



# Report on **The Builders Lien Act**

# **Report on the Builders Lien Act**

**A Report prepared for the British Columbia  
Law Institute by the Members of the Builders  
Lien Act Reform Project Committee**

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# INTRODUCTORY NOTE

## Report on the Builders Lien Act

The *Builders Lien Act* may be somewhat more familiar to a wide cross-section of the working world than many other commercial statutes, but the complexities that arise in its application are proverbial. The purpose of the Act has been judicially characterized as being “to protect the claims of those who supply work and materials [to an improvement to land] so long as the owner is not prejudiced.” There is a fundamental tension between the two poles of this dual legislative purpose, and it gives rise to contradictory effects.

For example, the Act provides contractors, subcontractors, and workers with highly valued extracontractual rights and remedies, but their use can result in the flow of payments down the chain of contracts and subcontracts being interrupted. This potentially leads to domino insolvencies, something that the Act was always intended to prevent. The Act lets owners limit their exposure to claims of unpaid subcontractors by means of a mandatory holdback, but the interest expense of maintaining an unnecessarily large holdback that accumulates in a project with a long construction schedule can become a problem in itself.

The *Report on the Builders Lien Act* offers concrete, practical recommendations for reforms to address a host of problems surrounding the Act, including the ways in which it tends to operate counter-productively and the ways in which it is sometimes misused. Many of the 86 recommendations would also simplify the Act and clarify the meaning of the more problematic provisions.

The report results from the first comprehensive, independent review of the present *Builders Lien Act* since its enactment in 1997. The recommendations are the product of lengthy deliberations by a highly experienced and knowledgeable Project Committee, and have been informed by broad stakeholder consultation. BCLI commends the members of the Builders Lien Act Reform Project Committee for their dedication and diligence, and endorses their recommendations for a better *Builders Lien Act*.

Thomas L. Spraggs  
Chair,  
British Columbia Law Institute

June 2020

## Builders Lien Act Reform Project Committee

The Builders Lien Act Reform Project Committee was formed in spring 2014. This volunteer project committee is made up of leading experts in construction and insolvency law and practice in British Columbia. The committee's mandate was to assist BCLI in developing recommendations on reform of the *Builders Lien Act*.

The present and former members of the Builders Lien Act Reform Project Committee are:

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Gregory G. Blue, Q.C. (senior staff lawyer, British Columbia Law Institute) is the project manager.

**For more information, visit us on the World Wide Web at:**  
<https://www.bcli.org/project/builders-lien-reform-project>

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## EXECUTIVE SUMMARY

The purpose of the *Builders Lien Act* is to protect the various participants in a construction project against the failure of others to pay for the work, services, or material that they provide in the course of the project. Legislation resembling it has existed in British Columbia for 140 years. The lien legislation is complex and calls for its reform are frequently made. Periodically, it has undergone intensive reviews by legislative committees and other bodies.

The current *Builders Lien Act* was enacted in 1997. It introduced significant changes aimed at correcting long-standing problems with previous lien Acts. Since then, practices and contractual arrangements in construction and real property development have continued to evolve, giving rise to new issues and uncertainties in the application of the Act. Added to these are perennial sources of discontent with features and effects of builders' lien legislation that frequently give rise to complaints to government and calls for change. After 20 years of experience with the 1997 Act, it is appropriate to run a check on how it has performed and how it may be improved.

These are the reasons for the Builders Lien Act Reform Project, which BCLI undertook at the invitation of the Ministry of Attorney General. The project was carried out with the aid of a volunteer Project Committee with extensive experience in construction law, construction industry bonding, lending, and insolvency practice. The recommendations in this report for reform of the Act have been reached after lengthy deliberations by the Project Committee and consultation with industry stakeholders and the general public.

Only some of the more prominent recommendations are mentioned in this summary. Each chapter contains additional recommendations and detailed explanations of their rationale.

Chapter 1 describes the BCLI Builders Lien Act Reform Project and its scope. It acknowledges the recent trend in Canada of adding prompt payment and interim adjudication provisions to construction lien statutes along the lines of those now in force in Ontario, and explains why the report does not deal with the merits of that legislation. Briefly stated, the reason is that payment delay in the construction sector is not exclusively related to the *Builders Lien Act*. To the extent that the Act sometimes leads to interruptions in the flow of funds during a construction project, recommendations in this report, especially those in Chapter 7, would minimize or eliminate that effect.



To the extent that payment delay in the construction sector is unrelated to the *Builders Lien Act*, however, it is outside the mandate of the Project Committee. While there appears to be significant support for prompt payment legislation in British Columbia among some sectors of the construction industry, its merits need to be assessed in a different process having financial management of construction projects as the focus, rather than the *Builders Lien Act*.

Chapter 2 is an overview of the principal features of the *Builders Lien Act*. It describes the several distinct remedies given by the Act to unpaid providers of work or materials to an improvement to land: lien rights, the holdback, and the statutory trust. Chapter 2 also emphasizes that the *Builders Lien Act* protects owners against the failure of contractors and subcontractors to pay their subcontractors and workers by giving them the means to limit their liability to lienholders.

Chapter 3 wrestles with basic questions about the value of the Act relative to the economic and administrative burdens it imposes, and whether it should remain broadly applicable or be restricted to commercial or higher-value projects. None of the options for restricting the scope of the Act are favoured by a majority of the Project Committee. Majority and minority recommendations are made on a new minimum amount for a claim of lien.

Chapter 4 is concerned with simplifying the process by which lien rights are preserved from expiration and eliminating gaps and inconsistencies in the ability to preserve them.

A simpler form of claim of lien is recommended that eliminates unnecessary information and common sources of confusion. The problem of owners being unaware when claims of lien are filed against their titles is discussed, and a means of notifying registered owners that would not interfere with the ability to file a claim of lien quickly is recommended.

Chapter 4 also contains several recommendations aimed at clarifying what amounts to lienable work or supply of material to an improvement to land.

Other recommendations in Chapter 4 are made to overcome gaps in the application of the Act to improvements on unregistered land and on a broader range of Crown resource tenures. While the Act does not distinguish between registered and unpatented (unregistered) land in terms of lienability, it is only possible as a practical matter to file a claim of lien against registered land. The only Crown tenures that are currently lienable are those issued under the *Mineral Tenure Act*, because the Act provides a mechanism for filing. It is increasingly common, however, for large in-

dustrial construction projects to take place on unpatented land, which is often covered by some form of statutory Crown tenure.

There are also recommendations in Chapter 4 dealing with unregistered leaseholds, phased construction projects, and public-private partnership (P3) projects, all of which present complexities in the application of the *Builders Lien Act*.

Chapter 5 deals with the difficulty most frequently encountered with the *Builders Lien Act*, namely determining whether a claim of lien against land has been, or can be, filed in time. The recommendations in Chapter 5 are aimed at making that determination easier. One of the overarching themes in the chapter is reduction of the number of separate events that can trigger the start of the 45-day countdown between substantial completion and the end of the lien filing period. Another is strengthening the certification process to provide lien claimants and owners with greater certainty surrounding the window of time for filing claims of lien and the appropriate release of holdback funds.

Chapter 6 deals with the so-called Shimco lien. Named after the court case in which it was recognized on the strength of a highly literal interpretation of two provisions of the Act, this lien against the statutory holdback is distinct from the lien on land and the improvement and is unique to British Columbia. No other Canadian jurisdiction has a dual-lien model in its construction lien legislation.

The Shimco decisions in 2002 and 2003 that declared the existence of a second lien under the Act surprised stakeholders. Simply stated, the dual lien theory is not in harmony with the *Builders Lien Act*. The Act lacks machinery for the assertion and enforcement of a Shimco lien, likely because it arises from inadvertent implication and was never intended to be a separate remedy. Chapter 6 explains numerous ways in which the Shimco lien is inconsistent with the scheme of the Act and creates serious uncertainty surrounding the handling of holdback funds. It also explains why the Project Committee came to the same conclusion BCLI did in an earlier 2004 report, namely that the Act should be amended to abolish the Shimco lien.

Chapter 7 contains numerous recommendations all aimed at removing obstacles to the flow of construction funds down the contract chain. There is a recommendation to eliminate the 10-day gap between the end of the lien filing period and the end of the holdback period, as an interval of that length is no longer required for land title office processing. Other recommendations address provisions that are commonly applied in ways that lead to unnecessary interruptions in the flow of payments.

The build-up of unnecessarily large owner's holdbacks in multi-year construction projects is addressed in recommendations for two alternative optional schemes for periodic early release of holdback. The first alternative, which is favoured by the Project Committee, would allow gradual release of holdback after the first year and throughout the rest of the project while maintaining a relatively steady level of holdback funds. This would overcome a drawback of periodic holdback release schemes in some other provinces, under which the holdback fund is reduced to zero after each annual or other periodic release and has to build up again. Some industry organizations expressed a preference in the course of consultation for the annual periodic release scheme used in the other provinces because of its greater simplicity. The report recommends that owners wishing to avoid the build-up of unreasonably large holdbacks in lengthy projects be able to choose between the two schemes.

Numerous recommendations are made in Chapter 7 to improve and streamline the procedures which the Act makes available for securing and clearing claims of lien from title. They are aimed at making these procedures faster, simpler, and less expensive.

The provision that allows the court to adjust priorities in favour of a lender who advances funds to complete construction after claims of lien have been filed would be strengthened to apply to new mortgages as well as further advances under a pre-existing one, and to resolve a problem with circular priorities.

Chapter 8 concerns the statutory trust attaching to funds received by a contractor or subcontractor in favour of persons whom the contractor or subcontractor has engaged in connection with the improvement. Amendments are recommended to clarify who is a beneficiary under the trust, and to confirm that the limit on the amount recoverable as a lienholder does not apply to a trust claim.

A majority of the Project Committee members are also in favour of repealing the one-year limitation period that the *Builders Lien Act* makes applicable to claims under the statutory trust, so that the general two-year limitation period under the *Limitation Act* for claims against a trustee would apply.

Chapter 9 deals with curbing abuses of the remedies under the *Builders Lien Act* and practices that are aimed at preventing or defeating the legitimate exercise of rights granted by the Act.

Abuses of remedies often take the form of claiming inflated amounts, or claiming liens in respect of work not actually performed or requested, or work which is not lienable. Interference with the use of rights conferred by the Act may take the form

of using greater bargaining power to extract contractual terms that discourage their exercise.

The existing anti-abuse provisions in the Act are relatively narrow. Except in the most obvious cases, such as where the claim of lien does not relate to the land to which it refers, has already been discharged or extinguished, or was the subject of an action that has been dismissed or discontinued, a claim of lien must be shown to be “vexatious, frivolous or an abuse of process” in order to be cancelled as abusive.

The phrase “vexatious, frivolous or an abuse of process” is borrowed from rules of court and makes the same high threshold for striking out pleadings applicable to an application to cancel a claim of lien. Recommendations in Chapter 9 would eliminate this wording and allow instead for cancellation of a claim of lien on grounds that are context-specific, namely that it is for an inflated amount, relates to non-lienable activity, is baseless to the knowledge of the claimant, does not relate to the land in question, or is simply non-compliant with the requirements of the Act.

Another recommendation would authorize a court to make orders for expeditious determination of any issue relating to a claim of lien. This could include a direction to a claimant to start an action to enforce the lien claimed within a specified time.

The Act currently states that anyone who files a claim of lien against an estate or interest in land to which the lien does not attach is liable to an owner for the costs and damages incurred as a result of the wrongful filing. A recommendation in Chapter 9 would broaden this provision to make a claimant who files a claim of lien when not entitled to do so for any reason liable for all reasonably foreseeable loss, including legal expense, that is incurred by anyone as a result of the filing. In addition, a claimant filing an inflated claim of lien would be liable for the cost of providing security for the lien to the extent that it is increased by reason of the inflated amount of the claim.

The Act currently contains a provision rendering void any agreement that the Act does not apply or that restricts the availability of remedies under it. The provision only applies to the most overt contracting-out terms, however. While a minority view in the Project Committee is that a general contractor should be able to agree not to file a claim of lien, the majority view is that this provision should be broadened to provide that a term of an agreement that directly or indirectly imposes a liability or penalty for exercising a right under the Act is void.

Chapter 10 deals with issues of the interaction of the *Builders Lien Act* with third-party interests. Prominent among these is the effect of a requirement to pay (RTP)

issued by the Canada Revenue Agency (CRA) to a party in the contract chain to collect unpaid tax liabilities from another party to whom the recipient of the requirement to pay is indebted.

An RTP may seriously complicate the application of the Act in a construction payment dispute and lead to very arbitrary and capricious results, exposing the recipient or someone else in the contract chain to duplicate payment obligations. Payment to the Receiver General of Canada discharges the original indebtedness for the amounts remitted, but it does not relieve the recipient of the RTP from purely statutory obligations under the *Builders Lien Act*, nor does it extinguish liens against the owner's land.

While provincial legislation cannot alter the superpriority given to an RTP by the *Income Tax Act* (Can.) and the *Excise Tax Act*, there is some room to eliminate duplicate liabilities for holdback funds and make outcomes more predictable when an RTP lands somewhere in the contract chain. A recommendation calls for amendment of the *Builders Lien Act* to reduce the required holdback by the amount of any holdback funds obligatorily paid to CRA under an RTP.

As the reduction in the required holdback relieves the owner or other RTP recipient at the expense of lien claimants, it would be counterbalanced to some extent by treating the amount paid under the RTP as if it had been received by the tax debtor for the purpose of the *Builders Lien Act* statutory trust. The owner or other person to whom the RTP is addressed would not have to pay twice, and the lien claimants would be at least partially compensated for the reduced holdback protection by a corresponding increase in the amount they could claim from the tax debtor as trust beneficiaries.

Chapter 10 also addresses the “pipeline problem,” which occurs when lien claimants who have done work on private land under the authority of a right of entry conferred by an enactment file claims of lien against the landowner's title, despite the fact that the private landowner has not requested the improvement, obtains no benefit, and has no connection with the contract chain. The pipeline problem was the subject of a previous BCLI report, but the Project Committee took a fresh look at several possible approaches before arriving at the same solution as that recommended in the earlier report. A recommendation calls for amendment of the *Builders Lien Act* to provide that a lien does not arise against land that is subject to a statutory right of entry with respect to an improvement to the land made pursuant to the statutory right of entry. Filing claims of lien against the private landowner's interest would be prohibited in those circumstances.

Chapter 11 concerns procedures for enforcing rights under the *Builders Lien Act*, and the interaction of the Act with arbitration.

The requirement to start an action to enforce a lien and any other proceeding under the Act at the Supreme Court registry nearest to the location of the land and improvement concerned, and for all applications in the action to be heard there, is recommended for repeal. Lien-related proceedings could then be started in any registry of the Supreme Court of British Columbia, like other civil proceedings.

The class of persons who could deliver a notice to a lien claimant to commence an enforcement action within 21 days would be expanded beyond owners and plaintiffs in another lien enforcement action to include anyone who has provided security for a claim of lien. General contractors, for example, frequently have to take active steps to secure and clear liens and may be contractually bound to do so. As the security is provided at their cost in this scenario, they should be in the same position as an owner to force matters forward to a resolution.

Another recommendation would require that all lien claimants whose recoveries may be affected must receive notice of trial of a lien enforcement action or of any application for judgment in one. While courts have emphasized that this is what good practice requires, the Project Committee believes it should not be left as a matter of practice. Instead, it should be a requirement of the Act.

The problem of dormant builders' lien enforcement actions is addressed by a recommendation for an express requirement to conduct an enforcement action expeditiously. In the event that requirement is breached, anyone with a financial interest in the disposition of the action could apply for relief. The court would have broad discretion to make an order it considers appropriate, including dismissal of the claim to enforce the lien.

Difficulties in claiming and enforcing a lien against common property in a strata plan are addressed. Currently, it is necessary to name and serve all the strata lot owners as defendants, as the strata corporation itself does not own common property. Amendments are recommended to rationalize the procedural difficulties involved. It would be sufficient to name the strata corporation as a defendant representing the owners in court documents and in a certificate of pending litigation. If the plaintiff successfully proves the lien for work done or materials supplied for an improvement to common property, there would be no order for sale, but judgment would be given instead against the strata corporation as the representative defendant. The owners would then be liable for the amount of the judgment under the *Strata Property Act* according to their fractional interests in the common property.

Last, Chapter 11 deals with the potential conflict between arbitration stays and the requirements of the *Builders Lien Act* to take procedural steps within specified time limits to preserve rights against extinction. With minor changes, the Project Committee recommends the adoption of model provisions to resolve this conflict that were originally developed by the Uniform Law Conference of Canada and adapted for British Columbia in an earlier BCLI report.

BCLI is highly appreciative of the efforts of the Project Committee and the contributions of stakeholders to the revision of the *Builders Lien Act*, and is confident that implementation of the recommendations in this report will benefit the construction sector and the general economy.

## CHAPTER 1. INTRODUCTION

### A. What is the Builders Lien Act?

The *Builders Lien Act*<sup>1</sup> is one of the principal enactments relating to the construction industry. Its purpose is to protect the various participants in a construction project against the failure of others to pay for the work, services, or material that they provide in the course of the project. The purpose of the Act may also be described as being to enhance the financial integrity of relationships within the construction industry.<sup>2</sup>

The Act applies to activities involving the creation, repair, or alteration of an “improvement” to land or alteration of the land itself. The broad definition of this term in the Act is key to gaining an understanding of what the Act does:

**"improvement"** includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;<sup>3</sup>

Buildings and various other structures above and below ground are improvements under this definition. So are culverts, driveways, installed utility lines, pipelines, excavations of all kinds, and nearly all active modifications of the surface and subsurface of land.

The Act provides several distinct rights to unpaid providers of work, services, or material. First, it confers a lien. The lien given by the Act attaches to the owner's interest in the improvement to land resulting from a construction project, to the improvement itself, to the land where the improvement is located, and to material delivered to or placed on the land in connection with the improvement.

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1. S.B.C. 1997, c. 45.

2. British Columbia Law Institute, *Questions and Answers on the New Builders Lien Act* (Vancouver: The Institute, 1997) at 1.

3. *Supra*, note 1, s. 1(1).



Second, the Act requires holdbacks from payments under a contract or subcontract so that funds will be available to meet claims of persons engaged by or under the payee.

Third, the Act creates a trust for the benefit of persons whom a contractor or subcontractor has engaged in connection with an improvement and has not paid in full. The trust attaches to funds received by a contractor or subcontractor on account of the contract or subcontract, and makes the contractor or subcontractor the trustee.

The *Builders Lien Act* also protects owners against the failure of contractors and subcontractors to pay their trade accounts arising in a construction project. It balances the rights given to lienholders against the landowners' property by giving owners a means by which they may limit their liability to the amount of the holdback.

Construction lien legislation has existed in some form in British Columbia since 1879.<sup>4</sup> It is complex legislation with a long history of dissatisfaction and calls for reform on the part of industry, lending institutions, landowners, and their legal advisers. Not surprisingly, the legislation has been amended frequently and re-enacted several times over the past 140 years. Periodically, it has undergone several intensive reviews by legislative committees and other bodies.

The current *Builders Lien Act* was enacted in 1997. The legislation it replaced had been reviewed in a lengthy report issued by the former Law Reform Commission of British Columbia in 1972, and by a select committee of the Legislative Assembly in 1990. It was preceded by two exposure bills introduced in 1978 and 1990 that did not advance beyond first reading.

The 1997 *Builders Lien Act* was enacted after extensive consultation with the construction industry. It introduced a number of significant changes aimed at correcting long-standing problems with the Act. Most prominent of these changes was the introduction of a multiple-holdback system. Instead of a single holdback by the owner that could not be released until after completion of an entire construction project, the new system imposed corresponding pass-through holdback obligations on each payor in a chain of contracts and subcontracts, and also allowed for progressive release of holdback funds as portions of work were completed.

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4. *Mechanic's Lien Act*, S.B.C. 1879, c. 24.

### **B. Why Review the Builders Lien Act Now?**

Since the enactment of the present *Builders Lien Act*, the practices of builders and developers have continued to evolve, as have the kinds of contractual arrangements employed in construction and real property development. For example, phased construction projects are now more common. The scheme of the *Builders Lien Act* is oriented to unitary or monolithic improvements, and there are difficulties in applying it to a phased development because uncertainty arises around the concept of “completion” and the identification of what amounts to a distinct improvement.

Owner-developers now frequently act as their own general contractors, so there is not a single prime contract but a number of different ones, complicating the application of the Act.

The public-private partnership, which typically involves long-term obligations of which construction of an improvement to land is only one, is a relatively new type of building contract that is outside the classic model on which the Act is based.

It is increasingly common for large industrial construction projects, such as those connected with non-renewable resource development, to take place on lands that have not been registered under the provincial land title system. While the Act ostensibly confers lien rights in these situations, they are effectively unenforceable because the land title office cannot accept a claim of lien that does not describe a parcel of registered land. As a result, the liens cannot be preserved.

These and other developments have given rise to new issues and uncertainties in the application of the *Builders Lien Act*. In addition, there are perennial sources of discontent with builders’ lien legislation that frequently give rise to complaints to government and calls for change. Notable among these are the cost and length of time associated with clearing claims of lien from title. Another is the related problem of the Act operating perversely to interrupt the flow of construction funds in a building project. A further complaint that has attracted the attention of legislators is that residential owners may not become aware that claims of lien appear on their titles until they interfere with a sale or a mortgage renewal.

Now that the present Act has been in effect for over 20 years, it is appropriate to run a check on how it has performed and how it may be improved.

### **C. The Builders Lien Act Reform Project**

In 2014, BCLI undertook a comprehensive review of the *Builders Lien Act* at the invitation of the Ministry of Justice and Attorney General. The project was carried out

with the aid of a volunteer committee with extensive experience in construction law, construction industry bonding, and insolvency. The members of the Project Committee are listed at the front of this report.

Beginning in mid-2014, the Project Committee met regularly to identify problems with the current Act, devise solutions, and develop the recommendations for reform of the Act set out here. Once tentative recommendations had been developed, the project moved to its next phase involving the publication of a consultation paper and public vetting of the tentative recommendations.

### D. The Consultation Paper

BCLI published the *Consultation Paper on the Builders Lien Act* in September 2019 for the purpose of inviting comment from stakeholders and the general public on 80 tentative recommendations for reform of the Act. A second consultative document entitled *Overview of the Consultation Paper on the Builders Lien Act* was also issued. The Overview summarized the more important substantive changes proposed in the full-length consultation paper, and was intended primarily for use by a non-legal audience. Digital versions of the two consultative documents were made available for free download from the BCLI website, and were distributed in electronic and print form to principal stakeholder organizations. Responses were requested by mid-January 2020.

BCLI received detailed and extensive submissions in response to the consultation paper from numerous organizations representing different sectors of the construction industry, individual contractors and subcontractors, a treaty first nation, engineering and architectural associations, the construction Bar, the Land Title and Survey Authority, and other stakeholders. One industry association conveyed its comments by way of a conference call.

The Project Committee arrived at the recommendations set out in this report after giving full consideration to all the responses to the consultation paper.

### E. Previous Reports of the Institute

BCLI issued three reports concerning specific issues surrounding the *Builders Lien Act* before undertaking the current Builders Lien Act Reform Project. These were the *Report on Builders Liens and Arbitration*,<sup>5</sup> the *Report on the Builders Lien Act* and

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5. British Columbia Law Institute, *Report on Builders Liens and Arbitration*, Report No. 22 (Vancouver: The Institute, 2002).

*the Pipeline Problem*<sup>6</sup> and the *Report on Builders Liens After the Shimco Case*.<sup>7</sup> While these previous reports have not been superseded, the Project Committee considered the matters covered in them afresh in keeping with the comprehensive nature of the current project. The Project Committee substantially endorsed the conclusions in the earlier BCLI publications. This is reflected in the recommendations of this report.

