

BUILDEX VANCOUVER

Trust Act

10 things contractors should know about trusts

The primary objective of the Builders Lien Act is to ensure that those providing work or materials on a construction project receive the money owed to them.

The act accomplishes this goal with the use of three mechanisms: the lien, the holdback and the trust.

Although many people in the construction industry have encountered the first two, the trust is an often overlooked remedy that can be particularly effective for subcontractors, workers and material suppliers.

The following are 10 things you should know about the act's trust provisions:

- What is a trust? A trust occurs where money or other assets are held and managed by one person (the trustee) for the benefit of another (the beneficiary).

The act provides that any money received by a contractor from an owner is "impressed with a trust" in favour of all those below in the contractual chain. Others

get paid first. Being "impressed with a trust"

means that subcontractors, workers and material suppliers must all be paid before the head contractor.

Until then, a head contractor cannot use the trust money for a purpose unrelated to that construction project.

Once those below are paid in full, the trust dissolves and the contractor is entitled to the remainder.

- What is an "improper use"? Trust money cannot be used for an improper purpose.

An improper purpose is one that is not associated

with the construction project and includes a contractor's general overhead costs, such as corporate insurance or telephone costs.

- Advantage over Liens: Project participants who do not qualify for liens may still seek a remedy under the trust provisions.

Unlike a lien, the sale of the property does not affect a trust.

The trust remedy is focused on the use of funds related to the construction project.

It is not connected to the land.

That makes the trust a useful remedy in situations where the requirements to assert a land lien cannot be met.

For example, liens cannot be applied to projects on federal land, but a breach of trust action can still be brought.

- Protection follows the money: Since the trust is connected to the construction project money, the laws protecting the trust apply to whoever is holding the money.

That means that trust money can be traced into the hands of a bank or the directors of a contracting company if they take the money for their own use.

The courts have even followed trust funds into assets purchased with that money, such as the house of a contracting company's director.

- Trust money may be protected in bankruptcy: Trust money is not "owned" by the trustee.

Thus, if a contractor goes bankrupt, the trust funds do not form part of the assets which are subject to division among the bankrupt's secured and unsecured creditors.

Beneficiaries may there-

fore still get paid out of those trust funds.

- Dividing up the money: Trust beneficiaries are generally presumed to share in the trust on a pro rata basis.

Special Exemptions: The trust does not apply to money received by an architect, engineer or material supplier.

A person providing work or materials for any of these persons cannot bring an action for a trust remedy.

- Penalties: The contractor or subcontractor who misappropriates trust money, or individuals who participate in the breach of trust, may be liable to repay the money owed plus a fine of up to \$10,000 or imprisonment for a maximum of two years, or both.

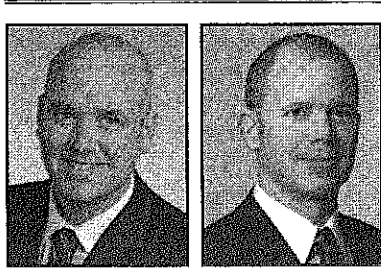
- Don't Wait: If the owner used a head contractor, an action for breach of trust must be commenced within one year after the head contract is completed, abandoned or terminated.

If no head contractor was used, the action must be brought within one year after the completion or abandonment of the improvement.

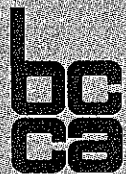
The court will not extend these strict timelines so it is important to consult a lawyer as soon as you suspect a diversion of money by any parties above you in the construction pyramid.

Norm Streu is chief operating officer of the LMS Reinforcing Steel Group and former chair of the Vancouver Regional Construction Association. Chris Hirst is a partner and the leader of the Construction & Engineering Group, Alexander Holburn Beaudin & Lang LLP.

They will lead a Buildex Vancouver seminar on Understanding Builder Liens on April 22.

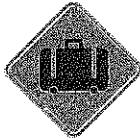


Legal Reinforcement Norm Streu and Chris Hirst



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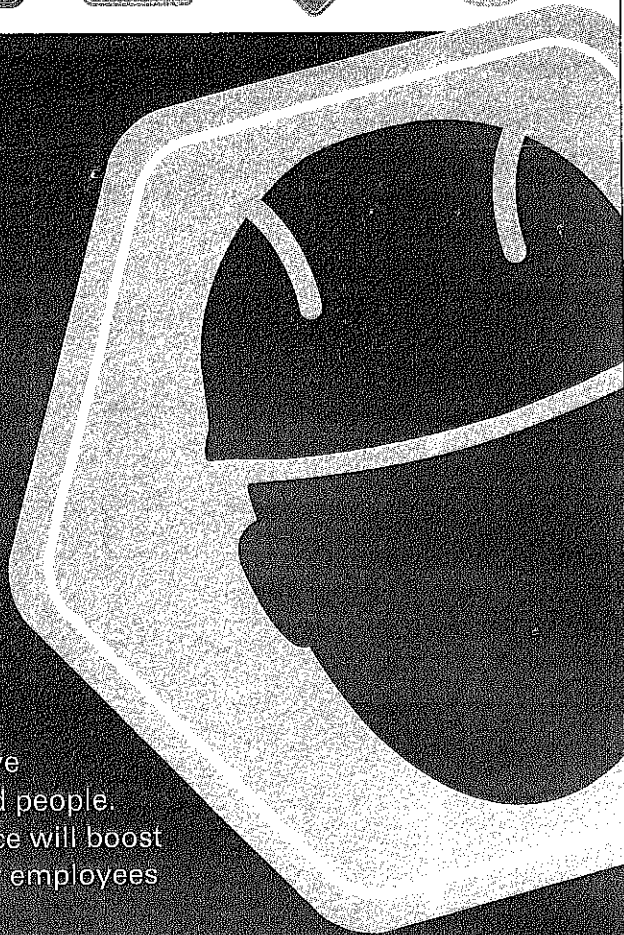
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Buildex Tips and Advice Show up prepared

Make sure you've got the gear on hand — a rolling suitcase, briefcase or carry bag — in which you can carry and organize all the material you'll be collecting.

Trade shows are all about networking, so bring something to hold and organize all the business cards you'll be collecting.

As for the ones you'll be handing out, bring more than you think you need — you don't want to run out.

When it comes to promotional and other material at the show, try and put a limit on it.

Experience suggests that you'll be throwing out much of what's handed out by exhibitors, so accept it selectively.

Block out time for appointments with important clients and prospects, but leave yourself time for checking out new products that interest you or for meeting with a new contact in your industry.



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