

## Anatomy of a Builders Lien

### What is a Builders Lien?

A lien is a legal right against assets that are used as collateral to satisfy a debt. The *Builders Lien Act* (the “Act”) of British Columbia provides a lien for payment owed to a party that performs work and/or supplies materials in relation to an improvement. The unpaid party has a lien right, to the extent that the payment remains unpaid, on the owner’s interest in the improvement, the improvement itself, the land on which the improvement is located and the material delivered to or placed on the land. In most instances, the nature of a construction project will require that the owner of the project retain a “holdback” from payments made to a contractor. If the contractor does not pay its subcontractors or suppliers, then, provided the owner has complied with the requirements of the Act, the owner’s liability is capped at the amount of the holdback. The holdback amount must be equal to 10% of the greater of:

- a) the value of the work or materials provided under the contract; or
- b) the amount of any payment made on account of the contract price.

British Columbia has a “multiple holdback” scheme, which also requires each contractor and subcontractor (who is primarily liable under a contract or subcontract) to holdback 10% from any subcontractors they hire. A holdback must not be retained from workers, material suppliers, architects, or engineers. These groups are required to be paid in full.

### Who Can Claim a Builders Lien?

A party who performs work or supplies materials in relation to an “improvement” on a construction project can claim a builders lien. Individuals or companies such as workers,

suppliers of materials (including renters of equipment), contractors hired by the owner, and subcontractors hired by contractors or by other subcontractors can claim a builders lien. Engineers or architects hired by the owner are also considered contractors and can claim a builders lien, even if no on-site services were provided.

An “improvement” includes anything constructed, altered, repaired or attached to land,<sup>2</sup> and also includes any clearing, excavating, digging, drilling, tunneling, filling, or ditching of land. Courts in British Columbia have held that preparatory coordination work,<sup>3</sup> cabinet, counter and shelving installation,<sup>4</sup> administrative costs,<sup>5</sup> and even underground conduit installation,<sup>6</sup> can qualify as work in that is lienable. Work that is performed off-site can be lienable if the work is “an integral and necessary part of the actual physical construction of the project”.<sup>7</sup> In other jurisdictions with legislation similar to British Columbia, courts have included landscaping,<sup>8</sup> surveying,<sup>9</sup> and cleaning<sup>10</sup> as work that is lienable.

### Time Limit

A party seeking to claim a builders lien must file a lien in the Land Title Office no later than 45 days after:

- a) a “Certificate of Completion” is issued;
- b) if no certificate of completion has been issued, after the head contract has been completed, abandoned or terminated; or
- c) if there is no head contract, after the improvement has been completed or abandoned.

A Certificate of Completion will be issued when a “Payment Certifier” (generally an architect, engineer, or other person specified in the contract) has certified that a

contract is completed. A contract will be considered completed when it is “substantially completed or performed, not necessarily totally completed or performed”.<sup>11</sup> A contract is substantially performed if the work remaining to be done under the contract is capable of completion at a cost of not more than:

- a) 3% of the first \$500,000 of the contract price (\$15,000);
- b) 2% of the next \$500,000 of the contract price (\$10,000); and
- c) 1% of the balance of the contract price.

To file a builders lien, a claimant must file a Claim of Lien form in the Land Title Office where the related land is registered. To enforce the claim of lien and prove it is valid, the claimant must start a lawsuit in the Supreme Court of British Columbia and file a Certificate of Pending Litigation into the Land Title Office within one year of filing the claim of lien. The owner, or others involved, can provide the claimant with written notice to accelerate the process. If such notice is provided, the claimant must commence an action to enforce the claim of lien and file the Certificate of Pending Litigation within 21 days after the date of the notice being served, rather than the usual year after filing the claim of lien. If the claimant misses this time limit, the lien is extinguished, and will be discharged from title, on application.

Once a contract or subcontract has an issued Certificate of Completion, or is completed, terminated or abandoned, time begins, not only for the filing of a builders lien claim, as discussed above, but also for the release of the holdback retained from a contractor or subcontractor. If no builders liens have been claimed, the holdback may be released at the end of 55 days to the party from whom it was retained.

### **Holdback**

The Act provides rules for the holdback retained by the owner or a contractor. The holdback must be deposited with a financial institution in a separate trust account. If the owner or contractor enters into contracts with several parties, a separate holdback account must be set up for each contract. Any interest earned in the holdback account

accrues to the benefit of the owner or contractor during the holdback period, and after that accrues to the benefit of the contractor or subcontractor from whom the holdback was retained. The requirement for a trust account does not apply for a contract where the total value of work and material supplied is less than \$100,000. Additionally, while local governments are required to retain the statutory holdback in accordance with the Act, they are not required to maintain a separate holdback account.