### F. Prompt Payment and Payment Dispute Adjudication

In the course of the BCLI Builders Lien Act Reform Project, prompt payment legislation resembling that existing in many U.S. states and several other countries has been spreading across Canada. While prompt payment legislation is in force only in Ontario as of the date of this report,<sup>8</sup> it has been enacted in Saskatchewan<sup>9</sup> and Nova Scotia,<sup>10</sup> and recommended in Manitoba<sup>11</sup> and New Brunswick.<sup>12</sup> In addition, a prompt payment regime applicable to construction projects under federal jurisdiction has been enacted by Parliament and will come into force on an undetermined future date.<sup>13</sup> Pilot projects regarding prompt payment terms for public projects are underway in Alberta<sup>14</sup> and Quebec.<sup>15</sup>

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6. British Columbia Law Institute, *Report on the Builders Lien Act and the Pipeline Problem*, Report No. 27 (Vancouver: The Institute, 2003).
  7. British Columbia Law Institute, *Report on Builders Liens After the Shimco Case*, Report No. 29 (Vancouver: The Institute, 2004).
  8. *Construction Act*, R.S.O. 1990, c. C.30, Part I.1, ss. 6.1-6.9, as am by S.O. 2017, c. 24, s. 7 (in force as of 1 October 2019).
  9. *The Builders' Lien (Prompt Payment) Amendment Act, 2019*, S.S. 2019, c. 2 (not yet in force).
  10. *Builders' Lien Act*, R.S.N.S. 1989, c. 277, ss. 4A-4K, as enacted by S.N.S. 2019, c. 12 (not yet in force).
  11. See recommendations in Manitoba Law Reform Commission, *The Builders' Liens Act of Manitoba: A Modernized Approach* (Winnipeg: The Commission, 2018) at 76-82. A private member's bill, *The Prompt Payments in the Construction Industry Act*, Bill 218, 3<sup>rd</sup> Sess., 41<sup>st</sup> Leg., reached second reading in 2018 and was reintroduced as Bill 245 in the next session. It was not passed before the Legislature dissolved prior to a general election.
  12. See Office of the Attorney General, *Law Reform Notes #42*, July 2019, online: <https://www2.gnb.ca/content/dam/gnb/Departments/ag-g/PDF/en/LawReform/Notes42.pdf> at 2-4.
  13. *Federal Prompt Payment for Construction Work Act*, S.C. 2019, c. 29, s. 387 (not yet in force), enacted as Division 26 of Part 4 of the *Budget Implementation Act, 2019*, No. 1, S.C. 2019, c. 29.
  14. The Alberta Ministry of Infrastructure began inserting prompt payment terms in its public works contracts in 2016. See Alberta Construction Association, "Alberta Infrastructure Introduces prompt Payment in Contracts," online: <http://albertaconstruction.net/?p=1184>. The Alberta government also carried out a survey in 2019-2020 concerning possible prompt payment

The government of British Columbia has been urged to introduce similar legislation, and during the spring 2019 session of the British Columbia Legislative Assembly, a private member's bill containing prompt payment provisions modelled closely on those enacted in Ontario received first reading.<sup>16</sup>

The prompt payment legislation recently enacted in Canada has certain general characteristics. It imposes a schedule for progress payments under construction contracts, and may curtail the ability of contracting parties to set alternate payment schedules. Payment within a specified number of days after delivery of an invoice in proper form is mandatory, unless the invoice is disputed by the payor. A payor who disputes an invoice must deliver a notice of non-payment to the invoicing creditor. If part only of an invoice is disputed, the payor must pay the amount not in dispute.

Certification by a payment certifier that the work covered by the invoice is complete may not be made a precondition to the submission of a proper invoice. If a progress payment is not paid within the time specified, the creditor may suspend work and/or terminate the contract with the payor.

Prompt payment regimes may be accompanied by a statutory procedure for rapid dispute resolution by specially designated adjudicators. Adjudicators may make binding interim orders for immediate payment, leaving the parties free to seek a final resolution of their dispute through civil litigation if they choose to do so.

In the consultation paper, we pointed out our reasons for not treating prompt payment as a distinct issue in connection with the reform of the *Builders Lien Act*. Principally, those reasons were that the mandate of the Project Committee was to review the existing *Builders Lien Act* of British Columbia and make recommendations for its reform, not to investigate the financial management of construction projects. What has been called “a culture of delayed payment” in the building sector is largely a

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amendments to the *Builders Lien Act*. The survey closed in March 2020. See online: <https://extranet.gov.ab.ca/opinio6/s?s=BLAPromptPay>.

15. See *Pilot project to facilitate payment to enterprises that are parties to public construction work contracts and related public subcontracts*, C.Q.L.R. c. C-65.1, r. 8.01. The authorizing legislation is the *Act respecting contracting by public bodies*, C.Q.L.R. c. C-65.1, ss. 24.3 and 24.5.

16. Bill M223, *Prompt Payment (Builders Lien) Act*, 4th Sess., 41<sup>st</sup> Parl., British Columbia, 2019.

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product of invoicing, documentation, payment certification, and cash-flow management practices in that sector.<sup>17</sup> It is not solely related to the *Builders Lien Act*.

We emphasized that the propensity of the Act to interfere with the flow of funds within the construction pyramid Act was addressed by tentative recommendations in the consultation paper aimed at preventing and minimizing interruptions in the flow of funds. We said, however, that payment delay in the construction sector that is not related to the operation of the *Builders Lien Act* is outside the scope of this project.

We suggested that the merits of prompt payment and interim adjudication legislation should be assessed in a separate process having the financial management of construction projects as its focus. That process would require a significantly different combination of expertise and resources than the Project Committee possesses.

As expected, a number of stakeholder organizations responding to the consultation paper strongly urged that Ontario-style prompt payment provisions be the main thrust of reform of the *Builders Lien Act*. Some construction industry organizations supported the position we took in the consultation paper, however. The submission of one of the latter organizations stated, “the best course of action is to pause on prompt payment while we determine the effectiveness of the legislation in Ontario and any lessons learned.”

Construction lien legislation is concerned principally with security of payment, rather than the regulation of invoicing and payment cycles. The Project Committee continues to hold the same views expressed in the consultation paper with respect to the matter of prompt payment provisions and interim adjudication. This report neither endorses nor rejects prompt payment legislation as a scheme of relief additional to the ones already contained in the *Builders Lien Act*. It concentrates instead on problems surrounding the present Act.

### G. Organization of this Report

The report begins with an overview of the *Builders Lien Act*. Subsequent chapters deal with different areas of reform which the Project Committee believes to be desirable to improve its operation. A list of recommendations is found at the end of the report. The Appendix contains the text of the present *Builders Lien Act*.

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17. Bruce Reynolds and Sharon Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act* (Toronto: Ministry of the Attorney General and Ministry of Economic Development, Employment and Infrastructure, 2016) at 160-161.

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### H. A Note on Terminology

The terms *lien* and *claim of lien* are often used interchangeably in both oral and written discourse with respect to the *Builders Lien Act*. An effort has been made to avoid using them interchangeably in this report, as such use is not technically correct. “Lien” nevertheless appears in place of “claim of lien” in a few places in the text for reasons of brevity and flow of the narrative where the difference in meaning is not significant.

Strictly speaking, the term *lien* in relation to the *Builders Lien Act* denotes a right conferred by the Act on contractors, subcontractors, material suppliers, and workers to secure payment of a debt owing to them for their services or a supply of materials in respect of an improvement to land. A *claim of lien* denotes the paper or digital document filed in the land title office to assert and preserve a lien against land under the *Builders Lien Act*.

When this report speaks of liens or claims of lien appearing on a title, it is actually referring to the presence of a notation on the title relating to a claim of lien having been filed. And when it speaks of the removal or cancellation of a lien or claim of lien from a title, it is referring to the cancellation of the notation.

As used in this report, the phrase *45-day period* refers to either the period of 45 days referred to in section 20(1) of the *Builders Lien Act* between issuance of a certificate of completion and the end of the time allowed for filing a claim of lien, or the 45 days between an event referred to in section 20(2)(a) or (b) and the end of that time, depending on which of sections 20(1) and (2) apply in a given set of circumstances.

The phrase *lien filing period* refers to the interval of time from the point at which it becomes permissible to file a valid claim of lien and the end of the 45-day period.

## CHAPTER 2. BRIEF OVERVIEW OF THE BUILDERS LIEN ACT

### A. Contractual Relationships in a Typical Construction Project

#### 1. THE CHAIN OF CONTRACTS AND THE CONSTRUCTION PYRAMID

In order to understand the *Builders Lien Act* and what it attempts to do, it is necessary to understand the configuration of contractual relationships in a typical construction project.

It is common to refer to a “chain” of contracts in a construction project, because the different parties engaged to perform work or provide services in connection with the project typically contract out portions of that work to others. Thus, a typical construction project involves a series, or chain, of contracts in which the scope of work covered by each contract progressively narrows and becomes more specialized down the chain.

The contractual relationships may also be thought of as a pyramid in which the owner and lenders to the owner are at the top. An “owner” is defined as follows in the Act:

**“owner”** includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and

- (a) on whose credit,
- (b) on whose behalf,
- (c) with whose knowledge or consent, or
- (d) for whose direct benefit

work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land;<sup>18</sup>

There may be more than one “owner” for the purposes of the Act.

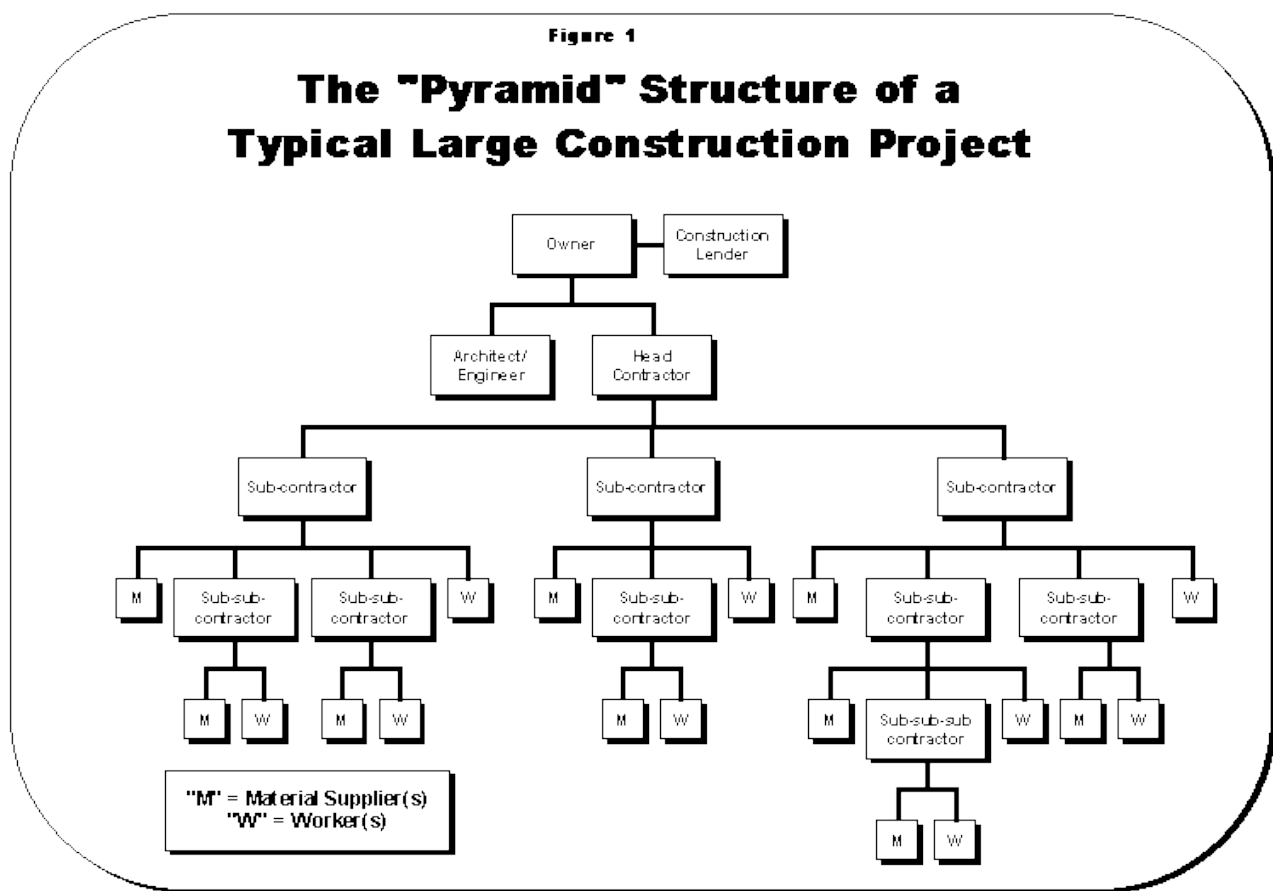
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18. *Supra*, note 1, s. 1(1) (“owner”).



Next below are persons contracting directly with the owner. These would typically be a general (or “head”) contractor engaged to carry out substantially all the work in the project, and possibly an architect or engineer who may be responsible for design or supervision of the work. The next level are subcontractors who have contracts with the general contractor, then sub-subcontractors who enter into contracts with subcontractors, and so on. Material suppliers and workers may be engaged at any level in the pyramid. See Figure 1 below.<sup>19</sup>

Figure 1 – Construction Pyramid With Head Contractor

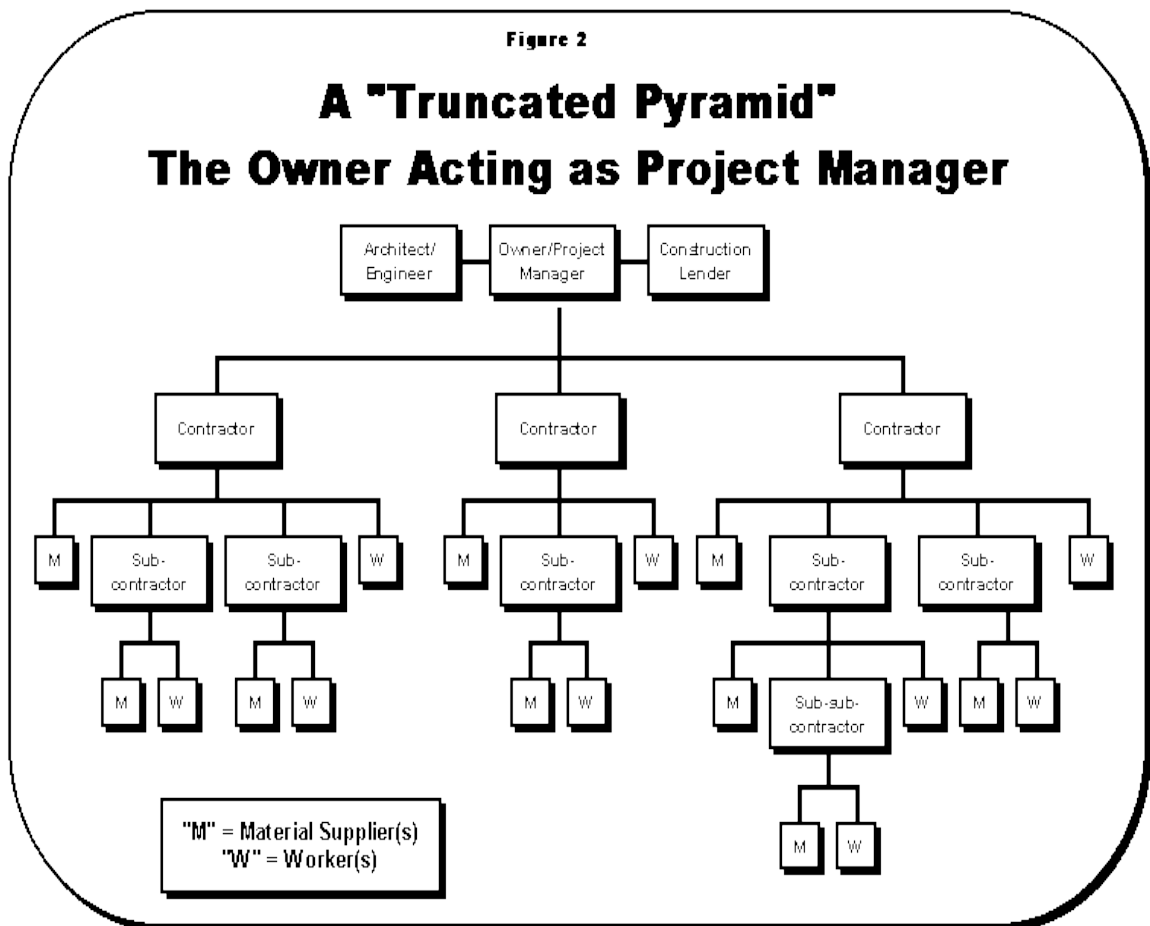


19. Figures 1-3 inclusive first appeared in *Questions and Answers on the New Builders Lien Act, supra*, note 2 at 4.

Many variations of this pattern are found in the construction industry. For example, owner-developers frequently manage their building projects without a head contractor.

Figure 2 is a diagram of contractual relationships in an owner-managed project without a head contractor:<sup>20</sup>

Figure 2 – Construction Pyramid Without Head Contractor



Another common variant is a "design-build contract" in which the roles of architect / engineer and head contractor are combined. The basic pyramidal structure and

20. *Ibid.*

chains of contractual relationships within the pyramid nevertheless typify construction projects generally.

### 2. FLOW OF FUNDS WITHIN THE CONSTRUCTION PYRAMID

In the course of a construction project, money flows from the top to the bottom of the pyramid as work is completed, invoices are submitted, and payments are made. Construction contracts typically call for “progress payments.” These are instalments of the total cost to the payor that are made as segments of work are finished and invoices rendered, or at intervals specified by the contract.

An owner typically receives funds from a lender. Advances by the lender to the owner may be approximately timed to coincide with the times at which a contract calls for progress payments. The owner pays the contractor, who in turn pays subcontractors, who then pay their sub-subcontractors, and so on. Material suppliers and workers may be paid by persons at any level in the pyramid.

Another way of looking at the money flow is that those lower in the contractual chain to whom money is owed extend credit to those higher in the contractual chain until they are paid.<sup>21</sup>

### 3. MEANING OF “ENGAGED BY” AND “ENGAGED UNDER”

The Act frequently speaks of a group of persons being “engaged by or under” another person in connection with an improvement to land, and this phrase is descriptive of the contract chain. “Engaged by” means that two parties have directly contracted with each other.<sup>22</sup> Thus “A is engaged by B” means that they are parties to the same contract and B is located higher in the pyramid than A.<sup>23</sup> “Engaged under” means parties are in the same chain of contracts by virtue of having contracted directly with each other or because they are connected through intermediate parties.<sup>24</sup> “A is engaged under B” means that B is located higher in the pyramid.<sup>25</sup>

A reference to parties “engaged by or under” a particular contractor or subcontractor means those in a contract chain that includes the contractor or subcontractor be-

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21. *Ibid.*, at 6.

22. *Ibid.*, at 3.

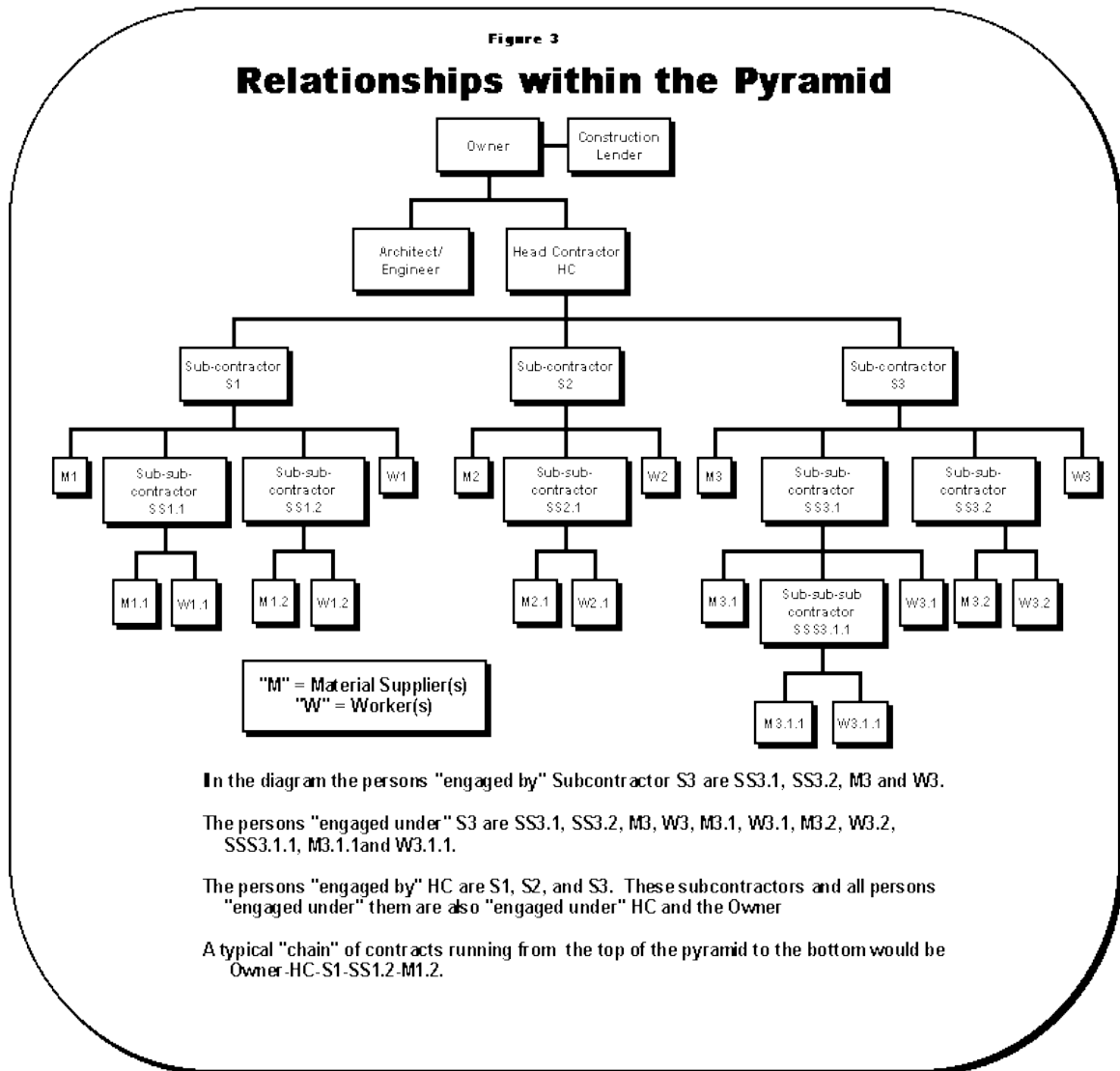
23. *Ibid.*

24. *Ibid.*, at 5.

25. *Ibid.*

ing referred to, and who are located below the level in the pyramid at which that contractor or subcontractor is located. See Figure 3 below.<sup>26</sup>

Figure 3 – “Engaged By or Under”



26. *Ibid.*

## B. Three Core Features of the Builders Lien Act: Lien, Holdback and Trust

### 1. GENERAL

The *Builders Lien Act* has three principal features providing distinct rights to participants in a building project. They are the “land” lien, the holdback, and the statutory trust.

### 2. THE “LAND” LIEN

Security charging property for payment of a debt generally arises through direct contract between the owner of the property and the creditor, as in the case of a mortgage, although in some cases it arises through operation of law. The *Builders Lien Act* provides security in the form of a *statutory* lien on the owner’s property, however. The lien is given to those who perform work or supply materials in connection with an improvement to land, even if they have not contracted directly with the owner.

The lien attaches to the owner’s interest in the improvement, to the improvement itself, to the land in, on or under which the improvement is located, and to material that is delivered to or placed on the land.<sup>27</sup>

If not for the lien given by the Act, unpaid participants in a building project could only sue the person who engaged them for payment. The lien allows them to also claim against the owner’s property, however.

The Act provides for liens to be satisfied from the proceeds of a court-ordered sale of the land, improvement, material, and the owner’s interest in them.<sup>28</sup>

In practice, this rarely happens, because filing claims of lien generally has the practical effect of forcing the resolution of a payment dispute in one way or another.

In order to assert a land lien under the Act and preserve it against extinguishment, a lien claimant must file a *claim of lien* in a prescribed form in the land title office (and/or, if applicable, the chief gold commissioner’s office) within the time limit specified by the Act.<sup>29</sup>

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27. *Supra*, note 1, s. 2(1).

28. *Ibid.*, s. 31(2).

29. *Ibid.*, ss. 15(1), 18(1). If the claim of lien is in respect of a mineral title held under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 other than a Crown-granted mineral claim, s. 18(1) of the *Builders Lien Act* requires the claimant to file it in the office of the gold commissioner in which the

This must be no later than 45 days after the earliest of the following “triggering events”:

- (a) the date on which a certificate of completion, if any, was issued in relation to a contract or subcontract under which the lien claimant is claiming;
- (b) the substantial completion, abandonment, or termination of the head contract, if any;
- (c) the substantial completion or abandonment of the improvement if there is no head contract;<sup>30</sup>
- (d) in the case of a strata lot (condominium unit), transfer by the owner-developer to a purchaser.<sup>31</sup>

If a claim of lien is not filed in time, the underlying lien is extinguished.<sup>32</sup> While a claim of lien may be filed at any time after the claimant has been engaged until 45 days have elapsed after the earliest triggering event, most of the issues surrounding the preservation and extinguishment of liens relate to the 45-day period.

