



How BC's Builders Lien Act Applies to Architects and Engineers

The purpose of this summary is to give a general idea of the rights and liabilities which flow from the most important provisions in the Act. This summary is not intended to be relied on as a substitute for the Act, which in many areas is complex, ambiguous, and not conducive to summarization. Do not rely on this summary: refer to the Act.

Architects & Engineers qualifying as Contractors:

If you have been engaged directly by an owner (or by an owner's agent) to provide services as an architect or engineer in relation to an improvement you qualify for lien rights as a "contractor" under the *Builders Lien Act*. It is immaterial whether your services were provided before or after construction has begun. However, there must have been a physical "improvement", which is defined as "anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land."

What you can claim:

You may claim a lien against the project land for the price of your services, to the extent that the price remains unpaid, plus your costs of filing and proving the lien.

In calculating the value of your lien, you must credit any project money received against services supplied to that project, regardless of other debts owed by the owner.

Filing your lien claim:

Your lien takes effect, notionally, from the time work begins, whether you file a claim then or later. However to preserve your lien and make it useful you must make a formal claim by filing a prescribed form in the Land Title Office where the project land is registered.

You are entitled to file your lien claim as soon as services have been provided. Your right to file ends 45 days after the earliest of these trigger events:

- Issuance of a certificate of completion for your contract
- Completion/termination/abandonment of the head contract (if there is a head contractor)
- Completion/abandonment of the improvement (if there is no head contractor)

- (If a strata lot is involved) Conveyance from the original owner/developer to the first purchaser

You can join with others and file a joint lien claim.

What might happen to your lien claim after filing:

Owners can remove your claim from title by posting sufficient security (using a “Section 24” court process). This does not affect your lien claim except to transform the form of security for it, and does not affect your obligation to perfect your lien.

How you can turn your lien claim into money:

Your usual right to recover debt or damages directly from the owner is unaffected by the *Builders Lien Act*.

If you are unable to collect your debt directly from the owner, you may be able to collect via your lien claim against the owner’s land.

To perfect your lien claim against the land, you must start a Supreme Court lawsuit (in a registry in the municipality where the land is; if no such registry, then in any registry in same judicial district). You also must file a certificate of pending litigation in the Land Title Office (no CPL is required if the lien has been removed or cancelled by the payment of security into court).

Your lawsuit will likely name as defendants whoever hired you plus every other “owner”— that is, each person who has an interest in the land and who has requested or has prior knowledge of the work (typically, this will include registered owners, and registered and unregistered tenants; special rules apply to “government” owners). Note that owners can exclude liability by filing a notice to that effect in the Land Title Office—but not if they requested the work.

Your lawsuit may claim a charge on the interest of each owner in the improvement; on the improvement itself; on the land; on all of the material delivered to or placed on the land; on any security which may have been posted in respect of your lien; and on any insurance money paid due to the destruction of the property by fire.

Your lawsuit will produce a declaration of lien if you are able to:

- prove the debt; and
- prove that your claim was in time, that you qualify as a claimant, and that you followed the correct procedure.

If the lawsuit succeeds but the lien remains unsatisfied, you may force a sale of the land or any of the interests in the land which your lien has charged (for example, the tenant's leasehold interest), or force payment from the security.

You may claim in contract as well as lien in the same lawsuit.

A money judgment against the owner, but not a sale, is available if the land is owned by the provincial Crown or by a municipality.

Your lien can be lost if:

- The owner or another lien claimant applies to have your lien removed as out-of-time, ineffective, or abusive.
- You fail to commence the required Supreme Court action and file the required certificate of pending litigation in time. Both must be accomplished within one year of filing the lien claim, or within 21 days after service of a notice from the owner or another lien claimant. The 21-day notice is "conclusively deemed to have been served" 8 days after it is dropped in a mailbox, and need not actually come to your attention.
- You start and then discontinue a lien action.
- You fail to appeal a dismissal of your lien action.

Limits to your recovery:

If you filed your claim against stratified property which had been recently sold by the owner-developer, your claim, together with all others filed after conveyance, is normally limited in total to 7% of the purchase price, by operation of the Strata Property Act.

If you have applied a single lien to several parcels of land (for example, a stratified property), the court may apportion the lien amongst the parcels.

If there is no security posted, and the land is sold to satisfy lien claims, your recovery is further limited by the equity left in the land after prior charges. However your lien has priority over all judgments, executions, etc. issued after the first work was done. It will also have priority over mortgages to the extent that mortgage money was advanced after your lien claim was filed. Otherwise, the formula for distributing the proceeds of sale provides for payment to workers and subcontractors (which includes material suppliers) first. You and others engaged by the owner share last.

Your trust obligations:

Your receipt of project monies is not accompanied by any trust obligations.

Your contract rights:

Payments due under your contract are not subject to a statutory holdback.

Any agreement or contractual provision which purports to remove lien rights is void. However you may assign your lien rights to others.

Other rights granted by the Act:

You can demand particulars from mortgagees or unpaid vendors, including particulars of amounts advanced, arrears, etc.

You may apply to have any other person's lien claim cancelled on the basis that it was filed out-of-time, is abusive, etc.

You may issue a 21-day notice requiring another lien claimant to start its lien action or lose its lien.

Your obligations as payment certifier:

If you are the person identified in a construction contract as responsible for payment certification, then that contractor may apply to you for determination of whether that contract has reached the requisite state of "completion" to trigger lien deadlines and holdback period expiry.

"Completion" of a contract for Lien Act purposes means that the work remaining to be done (including deficiency correction) can be carried out at a cost not exceeding:

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

Penalties against you:

If you have been identified in a contract or subcontract as the payment certifier, you may become liable for resultant loss if:

- you fail without reasonable excuse to issue a certificate of completion within 10 days of request; or
- you do not within 7 days after issuing a certificate of completion deliver a copy to the owner, the head contractor (if any), the person at whose request the certificate was issued, and any lien claimants who have made a written request; or

- you fail to post a notice of certification of completion prominently at the site within 7 days of issuance of the certificate; or
- you fail to deliver and post within 7 days any court order granted which declares completion.

If you file a lien claim out of time or against the wrong land or if it otherwise fails to attach, you may be liable to the owner for costs and damages.

If you knowingly file a lien claim containing false statements you may be fined.

Summaries of how the Builders Lien Act applies to Owners, Contractors, Subcontractors, and Material Suppliers are also available from Jenkins Marzban Logan. Contact Andrew Wallace, Scott Booth, Don Thompson, Derek Brindle QC, John Logan or Bob Jenkins QC for further information at 604 681.6564. Revised: 2005.05.05