



## How BC's Builders Lien Act Applies to Contractors

*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.*

### Qualifying as a Contractor:

You qualify for lien rights as a "contractor", and are charged with certain obligations as well, if you are engaged by an owner to provide labour or services, or to supply material, or both, in relation to an improvement. If under contract with an owner you supply equipment with an operator for use in making the improvement, you also qualify as a contractor.

A worker for wages cannot be a contractor. You will be considered to be the "head contractor" if are engaged to do substantially all of the work respecting the improvement, whether or not others are also engaged.

### How your progress payments are affected:

The owner is required to withhold, from every payment to you, a statutory holdback equal to 10% of the greater of:

- the value of your work or material as they are actually provided under the contract; and
- the amount of any payment made on account of the contract price.

If you default, the owner is not entitled to use the statutory holdback for correction of deficiencies or for the payment of damages or for completion of the work until all derivative liens have been dealt with.

### Holdback account:

The owner must pay the statutory holdback retained from payments to you into a holdback account at a savings institution, unless the owner is a government (or crown corporation, or other public body), or the contract price is less than \$100,000, or the owner's mortgagee is retaining a holdback.

If the owner fails to pay into the trust account as required, you can give 10 days notice and then suspend operations until the account is brought up to date.

You are responsible for administering the holdback account jointly with the owner.

Interest on the holdback accrues for the benefit of the owner until the expiry of the holdback period, and afterwards for your benefit.

**Your holdback obligations:**

You are required to withhold, from every payment you make to a subcontractor engaged by you, a statutory holdback equal to 10% of the greater of:

- the value of that subcontractor's work or material as they are actually provided under the subcontract; and
- the amount of any payment made on account of the subcontract price.

The holdback from subcontractors does not need to be deposited into a special holdback account.

The holdback obligation does not apply to your contracts with material suppliers, workers, architects or engineers.

If your subcontractor defaults, you are not entitled to use the statutory holdback for correction of deficiencies or for the payment of damages or for completion of the work until all liens derivative of that subcontractor have been dealt with.

The holdback period for your subcontractors expires 55 days after the earliest of:

- issuance of a certificate of completion with respect to the subcontract in question, or your own contract, or the head contract (if you are not the head contractor);
- completion/abandonment/termination of the head contract (if there is one, and there is no certificate of completion for the head contract); and
- completion/abandonment of the improvement (if there is no head contractor).

**Progressive holdback release:**

If a certificate of completion with respect to any of your subcontracts has been issued, you are entitled to receive from the holdback account the holdback amount applicable to that subcontract. You can obtain this money 55 days after the certificate has been issued, unless the subcontractor or a derivative claimant has filed a lien.

**Holdback period:**

You are entitled to receive the balance of the holdback from the holdback account 55 days after the earliest of:

- issuance of a certificate of completion with respect to your contract; or
- completion/abandonment/termination of your contract (if you are the head contractor, and there is no certificate of completion); or
- completion/abandonment of the improvement (if there is no head contract and no certificate of completion for your contract)

unless you or a derivative claimant has filed a lien, or proceedings are commenced to enforce a lien against the holdback.

**Your lien rights:**

You may claim a lien against the project land for the price of your work and material, 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 work and materials supplied to that project, regardless of other debts owed by the owner.

**Filing your lien claim against the land:**

Your lien takes effect, notionally, from the time work begins or the first material is supplied, 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 work has been performed.

Your right to file ends 45 days after the earliest of these trigger events:

- Issuance of a certificate of completion in respect of your contract
- Completion/abandonment/termination of the head contract (if there is one)
- 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 the owner who 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 or holdback funds.

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.

**Limits to your recovery:**

Whether or not you can collect the full value of your proven lien out of the sale of the owner's land depends on whether there are other lien claims below you in the contractual chain. At each link in the chain, claimants who prove their claims have access only to the greater of:

- the amount actually owing to the person above them; and
- 10% of the payments made to that person, or the value of work/material actually supplied by that person.

