by paying into court the lesser of:
 - the **total amount of the claim** or claims filed; or
 - the amount owing by the payor to the person engaged by the payor, if it is at least equal to the **required holdback**.
 - Section 4 sets out the required holdback as follows: the person primarily liable on each contract must retain a **holdback** equal to 10% of the **greater** of:
 - the **value** of work or materials **actually provided** under the contract; or
 - the amount of any **payment made** on account of the contract
- Owner can only do this with subcontractor claims, not its own contractors' claims
- Once paid, lien then discharged from title and liability for quantum of lien also discharged (if sub still owed money, can still pursue its claim against person it engaged but owner no longer has liability)
- Make sure evidentiary record is sufficient (*Metro-Can Construction (PE) Ltd. v. Escobar et al.*, 2022 BCSC 1042).
- Petitioner should provide clear, uncontroverted evidence of the amount owing by the payor to the person engaged by the payor and the required holdback. Any discrepancy or dispute on this point may result in a finding that the issue be determined at trial. (*Savory 2588 Developments Ltd. v HQM Contracting Ltd.*, 2024 BCSC 1733)
- Double payment? *Lonsdale Quay Market Corporation v. Klondike Contracting Corporation*, 2025 BCCA 461

S. 25 – Removing Invalid Lien

- Applicant can apply to the court to remove the lien on the basis that it is invalid, including:
 - Lien was filed out of time; or
 - Lien is vexatious, frivolous or an abuse of process
 - e.g., filed against wrong land, for amounts not lienable, or amounts grossly inflated or not properly due and owing

Strata Lots

- Purchaser of a strata lot can make an application to discharge a lien on title and release the purchaser from liability in return for payment into court or the lesser of:
 - Total amount of the liens; AND
 - Full amount of the lien holdback retained from the purchase price of 7% of the purchase price
- Strata lot owner may also discharge a lien by making payment of the strata lot's share of the amount secured by the lien (Strata Property Act and regulations)
 - There is a chart and process to calculate this as to what percentage the owner would have to pay

Strict Compliance with the BLA

Dan W. Melnick

604 891 7718 | dmelnick@cwilson.com

Strict Compliance

- The BLA requires strict compliance with the requirements of the BLA.
- A failure to comply with the requirements of the BLA such as the prescribed forms or deadlines can be fatal to a claim of lien.
- S. 22 of the BLA provides:
 - A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this BLA is extinguished.

Strict Compliance

S. 25

(1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that:

- (a) a lien is extinguished under section 22 or 33; or,
- (b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,
- (c) an action to enforce the claim of lien has been discontinued, or
- (d) the claim of lien has been satisfied.

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

- (a) the claim of lien does not relate to the land against which it is filed, or
- (b) the claim of lien is vexatious, frivolous or an abuse of process.

Strict Compliance

Nita Lake Lodge Corp v Compact Systems (2004) Ltd., 2006 BCSC 885

- The lien incorrectly identified the corporation that engaged the claimant
- Named the construction manager, but not the contracting party as the person who engaged the claimant
- The construction manager had no contractual relationship with the claimant
- The Court struck the claim of lien, holding that it was invalid for failing to comply with the strict requirements of the BLA.

Strict Compliance

Nita Lake Lodge Corp v Compact Systems (2004) Ltd., 2006 BCSC 885

- It is settled law that the BLA must be interpreted strictly because it creates a preference in favour of one creditor over another.
- The lien is a creature of statute, and the court has no discretion to depart from the statutory requirements.

Strict Compliance

AW Kennedy Construction v Wan, 2021 BCCA 175

- Contractor filed a claim of lien, but failed to complete section 1 as agent of lien claimant.
- Based on *Nita Lake Lodge*, should be invalid?

CLAIM OF LIEN

1. Andrew Kennedy of A.W. Kennedy Construction INC [claimant] of
288 1st Street North Vancouver BC [address], British Columbia,

[if claim is made by an agent, insert here "agent of the lien claimant"] state that:

1. _____ [claimant] of
_____ [address], British Columbia,

claims a lien against the following land:

Lot B Block 13 DL 616 PLAN EPP55678
029-756-308

[Insert legal description here or, if a lien is claimed under section 16 against more than one parcel of land, insert the legal description of all parcels of land against which the lien is claimed. If insufficient space is provided, attach a schedule. If the claim of lien is to be filed in the gold commissioner's office, insert the name of the mineral title, its tenure number and the name of the mining division.]

Strict Compliance

***AW Kennedy Construction v Wan*, 2021 BCCA 175**

- Court of Appeal Decision:
 - Relied on s. 28(1) of the *Interpretation Act*:

28(1) Where a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead to not invalidate the form used
 - The Form 5 Lien is a prescribed form under the BLA so s. 28 of the *Interpretation Act* applies.

Strict Compliance

AW Kennedy Construction v Wan, 2021 BCCA 175

Decision:

- an otherwise defective claim of lien is valid, as long as the defect:
 - doesn't affect the substance of the claim of lien;
 - is not calculated to mislead a party; and,
 - is immaterial.
- The defect in the claimant's lien did not affect its substance and was not calculated to mislead, and was held to be valid.

Strict Compliance Summary

- The lien and related rights are purely statutory in nature.
- As a result, the ability of the courts to intervene and remedy errors in a lien is very limited.
- The Form 5 Lien must be completed accurately
- **“Strict compliance”** requirement does not impose a standard of perfection
 - A lien will not be invalid because of inconsequential defects not affecting the substance of the lien which are not calculated to mislead
 - A lien will be invalid if there are substantive defects or errors, including the wrong claimant named, where the claimant doesn’t exist, where the wrong debtor is named, or the date the amount owing is not filled in.
- The Court cannot fix or forgive missed filing deadlines.
- **Takeaway:** be careful, get legal advice early, and have your documents and lien details ready.

Concluding Remarks

1. **Statutory interaction:** The CPPA imposes mandatory payment timelines and adjudication, while the BLA continues to preserve lien rights if payment is not made.
2. **Double security risk:** Interim adjudication payments or security under the CPPA may coexist with lien security for the same amounts, creating potential double security.
3. **Interim fund reallocation:** Adjudication shifts cash flow on an interim basis, subject to later adjustment by a court or arbitrator.
4. **Record keeping:** Ensure record keeping is pristine and kept up to date – adjudication happens quick.

QUESTIONS?



Dan Melnick

Partner

604 891 7718

dmelnick@cwilson.com



Carter Moe, P.Eng.

Associate

604 643 3126

cmoe@cwilson.com



Kim Do

Associate

604 643 3901

kdo@cwilson.com

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