

# Builders Lien Guide

The purpose of the *Builders Lien Act* is to provide a form of security (the right to lien) for the payment of monies owed to contractors, sub-contractors, workers, and material suppliers, who supply labour and/or materials to a construction project. This is consistent with the former legislation. The *Act* places increased responsibility on owners to provide protection to contractors, subcontractors, workers and material suppliers by requiring an actual holdback account to be set up. The *Act* encourages the payment of creditors as their claims come due throughout a construction project and works to ensure that money obtained to finance construction is used in the construction project and not for other purposes.

## A Multiple Holdback System

The most significant aspect of the *Act* is that it creates a multiple holdback system throughout the construction chain. The former *Act* only required a single holdback between the owner and its general contractor. The *Act* now requires that all persons who make payments under a contract or subcontract in a construction chain to retain a 10% holdback. This holdback must be equal to the greater of 10% of the value of the work or material provided, or 10% of any payment made on account. There is no holdback for monies owed to material suppliers or workers because there is no person behind them in the contractual chain who would be entitled to file a lien.

The multiple holdback system provides security for persons engaged by or under the contractor or subcontractor from whom the holdback was retained. It also defines the maximum liability of the person who retains the holdback if it becomes necessary to clear liens arising under the person from whom the holdback was retained.

## The Holdback Account

Under the former *Act* there was no requirement that an owner actually maintain a holdback. Consequently, in some situations owner/developers were holding back amounts from the people who supplied labour and/or material, but did not actually set that money aside for the benefit of the persons who supplied labour and/or materials to a construction project. If the project was insolvent the holdback was not available to pay the tradespeople and suppliers.

The *Act* creates special rules requiring an owner to set up a holdback account at a "savings institution". The only exceptions to this rule are contracts for the construction of certain Government projects or a construction project having an aggregate value of less than \$100,000.00. Where the owner contracts with the general contractor, the owner and the general contractor administer the holdback account jointly. In situations where the owner is acting as its own head contractor, the owner would set up and administer each holdback account for each contract, having a value greater than \$100,000.00.

The purpose of this rule is to insure that there is security in addition to the land itself for the benefit of all the persons who have supplied labour and/or material to construction projects.

## **Progressive Release of Holdback**

The *Act* now permits the release of holdbacks retained to sub-contractors when their contracts are completed before the construction project itself is complete. This change will benefit sub-contractors who are involved earlier on in the project, as well as benefiting the owner, as it will reduce the body of potential lien claimants as the construction project progresses.

There are two important periods of time that affect the release of holdbacks. The first is the time limit for the filing of the lien. The second is the time for the retention of holdbacks.

The *Builders Lien Act* provides a mechanism whereby formal notice may be given to contractors, subcontractors, and material suppliers, as to when time limits with respect to the filing of a lien and the holdback period commence. This notice is called a Certificate of Completion.

If a Certificate of Completion has been issued with respect to a contract or a sub-contract, the claims of lien of a contractor, sub-contractor, material supplier, or any persons engaged by or under the contractor or sub-contractor may be filed no later than 45 days after the date on which the Certificate of Completion was issued. If no Certificate of Completion has been issued, liens may be filed no later than 45 days after the head contract has been completed, abandoned, or terminated, if the owner engaged a head contractor, or if there was no head contractor, 45 days after the improvement has been completed or abandoned. The time for retention of the holdback is now 55 days after the earlier of:

- (a) a Certificate of Completion is issued;
- (b) after the head contract is completed, abandoned, or terminated, if there was a head contractor; and
- (c) if there was no head contractor, then 55 days after the improvement is completed or abandoned.

## **The Payment Certifier**

The *Act* introduces a procedure by which a Certificate of Completion can be issued. The project architect, engineer, or other person may certify when a particular contractor's subcontract is complete. This person is known as a payment certifier. We recommend that all contract documents clearly specify who the payment certifier will be. If this is not done, the *Act* specifies that the owner acting alone with respect to monies owed to the head contractor is the payment certifier and the owner and the head contractor acting together are the payment certifiers with respect to monies owned to subcontractors. When the payment certifier issues a certificate of completion, the time begins to run both for filing of lien claims arising out of that contract or subcontract, and for the release of a holdback retained from the contractor or sub-contractor with respect to that contract or sub-contract.

The *Act* allows any potential lien claimants to make a request in writing to the payment certifier that they deliver to the lien holder:

- (a) particulars of any Certificate of Completion issued before or after the written request; or
- (b) particulars of Certificates of Completion issued, before and after the request, with respect to a specific contract or subcontracts.

The payment certifier upon receipt of the written request must within 10 days determine whether the contract or subcontract has been completed.

Within seven days after issuing a Certificate of Completion, the payment certifier must:

- (a) deliver a copy of the Certificate of Completion to the owner, the head contractor (if any), and to the person at whose request the certificate was issued;
- (b) deliver a notice of Certificate of Completion to all persons who submitted written requests in relation to the contract or subcontract; and
- (c) post in a prominent place on the construction site a notice of Certificate of Completion.