Note that counterclaims which are unrelated to the project do not reduce the "amount actually owing", nor do payments made in bad faith or after actual notice that a derivative lien claim has been filed and remains on title.

Lien proceeds must also be shared among claimants, pro rata by class. Subject to the class limits mentioned above, the distribution formula provides for payment of claimants' court costs first, then 6 weeks wages to workers who have proved lien claims, then to subcontractors (which includes material suppliers). The contractor and others engaged by the owner share last.

If there has been a land sale to generate lien proceeds, recovery is further limited by the equity left in the land after prior charges. However liens have priority over all judgments, executions, etc. issued after the first work is done or material is supplied. They also have priority over mortgages to the extent that mortgage money was advanced after the lien claims were filed.

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

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

**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 your lien action.
- You fail to appeal a dismissal of your lien action.

**Your trust obligations:**

Project funds you receive as contractor are trust funds. Your subcontractors, workers and material suppliers are trust beneficiaries, and can claim damages against you unless the trust funds are used first to pay one or more of the trust beneficiaries.

[Note: You are entitled to discharge a loan made to pay for work or materials without breaching the trust.]

A trust beneficiary must start its claim for damages within one year of completion, abandonment or termination of the head contract or of the project (if there is no head contract).

A trust beneficiary may also lay a criminal information with respect to your alleged breach of trust during the 3-year period following the offence. If convicted, you can be imprisoned or fined or both. If you are a company officer you can be convicted along with the company if you were a knowing participant in the breach.

**Clearing derivative liens:**

You are entitled to clear the owner's title of liens filed by claimants derivative of you by paying into court (using a "Section 23" court process) the lesser of:

- the total amount of the claims filed; and
- (if the claims are all derivative of one of your subcontractors) the amount owing to that subcontractor, provided this is at least equal to the statutory holdback from your subcontractor.

If the court approves, or if you have the owner's consent, you can use money from the holdback account for this purpose.

You can remove subsequent derivative liens by (after an application) topping up the amount paid into court as necessary.

You are also entitled to clear the owner's title of liens by posting security (using a "Section 24" court process) in an amount and form which the court thinks sufficient. The court may consider "all relevant circumstances" and select an amount which is less than the face value of the liens (if, for example, some of the liens are duplicative).

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

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

**Obtaining a certificate of completion:**

You can require that the “payment certifier” (the person identified in your contract as responsible for payment certification; if none is mentioned, then the owner) determine whether your contract has been completed. Within 17 days of your request, the payment certifier must have reached a decision, and if completion is certified, must have delivered a certificate and posted a notice of certification of completion at the site.

If there is a failure or refusal to issue a certificate of completion, you may apply to the court for one. If you suffer damages because of the refusal or failure, you can hold the payment certifier accountable.

“Completion” of your contract 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.

**Your obligations as payment certifier:**

Your subcontracts might identify you as responsible for determining the size of progress payments due to your subcontractors. In this case you have the same obligations to your subcontractors as your own payment certifier has to you with respect to issuing and posting certificates of completion.

If your subcontracts do not identify a payment certifier, then you must share this obligation jointly with the owner.

**Your contract rights:**

Any agreement or contractual provision which purports to remove your lien rights is void.

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 can demand from the owner particulars of the holdback account, including location, account number, credits and debits, and balance.

In some circumstances, you can hold the owner's mortgagee liable if it fails to deal properly with holdbacks it has retained or should have retained from advances made to the owner.

**Penalties against you:**

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.

If you repossess material already delivered to site you will prejudice your lien rights. A court order is available which will restrain you from even attempting to remove material.

If you fail to provide the owner with certain information within 10 days of a request (terms of any subcontract, including state of account and any labour and material payment bond posted by the subcontractor), you can be liable for resulting damage. The owner is also entitled to withhold further payment until you have complied.

*Summaries of how the Builders Lien Act applies to Owners, Architects/Engineers, 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.*

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