

When a Lien Won't Help

BY REBECCA CLEARY



Contractors, trades, and workers commonly use the BC Builders Lien Act to protect and secure payment of their work. However, there are certain circumstances when filing a lien won't help secure payment. It is important to know when to file a lien, and when filing a lien is a wasted effort. In this article, we briefly review some of the exclusions and exceptions in the BC Builder's Lien Act which indicate when a claim of lien should not be filed and in those circumstances, what other options are available to you.

Exclusions for Certain Types of Land

The BC Builders Lien Act applies only to land located in British Columbia. If you are working on a project located outside British Columbia, you cannot file a lien in British Columbia. Each province has its own builders lien legislation and you will have to follow the legislation of the province where the land is located. When working on a project outside of British Columbia, never assume that the same time limits apply and if you are unfamiliar with that province's lien legislation, obtain legal advice.

There are certain types of lands located in British Columbia which cannot be liened. Federal land and federal undertakings that have extra-provincial importance, which usually includes federal government buildings and international airports, cannot be liened. The BC Builders Lien Act, as a piece of provincial legislation, cannot regulate federal lands. Aboriginal land, which is subject to federal jurisdiction, falls into this same category and cannot be liened.

The BC Builders Lien Act also prevents liens from being filed against highways (which

includes public streets, roads, trails, bridges, trestles, tunnels, or other "public ways", and any improvements located on them), forest service roads, as defined by the BC Forest Act, and ferry terminals.

Under the Monetary Limit

A claim of lien cannot be filed seeking security for less than \$200.

Missing the Time Limits

If you are outside the deadline to file a claim of lien, you are out of luck. You must file your claim of lien within 45 days of the first of either the date of issuance of a Certificate of Completion, actual completion of the project, abandonment of the project, termination of the contract, or, when the work is being done on a strata lot, 45 days from when the strata lot is conveyed to the purchaser or is first occupied. Each of these "trigger" dates for filing a lien have been extensively interpreted by the courts. If a claim of lien is not filed within the applicable 45 day deadline, then the right to claim a lien is extinguished.

When there is some doubt as to when the clock started running on the 45 day period, it is prudent practice to proceed with filing the claim of lien and to be prepared to quickly remove it if it is later shown that the lien was clearly filed out of time.

Further, if the 45 day period has expired, but there are funds retained in a holdback account, then the contractor should consider making a Shimco lien claim. A Shimco lien is a separate and distinct lien against holdback funds, as outlined by the BC Court of Appeal in *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*,

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2002 BCSC 238, affirmed 2003 BCCA 193. The right of a contractor to claim a Shimco lien is not dependent upon a claim of lien being filed within the applicable time limits.

What To Do When You Cannot Lien

If you cannot file a claim of lien, then there are other options available to you to assist in securing or enforcing payment. If you know from the outset of the project that the BC Builders Lien Act will not apply (for example, the project is on federally owned or Aboriginal lands), then ensure that the owner is required to obtain a labour and materials payment bond or negotiate that the owner be required to maintain a holdback account which will provide some measure of security for unpaid accounts.

If you discover at the end of the project that you have missed the deadline to file a claim of lien, determine whether there are holdback funds, and if so, then provide notice to the holder of those funds that you are asserting a Shimco lien.

Finally, if the unpaid amounts justify the time and expense, you may commence an action to sue the owner and/or general contractor for breach of contract, debt, and unjust enrichment. Unlike an action to enforce a builders lien, which must be brought in Supreme Court, a debt action may be brought in Small Claims Court if the amount at issue is less than \$25,000 or you are prepared to reduce the amount of your claim to \$25,000. Claims for more than \$25,000 must be brought in Supreme Court.

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