



How BC's Builders Lien Act Affects Owners

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.

Definition of an Owner:

For the purposes of the Act, you will be considered an "Owner" if you have any legal or equitable interest in land at the time a lien is filed (mortgagees excluded), and if an improvement has taken place at your request and with your consent or for your benefit. Even if you did not request the improvement – for example if you are a landlord, and work was undertaken at the direction of a tenant – you will be deemed to be an "owner" with liabilities under the Act if you had prior knowledge that the improvement would take place.

Your holdback obligations:

You are required to withhold, from every payment you make to a contractor carrying out an improvement on your property, 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 the contractor defaults, you are not entitled to use this statutory holdback for correction of deficiencies or for the payment of damages or for completion of the work until all derivative lien claims have been dealt with.

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

Holdback account:

You must pay the statutory holdback into a holdback account at a savings institution, unless the contract price is less than \$100,000 or your mortgagee is retaining a holdback.

If you fail to pay into the holdback account as required, the contractor is entitled to 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 contractor.

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

Liens against your land:

A builders lien is a charge on your interest in the improvement; on the improvement itself; on the land; on all of the material delivered to or placed on the land; on any insurance money paid due to the destruction of the property by fire; and on the statutory holdback retained from payments. The contractor and all subcontractors, material suppliers, and workers claiming in the contractual chain below him (if they meet definitions set out in the Act) all have lien rights to the extent that the price of their work or materials remains unpaid. Notionally, their liens exist as soon as their work begins.

If a claimant wishes to preserve his lien against your land, he must file a lien claim against your title. If he remains unpaid, his ultimate remedy is forced sale of your land for recovery of what is proven to be owing to him. However your liability to satisfy liens is limited, in the aggregate, to the greater of the 10% statutory holdback and the amount you owe the contractor.

Your ability to refinance or sell your land will be affected if lien claims are filed. Liens have priority over all judgments, executions, etc. issued after the first work was done or material was supplied. They also have priority over mortgages to the extent that mortgage money is advanced after the lien claim was filed.

You may not become aware of lien claim filings unless you conduct a title search. The Land Title Office will not automatically notify you that claims have been filed.

Avoiding deemed liabilities:

You will be able to avoid lien liabilities for improvements undertaken by your tenants or co-owners if you file a Notice of Interest in the appropriate land title office before work takes place. Once filed, this will protect you in connection with all future work not requested by you, even if you have knowledge that it is being undertaken. The Notice of Interest does not need to be brought to the attention of contractors to be effective, nor does it need to be posted at the jobsite.

How you can clear your title in short order:

You can remove a lien claim from title by paying the claimant, but if there is a dispute about the amount owing the usual alternative is to post sufficient security using a "Section 24" court process. The amount of security required will usually be the face value of the lien plus a ten to fifteen per cent allowance for costs. The security is merely a substitute for the security represented by the land itself. In special circumstances the court may select an amount which is

less than the face value of the liens. The court will accept cash security, or security in the form of a letter of credit.

If lien claims have been filed by subcontractors or others claiming below the contractor, you may be able to clear your title and end any further obligation to those lien claimants by using a "Section 23" process to pay into court the amount actually owing to the contractor (as long as this equals or exceeds the statutory 10% holdback), or the full face value of the lien claims if this is a lesser amount.

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

Generally, it will be the contractual responsibility of your contractor to keep your title clear of derivative lien claims. If the court approves, or if the contractor has your consent, the contractor can use money from the holdback account for this purpose under Section 23.

How lien claimants can perfect their lien claims against your land:

After filing in the Land Title Office, the lien claimant is obliged to start a Supreme Court lawsuit if he wishes to perfect his entitlement to the lien. Typically, the defendants in this lawsuit will include the claimant's contracting partner as well as you (unless the lien claim has been removed under Section 23) and whoever hired the lien claimant (if it wasn't you).

The claimant's lawsuit will produce a declaration of lien if he is able to:

- prove the debt; and
- prove that his claim was in time, that he qualifies as a claimant, and that he followed the correct procedure.

Even if there are multiple lien claimants, your liability to satisfy their claims will not be more than the amount actually owing to your contractor (as long as this equals or exceeds the statutory 10% holdback), or the full face value of the lien claims if this is a lesser amount.

If a lien is declared but remains unsatisfied, the claimant will be entitled to force a sale of your land or any of the interests in the land which the lien has charged (for example, a tenant's leasehold interest), or force payment from the security posted in place of the lands or from holdback funds.

You will be able to defeat a lien claim against land if:

- The claim was not filed in the land title office before the deadline (generally 45 days after completion or abandonment of the improvement or contract)

- The claimant failed to commence the required Supreme Court lawsuit (and file an accompanying certificate of pending litigation) in time and in the right registry. Both must be accomplished within one year of filing the lien claim, or within 21 days after service of a notice from you or another lien claimant.
- You succeed in having the lien removed as abusive.

Lien claims against the holdback:

All unpaid persons engaged in connection with the improvement are entitled to assert a lien claim against the statutory holdback. This type of lien is separate and distinct from lien claims filed against land, and the lien can be asserted anytime (by the commencement of a lawsuit against you) as long as holdback remains unpaid to the contractor.

Certificates of completion:

Unless someone else has been designated in the contract, you as owner will be deemed the “payment certifier” with respect to amounts owing to your contractor, and you and the contractor jointly will have this responsibility with respect to amounts owing to subcontractors. Claimants are entitled to apply to their payment certifier for a decision on whether a certificate stating that their work is complete should be issued. Certificates trigger the deadline for releasing holdback and filing lien claims. If you are a payment certifier and fail to respond properly to a request for a certificate, including posting a proper notice of certification at the improvement, you can be held liable for damages which result.

“Completion” of a 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.

Progressive holdback release:

If a certificate of completion with respect to any subcontract has been issued, the contractor is entitled to receive from the holdback account the statutory holdback applicable to that subcontract. You will be required to release this money 55 days after the certificate has been issued, unless the subcontractor or a derivative claimant has filed a lien.

Releasing the balance of the holdback:

You must retain the balance of the statutory holdback until 55 days after the earliest of:

- issuance of a certificate of completion with respect to your contract with the contractor;
- completion/abandonment/termination of that contract (if it is a “head contract” and there is no certificate of completion); and
- completion/abandonment of the overall improvement (if there is no head contract and no certificate of completion)

When the 55-day period has expired, you may safely pay the holdback balance to your contractor and end your lien liability unless in the meantime the contractor, or someone with a claim derivative of the contractor, has filed a lien claim or started an action to enforce a lien against the holdback. Searches of the land title office and relevant court registries will be necessary to determine whether such filings have taken place.

Contracting out of the Builders Lien Act:

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

Your right to information:

You can demand accounting and contract particulars from subcontractors who have filed liens, and you are also entitled to obtain copies of labour and material payment bonds which may have been posted. You may also be on the receiving end of such a request, or a request about the state of the holdback account, and must comply within 10 days to avoid penalties.

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