

Builders Liens Obligations and Protections



Homeowner
Protection Office
Branch of BC Housing

The following information is intended to summarize the obligations and protections provided for in the *Builders Lien Act (Act)*, and to assist individuals who might be contracting to build a new home in understanding the *Act*. The Homeowner Protection Office does not warrant (HPO) the accuracy or the completeness of this information and in no event will the HPO be liable or responsible for damages of any kind arising out of the use of this information.

In all cases of doubt with respect to your rights and obligations under the *Builders Lien Act* or other legal aspects of your construction project you should seek the advice of your lawyer.

Persons who need to rely on the text of the *Builders Lien Act* or other provincial acts for legal and other purposes may obtain the Queen's Printer official printed version from Crown Publications Inc., 563 Superior Street, Victoria, BC, V8V 1T7. Telephone: 250-387-6409.

THE BUILDERS LIEN ACT

Builders lien legislation is remedial in nature and exists to ensure that parties involved in the construction industry are compensated, at least in part, for work and materials provided to construction projects. Its primary concept is to create a pool of funds which will be available to those parties should any of them not be paid for their work or material. The system protects not only those involved in the construction industry but also owners as it limits their liability to unpaid parties with whom they *do not* have a contract.

There are various rights and obligations in the *Builders Lien Act* of which one should be aware when involved in house construction or renovation or when purchasing a new or partly new home. Both as an owner and as a general contractor, if you are assuming this responsibility during construction, you have obligations with which you must comply to avoid

potential liability and to obtain the protections afforded by the *Act*.

OBLIGATIONS

The main obligation under the *Act* for owners is the requirement to retain a holdback on most types of construction contracts. This obligation arises on any contract into which an owner enters unless it is a type of contract specifically excluded by the *Act* (see #1). Thus, if an owner also acts as a general contractor and enters into a number of contracts with various trades the holdback obligation will apply to each of those contracts.

The holdback funds are retained to provide a pool of funds available to any party who sub-contracts to provide work or materials with the owner's contractor. If the contractor does not pay a sub-contractor, that sub-contractor can file a lien and, assuming the lien is valid, can be paid out of the holdback funds.

The specific requirements for the holdback are as follows:

1. You must retain a 10% holdback of funds on every payment made under every contract into which you enter, other than a contract with an architect, engineer or material supplier in which case you do not need to retain a holdback.
2. If the value of the work and material provided under a contract exceeds \$100,000.00, you must establish a specific bank account for the holdback retained under that contract. The holdback must be deposited into that bank account and the account must be jointly administered by you and the contractor from whom the holdback is retained. If you enter into more than one contract which exceeds \$100,000.00, you must establish a separate bank account for each such contract.

3. Generally speaking, the holdback funds for a contract must be retained by you for 55 days after that contract is completed. The *Act* defines how to determine whether or not a contract has been completed. The *Act* also sets out other ways in which to determine whether holdback funds can be released if a contract has not been completed as defined by the *Act*. The determination of whether holdback funds should be released is entirely dependent on the facts of a particular construction project. Reference should be made to the specific provisions of the *Act* and in most cases legal advice should be sought.
4. If a construction party is going to file a lien, they have 45 days from the completion of the relevant contract in which to file a claim of lien against the property and holdback.
5. If an owner does not retain the holdback funds and a claim of lien is filed and proven, then the owner will likely be ordered to pay the holdback funds to the lien claimant. If the owner has already paid this amount to the contractor then the owner will, in effect, pay 10% more than the original cost of that contract. However, it is possible that the owner may be ordered to pay the full amount of the lien claim rather than just the 10% holdback amount. In addition, if the owner does not have the funds available to pay the amount owing, it is also possible that the Court will order that the property be sold and the proceeds be used to pay the lien claim. As you can see, it is very important that the holdback funds be retained properly.

PROTECTIONS

The corollary to the obligation to retain holdback funds is that owners are protected from paying unpaid lien claimants *with whom they do not have a contract* anything more than the holdback funds owing under the relevant contract. It is important to note that an owner will still be responsible to pay a party with whom the owner contracts the full amount owing to

that contractor under basic principles of contract law. The *Act* only protects owners against claims from sub-contractors who are not paid by the owner's contractors.

If a claim of lien is filed by a sub-contractor, an owner can apply to Court to have the lien removed upon payment into Court by the owner of the holdback funds. An owner can also apply to have the lien cancelled upon payment of security satisfactory to the Court.

If you are purchasing a recently constructed home or a home which has recently been renovated, you will likely be subject to the provisions of the *Act* as you will be deemed to be an "owner" as defined in the *Act*. Accordingly, it is important that you obtain legal advice regarding whether it is necessary to include in your contract of purchase and sale a provision allowing you to retain from the payment to the vendor an amount equivalent to the necessary holdback. If you are purchasing a strata lot, reference should also be made to specific provisions in the *Strata Property Act* and its regulations regarding the holdback which needs to be retained.

Builders lien legislation is complicated and can not be easily summarized. This paper only sets out the basic concepts and requirements under the *Act*. Specific reference to the *Act* and consultation with a lawyer should be undertaken when dealing with builders lien issues to ensure that you fulfill your obligations and achieve the protection available under the *Act*.

**This informational bulletin was prepared by:*

Beth Allard, Partner

Bull, Houser and Tupper