A lien claimant must comply strictly with the time limits and other requirements of the Act surrounding filing claims of lien.<sup>33</sup> Neither the land titles registrar nor the court has the power to extend the time limits. The requirement for strict compliance

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mineral title is recorded. At the present time, this means the claim of lien must be filed in the Mineral Titles Online Registry maintained by the office of the Chief Gold Commissioner, as that office has assumed the recording functions formerly carried out by gold commissioners in the different mining divisions. Section 18 of the *Builders Lien Act* therefore requires updating to reflect the introduction of the Mineral Titles Online Registry in 2005. The term “mineral title” denotes a mineral claim, mining lease, placer claim or placer lease, which are tenures giving rights with respect to Crown-owned minerals. By contrast, a Crown-granted mineral claim is a fee simple interest comprising surface and subsurface rights. Crown-granted mineral claims are registered in the normal manner for fees simple in a land title office rather than in the Mineral Titles Online Registry. Crown-granted mineral claims are no longer issued.

30. *Ibid.*, ss. 20(1), (2).

31. Section 88(1) of the *Strata Property Act*, S.B.C. 1998, c. 43 contains a special rule concerning the time limit for filing a claim of lien against a strata lot that has been or is in the course of being transferred by an owner-developer to a purchaser. The special rule is explained in Chapter 5.

32. *Supra*, note 1, s. 22.

33. *Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.*, 2006 BCSC 885 [*Nita Lake*]; 581582 B.C. Ltd. v. *Habib*, 2013 BCSC 378.

is explained by the fact that a builder's lien is what courts describe as an "extraordinary remedy." It creates a special charge against property that would not exist apart from the Act, and as discussed later in this report, it gives special priority to lien claimants over the claims of some other creditors.<sup>34</sup>

In order to enforce a valid land lien, a claimant must start an action in the Supreme Court of British Columbia and (unless the claim of lien has been secured and removed from title) register a certificate of pending litigation in the land title office within one year of the date on which the claim of lien was filed.<sup>35</sup> If these steps are not taken within this special one-year limitation period running from the date on which the claim of lien was filed, the underlying lien is extinguished.<sup>36</sup>

### 3. THE HOLDBACK

#### (a) General

Anyone primarily liable to pay for work or services under a contract or subcontract under which a lien could arise under the Act is required to retain a holdback from payments to those engaged by them, other than payments to workers, material suppliers, architects and engineers.<sup>37</sup> Those who are "primarily liable to pay," and therefore must retain a holdback, include the contracting owner and any contractor or subcontractor who has subcontracted work or services to others in relation to the improvement.

If an owner's interest in land is mortgaged to a savings institution, the Act allows the mortgagee savings institution to retain the holdback that the Act requires the owner to retain. This is deemed to be compliance by the owner with the holdback requirement.<sup>38</sup>

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34. *Clarkson Co. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 at 114; *Nita Lake*, *supra*, note 33.

35. *Supra*, note 1, ss. 26, 33(1).

36. *Ibid.*, s. 33(5). See *Alan Jones Construction Limited v. Hicks*, 2019 BCSC 568 (failure to register certificate of pending litigation in time leads to extinguishment of the lien, despite owner not being prejudiced because of having notice of the lien through the notice of civil claim). The Act contains a procedure in s. 33(2) whereby the one-year limitation period may be abridged through service of a notice requiring commencement of an action and registration of a certificate of pending litigation within 21 days from the date of service.

37. *Supra*, note 1, s. 4(1).

38. *Ibid.*, s. 4(4).

Holdbacks are retained only from amounts paid to contractors and subcontractors. They are not retained from amounts paid to an architect, engineer, material supplier, or worker, because no liens can arise under them.<sup>39</sup>

### *(b) Amount of the holdback*

The amount of the holdback which the Act requires is “10% of the greater of (a) the value of the work and material as they are actually provided under the contract or subcontract, and (b) the amount of any payment made on account of the contract or subcontract price.”<sup>40</sup> Construction contracts usually call for regular progress payments based on the value of work done in the interval between payments, so payors would normally comply with the Act by withholding 10% of each progress payment.

### *(c) Purposes of the holdback*

The holdback requirement serves a dual purpose. One purpose is to prevent undue hardship on an owner who has paid a contractor in good faith, because the maximum amount an owner would have to pay to discharge the liens of those claiming under the contractor is limited to the greater of the amount the owner owes to the contractor and the amount of the required holdback.<sup>41</sup> The same principle applies further down the contractual chain as well.

A second purpose of the holdback under the Act in its present form is to create a fund from which unpaid claims of lienholders may be satisfied. The holdback is charged with payment of all persons engaged in connection with the improvement by or under the person from whom the holdback is retained.<sup>42</sup> To the extent that the claims of those persons are not fully paid through their liens on the land or the holdback, they may pursue the person who engaged them for the balance by means of ordinary actions in debt or on the basis of the statutory trust described below.

### *(d) Holdback period*

A holdback must be maintained for 55 days after the earliest of the triggering events causing the 45-day period to begin running: (a) the date on which a certificate of completion, if any, is issued for the contract or subcontract to which the holdback re-

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39. *Ibid.*, s. 4(6).

40. *Ibid.*, s. 4(1).

41. *Ibid.*, s. 34(1).

42. *Ibid.*, s. 4(9). Section 4(9) has been interpreted as creating a lien on the holdback, commonly known as the “*Shimco* lien,” that is separate from the lien on land created by s. 2(1). Difficult issues surround the *Shimco* lien, which is the subject of Chapter 6.



lates; (b) completion, abandonment, or termination of the head contract if any; (c) if there is no certificate of completion and no head contract, the completion or abandonment of the improvement.<sup>43</sup> The holdback may then be paid out if no claims of lien have been filed and no proceedings have been commenced to enforce a lien against the holdback.

### *(e) Holdback account*

An owner is required to establish a holdback account at a savings institution for each contract under which a lien could arise, if the aggregate value of work and material under the contract is \$100,000 or more.<sup>44</sup> The owner is required to deposit holdback funds into the account, which is administered by the owner and the contractor “together.”<sup>45</sup> Funds may not be paid out of a holdback account without agreement of all persons administering the account.<sup>46</sup> If there is more than one owner within the meaning of the Act, only one of the owners is required to establish and administer a holdback account.<sup>47</sup>

In projects where there is no single head contract, a separate holdback account is required for each contract between the owner and a contractor with a value of \$100,000 or more (other than contracts between an owner and material suppliers, architects and engineers). The Act does not currently allow a pooled holdback account covering multiple contracts.

The provincial government and certain other public bodies are exempt from the requirement for a holdback account when they are owners for the purposes of the *Builders Lien Act*.<sup>48</sup>

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43. *Ibid.*, ss. 8(1), (2). In the case of a holdback retained by a purchaser buying a strata lot from an owner-developer to cover claims of lien not yet filed at the time the title to the strata lot is transferred, the holdback period expires on the earlier of the 45-day period under the *Builders Lien Act* and 55 days after the strata lot is conveyed to the purchaser: *Strata Property Act*, *supra*, note 31.

44. *Supra*, note 1, ss. 5(1), (8)(b).

45. *Ibid.*, ss. 5(1)(b), (c).

46. *Ibid.*, s. 5(2)(c).

47. *Ibid.*, s. 5(5).

48. *Ibid.*, s. 5(8)(a).

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### 4. THE STATUTORY TRUST

The third core feature of the *Builders Lien Act* is the trust created by section 10 of the Act. The purpose of this statutory trust is to prevent the diversion of construction funds for purposes extraneous to the project, and to keep them within the construction pyramid.

Section 10(1) declares that contractors or subcontractors (other than architects, engineers, or material suppliers) are trustees of any money received by them on account of the price of their respective contracts or subcontracts. The trust is for the benefit of persons whom these contractors and subcontractors engage in connection with the improvement.

Until all the beneficiaries of the trust have been paid, contractors and subcontractors are prohibited from using the money received on account of their respective contracts for any other purpose.<sup>49</sup> To do otherwise is an offence.<sup>50</sup> The money received may be retained by a contractor or subcontractor to the extent that the contractor- or subcontractor-trustee has paid others engaged to perform work or supply materials called for by the contract or subcontract using non-trust money, however.<sup>51</sup> In other words, if those others have already been paid from non-trust money, the contractor- or subcontractor-trustee may retain an equivalent amount from the trust money. The trust money may also be used to pay off a loan, if the contractor or subcontractor- trustee has used the borrowed funds to pay trust beneficiaries.<sup>52</sup>

The ability to assert rights as a beneficiary of the statutory trust does not depend on having a valid lien. For example, if an unpaid subcontractor's lien has lapsed because of failure to file a claim of lien in time, the subcontractor may still be entitled to pursue the debtor contractor for breach of the statutory trust if the debtor has used money received in the course of the project in a manner inconsistent with the Act.

### C. Other Provisions of the Builders Lien Act

The *Builders Lien Act* contains numerous provisions ancillary to the principal ones that confer rights and impose corresponding obligations. They deal with matters such as actions to enforce liens, priorities as between lien claimants and other credi-

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49. *Ibid.*, s. 10(2).

50. *Ibid.*, s. 11(1).

51. *Ibid.*, s. 11(4).

52. *Ibid.*, s. 11(4)(b).

tors, and the distribution of funds. An important group of provisions deals with mechanisms for securing claims of lien and clearing the title of liens. These are intended to prevent liens from impeding the flow of funds while a construction project proceeds and allow for dealings with the land, while at the same time protecting claimants' rights to prove entitlement to liens and recover payment through recourse to the security.

These ancillary provisions of the Act are discussed in later chapters in conjunction with recommendations relating to them.

## CHAPTER 3. REPEALING THE ACT OR RESTRICTING ITS SCOPE - FEASIBLE OPTIONS?

### A. The Question of Repeal

As noted in Chapter 1, the *Builders Lien Act* is a perennial source of discontent. Nearly every review of builders' lien legislation in Canada over the past six decades has addressed the question of whether the legislation should be repealed.<sup>53</sup> Outright recommendations for immediate repeal have been rare, however, and no province or territory has repealed its builders' lien statute.

Most recently, the question of repeal was raised during the Construction Lien Act Review in Ontario, but it was not pursued because of the strength of support for retention from the broad swath of stakeholders that participated in the review.<sup>54</sup> This illustrates a conundrum surrounding builders' lien legislation, namely that the very interests that are often heard to complain about its operation tend also to vigorously oppose repeal because of the protections that the legislation reputedly provides.

The main arguments made over the decades in favour of repealing the Act are that it:

- is discriminatory in giving a privileged status to certain classes of creditors;
- obstructs the flow of funds within the construction pyramid;
- is abused to create pressure on payors, especially unsophisticated residential owners;

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53. See Ontario Law Reform Commission, *The Mechanics' Lien Act* (Toronto: Dept. of the Attorney General, 1966) at 4; Law Reform Commission of British Columbia, *Report on Debtor Creditor Relationships: Part II – Mechanics' Lien Act: Improvements on Land* (LRC 7) (Vancouver: The Commission, 1972) at 20-26; Manitoba Law Reform Commission, *Report on Mechanics' Lien Legislation in Manitoba*, Report #32 (Winnipeg: The Commission, 1979) at 13; Alberta Institute of Law Research and Reform, *The Builders' lien Act: Certain Specific Problems*, Report No. 30 (Edmonton: The Institute, 1979) at 1-3; Law Reform Commission of Nova Scotia, *Builders' Liens in Nova Scotia: Reform of the Mechanics' Lien Act* (Halifax: The Commission, 2003) at 19.

54. Reynolds and Vogel, *supra*, note 17 at 2 and Appendix A, List of Participating Stakeholders.

- gives an illusory sense of security to creditors who may think filing a claim of lien will result in quick payment;
- is complex, difficult to apply, and uncertain, which leads to interpretative and technical issues that give rise to disputes and drive up legal expenses;
- is often ignored in practice.

The former Law Reform Commission of British Columbia dealt with the question of retention or repeal at some length in its 1972 report. The Commission thought that arguments in favour of repeal had considerable force, but the construction industry, its suppliers, and lending institutions had long operated on the assumption that the Act would be in place. The problems with the legislation were known and solutions could be devised to address them, but the drastic surgery of repeal could have far-reaching effects that could not be entirely foreseen. The lack of empirical, objective information on which to base a policy decision to retain or repeal the Act then in force was noted. The Commission concluded that it could not “at the moment demonstrate conclusively that the balance of benefit lies in favour of repeal.”<sup>55</sup>

The circumstances noted by the former Commission still persist. The *Builders Lien Act* is part of the culture of the construction sector, which includes not only builders and the building trades, but a much larger circle of stakeholders comprising suppliers, engineers, architects, developers, and lending institutions. Commercial practices within that sector have been predicated on the rights, liabilities, and remedies under the Act. The consequences of repeal of the Act cannot readily be foreseen. They cannot be assessed with any confidence without extensive consultation with all affected interests, together with a thorough economic analysis that would require expertise which the Project Committee does not possess. Accordingly, the report contains no recommendation regarding retention or repeal.

### **B. Should the Act Be Restricted to Non-Residential Construction?**

The provincial government and legislators regularly receive complaints from citizens that the *Builders Lien Act* is one-sided and places homeowners at an extreme disadvantage vis-à-vis an unscrupulous contractor. Many have stories to tell of lien rights being used oppressively to force payment of disputed accounts or inflated invoices. In the course of this project, BCLI has received submissions in this vein as well. Abusive practices connected with the *Builders Lien Act* are neither new nor uncommon, and a later chapter contains recommendations addressing them. Here we consider whether making the Act inapplicable to improvements on residential prop-

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55. Law Reform Commission of British Columbia, *supra*, note 53 at 26.

erty would result in a better balance between the interests of the industry and residential owners.

The *Builders Lien Act* gives builders and tradespeople a powerful means of extracting payment from homeowners, regardless of whether there is a genuine dispute over the claimant's performance of the work. Filing a claim of lien adds considerably to the expense a homeowner will face in disputing a contractor's or tradesperson's invoice, as it has the effect of elevating a dispute within the monetary jurisdiction of the Small Claims Court (currently \$35,000) or even the Civil Resolution Tribunal (currently \$5,000) into the Supreme Court.<sup>56</sup> In order to clear the lien from the title pending resolution of the dispute, the homeowner will have to apply to the Supreme Court and provide security, even if the homeowner eventually manages to have the underlying dispute over the amount owing decided in the Small Claims Court or Tribunal.

At the very least, the filing of a lien against a homeowner's property can damage the homeowner's credit rating. Left in place on the title, a lien may interfere with the renewal of a mortgage. Standard mortgage terms give the mortgagee the option to treat it as a default under an existing mortgage, triggering the operation of an acceleration clause. Another scenario is that the mortgagee may choose to obtain discharge of the lien by paying the lien claimant directly and add the amount of the payment to the homeowner's indebtedness, meaning the homeowner will ultimately pay much more to the mortgagee over time than the amount of the lien claim, regardless of whether the homeowner had valid defences. Homeowners have little or no control over these possibilities unless they forego any valid defences and meet the demands of service providers for immediate payment of their claims.

In reality, the Act does not protect homeowners in the way it protects commercial landowners and developers. The latter know they are entitled to maintain a 10% holdback and that it limits their liability to potential lien claimants. Homeowners frequently do not know this. If a homeowner does insist on the right to maintain a 10% holdback, this may well lead to the immediate filing of a claim of lien or refusal to perform the work. Builders' liens are expensive and aggravating for commercial landowners and developers to deal with, but they usually do not create the same degree of pressure that they can impose on a homeowner.

If the *Builders Lien Act* as a whole or the portions of the Act dealing with the lien remedy ceased to apply to residential property, it would eliminate most cases in

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56. See the *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, s. 1; *Tribunal Small Claims Regulation*, B.C. Reg. 232/2018, s. 3.

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which the Act is misused as a collection device and pressure tactic where there is a genuine dispute between homeowners and a contractor or repairer over the extent or quality of work. It would also go some distance in maintaining proportionality between the value of contracts and court processes to enforce them.

A variant of this approach would preserve lien rights in the residential sector only with respect to new construction. The values of contracts and claims relating to new construction are generally larger than they are in the home renovation and repair market. Furthermore, the owner during the construction of new dwellings is often a commercial developer, especially in new subdivisions.

On the other hand, confining the application of the Act to non-residential property would deprive small and middle-echelon contractors, subcontractors, material suppliers, and individual tradespeople of lien rights not only where the payor is an individual homeowner, but also where the owner is a developer engaged in building an entire residential subdivision or a pre-sold condominium tower. It also presents problems of definition. How, for example, should common property in a residential strata development be made lienable? Would residential subdivisions built on speculation by a developer count as lienable commercial or non-lienable residential property before units are sold?

A **minority** of members of the Project Committee are in favour of confining the Act to non-residential property. The **majority**, however, are opposed to restricting the operation of the Act in this manner.

### C. Should the Act Be Restricted to New Construction Only?

The original purpose of builders' lien legislation was to protect against insolvency occurring in the course of construction. While arguments may be made that the model is imperfect or even misguided, a major policy underlying builders' lien legislation is to prevent domino chain insolvencies from undermining the viability of the building industry, the building trades, and their suppliers, while protecting the owner at the same time. New construction and replacement of existing structures are necessary for a thriving economy, and the importance of the construction sector as a focal point of a very wide field of economic activity is at the root of the privilege that the *Builders Lien Act* gives to lienholders over other creditors of an owner or contractor.

It is not obvious that the same protection against domino chain insolvencies is necessary for providers of repairs or minor renovations that do not involve new construction or significant structural alterations. They are more likely to be engaged directly by an owner rather than being in a contract chain where the insolvency of a

head contractor or another subcontractor could have a serious impact on other parties on the same job. Thus, the justification for elevating repairers and renovators to the status of secured creditors with a pre-judgment charge against the owner's property is arguably absent, even if they are the same people who would be entitled to lien rights when working as builders and subtrades on a different job that involves new construction.

Restricting the application of the *Builders Lien Act* to new construction, including substantial additions to existing structures, would arguably be in keeping with the original purpose of the Act. It would help to prevent lien rights from being used purely as a pressure tactic. It would also address the disproportionality in terms of the cost and potential detriment that is imposed on a homeowner when the *Builders Lien Act* is invoked to collect a relatively small account.

It could be difficult to pin down a workable definition of "new construction," however. Some renovations may be very large in scope, particularly if they are made in order to allow for a change in use of a building. For example, would "new construction" apply only to improvements resulting in new exterior and supporting structures, or should it also apply to jobs in which an interior is completely or substantially rebuilt without altering the exterior?

A **minority** of members of the Project Committee would prefer to restrict the scope of the Act to new construction. The **majority**, however, believe the Act should continue to apply to renovations and repair of existing structures.

### D. Should the Minimum Value of a Claim of Lien Be Raised?

The minimum amount for which a claim of lien may be filed is \$200.<sup>57</sup> Clearly, this threshold is out of date and unrealistic. It is not economical to invoke the machinery of the *Builders Lien Act* for claims of this size.

The Project Committee considered several proposals for a minimum lien value. The upper limit of the monetary jurisdiction of the Small Claims Court, currently set at \$35,000, was rejected as a minimum lien value because it would exclude many claims by subcontractors and virtually all claims by workers. Another amount considered was \$5,000, which is the upper limit of the jurisdiction of the Civil Resolution Tribunal. This was also thought to be too high, as workers' wage claims would generally be non-liable. A majority of members reached a consensus that \$3,000 would be an appropriate minimum value for a valid claim of lien, because this ap-

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57. *Supra*, note 1, s. 17.



proximates the minimum cost to obtain an order securing a lien or to commence a lien enforcement action. An organization representing general contractors supported \$3,000 in its response to the consultation paper.

A minority view, however, was that the minimum value for a claim of lien by a contractor should be \$25,000, as a contractor is engaged directly by an owner and has a direct contractual claim against the owner in addition to lien rights. One respondent to the consultation paper supported this position.

As views did not change within the Project Committee subsequent to the consultation period, and the same division was seen in the responses from readers of the consultation paper, each view regarding an appropriate minimum value is set out below.

A **majority** of the members of the Project Committee recommend:

1. *The Builders Lien Act should be amended to increase the minimum amount for which a claim of lien may be filed to \$3,000.*

A **minority** of the members of the Project Committee would set the minimum value for a claim of lien by a contractor at \$25,000.

## CHAPTER 4. CLAIMING A LIEN – IMPROVING THE PROCESS FOR PRESERVING LIEN RIGHTS

### A. General

This chapter focuses on the process of claiming a lien under the *Builders Lien Act*. One group of recommendations covered in this chapter concerns the form of the claim of lien. They are intended to reduce the amount of information required by the form to the minimum necessary, and to eliminate common pitfalls in completing it.

Another group of recommendations concerns the triggers for time to start running under the 45-day period. They are aimed at simplifying the section specifying those triggers and making it easier for lien claimants and their advisers to determine how much time a claimant has to preserve lien rights by filing a claim of lien.

Other recommendations in this chapter address gaps and inconsistencies in the Act regarding the ability to preserve lien rights against particular lands and interests in land.

A further issue addressed in this chapter is the lack of a mechanism in the Act to ensure that registered owners are made aware when claims of lien are filed against their titles.

### B. The Claim of Lien

#### 1. THE PRESENT FORM 5 (CLAIM OF LIEN)

The form of claim of lien is prescribed in the *Builders Lien Act Forms Regulation*.<sup>58</sup> This is the form prescribed at the present time:

#### Form 5

#### *Builders Lien Act*

(Sections 15, 16, 18)

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58. B.C. Reg. 1/98.

## Report on the Builders Lien Act

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### Claim of Lien

I,.....[claimant] of .....[address], British Columbia, [if claim is made by an agent, insert here "agent of the lien claimant"] state that:

1 .....[claimant] of .....[address], British Columbia, claims a lien against the following land:

[Insert legal description here or, if a lien is claimed under section 16 against more than one parcel of land, insert the legal description of all parcels of land against which the lien is claimed. If insufficient space is provided, attach a schedule. If the claim of lien is to be filed in the gold commissioner's office, insert the name of the mineral title, its tenure number and the name of the mining division.]

2 A general description of the work done or material supplied, or to be done or supplied, or both, is as follows:

3 The person who engaged the lien claimant, or to whom the lien claimant supplied material, and who is or will become indebted to the lien claimant is:

4 The sum of \$..... is or will become due and owing to ..... on ..... [month, day, year].

5 The lien claimant's address for service is:

Signed: .....

Dated ..... [month, day, year]

NOTE: Section 45 of the *Builders Lien Act* provides as follows:

**45** (1) A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence.

(2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of \$2 000 or the amount by which the stated claim exceeds the actual claim.

### 2. COMMENTARY ON THE PRESENT FORM 5 (CLAIM OF LIEN)

Paragraph 1 of Form 5 contains the information identifying the claimant and the description of the land against which the claimant is asserting a lien. There is a practice of including the incorporation number in paragraph 1 if the lien claimant is a British Columbia corporation, or the registration number for an extraprovincial corporation. It is commonly believed that the incorporation or registration number of a corporate lien claimant must appear with the corporate name in paragraph 1. Form 5 does not specifically require this, nor does the land title office.<sup>59</sup> As errors are frequently made in entering these numbers, the Project Committee does not believe they should be required in a revised claim of lien form.

Paragraph 1 of Form 5 calls for the entire legal description of the land against which the lien is being filed, but does not expressly require the PID (property identification designation). A PID, however, is a unique identifier for a subdivided parcel of land that now has to accompany the legal description in land titles documents to enable registration.

Paragraph 3 of Form 5 identifies the debtor who owes money to the claimant. It contains the words “or to whom the lien claimant supplied material, and who is or will become indebted to the lien claimant” in paragraph 3. These words are actually unnecessary and potentially confusing. All that is needed is the name of the person who owes money to the claimant for the work or materials.

Paragraph 4 of Form 5 also requires the name of the lien claimant to be inserted unnecessarily a second time. It also requires a superfluous date. The paragraph recognizes that a claim of lien may be filed in respect of amounts that will become payable in the future, but it is not essential to specify a date on which future payments will become due. The only essential information in this paragraph is the amount of the lien claimed.

Unrepresented claimants may be unsure whether the amount claimed should include taxes and interest. Interest as such is not properly included in the amount of a lien.<sup>60</sup> Value-based taxes are part of the total price and should be included in the

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59. The belief that the incorporation or registration number of a corporate lien claimant is essential information in the claim of lien has evidently been reinforced by the pop-up prompt calling for entry of the number that appears when paragraph 1 of Form 5 is being completed online. Inclusion of these numbers is nevertheless optional, according to information provided by the Land Title and Survey Authority.

60. *Horsman Brothers Holdings Ltd. v. Lee*, [1985] B.C.J. No. 2269, 12 C.L.R. 145 (C.A.). The reason why the amount of a lien does not include interest is that interest is not a cost related to the val-

amount claimed, however.<sup>61</sup> Paragraph 4 could be re-worded to clarify this for the benefit of claimants filling in the form without the benefit of legal advice.

