



How BC's Builders Lien Act Applies to Subcontractors

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.

Note: If you are a material supplier, this summary does not apply to you, even though you are defined as a "subcontractor" under the Builders Lien Act. Refer to the separate "Material Suppliers" summary.

Qualifying as a Subcontractor:

You qualify for lien and trust rights as a "subcontractor," and are charged with certain obligations as well, if you are engaged by the contractor or another subcontractor to perform or provide labour or services in relation to an improvement, whether or not you also supply material. If under contract to a contractor or another subcontractor you supply equipment with an operator for use in making the improvement, you also qualify as a subcontractor.

A worker for wages cannot be a subcontractor, nor can anyone engaged by an architect, an engineer, or a material supplier.

How your progress payments are affected:

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

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

If you default, the contractor 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 and contractor will maintain a holdback account into which the statutory holdback retained from progress payments on the prime contract will be deposited. However there is no similar obligation with respect to subcontracts.

Your holdback obligations:

If you engage your own sub-subcontractors, you are required to withhold, from every payment you make, a statutory holdback equal to 10% of the greater of:

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

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

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

If your sub-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 sub-subcontractor have been dealt with.

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

- issuance of a certificate of completion with respect to the sub-subcontract in question, or your own subcontract, or any subcontract or contract above you in the contractual chain;
- completion/abandonment/termination of the head contract (if there is no applicable certificate of completion); and
- completion/abandonment of the improvement (if there is no head contract).

Progressive holdback release:

If a certificate of completion with respect to your subcontract has been issued, the contractor is entitled to receive from the holdback account the holdback amount applicable to your subcontract. You should be able to obtain this money from the contractor 55 days after the certificate has been issued, 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 contractor.

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 subcontract or any subcontract or 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 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 contractor is unaffected by the *Builders Lien Act*.

If you are unable to collect your debt directly from the contractor, 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 contractor 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 holdbacks retained from payments to the contractor.

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 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 work or material. 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 world 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 by an owner-developer, 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 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 holdback retained from the contractor. 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 or work 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 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:

You must pay all outstanding debts to sub- subcontractors and material suppliers engaged by you before using project funds for your own purposes, or face a claim for damages or criminal breach of trust as described above.

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 sub-subcontractors) the amount owing to that sub-subcontractor, provided it is at least equal to the statutory holdback retained from that sub-subcontractor.

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 subcontract as responsible for payment certification; if none is mentioned, then the contractor acting jointly with the owner) determine whether your subcontract 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 subcontract 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 subcontract price; plus
- 2% of the next \$500,000 of the subcontract price; plus
- 1% of the balance of the subcontract price.

Your obligations as payment certifier:

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

If your sub-subcontracts do not identify a payment certifier, then the contractor will 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 instruct the contractor 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.

Revised: 2005.05.05