

THE Misunderstood Builders Lien

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The subject of Builders Liens is much discussed, but little understood. Industry participants with considerable experience often still misunderstand many of the central rights and remedies provided by the legislation.

The following is intended as a primer (or reminder) of some of the fundamental concepts of the *Builders Lien Act*, particularly as those concepts pertain to engineers.

What is a Lien?

A lien is a simple and cost effective tool for securing the recovery of unpaid contract amounts owed to construction industry participants.

A lien is intended to give those who have assisted in the improvement of land an interest in that land or the improvement until such time as they are paid. Section 2 of the *Builders Lien Act* provides a lien for contractors, subcontractors, and workers for the price of the work and material to the extent that the price remains unpaid, on the owner's interest in the land, the improvement, and the material itself placed on the land.

A lien holder obtains a right to have a specific interest in the land sold and to be paid from the proceeds of such sale. In the absence of that secured claim against the land and improvement, a lien claimant would be left with nothing more than its contractual claims.

Another type of lien, peculiar to British Columbia, is the holdback lien (also known as a Shimco Lien) which gives the lien holder a right to be paid from any holdback funds held on the project.

Can Engineers File Liens?

At one time, the lien rights of consultants and other design professionals were extremely limited. That changed in 1998 when the old *Builders Lien Act* was replaced with the current Act. Today, a consultant who can satisfy the following criteria may file a lien:

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

The definitions of "contractor" and "subcontractor" found in the *Act* clearly indicate that a consultant who is engaged by an owner is a contractor and that a consultant

engaged by a general contractor, or by someone who is not an owner, is a subcontractor.

Significantly however, a sub-consultant has no lien rights. Accordingly, if a consultant has been engaged by another engineer or architect to provide services with respect to a project, that sub-consultant is not entitled to a lien.

What Can be Liened?

"Land" and "improvements" are central concepts in the *Act* and generally speaking any land or any interest in land (eg, a leasehold interest) that is registered at the Land Titles Office can be liened. In addition, holdback funds can be liened.

Land and improvements that cannot be liened include federal land and federal undertakings as well as highways.

When Must a Lien be Filed?

The key time period to keep in mind with respect to filing a land lien is 45 days. A lien must be filed prior to 45 days from the:

1. issuance of a certificate of completion for the contract claimed under;
2. completion, termination, or abandonment of the head contract, if there is a head contract;
3. completion or abandonment of the improvement, if there is no head contract; or
4. the first sale or occupancy of a strata lot.

A failure to file a land lien within the requisite 45 day period of time will result in the absolute cancellation of that lien.

There is no equivalent time period for holdback liens. However, the holdback must still be in existence for the holdback lien to have any effect. Once the holdback is paid, generally 55 days after completion, your ability to file a holdback lien will have ended.

How to File a Lien

To make a claim of lien against the land a lien claimant must complete a simple document called a "Claim of

Lien" which then must be filed at the Land Title Office. It is important to note that when completing this document you must be absolutely precise with respect to the name of the owner, the contracting parties, and the description of the title to the land that you intend to lien, or the lien may be found to be invalid.

There are no formal requirements with respect to making a lien against the holdback. The most common method of making such a claim is to notify the owner in writing of the claim of lien against the holdback and/or commencing an action with respect to the holdback.

So You Have a Lien: How Do You Get Paid?

A lien must be proved in the Supreme Court of British Columbia. Accordingly, to enforce the lien, an action must be commenced. As with the lien itself there are time limits here that a lien claimant must be aware of. A lien action must be commenced within a year of filing the lien or within 21 days of a demand being made by the owner of the lands that a lien claimant commence its action.

To protect your claim, a lien claimant must also file a document known as Certificate of Pending Litigation (CPL) with the Land Title Office.

A failure to commence your action within time or to file a CPL will result in the absolute cancellation of the land lien.

How to Improve Your Chances of Getting Paid in the First Place

Of course, it is far preferable to simply be paid for your work in the first place rather than worry about the intricacies of the *Lien Act* and any associated litigation costs. While sometimes you couldn't have done anything differently, you should always make sure that you have a clear written contract, that you bill regularly in accordance with that contract, and that you stay on top of your accounts receivable. While your work is still in progress, you obviously have more ability to leverage payment from your client than when you are complete and the client has your Schedule C or equivalent in hand. ☒

Norm Streu and Chris Hirst are partners in the Construction & Engineering Group of Alexander Holburn Beaudin & Lang LLP. Norm is the past Chair of the Vancouver Regional Construction Association. This article was prepared with the assistance of Kelsey McDermott, articled student. If you have any questions about liens, or other construction law related issues, please feel free to call Norm Streu or Chris Hirst at (604) 484-1700.