Paragraph 5 requires the claimant to state an “address for service” without an explanation of what that term means. This term drawn from court procedure means an address that others may use in order to deliver legal documents that affect the person who provides the address. The unexplained term often confuses unrepresented claimants, who sometimes enter the owner’s address or the address of the worksite instead, since that is where they provided services. An address for service is an essential piece of information in the claim of lien, because other interested persons must be able to serve notices and other documents on claimants in subsequent proceedings that concern or affect their rights.

Form 5 is worded as a formal, legalistic declaration into which the claimant inserts information. It would be simpler overall and less daunting to unrepresented claimants if it were re-cast as a set of questions.

### 3. PROPOSED NEW FORM OF CLAIM OF LIEN

The Project Committee has developed a new form of claim of lien with a simpler format that addresses each of the points made under the preceding subheading. It contains wording that explains the purpose of providing an address for service for the lien claimant, namely to indicate to the lien claimant and anyone else that documents relating to the claim of lien may be delivered to the lien claimant at that address.

The Project Committee recommends:

*2. The present Form 5 (Claim of Lien) should be replaced by the form set out below:*

#### **Builders Lien Act (Sections 15, 16, 18)**

#### **Claim of Lien**

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ue of the improvement. It is a purely contractual entitlement, enforceable only between parties to a contract and /or their assignees. A builder’s lien, by contrast, is a right *in rem* (in a thing) that can be enforced against an owner with whom a claimant such as a subcontractor or worker may have had no direct contractual relationship.

61. See the heading “GST and PST As Part of the “Price” or “Value” of Work or Material – Clearing Up Doubts” below.

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## Report on the Builders Lien Act

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The lien claimant identified below claims a lien against the land or interest in land identified below for work and/or materials provided or being provided:

1. Legal name of the lien claimant: \_\_\_\_\_
2. Brief description of the work/materials: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. Amount which is or will be owing to the lien claimant for the work/materials, including taxes but not including interest or legal costs: \_\_\_\_\_
4. Who owes or will owe the lien claimant that amount: \_\_\_\_\_
5. PID and legal description of the land or interest in land (or details of the mineral title if filing in the chief gold commissioner's office):<sup>62</sup>  
\_\_\_\_\_  
\_\_\_\_\_
6. Lien claimant's address for service of documents. Legal documents relating to this claim of lien may be legally served on the lien claimant by delivering them to this address: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Date signed: \_\_\_\_\_  
Print name and address of person signing: \_\_\_\_\_  
\_\_\_\_\_

**IMPORTANT: All sections of this form must be filled in.**

### C. Dealing with Defects in a Claim of Lien

#### 1. GENERAL

The *Builders Lien Act* that was in force before 1997 contained a provision stating that only substantial compliance with the formal requirements for a claim of lien

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62. The wording of paragraph 5 of the proposed form of claim of lien reflects the interests in land and Crown resource tenures that are currently lienable. It would need to be modified to reflect the expansion of lienable interests which Recommendations 5 and 6 call for, if those recommendations are adopted.

was necessary.<sup>63</sup> It also stated that a claim of lien was not invalidated because of non-compliance with the formal requirements, unless the court also found that the non-compliance had caused prejudice (detriment) to some person. Substantive defects in a claim of lien, such as a misdescription of the land, were outside the scope of this “curative” provision.<sup>64</sup>

The curative provision was not carried over into the 1997 *Builders Lien Act*, which is currently in force. The deletion of the curative provision seems to have influenced British Columbia courts to insist on strict compliance regarding matters of form as well as substance.<sup>65</sup> Claims of lien have been held invalid in numerous cases because of misnomers without proof that anyone was actually misled regarding the contractual relationship giving rise to the lien being claimed or the identity of the true parties.<sup>66</sup>

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63. *Builders Lien Act*, R.S.B.C. 1996, c. 41, s. 21(4).

64. *Rafuse v. Hunter* (1906), 12 B.C.R. 126 (Co. Ct.); *Clark v. Fairview Homes Ltd.* (1988), 289 C.L.R. 173 (B.C. Co. Ct.).

65. In *Nita Lake*, *supra*, note 33, at para. 10 the court took note of the omission of the former curative provision in the 1997 *Builders Lien Act* in holding that misidentification of the debtor in a claim of lien should lead to invalidation. See also *Framing Aces Inc. v. 733961 B.C. Ltd.*, 2009 BCSC 389, at para. 26 regarding insistence on strict compliance with the statutory form. In *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, the Court of Appeal referred to the liberal, purpose approach to interpretation approved by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26, with respect to the effect of a change introduced by the 1997 *Builders Lien Act*. More recently, the Court of Appeal expressly endorsed the *Bell ExpressVu* approach to the interpretation of the Act generally in *Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FES Energy*, 2018 BCCA 272. This places in some doubt the statements in *Nita Lake* and other cases that the formal requirements of a claim of lien must be strictly applied. See also *Primex Industries Inc. v. The Owners, Strata Plan LMS 1751*, 2016 BCSC 2092, at para. 45. The general trend of cases up to the present that deal with the formal validity of a claim of lien is nevertheless in keeping with the strict compliance approach exemplified by *Nita Lake*. See *Yongfeng Holdings Inc. v. Zheng*, 2019 BCSC 1534 at paras. 170-181 [*Yongfeng Holdings*].

66. In *581582 B.C. Ltd. v. Habib*, *supra*, note 33, a contractor was identified in the claim of lien by a trade name instead of the contractor’s correct corporate name. In another case, the claimant inserted the name of a company he intended to incorporate instead of his own name, and the company was not incorporated until after the claims of lien were filed. The liens were found invalid because the named claimant was not a legal entity at the relevant time: *Framing Aces Inc. v. 733961 B.C. Ltd.*, 2009 BCSC 389, *supra*, note 65. Again in *Yongfeng Holdings*, *supra*, note 65, a trade name was shown as the lien claimant instead of the correct corporate name of the claimant or that of an agent, although there was no confusion regarding the true claimant. In holding the lien extinguished, however, the court did not rely on this because the claim of lien contained another more serious error, namely that the owner’s existing address was shown as the claimant’s address for service. In *Nita Lake*, *supra*, note 33, the name of a construction manager was mistakenly inserted as that of the debtor instead of the name of the actual owner. The justification

As there is no power in the Act to amend a claim of lien, the consequences of making a mistake in filling out a claim of lien can be severe. If the claim of lien is later found to be invalid and the period for filing claims of lien has expired, the lien is lost.

### 2. A POWER TO AMEND CLAIMS OF LIEN?

The Project Committee considered whether a provision should be added to the Act empowering the court to amend a claim of lien, but has concluded this is not needed for several reasons.

If an error relates to the amount of the lien, it is currently possible for a lien claimant to voluntarily reduce the amount without the need to amend the claim of lien document. The practice now is to do this by means of a letter. The Project Committee thought that allowing claimants to increase the amount of their liens after they have been filed would invite abuse. It would also produce extreme uncertainty concerning apportionment of holdbacks and efforts to clear the title.

Another reason why the Project Committee believes a general power to amend is unnecessary is that the land title office may allow the correction of a claim of lien that is defective on its face within 21 days after service of a Notice Declining to Register (defect notice) without loss of priority in the queue of pending applications for registration. While this can create a significant problem for owners and head contractors because the title cannot be cleared in the interim, it detracts from the case for providing a general power resting with the court to amend claims of lien on application.

The Project Committee also considered and rejected the suggestion that the land description in a claim of lien should be capable of amendment when the description is not defective on its face, but describes the wrong land. It would be inconsistent with the scheme of the *Builders Lien Act* to record a claim of lien against the correct title on the basis of an amendment if the time for filing a claim of lien has expired. Even if the time for filing has not expired, difficult priority issues could arise because other charges might have been endorsed on the correct title in the period between the filing of the claim of lien containing the wrong land description and the amendment. If the claimant files against the wrong land, the claim of lien should simply be treated as invalid.

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offered for invalidating the claim of lien was that the misnaming of a party meant the claim of lien did not refer to an actual contract. It was not established that anyone had been confused about the identity of the proper party, however.

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The Project Committee thought misnomers in a claim of lien should not necessarily invalidate a claim of lien, however. Instead, they should be treated in a manner similar to the way they are treated when they appear in court documents. In other words, misnaming someone in a claim of lien should not be considered to invalidate the claim of lien unless someone has actually been misled and as a result has been “prejudiced” in the legal sense of having suffered some form of detriment. The Project Committee saw merit in restoring a version of the former curative provision to the Act and extending it to misnomers as well as defects in form.

### 3. RESTORING A CURATIVE PROVISION TO THE ACT

Reaction to the proposed restoration of a curative provision requiring only substantial compliance with the claim of lien form was mixed amongst respondents to the consultation paper. There was support for the position that minor errors and misnomers should not invalidate claims of lien when they do not mislead, but the criticism was raised that a standard of “substantial compliance” would create uncertainty and inconsistent results from one case to another.

With the simplification of language and elimination from the form of details that are common sources of errors, the Project Committee believes that there will be few situations calling for application of the substantial compliance standard. Unless the Act is amended to contain a clear statement that substantial compliance with form is the operative standard, however, case authority calling for strict compliance with the prerequisites for completing a claim of lien would probably continue to be followed.

The Project Committee recommends:

#### *3. The Builders Lien Act should be amended to include a provision declaring that*

- (a) only substantial compliance with the provision of the Act concerning the form of a claim of lien is necessary; and*
- (b) a claim of lien is not invalidated for the reason only that it fails to comply with any provision of the Act concerning form or misnames a person unless, and then only to the extent that, a person is prejudiced by the failure or misnomer.*

### 4. DELAYS ASSOCIATED WITH DEFECT NOTICES CONCERNING CLAIMS OF LIEN

#### *(a) Defective claims of lien as pending applications*

As mentioned above, a claim of lien cannot be removed while it remains a pending application in the registration queue, because it has not yet been endorsed on the title. Despite its pending status, it can still hold up advances of mortgage funding and

interrupt the flow of construction funds down the contract chain. If the claim of lien is defective and a Notice Declining to Register (defect notice) is issued giving the claimant an opportunity to correct the defect, the interval in which the flow of construction funds is held up without the claimant having the ability to clear the lien may be prolonged accordingly.<sup>67</sup> In the consultation paper, the Project Committee suggested two ways of addressing this problem and invited comment, without expressing a preference between the two approaches.

The first approach proposed in the consultation paper was to minimize the threshold requirements for acceptability of a claim of lien for filing against the proper title, in order to also minimize the room for defects that would generate a defect notice requiring correction. The suggested minimum requirements would be words such as “claim of lien” to identify the interest claimed, a subsisting PID or land description, the amount claimed, the name of the claimant, and the mailing address of the claimant required by section 149 of the *Land Title Act*.<sup>68</sup> While this approach would make no inroads into the land title system, it would have been a partial solution at best. It would reduce the scale of the problem of delay associated with defect notices, but not eliminate it.

The second approach proposed in the consultation paper was to empower the court to abridge the time for correcting the defect, and to direct the registrar to cancel the pending application to file the claim of lien if the defect was not corrected within the abridged time. In responding to the consultation paper, the Land Title and Survey Authority raised objections to conferral of a power to abridge the statutory time limit allowed for correction, noting that it would be unique in the land title system. The Land Title and Survey Authority also maintained it would alter the legislative balance between lien claimants and owners.

Having revisited the original proposals, the Project Committee decided to abandon them and look for alternative solutions. A minority view within the Project Committee is that claims of lien with defects that prevent acceptance for filing should simply be rejected and removed from the pending application queue, rather than giving rise to a defect notice and an opportunity for correction.

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67. Section 308(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 allows an applicant to correct a defected application to comply with the registrar’s requirements for registration or filing within 21 days after service of the defect notice. Service of the defect notice by registered mail is deemed under s. 317(3) of the *Land Title Act* to occur 10 days after mailing. The statutory period for correction therefore amounts effectively to 31 days, which is subject to extension under s. 308(4) at the registrar’s discretion.

68. Section 149(1) of the *Land Title Act* requires all applicants seeking to register an instrument to provide a mailing address, although the address need not appear in the instrument itself.

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The alternative favoured by the majority of members of the Project Committee is to empower the court to make an order under section 24 securing and cancelling a claim of lien subject to a defect notice, or an order for its “removal” under section 23, during the interval allowed by the registrar for correction of the defect and despite the fact the claim of lien would not yet have been endorsed on the owner’s title.

The defected claim of lien would have to be treated as a cancelled charge from the time a certified copy of the order was provided to the land title office. If the claimant corrected the defect after the order was made, so that the pending application to file the claim of lien could proceed to the registration stage, the claim of lien would appear in a title search result as a cancelled charge. If the defected claim of lien was not corrected within the time allowed by the defect notice, it would cease to appear on a search result, and an order for release of the security could be obtained.

A **majority** of the members of the Project Committee recommend:

4. *The Builders Lien Act should be amended to provide that*

- (a) a claim of lien that is the subject of a notice under section 308(1) of the Land Title Act may be removed pursuant to an order under section 23 or cancelled pursuant to an order under section 24 of the Builders Lien Act, notwithstanding that at the time the order is made, the claimant has not fulfilled the registrar’s requirements stated in the notice to permit the claim of lien to be filed against title;*
- (b) upon receiving a certified copy of an order under section 23 or section 24 of the Builders Lien Act applicable to a claim of lien that is the subject of a notice under section 308(1) of the Land Title Act, the registrar must treat the claim of lien as being immediately subject to the order, regardless of whether the claimant later fulfils the registrar’s requirements stated in the notice; and*
- (c) if the claimant fulfils the registrar’s requirements stated in the notice under section 308(1) of the Land Title Act to permit the application to file the claim of lien to proceed, the claim of lien must appear in the land titles register as having been removed or cancelled by virtue of the order under the Builders Lien Act.*

A **minority** of members of the Project Committee recommend:

4a. *A claim of lien with one or more defects that prevent its acceptance for filing by the land title office should simply be rejected, without any defect notice being issued.*

## D. Unpatented Lands and Unregistered Interests: Closing Gaps in the Scheme

### 1. UNPATENTED LANDS

#### (a) General

Ninety-four per cent of the land in British Columbia is described as “provincial Crown land,” or in other words, land that is neither in private ownership, covered by a treaty settlement, or federally owned.<sup>69</sup> Most of provincial Crown land is unregistered. Unregistered land, also called “unpatented land,” is land that has not been brought under the system of title registration established by the *Land Title Act*.<sup>70</sup>

The *Builders Lien Act* does not appear to distinguish between registered and unpatented land in conferring the right to a lien. Section 2(1) merely speaks of a lien on “the land in, on or under which the improvement is located.” Anyone who has performed work or supplied material in relation to an improvement is a “lien holder” and has the rights that accompany that status. As a practical matter, however, a claim of lien cannot be filed unless a land title office has issued a title for the land that is the location of the improvement.<sup>71</sup> The only exception is for claims of lien relating to mineral titles governed by the *Mineral Tenure Act*,<sup>72</sup> because section 18 of

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69. *Crown Land: Indicators & Statistics Report 2010* (Victoria: Ministry of Forests, Lands and Natural Resource Operations, 2011) at iii.

70. *Supra*, note 67.

71. *Laurentian Pacific Insurance Co. v. British Columbia* (1991), 12 C.L.R. (2d) 81 (B.C.S.C.); *Bolster Enterprises Ltd. v. British Columbia (Registrar, Kamloops LRD)*, [1991] B.C.J. No. 3976 (QL) (S.C.); *Re Pine Valley Mining Corporation*, 2007 BCSC 812.

72. R.S.B.C. 1996, c. 292. The rather misleading term “mineral title,” as defined in s. 1(1) of the *Mineral Tenure Act*, comprises mineral claims, placer claims, mining leases, and placer leases. These are not freehold titles but statutory tenures giving rights with respect to exploration for, and extraction of, Crown-owned substances that come within the definition of “mineral” under the Act. Section 18(1) states liens against these tenures are to be filed in the office of the gold commissioner, and if the land that is the subject of the tenure is registered, also in the land title office. (Note that the claim recording functions of gold commissioners in each mining division are now centralized in the office of the chief gold commissioner and the Mineral Titles Online Registry, with offices in Victoria and Vancouver. Section 18(1) of the *Builders Lien Act* therefore requires consequential amendment to reflect the present administrative structure under the *Mineral Tenure Act*.) Note that a “Crown-granted mineral claim” is not the same as a “mineral claim,” but is a type of grant of mines and minerals in fee simple with associated surface rights, registrable under the *Land Title Act*, *supra*, note 67. A claim of lien against a patented Crown-granted mineral claim is filed in the land title office in the regular manner. The language of the main clause of s. 18(1) of the *Builders Lien Act* is confusing, because it appears to assume that a Crown-

the *Builders Lien Act* requires these to be filed elsewhere than in the land title office. This exception does not apply to provincial oil, gas, and coal tenures.<sup>73</sup> It has been the practice of the provincial agency administering petroleum and natural gas tenures to accept claims of lien relating to oilfield operations on an “informational” basis, but there is no legal authority for such filings, and they will not preserve a lien against expiration.

It is increasingly common for large industrial construction projects to take place on unpatented lands, especially ones relating to natural resource development and power generation. Land held by the Crown cannot be sold to satisfy a lien under the *Builders Lien Act*, but the Act does bind the provincial Crown, and a claimant who has preserved a valid claim of lien may obtain a monetary judgment based upon the lien. While participants in projects on unpatented lands have lien rights in the abstract, they cannot preserve their liens because of the lack of a mechanism for filing a claim of lien against a specific title.

Unpaid lienholders whose liens against land and the improvement are not capable of being preserved are not bereft of all remedies under the Act. They remain beneficiaries of the statutory trust despite the expiration of their liens, and may pursue the person who has engaged them on that basis if that person has received trust funds. They may also pursue their contractual rights to recover what they are owed. The required holdback is not reduced by the inability to preserve liens.

The gap in the enforceability of lien rights arising from the inability to preserve claims of lien against unpatented land nevertheless excludes much Crown surface land and most kinds of Crown tenures from the effective scope of the lien given by section 2 of the Act, which contractors and subcontractors generally consider to be their principal remedy.

### *(b) Mechanisms available in other provinces*

Some provinces do have mechanisms in place to preserve liens relating to improvements situated on unpatented lands or Crown-issued tenures covering unpatented parcels.

For example, the Ontario *Construction Act* provides that if the Crown is the owner of the land, a lien may be preserved by filing the claim for lien in the office prescribed

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granted mineral claim is another form of tenure issued under the *Mineral Tenure Act*, rather than an older form of tenure that is no longer issued.

73. *Re Pine Valley Mining Corporation*, *supra*, note 71. Oil, gas and coal are not among the substances included in the definition of “minerals” under the *Mineral Tenure Act*.

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by regulation, or if there is none, by giving it to the ministry or Crown agency that requested the improvement.<sup>74</sup> The Ontario *Mining Act*<sup>75</sup> also provides that liens in respect of mines and mining activities and works connected therewith on unpatented lands are to be registered in the office of the mining recorder.

The Alberta *Builders Lien Act* directs land title offices to maintain a record of lien filings against unpatented lands.<sup>76</sup> When a statement of lien affecting unpatented land is received, Alberta land title offices create a “non-patent land sheet” on which the lien is endorsed the same way as it would be on a title.<sup>77</sup> Non-patent land sheets may be searched in the same way as titles to registered land. At the operational level, non-patent land sheets function as if a title had been issued for the unpatented parcel of land that has been liened.

### *(c) Describing unpatented land*

In order to record a claim of lien or any other interest against a parcel of unpatented land, there must be a means of accurately describing (identifying) the boundaries of the parcel. This is a straightforward task in Alberta because a single survey system (the Dominion Land Survey) extends over the entire province. The Dominion Land Survey system provides a simple means of describing any land in Alberta by reference to section, township and range, even if no title has ever been issued for it.

The situation is different in British Columbia, where several survey systems have been used and large areas of unpatented land have never been surveyed at all. This makes the description of unpatented land more complicated in British Columbia, but certainly not impossible.

Surveyed parcels of unpatented provincial Crown land can be identified by searching ParcelMapBC, a publicly accessible cadastral mapping service that integrates information on both registered land and surveyed Crown lands throughout the province. Surveyed Crown parcels will have a parcel identification number (PIN). The

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74. *Supra*, note 8, s. 34(3). The lien does not attach to the Crown’s interest in the land: s. 16. The ability to preserve the lien by filing in a provincial government office still allows claimants in Ontario to maintain the statutory priority of their liens vis-à-vis the claims of other creditors.

75. R.S.O. 1990, c. M.14, s. 171(2).

76. R.S.A. 2000, c. B-7, s. 35(4).

77. *Alberta Land Titles Procedures Manual*, Procedure BUL-1, para. 6. If the unregistered land is owned by the Crown, the statement of lien must claim a lien against the interest of someone other than the Crown, but an entry is still made on the record sheet for the land in question: *ibid.*, para. 7.

PIN is a unique identifier, analogous to the parcel identifier (PID) that is used for titled lands registered in the land title system.

Unpatented land that has not been surveyed may be described by reference to the British Columbia Geographical System (BCGS) map grid, a part of the National Topographic System covering all of Canada. Alternatively, the Online Mineral Title Grid (OMTG) could be used. It is partly based on the BCGS and is used to identify the location of hard-rock and placer mining claims and leases. It is identical to the map grid used to delineate the area covered by a petroleum, natural gas, geothermal, or coal tenure. The BCGS and OMTG map grids each allow for specific areas of land in British Columbia to be identified by combinations of letters and numbers.

A specific parcel of unpatented land spanning a portion of one or more of the spaces demarcated by the gridlines of these mapping systems may be described by reference to an outlined area shown on a scale drawing deposited in a government or public office. This is commonly done to delineate the area of land subject to a Crown land use or resource tenure. For example, “Parcel A as outlined in red on a map attached to lease no. \_\_\_\_ on file in \_\_\_\_.”<sup>78</sup>

A second method may be used to describe unpatented land that is contiguous to a surveyed area. The boundary lines of the parcel may be described by referring to directions and distances (“metes and bounds”) measured from a corner of the surveyed area. A significant construction project on unpatented land, however, is likely to have been preceded by a survey of the site, so a lien claimant should seldom have to resort to the metes and bounds method to describe the site of an improvement.

Using the available topographic map grid systems in combination with reference to a filed sketch map outline or a metes and bounds land description could make it possible to identify unpatented land with sufficient precision for the purposes of a claim of lien.

### *(d) A place to file the claim of lien*

Under the scheme of the *Builders Lien Act*, there must also be a place to file or record the claim of lien in order to preserve lien rights. The Project Committee examined

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78. The description of registered land by reference to lettered parcels is also permitted in B.C. land title office records by the *Land Title Act*, *supra*, note 67, ss. 64(1), (2). BC Land Title and Survey Practice Note 06-10 on standardized legal descriptions indicates, however, that descriptions of new parcels smaller than an existing subdivided parcel will generally not contain a letter or number designation. Instead, they are generally to be based on a filed plan of the new parcel, taking the form “That part of [legal description of existing parcel] shown on Plan \_\_\_\_.”

the possibility of using one of several existing public registries as a repository for claims of lien affecting unpatented lands. The legal and operational implications of doing so were discussed with the agencies and officials responsible for maintaining the different registries.

*(i) The land title office*

The land title office appears at first glance to be the most obvious choice for the repository. It is, after all, where claims of lien are normally filed. An Alberta-type solution, i.e., one in which a searchable “non-title” electronic record would be created for a given parcel of unpatented land subject to liens and a parcel identifier number assigned, should theoretically be feasible as long as the parcel in question could be adequately described. As explained above, describing unpatented land in British Columbia is more complicated than in Alberta because of the differences between the two provinces in relation to their survey systems and the extent of surveyed land.

The actual function of the land title offices is, however, to keep track of the ownership of land registered under the *Land Title Act*.<sup>79</sup> They are not set up to deal with unregistered Crown lands and interests connected with them. Maintaining a parallel set of records in the land title system for unpatented lands that happen to become subject to claims of lien, but are not subject to the land title system, could give rise to considerable confusion for users of the system.

*(ii) Ontario’s approach: filing in government office administering the improvement*

Another alternative would be to follow the Ontario approach, whereby liens affecting Crown-owned lands are preserved by filing the claim of lien in a designated provincial government office, or with the government agency that commissioned the improvement. Section 18 of the *Builders Lien Act* is an example of this model. So is the long-standing but legally ineffective practice of filing claims of lien in respect of petroleum and natural gas tenures with the provincial authority administering the tenures. Adopting the Ontario approach generally would involve formalizing and expanding upon practices that are already followed here to a limited extent. Having numerous repositories for claims of lien in respect of unpatented land or tenure interests arguably makes preservation and other dealings with lien rights excessively complicated, however. Some members of the Project Committee oppose increasing the number of repositories for this reason.