It is important that the payment certifier keep accurate records of who has made requests with respect to any particular contract or subcontract. If the payment certifier fails or refuses to deliver a Certificate of Completion to the parties requesting it, or fails to post the Certificate of Completion on the improvement, he may be liable to anyone who suffers a loss or damage as a result. For example, a payment certifier could be liable to a subcontractor who files a lien after the time for filing has expired as a result of that subcontractor requesting but not receiving the Certificate of Completion.

### **Definition for Substantial Completion**

The *Act* stipulates that a contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than three percent of the first \$500,000.00 of the contract price, two percent of the next \$500,000.00 of the contract price and one percent of the balance of the contract price. Additionally, the *Act* also defines an improvement to be completed if the improvement or substantial part of it is ready for use or is being used for the purpose intended. For example, if a house is occupied, but there remains ongoing construction, the house could be deemed to be "substantially complete".

With respect to strata lots, the *Act* states that the contract for its construction is substantially performed not later than the date the strata lot is first occupied.

The *Act* states that a contract or improvement is deemed to be abandoned on the expiry of a period of thirty days during which no work has been done in connection with the contract or the improvement. The only exceptions to the aforementioned are unless the cause for the cessation of work was, and continued to be a strike, lock-out, sickness, weather conditions, holidays, a Court Order, shortage of material or other similar cause.

It is important to note that while the *Act* says that a lien filed after 45 days after a Certificate of

Completion has been issued is filed out of time there are situations where the lien period may expire earlier. For example, if a Certificate of Completion is requested more than 45 days after a head contract has been completed, abandoned or terminated, a lien filed after that date would be filed out of time.

## **Who Can File A Lien**

A worker, material supplier, contractor or subcontractor who does or causes to be done any work on or supplies material to or does both supply work and material to or for an improvement, is entitled to file a lien if they are not paid. Additionally, the *Act* allows consultants, including architects or engineers who have provided design services to the construction may be entitled to file a lien even when they do not perform any on site supervision during the actual construction.

The *Act* also expands the class of material suppliers who are entitled to file liens. Before the amendments to the *Builders Lien Act*, if materials were transformed or changed in character prior to their delivery to the improvement, the supplier of those materials was not considered to be a material supplier and not entitled to file a lien. Now, materials are defined as "moveable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed state or is consumed or used in the making of the improvement". As a result, it is arguable that a material supplier who supplies materials which are subsequently transformed and then used in an improvement will be entitled to claim a lien.

## **How to File a Lien**

A new Lien form has been created. The Claim of Lien form and other forms are available at [www.qp.gov.bc.ca/statreg/reg/B/BuildersLien/1\\_98.htm](http://www.qp.gov.bc.ca/statreg/reg/B/BuildersLien/1_98.htm) . Under the *Act*, it is no longer necessary that a lien claimant swear the lien before a lawyer or notary public. The lien still has to be filed in the appropriate land titles office.

The time frame for commencing legal proceedings to prove a Claim of Lien has not changed. The lien claimant must commence legal proceedings within one year of the date of filing the lien, or within the 21 day period if a notice to commence action has been sent to a lien claimant. With respect to the 21 Day Notices, the *Act* provides that an owner, its agent or other lien claimants who have worked on the construction site and who have commenced an action may serve a 21 Day Notice on lien claimants.

The *Act* requires that an action for breach of the trust provisions of the act be commenced within one year after the head contract is completed, abandoned, or terminated, or if there is no head contract, within one year of the completion or abandonment of the improvement.

## **Discharge of Lien Where Claim Disputed**

Owners, head contractors, sub-contractors or other persons liable on the contract can apply to cancel a lien upon giving sufficient security for the payment of it. The *Act* allows an owner, contractor or sub-contractor to post security that is "satisfactory to the Court" security may be something less than the full amount of the lien claim.

## Protection for Non-Contracting Owners

Under the *Act*, non-contracting owners who were usually landlords, were required to post notices on two prominent locations at the construction site giving notice that they were not responsible for any claim of lien. Often the notices were removed, and consequently the owner could not establish that lien claimants who worked on the construction site had sufficient notice that the owner had not authorized the work. Under the *Act*, a non-contracting owner can now file a Notice of Interest at the appropriate Land Title Office to protect themselves from lien claims. A Notice of Interest advises all potential lien claimants of the owner's interest in the land and that it is not bound by lien claims filed with respect to an improvement on the land, unless the improvement is undertaken at the express request of the owner. As a result, it will be necessary for contractors and material suppliers who are dealing with construction projects involving leasehold properties to obtain a title search prior to attempting to file any claims of lien.

## Summary

Further information with respect to the *Builders Lien Act* is available online at [www.qp.gov.bc.ca/statreg/list\\_statreg\\_b.htm](http://www.qp.gov.bc.ca/statreg/list_statreg_b.htm). This article is meant to provide a summary of the important provisions of the *Builders Lien Act*. It is not meant to be legal advice and, as always, if issues arise, please feel free to contact Allan Elliott, Mark Baron or Clarke Burnett of our Construction Law Group for advice.

If you have any questions, please do not hesitate to contact us:



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