



## How BC's Builders Lien Act Applies to Material Suppliers

*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.*

### **Material Suppliers qualifying as Subcontractors:**

If you are a material supplier engaged by the owner, by the contractor, or by a subcontractor to supply material only in relation to an improvement, you qualify for lien and trust rights as a "subcontractor" under the Act.

The material must be delivered to the land where the improvement is located, and must be intended to become part of the improvement or be consumed or used in the making of it. Equipment rented without an operator qualifies as "material".

The material you supply can be transformed offsite by others without causing your lien or trust rights to be lost.

Materials you supply to an architect or engineer or to another material supplier do not give rise to lien or trust rights.

### **Your payments are unaffected:**

The Lien Act requires statutory holdbacks from progress payments made to contractors and subcontractors, but not from payments made to material suppliers.

### **Holdback account:**

The owner and contractor will maintain a holdback account into which the statutory holdback retained from progress payments on the prime contract will be deposited. Note that there is no similar obligation with respect to subcontracts.

### **Your lien rights:**

You may claim a lien against the project land for the price of your 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 materials supplied to that project, regardless of other debts owed to you.

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

Your lien takes effect, notionally, from the time 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 supply contract or any contract above you in the contractual chain
- Completion/abandonment/termination of the head contract (if there is one)
- Completion/abandonment of the improvement (if there is no head contract)
- (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:**

The subcontractor above you, or the contractor or owner, 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.

If one or more liens have been filed by subcontractors, the owner is entitled to clear title by paying into court (using a "Section 23" court process) the lesser of:

- the total amount of the claims filed;
- the amount owing to the contractor, provided this is at least equal to the statutory holdback retained from the contractor.

**How you can turn your lien claim into money:**

Your usual right to recover debt or damages directly from the person who hired you is unaffected by the Builders Lien Act.

If you are unable to collect your debt directly, 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 person who hired you plus every “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) and anyone who posted security for your lien claim. 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; on any insurance money paid due to the destruction of the property by fire; and on the statutory holdback retained from payments to you.

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 a person to whom material is supplied has signed an acknowledgment of receipt stating that the material was received for inclusion in an improvement at a named address, that acknowledgment is proof (unless there is evidence to the contrary) that the material was delivered to the land described by the address.

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 holdback (or the security posted, or the sale of the owner’s land) depends first of all on the contract price of the person to whom you supplied. All claimants who are derivative of that person and prove their claims have access only to the greater of:

- the amount actually owing to that person; 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.

If application has been made to clear liens by paying money into court under Section 23, the court may have made a final determination of the value of your lien (or the combined value of your lien and others).

**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 21-day 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.

**Lien claims against the holdback:**

In addition to your lien claim against the land, you are entitled to assert a lien claim against the statutory holdbacks retained from the contractor and from any subcontractor above you in the contractual chain. This type of lien does not require filing in the Land Title Office, and is unaffected by the deadlines which limit lien claims against land. It can be asserted anytime (by the commencement of a lawsuit against the owner), as long as a portion of the holdback remains unpaid.

**Your trust rights:**

The Act gives you trust rights in addition to lien rights.

Project funds received by a contractor or subcontractor to whom you supplied materials are trust funds. You are a trust beneficiary along with all others engaged by that person, and can claim damages against that person unless the trust funds are used first to pay one or more of the trust beneficiaries.

[Note: A contractor or subcontractor is entitled to discharge a loan made to pay for work or materials without breaching the trust.]

You will lose your trust rights if you do not start a lawsuit to enforce them within one year of completion, abandonment or termination of the head contract or of the project (if there is no head contract).

Breach of the Lien Act trust is also a criminal offence. You may lay an information with respect to an offence if you do so within 3 years. If convicted, the person who breached the trust can be imprisoned or fined or both. An officer of the company which breaches the trust can be convicted along with the company if the officer was a knowing participant in the breach.

**Your trust obligations:**

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

**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.

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.

**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 fail to provide the owner with certain information within 10 days of a request (terms of your supply contract, including state of account), you can be liable for resulting damage. The owner is also entitled to instruct the contractor to withhold further payment until you have complied.

*Summaries of how the Builders Lien Act applies to Owners, Architects/Engineers, Contractors, and Subcontractors 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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