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79. *Supra*, note 67.



### *(iii) The Integrated Land and Resource Registry*

An alternative that would avoid multiple repositories would be to designate the Integrated Land and Resource Registry (ILRR) as the place to submit claims of lien relating to improvements on unpatented lands. The ILRR compiles information provided by the tenure-issuing agencies within the provincial government to create a single source of information on the use of Crown lands and tenures affecting them. At the present time, only mapping information and a skeletal record about each issued land use tenure are entered into the ILRR. Significant changes in the mandate, funding, and staff of the ILRR would be required to enable it to accept, record, and discharge lien filings from the private sector in respect of improvements on Crown lands.

### *(iv) The Personal Property Registry*

The Project Committee also considered the Personal Property Registry (PPR) as a potential repository for claims of lien concerning unpatented lands. While the primary purpose of the PPR is to allow registration of security interests in personal property created by private contracts, various kinds of statutory liens are registrable there as well. The Crown tax liens and wage liens registrable in the PPR extend to real as well as personal property under their governing legislation, although PPR registration does not affect their attachment to real property.

The PPR is established under the *Personal Property Security Act* (PPSA), which lists leases of land, petroleum and natural gas leases, coal leases, mineral claims, and placer claims as being among the interests that cannot be the subject of a registration in the PPR.<sup>80</sup> A builder's lien is an interest in real property, and the surface leases and resource tenures expressly excluded from registration in the PPR are the very interests against which builders' liens relating to improvements on unpatented lands would commonly be filed. If the PPR were chosen as the repository for claims of lien affecting unpatented lands, application of the PPSA to the validity, effect, and priority of these registrations would need to be carefully excluded. At most, only the provisions of the PPSA relating to the mechanics of registration in the PPR would apply to them.<sup>81</sup>

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80. R.S.B.C. 1996, c. 359, ss. 4(f), (l).

81. The *Miscellaneous Registrations Act*, 1992, R.S.B.C. 1996, c. 312 and its regulations provide an example of how the PPR system could be adapted to registration of claims of lien that cannot be filed in a land title office. They facilitate the registration of numerous kinds of statutory liens in the PPR, including tax liens, wage liens, proceeds of crime notices, etc. They specify which provisions of the PPSA apply to their registration, and address priority issues.

The PPR user interface has some features that might be adaptable to recording and retrieving information relating to builders' liens. In the course of consultation, however, officials responsible for maintaining the PPR indicated that the age of its computer system was a major obstacle in adding new registration capabilities. If existing fields in the PPR user interface could hold the necessary data, operational implications of making the PPR the repository for claims of lien relating to unpatented lands could be manageable. Adding new data fields, however, would be a significant technical problem.

A further consideration is that registration in the PPR is an entirely electronic process in which initial registrations, changes to registrations, and discharges are effected directly by users of the system rather than registry officials. In contrast to the procedure in land title offices, data is not scrutinized by impartial eyes before being entered in the registrations database. If the PPR were chosen as the repository, the opportunity for improper lien filings and discharges would increase.

### *(e) Conclusion and recommendations*

Several existing provincial registries may be capable of serving as a repository for claims of lien relating to improvements situated on unpatented land, including improvements connected with various Crown land and resource tenures. Adding the acceptance and registration of these claims of lien to the mandate of any of these registries would require upgrades and other changes to computer systems in addition to legislative changes. The changes and upgrades to systems would involve expenditure.

The Project Committee believes strongly that the enforceability gap preventing the ability to preserve liens relating to improvements on unpatented land against expiry should be closed by some means. The choice of where to direct expenditure to enable one of several alternate provincial registries to take on additional functions to close that gap is one that is essentially fiscal, however. It is a choice that only government is able to make. For that reason, we confine our principal recommendation to stating that a mechanism to allow preservation of these liens should be created within a provincial registry system.

The Project Committee nevertheless recognizes the possibility that no such mechanism may be created for various reasons, fiscal or otherwise. In that case, a provider of labour, services or materials who would have been in a position to preserve and enforce a lien under section 2 of the Act if the land had been brought under the land title system should at least be able to recover from the holdback. Our secondary recommendation is that those persons should be able to claim against the holdback

by starting an action seeking a declaration that the holdback is charged with payment of the plaintiff's lien within the time allowed by the Act for filing a claim of lien.

The remedy contemplated by the secondary recommendation would not be the same as the *Shimco* lien, the abolition of which is recommended in Chapter 6. The availability of the remedy would be predicated on having an ostensible right to a lien on land under section 2 that cannot be preserved by filing a claim of lien in a land title office. The remedy would differ as well from the *Shimco* lien in that it could only be asserted within the normal lien filing period.

The Project Committee recommends:

*5. Claims of lien against provincial Crown tenures under the Petroleum and Natural Gas Act, the Coal Act, and the Land Act should be capable of preservation in addition to those against mineral titles as defined in the Mineral Tenure Act.*

*6. For the purpose of facilitating implementation of Recommendation 5, a definition of "interest in land" extended to include tenures issued under the Land Act, the Mineral Tenure Act, the Coal Act, and the Petroleum and Natural Gas Act should be added to the Builders Lien Act.*

*7. A filing mechanism should be available to enable a lien claimant to preserve a claim of lien against an unregistered interest, including an interest in unpatented land, from expiration.*

*8. In the event that Recommendation 7 is not implemented, the Builders Lien Act should be amended to provide that subject to section 34, a contractor, subcontractor, or worker who has provided labour, services or materials in relation to an improvement situated on, in, or under unpatented land may claim against the holdback to recover the amount owing to that person by commencing an action for a declaration that the holdback is charged with payment of that person, within the time in which that person would have been able to file a claim of lien if the land had been brought under the Land Title Act.*

## 2. UNREGISTERED LEASEHOLDS

### (a) General

Another gap in the scheme of the *Builders Lien Act* relates to unregistered leases. It is very common for improvements to be carried out at the request of a tenant. While liens arise under contracts with tenants for improvements to land, it is not always possible for claimants engaged by or under tenants to preserve them.

In order to grasp the nature of the problem, it is first necessary to understand how the *Builders Lien Act* affects landlords and tenants.

*(b) Landlords, tenants, leases and liens*

Improvements are often carried out at the request of a tenant, especially on commercial property. A tenant who requests an improvement is an “owner” for the purposes of the *Builders Lien Act*, and the tenant’s leasehold interest is subject to liens under the Act. If the landlord had prior knowledge of an improvement done at the request of a tenant, the landlord is deemed by section 3(1) of the Act to have requested the improvement. As a non-contracting owner, the landlord will be liable to the same extent as the tenant for the amount recoverable by a lien claimant under the Act.<sup>82</sup>

A non-contracting landlord who wishes to avoid being liable for liens in connection with improvements requested by a tenant may file a “notice of interest” in the land title office. A notice of interest will prevent a lien for an improvement requested by the tenant from attaching to the landlord’s interest in the land (called a *reversion*), provided that the landlord did not request the improvement and the notice of interest is filed before the improvement is “made.”<sup>83</sup>

If the lease is registered as a charge against the title to the land, a claimant engaged by the tenant may file a claim of lien in the normal way against the leasehold interest, even if the landlord has filed a notice of interest. The lien attaches to the registered leasehold of the tenant, though not to the landlord’s reversion.

For various reasons, however, most leases are not registered on the landlord’s title.

*(c) Section 199 of the Land Title Act and unregistered leaseholds*

If a lease is unregistered, section 199 of the *Land Title Act*<sup>84</sup> stands in the way of filing a claim of lien that attaches only to the unregistered leasehold. Section 199 reads:

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82. *Patrick v. Advanced Air Conditioning & Refrigeration Inc.*, 2000 BCSC 125, 50 C.L.R. (2d) 228.

83. *Supra*, note 1, s. 3(2). See “When Is An Improvement ‘Made’” in this chapter regarding further discussion of notices of interest and the meaning of “made” in s. 3(2) of the *Builders Lien Act*.

84. *Supra*, note 67.

199 An instrument purporting to create a charge by way of a submortgage or other subcharge of any kind must not be registered unless the charge on which the submortgage or subcharge depends has first been registered.

A claim of lien affecting an unregistered lease, but not the landlord's reversion, is a subcharge.<sup>85</sup> A subcharge cannot be registered (endorsed against the title) if the principal charge (in this case the lease) is unregistered.

An unpaid contractor or worker whose lien is in relation to an improvement requested by a tenant under an unregistered lease is thus in a position somewhat similar to one whose lien arises in connection with an improvement on unpatented land. The claimant is arguably unable to preserve the lien against expiration.

### *(d) Discussion*

The problem of improvements made under unregistered leases raises difficult questions of competing interests and policies underlying two important statutes. There is a division of opinion in the Project Committee regarding a solution.

A minority of the Project Committee members believe that allowing liens attaching only to leaseholds to appear on the landlord's title would defeat the purpose of notices of interest. It would also interfere with dealings between the landlord and third parties including lenders, because third parties will not distinguish between liens affecting the landlord's interest and those that do not. The minority view is that the paramount consideration should be the protection of the landlord's ability as a registered owner to deal with the title, rather than clouding the title to protect unpaid creditors of the tenant.

The majority view within the Project Committee is that the detriment to the landlord of having a temporary cloud on the title in the form of a lien arising from a leasehold improvement must be balanced against the detriment to unpaid providers of work and materials of being blocked from asserting a lien given by the *Builders Lien Act*.

A lien that attaches only to a leasehold, but not to the landlord's reversionary interest, may be tenuous because some leases provide that it is a breach for the tenant to allow claims of lien to arise. If the landlord cancels a lease under a clause of this kind, the lien obviously has no value. Providing a means of preventing the lien from expiring will not help the lien claimant in such a case. It does not necessarily follow,

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85. *Percon Construction Management Ltd. v. British Columbia (Registrar, New Westminster Land Title Office)* (1986), 12 B.C.L.R. (2d) 22 (S.C.).

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however, that all liens attaching to an unregistered leasehold should be incapable of preservation.

Situations in which a tenant under an unregistered lease is the contracting “owner” for the purposes of the *Builders Lien Act* are very common. Commercial leases frequently require tenants to make improvements and bear the cost of them.<sup>86</sup> A majority of the members of the Project Committee believe the sheer prevalence of these situations justifies having a means to preserve a lien against an unregistered leasehold from expiration.

An additional reason for allowing claims of lien against unregistered leaseholds from expiration is that as a non-contracting owner, the landlord receives the benefit of the tenant’s improvements. The landlord can make it a condition of the lease that the tenant must not allow liens to arise, and can have claims of lien made by creditors of the tenant vacated if there is no interest in land to which their liens can attach.

It would not be feasible in light of commercial realities to compel registration of leases simply to facilitate the filing of claims of lien against leaseholds. Among these is the fact that clearing expired and cancelled leases from a title is more difficult than clearing it of builders’ liens.

In order to allow claims of lien restricted to the interest of a tenant under an unregistered lease to be filed in the land title office, an exception to section 199 of the *Land Title Act* would need to be created for these subcharges, either by amendment to section 199 itself or by an amendment to the *Builders Lien Act* expressly allowing their filing despite section 199. In responding to the consultation paper, the Land Title and Survey Authority strenuously opposed the creation of such an exception, chiefly on the ground that it would detract from the cardinal principle of the Torrens system that it is unnecessary to look behind the register to determine the interests affecting a title, apart from limited exceptions to indefeasibility. Opinion was divided on the subject of an exception to section 199 amongst the other respondents who commented on it.

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86. In *Libero Canada Corporation v. Kwee*, 2013 BCSC 1297, a claimant argued that a clause in a lease requiring the tenant to “carry out all work necessary to complete the Premises” and pay for it, with the landlord reserving the right to approve working drawings and tenants’ contractors, constituted a request for improvements that would result in the landlord losing the immunity given by the prior filing of a notice of interest. The court declined to vacate the claim of lien as frivolous under s. 25 of the *Builders Lien Act*, holding that even though the argument was “farfetched,” it was still conceivable that a court might ultimately decide the lease clause amounted to a request for improvements by the landlord as a non-contracting owner.

The Project Committee is conscious that section 199 serves one of the basic principles underlying the *Land Title Act*, namely that the register is intended to reflect the state of the title. The majority of the Project Committee members believe nevertheless that the exception is justified to give effect to a remedy that the legislature intended to confer on providers of work and materials for an improvement to land, regardless of whether they contract with a landlord or a tenant.

A claim of lien filed under the exception would need to state clearly in the portion of the form setting out the description of the land that the lien is against “*the unregistered leasehold interest of X* [a named tenant] *in...*[PID and land description].” Likewise, the endorsement of the claim of lien on the title should clearly indicate that the claim of lien is with respect to that leasehold.

### *(e) Recommendation*

A **majority** of the Project Committee members recommend:

*9. An exception to section 199 of the Land Title Act should be created (either by direct amendment to section 199 or amendment of the Builders Lien Act) to permit a claim of lien against an unregistered leasehold interest to be filed despite the prohibition against registration of a subcharge if the principal charge has not been registered.*

A **minority** of the Project Committee members are opposed to allowing a claim of lien to be filed against an unregistered interest in registered land.

## E. Clarifying What a Claim of Lien May Cover

### 1. GENERAL

In reviewing key definitions and other provisions in the Act that determine who has lien rights, what activities give rise to them, and whose interests in the land and improvement are affected by them, the Project Committee identified some changes that were considered to be helpful in resolving some unsettled questions under the present Act, and to contribute to greater clarity. These include changes to the definitions of “improvement,” “contractor,” and “subcontractor.” Another change to section 3(2) is recommended to clarify when an improvement can or cannot be deemed to have been requested by an owner, and therefore whether the owner’s interest would be bound by liens filed in relation to the improvement. Additional changes are recommended to make what are widely assumed to be the implicit meanings of certain provisions appear more clearly on the face of those provisions.

### 2. GST AND PST AS PART OF THE “PRICE” OR “VALUE” OF WORK AND MATERIAL — CLEARING UP DOUBTS

Section 2(1) of the Act states that a contractor, subcontractor, or worker has a lien “for the price of the work and material” performed or supplied in relation to an improvement. It does not state what the “price” covers. This has led to some question as to whether Goods and Services Tax (GST) and Provincial Sales Tax (PST) should be included in the amount shown as owing or to become owing in a claim of lien.

Similarly, section 4(1) calls for the 10% holdback to be calculated on the greater of the “value of the work or material” actually provided and the amount of any payment made on account of the contract or subcontract “price,” giving rise to the same question.

While practice varies, the more common view appears to be that GST and PST should be included in the amount shown as owing in a claim of lien and in calculating holdbacks.<sup>87</sup> They are sales or value-based taxes that contractors and subcontractors are obliged to collect as a portion of the total indebtedness in conjunction with the performance of a contract. Not to include them in the amount claimed would understate the amounts actually owing in relation to a contract. If some claims of lien are filed inclusive of taxes and others filed net of tax, a misleading picture of what is actually owed within the contract chain will emerge and this may distort the proportional distribution of available holdback and funds that the Act demands.<sup>88</sup> In order to standardize practice, the Act should make it clear that these taxes should be included in the amount set out in a claim of lien.

The Project Committee recommends:

*10. The Builders Lien Act should be amended to expressly state that sales and value-added taxes (PST and GST) are to be included in the price or value of work or materials under sections 2(1) and 4(1) for the purposes of calculating the amount of a lien and a holdback, respectively.*

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87. The *British Columbia Builders Liens Practice Manual* (“Practice Manual”) characterizes GST and PST as “uncontroversial components of the price.” Continuing Legal Education Society of British Columbia, *British Columbia Builders Liens Practice Manual* (Vancouver: CLEBC, loose-leaf 2017 update), § 4.4. Some doubt remains in the absence of an express statement in the Act that these taxes are comprised in what a lien covers, however.

88. Sections 37(2), (3) and 38(2) require *pari passu* (prorated) distribution between lien claimants of the same claimant category (e.g. workers, contractors, subcontractors) or class (engaged by the same person) when available holdback funds or proceeds of sale are insufficient to pay all liens in full.



### 3. SHOULD LIEN RIGHTS EXIST WITHOUT THE POSSIBILITY OF RETAINING A HOLDBACK?

Someone may have an agreement which involves work on the owner's land without payment of money. An example might be an agreement for removal of materials from a demolition site in return for the right to salvage and re-sell building materials. The party who has the agreement with the owner may hire a third party to assist in the removal. A contract chain is created in this example, but it is not the kind of contract chain that the *Builders Lien Act* contemplates.

The contract with the owner in this example does not call for any payment from which an amount may be held back. Should the third party have lien rights?

Under the scheme of the *Builders Lien Act*, lien rights conferred as security for payment are balanced by requiring a holdback whereby owners may discharge their statutory liabilities towards lienholders with whom they have had no direct dealings. It would run counter to that balanced scheme to accord lien rights where there is no possibility of a holdback at the top of the contract chain.

Clarification that lien rights can only exist where there is an expectation of payment on the part of the service provider, and where a holdback is possible, could be achieved by adding the words "in exchange for payment" to the definitions of "contractor" and "subcontractor" in the *Builders Lien Act*, as shown below:

**"contractor"** means a person engaged by an owner to do one or more of the following in relation to an improvement *in exchange for payment*:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker;

**"subcontractor"** means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement *in exchange for payment*:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

The Project Committee recommends:

*11. The definitions of “contractor” and “subcontractor” in the Builders Lien Act should be amended by adding the words “in exchange for payment” following “improvement.”*

#### 4. SHOULD DEMOLITION BE TREATED AS LIENABLE WORK?

One of the unsettled questions under the present *Builders Lien Act* is when a claim of lien can validly be filed for demolition work. In order for work to be lienable, it must be performed in relation to an “improvement.” Here again is the definition of “improvement” in the Act as it now stands:

“**improvement**” includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunneling, filling, grading or ditching of, in, on or under land;

This definition is “inclusive” in not being limited to the activities listed in it. As the expressly listed activities are associated primarily with building, there is some question as to whether demolition of a structure comes within the definition. Generally, demolition has been considered lienable when it is a step in preparing a site for new construction, but some doubt remains regarding whether it would be lienable if no new excavations or construction follow.

The Project Committee holds the view that the goal of making the Act and its operation clearer and simpler wherever possible would be better served by affirming that demolition of a structure on land is lienable work, regardless of whether it is followed directly by new construction or other alterations of the land.

The Project Committee recommends:

*12. The definition of “improvement” should be amended to expressly include demolition.*

#### 5. SHOULD EXTRACTIVE OPERATIONS BE LIENABLE?

##### *(a) General*

Industrial operations such as mining, oil and gas production, and gravel extraction that involve removal of a substance from land appear to fit literally within the definition of “improvement.” They involve alteration of the existing surface and subsurface of land. The definition also expressly includes “excavating, digging, drilling, tunneling” and “ditching.” By removing a commercially valuable substance from

land, however, these extractive operations arguably deplete the value of land, and raise the question whether they should be capable of supporting a claim of lien.

It is well-established that work done is lienable if it is an “integral and essential part of the physical construction” of an improvement to land.<sup>89</sup> The Court of Appeal has interpreted the concept of an improvement under the *Builders Lien Act* in light of the common law definition that required an addition or alteration to land that enhances its value or utility, or adapts it to new purposes.<sup>90</sup>

A case that might have clarified whether a builder’s lien may be claimed for work done to remove something from land for use elsewhere has unfortunately left the law unclear on this point. A paper mill was partly demolished by the purchaser of a paper machine that had been sold in order to remove the machine. The work on and in the building was extensive, complex, and time-consuming. A Supreme Court chambers judge initially ruled that this work was non-lienable because it was not done for the purpose of increasing the value or utility of the land, but instead to allow the paper machine to be used elsewhere.<sup>91</sup> This decision was overruled on procedural grounds on appeal, however, leaving uncertainty remaining as to the lienability of work of this kind.<sup>92</sup>

There is a suggestion in an early British Columbia case that purely extractive activity is not properly the subject of a builder’s lien. Removal of ore from a mine was held non-lienable because it could not be shown to increase the value of the land. In so finding, the court drew a distinction between the extraction of ore and the development of a mine. The court suggested that mine *development* work would be treated differently.<sup>93</sup>

Site preparation for the construction of various mine facilities has been treated as lienable.<sup>94</sup> Exploratory drilling has also been treated as lienable in British Columbia,

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89. *Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd.* (1986), 1 B.C.L.R. (2d) 236 (S.C.) at 256.

90. *Boomars Plumbing & Heating Ltd. v. Marogna Brothers Enterprises Ltd.* (1988), 27 B.C.L.R. (2d) 305 at 313 (C.A.).

91. *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2011 BCSC 1460.

92. *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2012 BCCA 89.

93. *Anderson v. Kootenay Gold Mines* (1913), 18 B.C.R. 643 (Co. Ct.). The actual basis of the decision was the requirement in the mechanic’s lien statute in force at the time for an improvement to be shown to have increased the value of the land in order to have priority over advances under a pre-existing mortgage. No proof had been offered that the removal of ore had increased the value of the land.

94. *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*, 2002 BCSC 1460.

although the validity of the liens was not directly challenged in the case in question.<sup>95</sup>

### *(b) Interjurisdictional comparisons*

The Alberta and Saskatchewan builder's lien statutes expressly allow lien rights for work done or materials provided "preparatory to, in connection with, or for an abandonment operation in connection with *the recovery of a mineral*."<sup>96</sup> Operations relating to the development of a mineral resource must be in relation to a physical improvement in order to support a builder's lien under these statutes, however. In Alberta, it has been held that seismic exploration operations not involving any physical alteration of the land are not lienable, even though they arguably enhance the value of the land by aiding the owner to determine its mineral potential.<sup>97</sup>

Mere excavation not resulting in a discernible improvement will not support a claim of lien in Alberta. In an Alberta case involving a contract for the excavation and decontamination of soil, the contractor removed the soil but was unable to decontaminate it. The owner eventually filled in the same soil again in its original location, so the ultimate result was as if nothing had been done. It was held there was no enhancement of the land and therefore no improvement capable of being lienated.<sup>98</sup>

The three territories have special mining lien statutes conferring lien rights for work that includes the removal and processing of ore.<sup>99</sup> The lien rights conferred by these Acts are not dependent on the concept of an "improvement."

### *(c) Policy considerations in light of the purpose of the Act*

The purpose of the Act has been described by the Court of Appeal as being to protect the right to payment of those who contribute work and materials to the erection of buildings or other physical improvements, and to prevent owners from acquiring

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95. *Kootenay Exploration Drilling Ltd. v. International Mineral Resources Ltd.*, 2005 BCSC 767. Strictly speaking, diamond drilling is partly extractive as drill cores are removed from the land and preserved for assessment and analysis, but the degree of removal is obviously minimal and does not deplete the value of the land.

96. *Builders Lien Act*, R.S.A. 2000, c. B-7, s. 6(2); *The Builder's Lien Act*, R.S.S. 1984-85-86, c. B-7.1, s. 22(2).

97. *Time Seismic Exchange Ltd. v. Northern Mtn. Helicopters Inc.*, 2003 ABQB 2008.

98. *Dow Chemical Canada Inc. v. Southbend Construction Company* (1996) 27 C.L.R. (2d) 102 (Alta. Q.B.).

99. *Miners Lien Act*, R.S.Y. 2002, c. 151; *Miners Lien Act*, R.S.N.W.T. 1988, c. M-12; *Miners Lien Act*, R.S.N.W.T. (Nu) 1988, c. M-12.

the benefit of building and other work done at their behest on the land without paying for it.<sup>100</sup>

The Court of Appeal has also interpreted the concept of an improvement under the Act in light of the common law definition that required an addition or alteration to land that enhances its value or utility, or adapts it to new purposes.<sup>101</sup>

These pronouncements are not decisive as to whether work associated with an extractive activity will or will not fit within the conceptual scheme of the lien provisions of the Act.

The development of a land-based resource up to the stage of production adds to the utility and value of land. Mine construction or the drilling of an oil or gas well is an addition or alteration to land that adapts it to new purposes. In this sense, it is like constructing a building. In contrast, the production phase involving extraction and removal of substances may be likened to the use of an improvement that has been completed. This line of reasoning leads toward treating work performed to develop infrastructure preparatory to extraction as lienable, and work performed to extract a substance as non-lienable.

On the other hand, it can be quite difficult to distinguish the development of a land-based resource from use of the resource. Production and the further development and maintenance of the infrastructure on or in the land often take place simultaneously, and may be carried out by the same people. For example, the extraction of ore in an underground mine usually requires continual excavation and extension of the galleries. Servicing and maintenance of wells and flowlines has to continue during production of oil and gas. It is difficult to try to exclude extractive activities on a blanket basis from the definition of “improvement” without also having the effect of excluding work that is developmental and enhances the utility of the resource, increasing the economic benefit to the resource owner.