Generally speaking, statutory holdback funds are not to be used to address deficiencies, owner delay claims or other contractual defaults by the contractor, pursuant to section 6 the Act. However, once the period to claim a lien has passed, if there are no lien claims and the possibility of any lien arising under the contractor or subcontractor in default is exhausted, an owner or contractor may use the statutory holdback funds to address a contractual claim.

### **Advantages of a Builders Lien**

Once a claim of lien is registered on title to the land, it can interfere with the owner’s ability to sell the property or maintain mortgage financing, which can interfere with the flow of funds on a construction project. This can incentivise the owner to remove the lien, by paying money into court for security. The owner could pay the full amount of the lien or an amount equal to the holdback from the contractor under whom the lien arose. If the court finds the lien is valid, the holdback funds will be used to pay the lien.

Local governments may be involved in projects with untitled lands (such as dedicated roads or dedicated parks) that cannot have liens registered against them because there is no title to the property. To fulfill their role as the *owner* of a project, local governments may still choose to retain a holdback. Parties to the project can make a lien claim against the holdback pursuant to subsection 4(9) of the Act by commencing an action in court (also known as a *Shimco* lien). There is no specific time limit for commencing an action for a *Shimco* lien. Such a claim can be brought for as long as the holdback funds are held.

### **COVID-19 Pandemic**

As of the publication date of this article, the time limits established under the Act are not suspended. Mandatory

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statutory time limits for commencing an action, proceeding or appeal in court were suspended on March 26, 2020 by Ministerial Order M086 (“M086”), which created confusion about the applicability of M086 to the time limits under the Act. Consequently, on April 15, 2020, Ministerial Order M098 (“M098”) was issued to replace M086, and it was clarified that time limits under the Act were not to be suspended, and any such time limits suspended by M086 on March 26, 2020 began to run again on April 15, 2020 for all builders lien actions, proceedings, claims or appeals.

The Ombudsperson issued a draft report suggesting that M098 (and other Ministerial Orders) were not properly made, and as such may be invalid. Therefore, on July 10, 2020 the Province enacted the *COVID-19 Related Measures Act* (“COVID-19 RMA”) to correct the defects in the Ministerial Orders raised by the Ombudsperson. The COVID-19 RMA enacts as a provision of this act M098 and other Ministerial Orders.

Order in Council No. 453, issued on August 4, 2020 under the COVID-19 RMA, repeals the limitation suspending provision in M098, but contains a similar provision that replaces it. Limitation periods for commencing an action, proceeding or appeal in the Provincial or Supreme Court continue to be suspended and will be for 90 days after the date that the last extension of the March 18, 2020 declaration of a state of emergency expires or is cancelled.<sup>12</sup> As the Province’s response to the COVID-19 pandemic is constantly evolving, readers should monitor official sources to ensure they have up-to-date information.

<sup>1</sup> Section 1.1 of the Act exempts work done on highways by a municipality and certain other provincial agencies.

<sup>2</sup> Both on and under land.

<sup>3</sup> *Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2002 BCCA 357; if the related construction work is actually commenced.

<sup>4</sup> *Levan Millwork Ltd. v. Larken Industries Ltd.*, 1989 Carswell BC 653 (BCSC).

<sup>5</sup> *Redheugh Construction Ltd. v. Coyne Contracting Ltd.*, 1996 CarswellBC 1336 (BCCA).

<sup>6</sup> *Pedre Contractors Ltd. v. 2725312 Canada Inc.*, 2004 BCSC 1112; if the administrative costs directly contribute to an improvement on a project.

<sup>7</sup> *Action Holdings Ltd. v. Trend Homes Ltd.*, 2011 BCSC 381.

<sup>8</sup> *Calgary Landscape Maintenance Ltd. v. Khoury Real Estate Services Ltd.*, 1993 CarswellAlta 75 (ABQB); landscaping during construction can create a lienable interest but maintenance related landscaping does not.

<sup>9</sup> *Smith & Smith Kingston Ltd. v. Kinalea Development Corp.*, 1994 CarswellOnt 1111 (ONCJ).

<sup>10</sup> *Leslie L. Solty & Sons Ltd. v. Finbur Enterprises Ltd.*, 1977 CarswellOnt 1222 (ONSC).

<sup>11</sup> Pursuant to section 1 of the Act.

<sup>12</sup> Limitation periods for commencing an action, proceeding or appeal in the Court of Appeal continue to be suspended and will be for 45 days after the date that the last extension of the March 18, 2020 declaration of a state of emergency expires or is cancelled.

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Nicholas articulated at Civic Legal LLP and was called to the Bar in July 2020. He completed his J.D. from the Peter A. Allard School of Law at the University of British Columbia. During law school, he served as the Director of Operations for the Law Students’ Legal Advice Program, where he organized with community leaders to provide legal services to low-income individuals. Nicholas also volunteered with Pro Bono Students Canada and Legal Education Outreach and has completed the Business Law Concentration.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners,

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