In order to apply the lien provisions of the Act in this complex and ambiguous milieu, the Project Committee proposes a test based on the dominant purpose of the work described in the claim of lien. If the work is carried out or materials supplied for an operation consisting primarily of removing a substance from the land to use it elsewhere and realize the economic value of the substance, it could not be the sub-

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100. *Northern Thunderbird Air Ltd. v. Royal Oak & Kemess Mines Inc.*, 2002 BCCA 58, at paras. 24-25; *Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd.* (1986), 1 B.C.L.R. (2d) 236 (C.A.).

101. *Boomars Plumbing & Heating Ltd. v. Marogna Brothers Enterprises Ltd.* (1988), 27 B.C.L.R. (2d) 305 at 313 (C.A.).

ject of a valid claim of lien. If the dominant purpose of the work is to develop or increase the utility of a land-based natural resource containing the substance, and the work otherwise comes within the definition of “improvement,” it would be treated as lienable.

There will still be borderline cases, but in the view of the Project Committee, a “dominant purpose” test would enable a functional distinction to be made in most cases between development activities that increase the economic value of land and purely extractive ones. The definition of “improvement” in the *Builders Lien Act* should be amended accordingly.

The Project Committee recommends:

*13. The removal of anything from land for the dominant purpose of using it elsewhere should be expressly excluded from the definition of “improvement” under the Builders Lien Act.*

### 6. CLARIFYING WHAT MATERIAL IS AFFECTED BY A MATERIAL SUPPLIER’S LIEN

There is some question as to the extent of the lien on material that section 2(1) gives to a supplier of material. Section 2(1) states:

**2** (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

(a) performs or provides work,

(b) *supplies material*, or

(c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work *and material*, to the extent that the price remains unpaid, on all of the following:

(d) the interest of the owner in the improvement;

(e) the improvement itself;

(f) the land in, on or under which the improvement is located;

(g) *the material delivered to or placed on the land.*

Does “the material delivered to or placed on the land” in paragraph (g) mean that the lien attaches to *all* material delivered or placed on the land, or only to the particular material that the supplier in question has provided?

If a material supplier’s lien extended to all material whatsoever that is delivered to the site of an improvement, paragraph (g) would not need to refer to “*the material*” It would suffice to simply state “material delivered.”

Section 39 provides another clue to the intention of section 2(1). Section 39 prohibits removal of material from the land or the improvement to the prejudice of a lienholder while the lien continues. If a material supplier’s lien had been intended to extend to all material supplied for the improvement, section 39 would simply prohibit removal of material without referring to the possibility of detriment to a particular lienholder. All suppliers with liens would be detrimentally affected by the removal of any material.

The Project Committee believes the proper interpretation of section 2(1)(g) is that a material supplier’s lien with respect to material attaches only to the particular material that the supplier has delivered to or placed on the land. The ambiguity surrounding this point should be removed by amending section 2(1).

The Project Committee recommends:

*14. Section 2(1)(g) of the Builders Lien Act should be amended to clarify that a lien under the Act for the supply of material attaches only to the material delivered to or placed on the land by the lienholder, rather than to all material delivered to or placed on the land.*

### 7. WHEN IS AN IMPROVEMENT “MADE”? - CLARIFYING SECTION 3(2)

Section 3 of the Act deals with occasions when an owner is deemed to have requested an improvement and when not. Section 3(1) states that “An improvement done with the prior knowledge...of an owner” is deemed to have been requested by the owner. Section 3(2) provides, however, that section 3(1) does not apply to an improvement “made” after the owner has filed a notice of interest in the land title office. These provisions raise two questions: What is the purpose of a notice of interest? And what does “made” actually mean in this context?

A notice of interest appearing on the title to land is a warning to lien claimants that their liens cannot affect the *owner’s* interest in the land (as opposed to the interest of a tenant or other third party who engaged the claimant) unless the owner actually

requested the improvement.<sup>102</sup> In order to serve this purpose, a notice of interest should have to be filed *before* someone performs work or supplies materials in reliance on the security of a lien against the owner's interest in the land.

If "made" is taken to mean "completed," it could mean that an owner could file a notice of interest and avoid liability for liens at any time prior to completion. This would run counter to the purpose that a notice of interest is intended to serve. In order for section 3(2) to operate consistently with the other provisions regarding the effect of a lien, "an improvement *made* after a notice of interest has been filed" should be understood as if it read "an improvement *commenced* after a notice of interest has been filed." The Project Committee believes section 3(2) should be amended to read this way for the sake of clarity.

The Project Committee recommends:

*15. Section 3(2) of the Builders Lien Act should be amended to provide that section 3(2) does not apply to an improvement "commenced," rather than "made," after the owner has filed a notice of interest in the land title office.*

### 8. PHASED DEVELOPMENTS AND THE DEFINITION OF "IMPROVEMENT"

When a contract provides for the construction of more than one structure or development, a question arises as to whether it calls for separate improvements or one improvement with multiple components. The question largely turns on the facts of given cases. If the multiple structures or installations are part of an integrated complex, it may make sense to treat it as a single improvement. If the components are functionally self-contained, it may be less so.<sup>103</sup>

This is not a totally satisfactory test, however. Two highrise towers may be designed to share a common underground parkade. Each building would be capable of occu-

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102. "Notice of interest" is defined in s. 1(1) of the *Builders Lien Act*:

**"notice of interest"** means a notice in the prescribed form warning other persons that the owner's interest in the land described in the notice is not bound by a lien claimed under this Act in respect of an improvement on the land unless that improvement is undertaken at the express request of the owner;

103. There is authority, however, for treating a 27-house residential development or a cluster of three or four of the detached houses as a single improvement for lien purposes. See *NR Excavating & Services Ltd. v. Mand*, 2013 BCSC 723, at paras. 60-63. Which of these interpretations was correct did not matter on the facts of that case as both led to the same result, but the case illustrates that self-contained structures built under a single contract are not invariably distinct improvements.



pancy without the common facility being in place, but neither would be complete without the parkade extending under both towers.

The matter of what constitutes an improvement in a project with multiple components is of importance to lien claimants, contractors and owners alike. It is of particular importance in phased projects. Multi-phase developments may take place under a single head contract, with the projected completion dates of the phases scheduled far apart. Later phases may not proceed for a variety of reasons. Say that a single contract calls for two highrise towers to be built in succession as two phases, and construction of the second phase does not start. If the entire development is treated as one improvement, the 45-day period would not run and the date for release of the holdback would not arrive until after abandonment had indisputably taken place.

If there is a very long delay between the completion of one phase and the start of the second phase in the example, the holdback would need to be retained until completion of the second phase, and uncertainty would arise in the meantime for lienholders regarding the possibility that abandonment had taken place.

It is essential for lien claimants to know when time is running against them, and it is also essential for owners to know when they can release holdbacks. It is probably impossible to devise a definitive test applicable in all circumstances to determine when a construction project with multiple components consists of one improvement or several. The most direct path to certainty is to allow the parties to make that determination in the construction contract.

Fairness to all participants in a phased or multi-structure construction project requires that the terms of a contract providing for the designation of separate improvements, and those indicating whether the parties will treat phases as separate improvements, should be readily available. One organization responding to the consultation paper urged that the disclosure of contract terms relating to phases should be mandatory. The Project Committee agrees.

The Project Committee recommends:

*16. The Builders Lien Act should be amended to allow agreement between owners and contractors on what will be considered separate improvements for the purposes of the Act in a project involving multiple components.*

*17. Section 41(1)(a) of the Builders Lien Act should be amended to expressly include terms relating to the designation and completion of phases or separate improvements*

*as being among the terms that must be disclosed on the written request of a lienholder or trust beneficiary.*

## **F. Identifying the “Owner” For Purposes of the Act**

### **1. WHEN IS AN OWNER AN OWNER? - CLARIFYING THE DEFINITION OF “OWNER” WITH RESPECT TO TIME**

The definition of “owner” in section 1(1) of the *Builders Lien Act* refers to someone who has “*at the time a claim of lien is filed under this Act*” an estate or interest in the land on which the improvement is located, and who has requested work or material, etc.<sup>104</sup>

The words “at the time a claim of lien is filed under this Act” are not found in the definition of “owner” in the construction lien statutes of any other province or territory. While the definition in the *Builders Lien Act* otherwise corresponds relatively closely to the ones found in the other jurisdictions, the definitions in effect in the lien legislation of other provinces and territories do not link the status of being an owner to the time of filing.

The presence of the words “at the time a claim of lien is filed under this Act” is confusing, because it is inconsistent with many references in the Act to “the owner” as of other points in time. Numerous provisions refer to owners entering into a head contract, requesting work or materials, or filing a notice of interest, etc. These events typically, if not almost invariably, take place before claims of lien are filed. Furthermore, section 31 provides for enforcement of a lien by sale of the “the interest of the owner” and is clearly speaking of the owner at the time of the judicial sale.

The words are also misleading with respect to the law. As long as there are unexpired liens in existence, an owner’s liability for the liens does not depend on when the owner acquired an interest in the land. Someone who purchases an improvement after unexpired liens have arisen is liable under the liens, whether the claims of lien were filed before or after the transfer of title.<sup>105</sup>

The words “at the time a claim of lien is filed under this Act” needlessly complicate the definition of “owner.” Deleting them would improve the clarity and internal consistency of the Act.

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104. See the definition of “owner” reproduced on p. 9.

105. *Carr & Son v. Rayward* (1955), 17 W.W.R. 399 (B.C. Co. Ct.). While the purchaser’s title is subject to the unexpired liens regardless of the time of filing, s. 35 may limit the purchaser’s exposure to 10% of the purchase price of the improvement.

The Project Committee recommends:

*18. The definition of “owner” in the Builders Lien Act should be amended by deleting the words “who has, at the time a claim of lien is filed.”*

## 2. PUBLIC-PRIVATE PARTNERSHIPS: SPECIAL ISSUES

### *(a) Background*

Public-private partnerships, also known in various jurisdictions by the abbreviations P3, AFP,<sup>106</sup> and PFI<sup>107</sup> are a means of creating and/or maintaining and operating public infrastructure assets involving a transfer of capital cost and risk to the private sector. They take various forms, and there is actually no standard model. Typically, however, the basis for a P3 arrangement is a long-term relational agreement between a public entity and a private party who assumes the obligation and cost of bringing the infrastructure asset into being, as well as some of the associated risk. The private party to the relational agreement and the investors backing the private party are typically compensated through a return on their investment generated from the operation of the asset in the post-construction phase.

The private party entering into the P3 relational agreement will often be a “special purpose vehicle.” A special purpose vehicle, or SPV, is a corporation formed by a consortium of private sector investors to carry out the project. The private party may sometimes be referred to as the ProjectCo, SPV, or concessionaire.

Under one of the more common forms of P3 arrangements, the private party has a right to operate and maintain the asset after completion of construction for a fixed period, which may be as long as 30 years or more. After the fixed period has elapsed, the asset may revert entirely to the control of the public entity.

The private party will usually delegate the task of designing and building the asset, and possibly also that of post-construction maintenance, to one or more contractors. The private party will not necessarily have any proprietary interest in the land on which the asset is situated, or in the asset itself. If the private party does not have a proprietary interest in the land, it will typically hold a licence from the public entity to enter and use the land for the purposes of the project.

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106. Abbreviation for “alternative financing and procurement.” AFP is the term used in the report of the Ontario Construction Lien Act Review, *supra*, note 17, to refer to public-private partnerships.

107. Abbreviation for “private finance initiative.”

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*(b) Identifying the “owner” in a P3 project for purposes of the Act: less than straightforward*

P3 projects do not comfortably fit the model of the owner / contractor/ subcontractor construction pyramid which the definitions in the *Builders Lien Act* contemplate. In particular, some aspects of the owner’s role in a conventional construction project are transferred to the private party. The private party initially assumes the cost of building the infrastructure that would normally be borne by the owner, in addition to having the responsibility for ensuring that it is built. The private party concludes agreements with contractors as would an owner, but often has no proprietary interest in the land on which the infrastructure asset is built. As a result, it is not always obvious to third parties who will have the statutory obligation to retain the owner’s holdback and operate a holdback account in the variously structured arrangements that are labelled as P3s.

Letters of credit and bonding arrangements may be substituted for a cash holdback fund in a P3 project as they sometimes are in other commercial construction projects, but some construction lenders will only provide financing on the basis of compliance with the Act. In addition, as P3 projects are typically used to build public infrastructure, deliberate non-compliance with a statute has the potential to embarrass the public entities involved, even though payment and performance obligations may be adequately secured through other means. As a result, P3 relational agreements may expressly require compliance with construction lien legislation. In view of this, some better way to accommodate P3 arrangements under the Act needs to be found.

It is important to note that the public entity may not have any obligation to contribute funds until after construction has taken place and the improvement is being operated. The relational agreement may then call for the public entity to make so-called “availability payments” to the private party. If the public entity does not make contractual payments during construction or on completion, the public entity will not have any obligation to maintain a holdback. The public entity is not unlike a non-contracting owner in these circumstances.

In another form of P3 project, the public entity may provide a portion of the construction funding and the private party the remainder. In this case the distinction between the roles of owner and contractor is even less clear, but again it is usually the private party that will be obliged to make periodic contractual payments during and at the completion of construction, not the public entity. In projects where a public entity does make payments prior to the end of the project, these are more likely to be “milestone” payments linked to a particular stage of development that is

reached in the project, rather than regularly invoiced progress payments as are usual in ordinary construction projects.

While neither the private party nor the public entity in a P3 project fits the existing definition of “owner” in the *Builders Lien Act* precisely, the private party plays a role much like that of a contracting owner. Insofar as lienholders are concerned, it is the private partner who is at the top of the construction pyramid and will make contractual payments for labour and materials to a design-builder or other contractors.

The consultation paper contained a tentative recommendation that the private party under a public-private partnership be deemed an owner for purposes of the *Builders Lien Act*, regardless of the fact that the private party may lack a proprietary interest in the land. It was noted that a similar approach had been recommended by the legal experts who conducted the Construction Lien Act Review in Ontario, and by the Manitoba Law Reform Commission.<sup>108</sup>

While some respondents supported the tentative recommendation in the consultation paper without reservation, other comments were received suggesting it was too prescriptive and inflexible to take account of variations in practice and the evolution of the P3 model. Among them was a suggestion that the Act should empower the public entity in a P3 project to delegate the obligations to retain a holdback and maintain a holdback account to the private party or a third party.

Another point emphasized in the responses to the consultation paper was that in a P3 project, holdbacks must be calculated with reference to payments by the private entity under its agreements with providers of work and materials, rather than on the typically much larger and less frequent payments under the relational agreement between the public entity and the private partner. The Project Committee agrees. It should be noted that this result would flow directly from a provision deeming the private party under a P3 arrangement to be an owner, inasmuch as it is the private party who enters into agreements with service and material suppliers for work and materials. If such a deeming provision would be too inflexible and prescriptive, however, then it would be best to follow the example of the Ontario *Construction Act* and provide instead that the “owner’s” holdback must be calculated on the basis of payments under the contracts made by the private party with the third party providers of services and materials, not the value of payments under the private party’s higher-level relational agreement with the public entity.<sup>109</sup>

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108. *Supra*, note 17 at 20 (Ont.). See also *supra*, note 11 at 26-27 (Man.).

109. *Supra*, note 8, s. 1.1(3).

The Project Committee was not persuaded that the parties to a P3 arrangement should be able to delegate or re-allocate the holdback obligation by means of contract. This would be inconsistent with the scheme of the *Builders Lien Act*, which fixes “the person primarily liable on a contract” with the duty to retain the holdback.<sup>110</sup> Permitting the statutory obligation to be re-allocated by agreement or by the fiat of one party to the P3 arrangement would further complicate the application of the Act in a P3 setting.

The Project Committee believes that the responsibility to retain the holdback should rest with the party that makes payments directly for work and materials in relation to the construction of the improvement, or for its post-completion repair, alteration, or refurbishment, and does not see a need to distinguish between P3 projects and others in this regard.

Elsewhere in this report, we recommend changes that would allow holdback obligations to be satisfied by means of supplying an authorized security rather than retaining funds. This would probably be particularly advantageous in large-scale projects organized around the P3 model, as it would avoid the need to administer a large holdback fund and bear the associated interest cost.

The Project Committee recommends:

*19. The Builders Lien Act should be amended to provide that if a provincial, municipal, treaty first nation, or other public entity enters into an agreement with a private party that requires the private party to undertake to finance and build an improvement on behalf of the public entity, and/or maintain and operate the improvement after its completion, and to enter into one or more agreements for work and supply of materials for that purpose,*

- (a) the private party has the duty to comply with the requirements of the Act respecting holdbacks;*
- (b) the amount of any holdback must be calculated on the basis of the payments made on account of the agreement between the private party and the provider of work or material supplier.*

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110. *Supra*, note 1, s. 4(1).

## G. Notifying Owners That Liens Affect Their Property

### 1. NO PRESENT REQUIREMENT TO GIVE OWNER NOTICE OF FILING OF CLAIM OF LIEN

Once a claim of lien has been filed in the land title office and endorsed on the title to the land in question, everyone dealing with the land is deemed in law to have notice of the lien.<sup>111</sup> The procedure for exercising the right to a lien under the *Builders Lien Act* does not require the claimant to provide a separate notice to the owner that a claim of lien has been or will be filed.

In an active commercial construction project, the fact that a claim of lien has been filed will usually come to the attention of the owner and others in the construction pyramid relatively quickly. This may often be true in relation to new residential construction as well. New construction typically requires financing, and a prudent construction lender or owner will cause the title to be searched before each advance is made under a construction mortgage or progress payment under a head contract.

When claims of lien are filed in connection with smaller repair or renovation projects, however, the owner may not necessarily become aware that a lien appears on the title until a considerable period of time has passed. Lenders are not involved as often in these smaller projects because the value of the work may not be large enough to require financing. If the project does not involve a lender with an interest in keeping the title clear of liens that may affect the priority of mortgage advances, no one may be checking for claims of lien on a regular or frequent basis. Few residential owners who engage a contractor to carry out repair or renovation work would be aware of the Parcel Activity Notifier service provided by the land title system.<sup>112</sup>

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111. This is the effect of s. 27(1) of the *Land Title Act*, *supra*, note 67, which states:

- 27 (1) The registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected, of
- (a) the estate or interest in respect of which the charge has been registered, and
  - (b) the contents of the instrument creating the charge so far as it relates to that estate or interest,
- but not otherwise.

(A “charge” on land as defined in s. 1(1) of the *Land Title Act* includes a claim of lien.)

112. The Parcel Activity Notifier service provides e-mail notification of applications to register or file documents that affect a specific title. In order to take advantage of this fee-based service, one must have a myLTSAEnterprise deposit account.

A claim of lien that is not associated with new construction may not come to light until it interferes with a sale or re-financing of the property, possibly at a late stage when the owner is not able to cause the lien to be removed in time to prevent the sale or mortgage transaction from collapsing. This is a source of complaint about the *Builders Lien Act* by homeowners and owners of small commercial premises. Complications also arise in non-residential projects funded without borrowing, in which regular checking for claims may be overlooked because no lender is involved.

### 2. BILL M216

A private member's bill introduced in the 2015 session of the Legislative Assembly sought to address the lack of a process for alerting owners when a claim of lien is filed. It was evidently prompted by complaints from homeowners who had been unpleasantly surprised to find that liens encumbered their properties only when the liens interfered with a sale or mortgage transaction.

Entitled the *Builders Lien Notice to Owners Act* (Bill M216-2015), the bill would have added a section to the *Builders Lien Act* providing that before a claim of lien could be filed, a claimant would have to serve a "detailed written notice" on the owner declaring the claimant's intention to file. A claimant would also be required to provide the land titles registrar or gold commissioner with written evidence that the owner had received the notice. The notice would have to be served on the owner in one of the ways in which notices of claim may be served in an action in the Small Claims Court.

The explanatory note to the bill states that "Liens commonly interfere with property owners' attempts to refinance, mortgage or sell their property" and described the purpose of the bill as follows:

The Act introduces a standard of procedural fairness by having intended lien claimants inform property owners of the claim of builders lien which may be registered against their property and not letting that claim of builders lien be filed until a land title office registrar or a gold commissioner has been given evidence of the service of that notice.

While Bill M216 lapsed at the end of the 2015 legislative session, the Project Committee gave detailed consideration to it and the problem at which it is directed. It was noted that the pre-filing notice requirement that Bill M216 would have imposed would be unique in Canadian construction lien legislation. No other province or territory makes service of a notice on the owner a prerequisite to filing a claim of lien



or its equivalent, although Nova Scotia requires a claimant to give written notice of registration of the lien to the owner *after* the lien is registered.<sup>113</sup>

As Bill M216 would have required a pre-filing notice to be served on the owner in accordance with the *Small Claims Rules*<sup>114</sup> regarding service of documents, the notice could not simply be mailed to the owner. The *Small Claims Rules* specify different rules for service, depending on whether the person being served is an individual, a partnership, a company or other entity such as a municipality or society. A claimant would have to determine which service rule applied in the circumstances. If the owner is an individual, the claimant would have to serve the owner personally or by registered mail. Delay associated with service by registered mail could prevent the timely filing of a claim of lien and lead to its extinguishment, as could an individual's evasion of service if personal service were attempted.

A larger problem with Bill M216, however, was that the term "owner" under the *Builders Lien Act* is not limited to the registered owner of the land in question, namely the owner whose name appears on the title. "Owner" under the *Builders Lien Act* covers anyone with an interest in the land who requested, is deemed to have requested, had knowledge of, or for whose direct benefit, work is done or material provided in connection with an improvement to land. Bill M216 did not distinguish between the registered owner and other "owners" for the purpose of the pre-filing notice requirement that it would introduce. As written, therefore, Bill M216 would have required a lien claimant to identify, locate and serve every "owner" before being able to file a claim of lien, including holders of equitable interests that do not appear in a title search and who would be discoverable only if the lien claimant had access to all the instruments and documents affecting dealings with the land.

Claims of lien are often filed very close to the end of the 45-day period, when it becomes apparent that amounts owing or claimed to be owing are unlikely to be paid before that period expires. Even if Bill M216 were modified to require the pre-filing notice to be served only on the registered owner, it would have severely limited the ability to preserve a valid lien because of the delays associated with having to comply with the rules for service of court documents and obtain written evidence of

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113. *Builders' Lien Act*, R.S.N.S. 1989, c. 277, s. 24A. Ontario, Saskatchewan, New Brunswick, Nova Scotia, and Newfoundland and Labrador provide that giving written notice of a lien to a mortgagee before a claim of lien is filed has the effect of conferring priority for the lien over subsequent advances made under the mortgage, but it is not mandatory for a claimant to give the notice: see *Construction Act*, *supra*, note 8, ss. 78(4), (6), (8); *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, s. 71(3); *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-2, ss. 9(2), (3); *Builders' Lien Act*, R.S.N.S. 1989, c. 277, s. 15(1); *Mechanics' Lien Act*, R.S.N.L. 1990, c. M-3, s. 15(1).

114. B.C. Reg. 261/93.

compliance to satisfy the land title office, presumably in the form of an affidavit of service.

For these reasons, the Project Committee does not consider that Bill M216 provided a workable solution to alert owners. A different solution is outlined in the following section.

### 3. POST-FILING NOTIFICATION TO REGISTERED OWNER

The solution proposed by the Project Committee in the consultation paper was for the filing of a claim of lien against a title to generate a notice which the land title office would send to the registered owner, using the address on record for the registered owner for this purpose.<sup>115</sup> This proposed notification procedure would meet the objectives of Bill M216 in giving owners fair warning of liens filed against their property, without interfering with the ability of lien claimants to preserve valid liens by filing within the time limits imposed by the Act.

In the case of a claim of lien affecting common property in a strata plan, the notice could be sent to the strata corporation at the address which section 62(1) of the *Strata Property Act*<sup>116</sup> requires the strata corporation to provide to the land title office.

The statutory notification procedure tentatively recommended in the consultation paper corresponds to one that has long been in place in Saskatchewan.<sup>117</sup> It received support from all but one of the respondents who commented on it. One response from a prominent law firm contained a suggestion that holders of registered charges should receive notice of lien filings as well as the registered owner.

The Land Title and Survey Authority raised objections to this proposed statutory notification procedure, stating it would have “significant operational impact and expense...in both near and ongoing terms.” The Authority noted that there is no fee to file a claim of lien, and therefore the system costs relating to them are borne by other users of the land title system. The Authority suggested instead that the *Builders Lien Act* should require a lien claimant to mail a notice to the registered owner upon

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115. Section 149 of the *Land Title Act* *supra*, note 67 requires all applicants for registration to provide an address to which notices under the Act may be mailed. Thus, the registered owner would have provided an address to the land title office at the time the title was registered.

116. *Supra*, note 31.

117. *The Builders' Lien Act*, *supra*, note 96, ss. 50(7), (8). The Saskatchewan legislation also requires notification to mortgagees whose interests were registered prior to the registration of the claim of lien.

filing a claim of lien, as the claimant could obtain the mailing address on record from a title search.

The Authority took issue with the statement in the consultation paper that it would seldom be practical for residential owners to use its Parcel Notifier Service, and pointed out that this subscription service is available to anyone who opens a myLTSA Enterprise deposit account. An owner could, for example, open a deposit account at the outset of a project and close it after the lien filing period ends, or engage a registry agent to subscribe on the owner's behalf.

Regarding this, we would note that the Authority's website indicates myLTSA Enterprise provides access to "the full suite of the LTSA's Search and Filing and other services" and "allows professionals, and government and business customers" to carry out title searches, e-file applications to register documents, search ParcelMap BC, etc. In order to register, a GST/HST Business Number is required.<sup>118</sup>

The Land Title and Survey Authority also provides a pay-as-you-go service called myLTSA Explorer for less frequent users of the land title system who do not e-file, and whose "transaction volume does not warrant a \$250 deposit for a myLTSA Enterprise account."<sup>119</sup> The myLTSA Explorer service does not give access to the Parcel Notifier Service, however.

The Project Committee gave close consideration to the objections by the Land Title and Survey Authority, but still sees it as impractical to expect homeowners having little or no grasp of builders' liens to be aware of the Parcel Notifier service, and still more impractical to expect them to maintain a pre-paid myLTSA Enterprise deposit account to take advantage of it. The Authority's description of the myLTSA Enterprise on its website appears to indicate it is a service designed for sophisticated users of the land title system who regularly carry out searches and e-filings in significant volume.

Reliance on lien claimants to notify a registered owner that a claim of lien has been filed, as the Authority suggests, would likely produce haphazard results. Claims of lien are often filed without legal assistance. If such a notification requirement were imposed, claimants filing on their own behalf would vary greatly in awareness of the requirement and diligence in complying with it.

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118. MyLTSA Enterprise webpage, online: <https://ltsa.ca/online-services/myltsa-enterprise>.

119. *Ibid.*

The Project Committee is not persuaded that it should abandon the position taken in the consultation paper.

The Project Committee recommends:

*20. The Builders Lien Act should be amended to provide for a notice in prescribed form of the filing of a claim of lien to be sent by the land title office by ordinary mail to*

*(a) the registered owner at the address provided under section 149 of the Land Title Act, or*

*(b) if the claim of lien affects common property in a strata plan, to the strata corporation at the address provided under section 62(1) of the Strata Property Act,*

*once the claim of lien has been endorsed on the title to the land it describes.*

### **H. Re-Filing After Discharging a Claim of Lien Voluntarily**

If you voluntarily discharge a claim of lien, have you waived your lien rights altogether? There is a concern within the construction industry and amongst legal practitioners that the voluntary discharge of a claim of lien may prevent later filing in respect of the same work or materials.

Claimants may be persuaded to discharge claims of lien before payment in order to assist the flow of funds down the construction pyramid and facilitate payment of their claims. Claims of lien are also discharged voluntarily under the terms of informal trust agreements that are frequently used in order to avoid the cost and delay associated with an application to obtain an order under section 24 cancelling a claim of lien on provision of security. If claimants with valid liens are not paid in fact after they have voluntarily discharged their claims of lien, however, they should be in a position to preserve their lien rights by re-filing.

The Project Committee thinks that voluntary discharge of a claim of lien should not cause the loss of lien rights altogether, and that any lingering uncertainty about this point should be removed.

The Project Committee recommends:

*21. The Builders Lien Act should be amended to provide that voluntary discharge of a claim of lien does not in itself prevent the claimant from filing further claims of lien in relation to the same work or materials.*



## CHAPTER 5. COMPLETION AND THE 45-DAY PERIOD

### A. General

The difficulty most frequently encountered in applying the *Builders Lien Act* is determining whether a claim of lien against land has been, or can be, filed in time.<sup>120</sup> In order to determine the last possible day for filing, you first have to determine the earliest time at which the 45-day period could have started.

As mentioned in Chapter 2, the 45-day period may be triggered under section 20 by:

- (a) issuance of a certificate of completion for a contract or subcontract;
- (b) completion, abandonment, or termination of the head contract, if any;
- (c) completion or abandonment of the improvement if there is no head contract;
- (d) transfer of title to a strata lot from an owner-developer to a purchaser.

It is the earliest of these events that triggers the start of the 45-day period. The fact that a claim of lien has been filed and appears on the title to the land is no guarantee that the lien has been preserved, because the land title office or gold commissioner is not required to determine whether a claim of lien has been filed within the time limit.<sup>121</sup>

### B. The Existing Triggers of the 45-Day Period

#### 1. SECTION 20

The principal provision in the *Builders Lien Act* governing the time limit for filing a claim of lien is section 20:

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120. This chapter deals with the lien against land. The special problems associated with asserting a lien against the holdback (the so-called “*Shimco* lien”) are addressed in a later chapter.

121. *Supra*, note 1, s. 20(4).

### Time for filing claim of lien

- 20 (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
- (a) the contractor or subcontractor, and
  - (b) any persons engaged by or under the contractor or subcontractor
- may be filed no later than 45 days after the date on which the certificate of completion was issued.
- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
  - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
- (3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
- (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
  - (b) time had started to run under subsection (2).
- (4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

## 2. CERTIFICATE OF COMPLETION AS A TRIGGERING EVENT

Section 20(1) might seem to provide welcome certainty in declaring the date of issuance of a certificate of completion for a contract or subcontract as a starting point for the 45-day countdown, but this appearance of certainty is misleading.

The effect of section 20(3) is that a certificate of completion does not re-start the 45-day clock if it has already started. By the terms of section 20(3), the clock could have started under an earlier certificate of completion for a contract or subcontract, or because of one of the events mentioned in section 20(2): completion, abandonment, or termination of the head contract, or completion or abandonment of the improvement if there is no head contract.

A payment certifier has up to 10 days to issue a certificate of completion following a request for one.<sup>122</sup> After that, the payment certifier has up to 7 days to deliver the certificate to the requestor and give notice of its issuance to any other lienholder who has asked for “particulars” of any certificates of completion.<sup>123</sup> By the time a certificate of completion is issued and delivered, the 45-day period may be running or have already elapsed by virtue of one of the other triggering events.

In other words, the date of issuance cannot be relied upon as the start of the 45-day period for liens that arise under the contract or subcontract to which the certificate relates.

### 3. COMPLETION, ABANDONMENT OR TERMINATION OF A HEAD CONTRACT

#### *(a) Completion of a head contract*

As with other contracts and subcontracts, completion of a head contract occurs for the purposes of the *Builders Lien Act* when it is “substantially performed” according to the formula set out in section 1(2) known as “3-2-1.” Section 1(2) states:

- (2) For the purposes of this Act, a head contract, 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
  - (a) 3% of the first \$500 000 of the contract price,
  - (b) 2% of the next \$500 000 of the contract price, and
  - (c) 1% of the balance of the contract price.

Once the cost of the remaining work under a head contract is equal to the amount resulting from application of the 3-2-1 formula, time begins to run against all lien claimants under the 45-day period except for those against whom it previously began to run because a certificate of completion was previously issued for a contract or subcontract under which their liens arose.

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122. *Supra*, note 1, s. 7(3). A “payment certifier” is defined in s. 7(1) as: (a) an architect, engineer or other person identified in the contract or subcontract in question as being responsible for payment certification, (b) if there is no such person, the owner in respect of amounts due to the contractor, or (c) the owner and contractor acting together in respect of amounts due to a subcontractor. A certificate of completion can be validly issued only after a request by a contractor or subcontractor. It is invalid if issued without a prior request: *Quigg Homes WV345 Ltd. v. Bosma*, 2004 BCSC 1582.

123. *Supra*, note 1, s. 7(4).



### *(b) Abandonment of a head contract*

Abandonment of a head contract will also start the 45-day period under section 20(2)(a).

Before the present *Builders Lien Act* came into force in 1997, abandonment was judicially interpreted as a cessation of work coupled with an intention not to resume work.<sup>124</sup> Due to the requirement of intention, uncertainty often surrounded the date of abandonment.

Section 1(5) was included in the present Act in an effort to overcome this. It deems abandonment to have occurred if no work takes place in connection with a contract or an improvement for 30 days, except for specified reasons. Section 1(5) states:

- (5) For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.

The Court of Appeal has interpreted deemed abandonment under section 1(5) as creating only a presumption that a cessation of work for 30 days amounts to abandonment, however. The presumption is rebutted if it can be shown that the owner and contractor (or contractors) have a real intention to complete.<sup>125</sup>

In other words, the intention of the parties to a head contract is still relevant in determining whether abandonment has occurred, and pinpointing a date of abandonment therefore remains a task fraught with uncertainty.

### *(c) Termination of a head contract*

Termination of a head contract by the act of one or both of the parties will trigger the start of the 45-day period if it has not previously started to run against the lien claimant because of an earlier certificate of completion at the lien claimant's level or a higher level in the contract chain. Termination of a contract other than a head contract is not a trigger for the 45-day period.

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124. *Elizabeth Townhouses Ltd. v. Sigurdson*, [1975] 2 S.C.R. 449.

125. *McManamna v. Chorus*, 2008 BCCA 471, 85 B.C.L.R. (4th) 323.

Termination is not defined in the *Builders Lien Act*. In some cases, termination may be effected by written communications from the owner or head contractor to the other party. In other cases, termination of a head contract might be inferred from the replacement of the contractor with a different contractor to complete the work. In cases that are less clear, courts tend to look to general contract law principles and the surrounding factual events and circumstances to determine if a contract has been terminated. Depending on the facts, express terms in a building contract regarding how the contract may be terminated may be relevant to the issue.<sup>126</sup>

#### 4. COMPLETION OR ABANDONMENT OF AN IMPROVEMENT

##### (a) General

If there is no head contract and no relevant certificate of completion, the 45-day period is triggered by the completion or abandonment of the improvement under section 20(2)(b).

##### (b) Completion of an improvement

Section 1(3) provides that an improvement is completed when it, or a substantial part of it, is *in use or ready for use*.<sup>127</sup>

##### (c) Abandonment of an improvement

Abandonment of an improvement is relatively rare, but may take place as a result of the owner becoming insolvent, for example.

The concept of abandonment, deemed abandonment under section 1(5), and their drawbacks in terms of uncertainty as triggering events due to the element of intention, were explained above in relation to abandonment of a head contract. The same concepts apply in relation to the abandonment of an improvement, except that in this case we are speaking of abandonment by the owner.

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126. *R.N. Tanner Construction Ltd. v. K-West Estates Ltd.* (1986), 1 B.C.L.R. (2d) 59 (C.A.); *Alexander Construction Ltd. v. Al-Zaibak*, 2011 BCSC 590.

127. As the *Practice Manual*, *supra*, note 87 states at 5-13, this stage can occur before substantial performance of some contracts is reached under the 3-2-1 formula. This is because portions of an improvement may be in use while work on other portions continues. The example given in the *Practice Manual* is landscaping around a new building that is started after the building has been occupied.

### 5. TRANSFER OF A STRATA LOT BY AN OWNER-DEVELOPER TO A PURCHASER

A special rule regarding the time limit for filing a claim of lien against a strata lot and its proportional interest in the common property of a stratified development is found in section 88(1) of the *Strata Property Act*:

- 88 (1) Despite any other Act or agreement to the contrary, if an owner developer conveys a strata lot to a purchaser, a claim of lien under the *Builders Lien Act* filed against the strata lot, or against the strata lot's share in the common property, must be filed before the earlier of
- (a) the date on which the time for filing a claim of lien under the *Builders Lien Act* expires, and
  - (b) the date which is 45 days after the date the strata lot is conveyed to the purchaser.<sup>128</sup>

This special rule was introduced so that purchasers who bought strata lots before the development was built or in the course of construction would not become subject to liens filed at the end of construction of the entire development, but long after they agreed to purchase the strata lot.<sup>129</sup> If the 45-day period elapsed for either the strata lot in question or the entire development under one of the triggers set out in sections 20(1) and 20(2) of the *Builders Lien Act* before the owner-developer transferred the strata lot to a purchaser, the special filing period of 45 days following the transfer has no application.<sup>130</sup>

### C. Making the Picture Simpler: Reducing the Number of Separate Triggers

#### 1. GENERAL

Making it easier to determine when the 45-day period begins would be one of the most useful changes that could be made to the present *Builders Lien Act*. The difficulty of determining the starting point could be reduced, first by clarifying how substantial completion of a contract is determined and, second, by reducing the number

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128. *Supra*, note 31. A similar provision in earlier condominium legislation was interpreted to apply only if an owner-developer transferred the strata lot before the stratified development as a whole had been substantially completed: *Mierau Construction Ltd. v. 1705 Nelson Holdings Ltd.* (1988), 25 B.C.L.R. (2d) 396 at 400 (Co. Ct.).

129. *Haw Can Construction Ltd. v. Vancouver* (1984), 58 B.C.L.R. 303 at 304 (Co. Ct.); *Mierau Construction Ltd. v. 1705 Nelson Holdings Ltd.*, *supra*, note 128 at 398-399 (Co.Ct.).

130. Section 1(4) of the *Builders Lien Act* states that the latest possible date for completion of a strata lot, or of substantial performance of a contract for its completion, cannot be later than the date on which the strata lot is occupied.

of separate triggers for the running of time. Those are the aims of the recommendations in this chapter concerning section 20 and the tests for completion.

### 2. A HEAD CONTRACT SHOULD MAKE NO DIFFERENCE

Section 20(2) specifies two “default” triggers for the 45-day period that come into play when there is no applicable certificate of completion. One applies to projects in which there is a head contract, the other in projects without one. This distinction adds unnecessary complexity.

It may not be clear to a potential lien claimant whether there is a head contract. If a head contract is in place, lien claimants have to investigate the contractual relations and the state of accounts between the owner and the head contractor before they can determine the start and end of the 45-day period. It is only by doing so that they can obtain the information needed to perform their own 3-2-1 formula calculation with respect to the head contract and determine whether it is complete for the purposes of the Act.

In a scenario where abandonment and termination of a head contract are in question, these two triggers may be more readily identified than completion as determined under the 3-2-1 formula, depending on the facts of the situation. Determining that either abandonment or termination has occurred still depends, however, on information about the state of contractual relations between the owner and the head contractor.

In this regard, section 41(1) of the Act gives any lienholder the right to obtain the necessary information from the owner, who is obliged by section 41(3) to comply within 10 days after receiving the request. Nevertheless, there seems to be no reason why lien claimants should be put to these lengths to assess their window of time for filing and possibly run out of time only because of the existence of a head contract. If there is no head contract, they can apply the much simpler “in use or ready for use” test to determine if the improvement is complete.

The Project Committee sees no need to have different triggers for the running of time under the 45-day period depending on whether there is a head contract.

The Project Committee recommends:

*22. Section 20(2) of the Builders Lien Act should be amended by*

*(a) repealing paragraph 20(2)(a) referring to the completion, abandonment or termination of a head contract; and*

*(b) providing simply that a claim of lien to which section 20(1) does not apply may be filed no later than 45 days after the improvement has been completed or abandoned.*

### 3. CERTIFICATE OF COMPLETION AS A TRIGGER

The Project Committee believes that issuance of a certificate of completion for a particular contract or subcontract should remain an event triggering the start of the 45-day period. Certification that a contract or subcontract is complete is a useful mechanism within the scheme of the Act, because it allows claimants whose liens arise under the contract to receive payment earlier than if the owner and others above them in the contract chain had to wait until the end of the project to pay out any holdbacks. Also, certification provides the most certainty to lien claimants of all the triggering events now specified under section 20 as to when the 45-day period begins.

The Project Committee considered whether certification of completion could realistically be made mandatory for construction contracts, but concluded this would be impractical for housebuilding, small renovation projects, and some other sectors of the building industry.

Under the heading “Strengthening the Certification Process” later in this chapter, we make several recommendations to improve the process of certifying completion of contracts and subcontracts.

### 4. COMPLETION OF AN IMPROVEMENT: IN USE / READY FOR USE TEST

#### *(a) General*

If no certificate of completion is issued with respect to a relevant contract or subcontract, section 20(2) provides that a claim of lien may not be filed more than 45 days after completion or abandonment of an improvement if there is no head contract. Under section 1(3), an improvement is complete when it or a substantial part of it is “ready for use or is being used for the purpose intended.”

In many cases, “in use” is synonymous with occupation. The Project Committee discussed the possibility of substituting issuance of an occupancy permit or actual occupation of the improvement as a test for completion of an improvement intended for human habitation, because it might allow a lien claimant to more easily pinpoint a precise date for the start of the 45-day period.

Some building projects do not involve occupation in the usual sense, however. For example, infrastructure projects and some industrial installations are not designed for any human occupation.

Introducing a new trigger of “occupation” would not help to reduce the number of separate triggers of the 45-day period. Furthermore, the term “occupation” is commonly used by industry and regulators alike to refer to issuance of an occupancy permit as well as actual occupation, bringing its own share of imprecision into the Act. The Project Committee decided that occupation would be unhelpful as a general test for completion of an improvement.

When premises remain occupied or otherwise in use throughout renovation or renewal projects, it may be somewhat inaccurate to describe an improvement as reaching the point of being “in use or ready for use.” Repair of a “leaky condo” building envelope would be an example. Introduction of a cost-based formula was considered as a fall-back test for completion of the improvement for cases when the premises have been continuously in use during a project. The Project Committee concluded, however, that an additional or fall-back test would add unnecessary complexity to the Act. The in use / ready for use test may be applied with reference to completion of the scope of work in renovation and renewal projects. In other words, the alteration or repair itself is the improvement, which may be treated as ready for use when no further work needs to be done on it.

The Project Committee sees “in use / ready for use” as a generally practical and robust test for completion of improvements, whether they consist of new construction or alterations of existing structures. Completion of the improvement should remain a trigger of the 45-day period for filing claims of lien, applicable if the time has not started to run earlier because of the prior issuance of a certificate of completion.

*(b) Adding certainty by removing superfluous words from section 1(3)*

As noted above, the current wording of section 1(3) treats an improvement as complete for the purposes of the Act if “a substantial part of” the improvement is in use or ready for use. What is “a substantial part?” For example, is a substantial part of a 100-unit high-rise condominium project complete when 65 units are capable of occupancy, or 75 units, or 80?

“A substantial part” is a subjective and imprecise expression capable of describing any portion greater or even less than 50 per cent of a work or structure. These words inject uncertainty and detract from the simplicity and effectiveness of the “in use / ready for use” test.

The Project Committee recommends:

*23. The words “or a substantial part of it” in section 1(3) of the Builders Lien Act should be repealed.*

### 5. ABANDONMENT OF AN IMPROVEMENT

#### *(a) Why abandonment by the owner needs to remain a trigger*

Once the presence or absence of a head contract is no longer a factor in determining when the 45-day period starts, as recommended above, the concept of abandonment would remain relevant only in relation to the improvement itself. As the improvement is the owner's property, it is only the owner who can properly abandon it.

The Project Committee debated whether abandonment of an improvement needed to be kept as one of the triggers of the start of the 45-day period, and concluded that it does. It is not uncommon for a construction project to stop in an incomplete state because an owner or a general contractor has become insolvent. In such a case there must be a mechanism to start the 45-day period, otherwise the time for filing liens might never expire. Keeping abandonment of the improvement by the owner as one of the triggers serves that purpose.

#### *(b) When should abandonment be deemed to have taken place?*

As mentioned earlier, section 1(5) now deems abandonment to have occurred for the purposes of the Act if no work has taken place for 30 days, unless the stoppage is due to certain specified causes. This is unrealistically short in view of the many reasons why work may stop temporarily on a building site. The Project Committee considers that the provision would better reflect actual experience in the construction industry if it deemed an improvement to be abandoned after 60 days without a resumption of work.

#### *(c) Exceptions to deemed abandonment*

As noted above, work stoppages caused by “a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause” do not result in deemed abandonment. A major construction association urged in its response to the consultation paper that these exceptions to deemed abandonment referred to in this proviso to section 1(5) should be expanded, though no specific additions were mentioned. The Project Committee recognizes there is a need to take account not only of court orders, but also orders forcing a temporary work stoppage that are made by other public authorities acting under statutory powers.

The Project Committee recommends:

*24. Section 1(5) of the Builders Lien Act should be amended:*

- (a) to provide that an improvement is deemed to have been abandoned after 60 days in which no work was done in connection with the improvement, unless the cause of the cessation of work is referred to in the proviso to section 1(5); and*
- (b) to add “an order made by a public authority exercising statutory powers” to the causes of cessation of work referred to in the proviso to section 1(5) as being exceptions that do not lead to deemed abandonment.*

### 6. CESSATION OF WORK UNDER A CONTRACT OR SUBCONTRACT

#### *(a) General*

If work stops under a contract or subcontract, but the building project itself continues, the contractor or subcontractor will simply be replaced in most cases. In that situation, there should be a way of starting the 45-day period running with respect to liens that arose under the contract or subcontract under which work has ceased. Otherwise, liens could be filed until 45 days after the completion of the entire improvement, and the holdback from the contractor or subcontractor would have to be retained that long as well.

Under section 20(2) as it now stands, abandonment or termination only apply as triggers for the 45-day period in relation to a head contract. If the presence or absence of a head contract is no longer to be a factor in determining when time starts to run against a lien claimant, as we have recommended, should these two concepts be applied as triggers with respect to any contract or subcontract that is not completed?

The Project Committee saw difficulties with using abandonment and termination of contracts as triggers to start the 45-day period with respect to contracts generally. Neither abandonment nor termination would be obvious in all cases to persons other than the parties to the contract or subcontract in question. These concepts require some form of notification to third party lienholders that an event has taken place causing time to run against them under the 45-day period sooner than the completion or abandonment of the improvement as a whole.



### *(b) Certificate of cessation of work*

The Project Committee considered introducing a certificate of abandonment or termination that could be adapted to either situation, but concluded it would be simpler to provide instead for a “certificate of cessation of work” that would operate much like a certificate of completion. In other words, the 45-day period for liens arising under the contract or subcontract under which work has ceased would begin on the date the certificate was issued. It would be issued by a payment certifier. The same posting requirements would apply as for a certificate of completion, and lienholders would be entitled to receive copies of the certificate from a payment certifier on request.

The Project Committee recommends:

*25. The Builders Lien Act should be amended to allow a certificate of cessation of work, having the same effect as a certificate of completion with respect to the time within which a claim of lien may be filed, to be issued by or on behalf of the party liable for payment under a contract or subcontract if work under the contract or subcontract has stopped and will not resume.*

*26. The Builders Lien Act should require certificates of completion and certificates of cessation of work to be dealt with similarly in terms of issuance, publication, and distribution of copies.*

## 7. SPECIAL RULE FOR TRANSFERS OF STRATA LOTS BY AN OWNER-DEVELOPER

### *(a) General*

The special rule in section 88(1) of the *Strata Property Act*<sup>131</sup> concerning the time for filing claims of lien against strata lots purchased from an owner-developer was explained earlier in this chapter.<sup>132</sup> Its purpose, namely to prevent an owner who purchases a strata lot from an owner-developer in the pre-build period or in the early stages of construction from being affected by a claim of lien filed much later in the project, remains sound. The Project Committee considers that the transfer of a strata lot by an owner-developer should remain one of the potential triggers of the 45-day period.

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131. *Supra*, note 31.

132. See the text under the heading “5. Transfer of a Strata Lot by an Owner-Developer” in Part B above.

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### *(b) Relocation of the special rule to the Builders Lien Act*

Section 88(1) is grouped in the *Strata Property Act*<sup>133</sup> with several other provisions dealing with the application of the *Builders Lien Act* to strata property. Some of these might be better placed in the *Builders Lien Act*, although this is debatable. The Project Committee considers that at a minimum, section 88(1) should be consolidated in the same section of the *Builders Lien Act* with the other triggering provisions for the 45-day period. Section 1(4) of that Act, which specifies when a strata lot or a contract to build one are deemed to be completed, should ideally be moved also to the same section of the *Builders Lien Act*. This would help to simplify the overall scheme of the Act.

The Project Committee recommends:

*27. Section 1(4) of the Builders Lien Act and section 88(1) of the Strata Property Act should be relocated to section 20 of the Builders Lien Act.*

### 8. SUMMARY: FEWER SEPARATE TRIGGERS OF THE 45-DAY PERIOD

Under our recommendations, a claim of lien would have to be filed not later than 45 days after the *earliest* of the following events:

- issuance of a certificate of completion *or* a certificate of cessation of work for a contract or subcontract, if the claimant is the contractor or subcontractor, or a person engaged by or under them;
- completion of the improvement, meaning the date on which the improvement is ready for use or is in use for the purpose intended;
- abandonment of the improvement by the owner (deemed rebuttably to take place if work on the improvement ceases for 60 days, unless it is for a reason listed in section 1(5));
- in the case of a strata lot purchased from an owner-developer, the date on which the title to the strata lot was transferred to the purchaser.

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133. *Supra*, note 31.

## D. Strengthening the Certification Process

### 1. WHY IMPROVING THE CERTIFICATION PROCESS IS IMPORTANT

Eliminating the completion, abandonment, or termination of a head contract as a triggering event for the start of the 45-day period would mean that in most building projects, time would start to run against a lien claimant either on issuance of a certificate of completion for a contract or subcontract under which the claimant's lien arose or on completion of the improvement, whichever is earlier.<sup>134</sup> As there inevitably are pressures to have liens cleared and holdbacks from subcontractors paid out sooner than the point at which an improvement is fully built and ready for use, requests for certificates of completion may be made more frequently.

Certification of completion provides the greatest amount of certainty to lienholders and owners of the start of the 45-day period. There is evidence that certificates of completion are not well-understood and often contain defects, however. Defects may invalidate a certificate of completion, in which case the certificate will have no effect on the running of time under the 45-day period.<sup>135</sup> Reliance on an invalid certificate of completion might result in premature payout of holdbacks, and may cause lienholders with persisting lien rights to be misled into thinking their liens have been extinguished.

We have nevertheless recommended adding the issuance of a new type of certificate, namely the certificate of cessation, as a trigger for the start of the 45-day countdown in order to remove some of the delay and uncertainty surrounding the end date of the lien filing period in situations where contracts and subcontracts will not be completed.

It is important, therefore, to strengthen the certification process and make it as straightforward as possible.

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134. The sale of a strata lot by an owner-developer and abandonment of an improvement by the owner are two relatively restricted situations in which a different rule would or could determine when the 45-day period starts to run against a claimant. In the first situation, s. 88(1) of the *Strata Property Act*, *supra*, note 31, currently determines when the 45-day period starts, as explained earlier in this chapter. Abandonment by an owner is discussed below.

135. *Alterra Property Group Ltd. v. Doka Canada Ltd.*, 2008 BCSC 1880, at para. 20; *W Redevelopment Group Inc. v. Allan Window Technologies Inc.*, 2010 BCSC 1601, at paras. 57-70; *Indy Electrical Ltd. v. Warn*, 2013 BCSC 2188, at paras. 9-10.

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## 2. CLARIFYING APPLICATION OF THE 3-2-1 FORMULA

### *(a) Completion cost should be assumed to be cost to the owner under the contract*

As explained earlier, a contract or subcontract is complete for the purpose of the Act if it is “substantially performed” according to section 1(2), meaning that the work remaining to be done under it may be completed or corrected at a cost of not more than

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

The Project Committee considered there would be more certainty surrounding the application of the 3-2-1 formula if the Act made it clear that the formula is concerned with the cost to complete any remaining work or correcting deficiencies, as incurred by the *owner* under the terms of the contract or subcontract in question. In other words, the estimated cost to complete and correct deficiencies that is to be compared with the percentages in the 3-2-1 formula should include the contractor’s or subcontractor’s overhead and profit built into the contract price, not merely the input costs of the work. If only the contractor’s or subcontractor’s input costs are used in the formula, the result may be a premature determination that completion has occurred.

The Project Committee recommends:

*28. The 3-2-1 formula should be applied with reference to the cost to complete or correct the work as would be incurred by the owner, based on the terms of the contract or subcontract in question.*

### *(b) Cost of materials not yet incorporated into the improvement*

The Act does not give payment certifiers explicit guidance on how to treat the cost of materials that have not yet been installed in the improvement under the 3-2-1 formula. The Project Committee considered that a distinction should be made between the cost of materials already delivered to the site of the improvement and that of materials not yet delivered.

The cost of materials already delivered to the site may be treated similarly to the cost of work already done, as the material supplier has no further obligation to perform with respect to those materials. In other words, it should be left out of the cal-

ulation of the cost which the owner would still incur before the contract is entirely complete.

The cost of material not yet delivered to the site of the improvement, on the other hand, should be treated like the cost of work not yet performed, and be included in calculating the cost to complete.

The Project Committee recommends:

*29. The Builders Lien Act should be amended to provide that the cost of materials already delivered to the site of an improvement (whether or not installed) should not be included in the cost of work remaining to be done when the 3-2-1 formula is applied. The cost of materials not yet delivered to the site of the improvement should be included in the cost of work remaining.*

### *(c) Treatment of GST under the 3-2-1 formula*

Recommendation 10 above calls for GST to be included in the “price” or “value” of work for purposes of determining the amounts of liens and holdbacks. GST should also be included in the cost of remaining work and the “contract price” on which the percentages are calculated under the 3-2-1 formula, as this would be in keeping with the application of the formula on the basis of the cost to the owner to complete the work. As the end user at the top of the contract chain, it is the owner who ultimately pays GST. Recommendation 10 would also tend to ensure that the cost to complete as a percentage of the contract price corresponds to the percentage of work remaining.

The Project Committee considered, however, that it is unnecessary to mention GST expressly in the 3-2-1 formula, as it is part of the owner’s cost.

## 3. FORM OF CERTIFICATES OF COMPLETION AND CESSATION

### *(a) Mandatory vs. optional forms*

The *Builders Lien Forms Regulation* contains a form (Form 3) for a certificate of completion.<sup>136</sup> The form calls for the following information:

1. The payment certifier’s name and address;
2. The date on which the contract or subcontract was completed;

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<sup>136</sup> B.C. Reg. 98/1.

3. The civic address or legal description of the land affected by the improvement;
4. A description of the improvement;
5. A description of the contract or subcontract, including its date and the names of the parties;
6. Signature of the payment certifier;
7. The date of the certificate.

Some payment certifiers are unaware of Form 3 or ignore it, resulting in considerable variation in the form and content of certificates of completion that are in actual use. There is currently no legal requirement for a certificate of completion to be in that form. Section 7(10) of the Act merely states that a certificate of completion “may be in the prescribed form, and if it is in the prescribed form, it is sufficient to comply with the Act.”

Despite the fact that use of Form 3 is not mandatory, courts have not hesitated to find certificates of completion missing various pieces of the information contained in Form 3 to be invalid.<sup>137</sup> Payment certifiers therefore deviate from Form 3 at their peril, and persons relying on certificates issued in another form may also suffer loss.<sup>138</sup>

Leaving the prescribed form for a certificate of completion optional fosters inconsistent practice across the industry. It also invites payment certifiers to subject themselves unwittingly to potential liability by using individual versions of the certificate.

The consequences of non-compliance with Form 3 are not made clear at the present time. The Act says the certificate “may be” in the prescribed form, but the dangers of issuing a purported certificate of completion in a defective form are not readily apparent and must be extracted from case law. Making the prescribed form mandatory would make the consequences of non-compliance clear. There should be some room

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137. See cases cited at note 135, *supra*.

138. Section 7(8) states that a payment certifier who fails or refuses to issue a certificate of completion without reasonable excuse following a request to issue one under s. 7(3) is liable to anyone suffering loss or damage as a result. Issuing an invalid certificate of completion is equivalent to failing to issue one.

left to adapt a form to special circumstances, but as a general rule, the Act should require at least substantial compliance with the prescribed form for a certificate of completion. The form of a certificate of cessation should be treated similarly.

The Project Committee recommends:

*30. The Builders Lien Act should be amended to require that a certificate of completion or a certificate of cessation of work must comply substantially with the prescribed form.*

*(b) Contents of a certificate of completion*

The Project Committee considered that certificates of completion should be shorter rather than longer, as the opportunity for confusion and error increases with the amount of detail required in a certificate.

For example, Form 3 calls for three dates to appear in the certificate, namely the date of the contract or subcontract in question, the date on which completion occurred, and the date on which the certificate is signed. The Practice Manual refers to the potential for confusion between the date of completion and the date of the certificate, and advises that the date shown for completion should be the same as the date on which the certificate was signed, in the absence of special circumstances.<sup>139</sup>

The requirement to enter a date of completion in the certificate is entirely superfluous, because the only date connected with a certificate of completion that is relevant to the start of the 45-day period is the date on which the certificate is issued. The requirement serves no purpose other than to create confusion.

The Project Committee recommends:

*31. The form of certificate of completion should be amended to delete reference to the date of completion.*

There is a recommendation later in this chapter to combine the functions of certificates of completion (Form 3) and notices of certification of completion (Form 2) by abolishing the notices and replacing them with copies of the certificate of completion itself. The prescribed form for a certificate of completion or a certificate of cessation of work should therefore warn lienholders that they have a limited time to file claims of lien, as the notice of certification does at the present time.

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139. Practice Manual, *supra*, note 87 at 2-52.

The Project Committee recommends:

*32. The form of a certificate of completion or cessation of work should incorporate a warning to lien claimants that the time for filing a claim of lien is limited and the Builders Lien Act should be consulted to determine the time allowed for filing.*

#### 4. IDENTIFYING THE PAYMENT CERTIFIER MORE CLEARLY

It is not always clear to participants in a construction project who is responsible for issuing certificates of completion with respect to the contracts or subcontracts under which they are engaged. As mentioned earlier, the Act refers to that person as the “payment certifier,” defined as follows in s. 7(1):

7 (1) In this section, “**payment certifier**” means

- (a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or
- (b) if there is no person as described in paragraph (a)
  - (i) the owner acting alone in respect of amounts due to the contractor, or
  - (ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.

The term “payment certification” in section 7(1)(a) is imprecise, because what matters for the purpose of the Act is certification of completion (and as we have recommended, also certification of cessation of work in situations where contracts or subcontracts will not be completed). Section 7(1)(a) is intended to authorize someone contractually designated to authorize progress payments to also issue the certificates called for by the Act, but this intent would be clearer if, instead of “person responsible for payment certification,” it read “person responsible for certifying the amounts to be paid to the contractor or subcontractor.”

Not all construction agreements call for certification of progress payments, however. In keeping with the policy of encouraging and facilitating certification to create greater certainty about filing and holdback periods, the Project Committee believes that the Act should expressly authorize the parties to a contract or subcontract to designate a payment certifier solely for the purpose of issuing certificates of completion or of cessation of work, regardless of whether certification of progress payments is involved.



The Project Committee recommends:

33. *Section 7(1)(a) of the Builders Lien Act should be amended for reasons of clarity by repealing the words “person responsible for payment certification” and substituting “person responsible for certifying the amounts to be paid to the contractor or subcontractor.”*

34. *The Builders Lien Act should be amended to expressly authorize the parties to a contract or subcontract to appoint a payment certifier solely for purposes of issuing certificates of completion or cessation of work.*

### 5. CLARIFYING WHAT IT MEANS TO “ISSUE” CERTIFICATES OF COMPLETION AND CESSATION OF WORK

Despite the fact that the date of issuance of a certificate of completion may be crucial in determining when the 45-day period starts and ends, the *Builders Lien Act* does not indicate clearly when a certificate of completion may be said to have been “issued.” Uncertainty surrounding what is meant by “issuance” and “issued” under the Act has been said to make it impossible to rely upon certificates of completion to determine when the 45-day lien filing period will run.<sup>140</sup>

The current form of the certificate (Form 3) specifies two dates, namely the date of signature and the date of completion. Neither of those dates may be treated conclusively as the date of issuance. Obviously, the certificate cannot validly be “issued” before the completion date specified in it, so the date of issuance will in almost all cases be later than the date specified in the certificate as being the date of completion of the contract or subcontract.

It is also clear from section 20(1) that the 45 day-period runs from the date on which the certificate was “issued,” not from the date of signature. Furthermore, case law holds that a certificate of completion may validly be issued only at the request of the relevant contractor or subcontractor under section 7(3). The Act does not allow unilateral issuance by the payment certifier or owner.<sup>141</sup>

Section 7(4)(a) of the Act imposes an obligation on the payment certifier to deliver a copy of the certificate to the owner, head contractor (if any) and the requester. This detracts from any suggestion that a certificate of completion would be “issued”

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140. Practice Manual, *supra*, note 87 at 5-7.

141. *Quigg Homes WV345 Ltd. v. Bosma*, 2004 BCSC 1582, at para. 5.

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merely because something resembling Form 3 has been filled in and signed, without more.<sup>142</sup>

There are suggestions in case law that “issuance” of a document is not synonymous with creating it, but requires some communication of its existence.<sup>143</sup> A document that has been created, but which is held by its originator, cannot be said to have been issued.<sup>144</sup>

Nevertheless, as the Act refers to delivery of the certificate in addition to issuance, and specifies that the delivery obligation arises “if a certificate has been issued,” it is still uncertain whether the date of delivery under section 7(4) may be taken as the date of issuance.

Uncertainty surrounding the date of issuance is increased by the fact that the payment certifier has additional obligations under s. 7(2)(b) and (c) to deliver notices of certification of completion to anyone who has requested particulars of any certificates of completion, and to post such a notice on the improvement.

Clarifying the meaning of “issuance” of a certificate of completion and linking it to a specific point in time would significantly improve the level of certainty under the Act.

The Project Committee considered whether it was feasible to equate issuance with the posting of the certificate.<sup>145</sup> The obligation to issue a certificate of completion

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142. There is a suggestion in *Sytnick v. 633170 B.C. Ltd.*, 2006 BCSC 1555, at para. 16 that the 45-day period starts on the date that completion is “certified” by the payment certifier. This suggestion is contained in *obiter dicta* (statements in a judgment that are collateral or non-essential to the reasoning behind the decision on an issue in a case, and are therefore not binding in subsequent cases.) As the *Practice Manual* points out, it is not clear from these *obiter dicta* whether the court intended to distinguish between the date of certification of completion (or signature) and the date of issuance. In *Sytnick* the purpose of the right to request a certificate of completion was interpreted as being to force an owner or owner’s agent to decide whether substantial completion has taken place, and as a means of estopping an owner from later asserting that substantial completion had not taken place by the date of the certificate. The *obiter* suggestion concerning the start of the 45-day period was made in this context.

143. *Alterra Property Group Inc. v. Doka Canada Ltd.*, *supra*, note 135 per Allan, J. at para. 15. These comments were also *obiter dicta*. See also *Practice Manual*, *supra*, note 87, at 5-5 and 5-6.

144. *Ibid.*

145. There is a suggestion in *Indy Electrical Ltd. v. Warn*, 2013 BCSC 2188 at para. 11 that the 45-day period will not run because of issuance of a certificate of completion until a notice of certification is posted on the improvement under s. 7(4)(c). It is not easy to reconcile this with s. 20(1),

when one is requested by a lienholder and the obligation to notify other lienholders of its issuance are distinct, however. Section 7(4) requires posting of a notice of certification of completion “if a certificate of completion is issued,” which implies that issuance is a stage that precedes notification to third parties.<sup>146</sup> Furthermore, ambiguity would not be eliminated by linking issuance to posting of the certificate on the improvement.<sup>147</sup> There would continue to be room for disputes as to whether the certificate was posted in accordance with the Act. Other forms of notification or publication were considered, but all would be subject to contingencies that could detract from certainty regarding the date of issuance.

Ultimately, the Project Committee reached the conclusion that the greatest degree of certainty with respect to a point in time would be achieved by equating issuance with delivery of the signed certificate to the contractor or subcontractor, i.e. the person responsible for performing the work under the contract or subcontract in question.

In the case of a certificate of cessation of work, difficulties could occasionally arise in delivering the certificate to a contractor or subcontractor who has stopped work and is no longer on the site. As a certificate may always be delivered to the registered office of a corporation, however, the problem would really arise only in relation to unincorporated contractors and subcontractors.

The Project Committee recommends:

*35. The Builders Lien Act should be amended to clarify that issuance of a certificate of completion or a certificate of cessation of work consists of delivery of the signed certificate by any method to the person responsible for carrying out the work under the contract or subcontract to which the certificate refers.*

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which makes issuance of the certificate a potential trigger of the 45-day period and with the requirement under s. 7(4) to post the notice within 7 days of issuance. The implication from these two provisions is that issuance and posting of the notice, which is a document separate from the certificate, are separate events for the purposes of the Act: see Coulson and Laudan, *Guide to Builders' Liens in British Columbia* (Toronto: Carswell, 1992, loose-leaf, updated) at 60.

146. Coulson and Laudan, *ibid.*

147. For example, it was contended in *Alterra Property Group Inc. v. Doka Canada Ltd.*, *supra*, note 135 that posting the purported certificate in a site office located in a trailer amounted to a posting it “in a prominent place on the improvement” in accordance with s. 7(4). The court held otherwise, on the ground that the site office was situated on a separate parcel of land and therefore could not be said to be “on the improvement.”

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### 6. ABOLISHING NOTICES OF CERTIFICATION OF COMPLETION

Once a certificate of completion has been issued, section 7(4) requires a payment certifier to deliver a copy of the certificate within 7 days to the owner, the head contractor if any, and to the person who requested the certificate. Section 7(4) also requires the payment certifier to post a *notice of certification of completion* “in a prominent place on the improvement.”

Lienholders who have made a request under section 7(2) for “particulars” of a certificate of completion are entitled to receive a notice of certification of completion from the payment certifier within 7 days after issuance.

A Notice of Certification of Completion (Form 2) recites that a certificate of completion was issued on a specified date with respect to a particular contract or subcontract and contains essentially the same information as the certificate, except that it also contains a warning to lienholders stating as follows:

All persons entitled to claim a lien under the *Builders Lien Act* and who performed work or supplied material in connection with or under the contract are warned that the time to file a claim of lien may be abridged and section 20 of the Act should be consulted.

The Project Committee considered notices of certification of completion to be superfluous, except for the warning to lienholders. It is easier nowadays to provide a photocopy or scanned copy of a certificate of completion rather than a separate notice and “particulars” of the certificate. Posting a copy of a certificate of completion (or a certificate of cessation of work) and providing copies of the certificate itself to any lienholders who request them would serve the same purpose as a separate notice of certification. As recommended earlier, a warning to lienholders similar to the one that now appears in notices of certification should be incorporated into the prescribed form of certificate of completion or certificate of cessation of work.

Combining the purposes of notices of certification of completion with those of a certificate of completion and abolishing the notice as a separate document would help to simplify the operation of the Act.

The Project Committee recommends:

*36. The Builders Lien Act should be amended to abolish the notice of certification of completion under section 7(4).*

37. *The Builders Lien Act should be amended to require delivery of a copy of a certificate of completion or a certificate of cessation of work to a lienholder requesting the same, instead of “particulars” of the certificate.*

### 7. POSTING CERTIFICATES OF COMPLETION OR CERTIFICATES OF CESSATION OF WORK

Section 7(4)(c) currently requires a payment certifier to post a notice of certification of completion “in a prominent place on the improvement” within 7 days following issuance of the certificate. Earlier in this chapter we recommended the abolition of notices of certification, because a copy of the certificate itself can serve the same purpose. If the posting requirement is retained, therefore, it would be a copy of the certificate that is posted, as is required in Alberta and Saskatchewan.<sup>148</sup>

The purpose of requiring a certificate to be posted in a prominent place is obviously to bring to the attention of lienholders the fact that a certificate has been issued and time is running under the 45-day period.<sup>149</sup> The requirement to post “in a prominent place *on the improvement*” raises questions of how to comply if the improvement is something other than a simple structure above ground. How does one post a document prominently on an underground structure, for example? If the improvement is an interior alteration, a certificate posted physically on it will not be an effective notice to lienholders no longer actively working on the improvement.

It has been held that the place where posting occurs must be on the same parcel of land as the improvement. If it is on the opposite side of a lot boundary, it will not comply with the Act.<sup>150</sup>

The Project Committee debated whether physical posting of a certificate might be replaced by electronic posting on a website created for a project, or by publication in a construction trade newspaper, as is required in Ontario.<sup>151</sup>

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148. See R.S.A. 2000, c. B-7, s. 20(1); S.S. 1984-85-86, c. B-7.1, ss. 41(2), (2.1). The “certificate of substantial performance” in these provinces corresponds to the certificate of completion under the *Builders Lien Act* of British Columbia.

149. *Alterra Property Group Ltd. v. Doka Canada Ltd.*, *supra*, note 135, at para.14; *W Redevelopment Group, Inc. v. Allan Window Technologies Inc.*, 2010 BCSC 1601, at para. 67.

150. *Alterra Property Group Ltd. v. Doka Canada Ltd.*, *supra*, note 135 at para.16. The document in this case was allegedly posted in a trailer serving as a site office. The trailer was on a lot adjacent to the one on which the improvement was located.

151. See s. 32, rule 5 of the *Construction Act*, *supra*, note 8, which requires a certificate of substantial performance to be published in a construction industry journal.

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Publication of certificates in a trade journal was seen as likely to have uneven hit-or-miss results in terms of adequately notifying the body of lienholders, and would involve added expense. The creation of a freely accessible project website by an owner or general contractor, on which all certificates of completion and certificates of cessation of work would appear as well as other important documents such as permits and labour and material bonds, was seen to have merit. A project website might be especially well-adapted to large, phased or multi-stage infrastructure projects as a means of giving notice of the completion of particular contracts where the in use/ready for use test may be more difficult to apply than in projects involving a single improvement. The Project Committee concluded, however, that a project website of this kind should be optional instead of being a requirement under the Act.

The ultimate conclusion by the Project Committee was that physical posting should be retained in the Act as the primary means of communicating the fact that a certificate has been issued to lienholders other than the head contractor, the person who made the original request for the certificate, or one who specifically requested a copy. Instead of requiring posting “on the improvement,” however, the *Builders Lien Act* should provide that a copy of a certificate must be posted on the job site, as do the corresponding Acts in Alberta and Saskatchewan.<sup>152</sup> This would allow greater flexibility and easier compliance in cases where it is physically difficult or impractical to post a document on the improvement itself.

The Project Committee recommends:

*38. The Builders Lien Act should be amended to require posting of a copy of a certificate of completion on the site of the improvement within 7 days after issuance.*

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152. *Supra*, note 148.



## CHAPTER 6. THE *SHIMCO* LIEN

### A. General

Among the most vexed issues surrounding the *Builders Lien Act* in recent years are those associated with the so-called “*Shimco* lien.” The lien is named for the case in which its existence was confirmed. This lien against the statutory holdback is unique to British Columbia. A dual-lien model is not found in the construction lien legislation of any other Canadian province or territory.

The confirmation in *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*<sup>153</sup> (“*Shimco*”) that there is a lien against the holdback separate from the lien against land and improvements surprised the building industry and many veteran members of the construction Bar. Since that case was decided in 2002, only some of the practical problems associated with the *Shimco* lien have received judicial consideration. Most of the serious difficulties that the *Shimco* lien presents remain unresolved.

In 2004 BCLI issued a report on the effect of the *Shimco* decisions.<sup>154</sup> The report recommended that the *Shimco* lien be abolished. The Project Committee has revisited the issues in the current project after 15 years of further experience with the dual lien theory in British Columbia.

### B. The *Shimco* Decisions

There was some support in case law before the *Shimco* case for the view that a separate lien existed against the holdback in addition to the lien on land and improvements. Two earlier cases contain references to the possible existence of a separate holdback lien. One of these concerned a predecessor provision to s. 4(9) of the *Builders Lien Act*.<sup>155</sup> The other concerned a provision of the former *Condominium*

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153. 2002 BCSC 238, 99 B.C.L.R. (3d) 59; aff'd (*sub nom. Shimco Metal Erectors Ltd. v. North Vancouver (District)*) 2003 BCCA 193, (*sub nom. Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.* (2003), 11 B.C.L.R. (4th) 199 (C.A.).

154. *Supra*, note 7.

155. *Metropolitan Trust Co. v Abacus Cities Ltd.* (1979), 18 B.C.L.R. 317 (S.C.).

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Act<sup>156</sup> corresponding to sections 88(3) and (4) of the present *Strata Property Act*,<sup>157</sup> which deal with the holdback that a purchaser of a strata lot must withhold from an owner-developer until the earlier of the end of the 45-day period or 55 days after the transfer of title to the purchaser.

These references in the earlier decisions attracted little attention from industry and the construction Bar. In *Shimco*, however, they were accepted as being authoritative.

*Shimco* involved a contract for the construction of a tennis facility on land owned by the District of North Vancouver. The contractor engaged by the District was unable to pay a number of its subcontractors on completion of the project. Seven subcontractors filed claims of lien, but only three of the subcontractors started actions to enforce their liens and filed certificates of pending litigation (“CPL”) in the land title office within the one-year limitation period under section 33(1) of the Act.

Another subcontractor, Shimco Metal Erectors Ltd., (“Shimco Metal”) had filed a claim of lien and started a lien enforcement action, but did not comply with the requirement to also file a CPL within a year of having filed its claim of lien. Due to Shimco Metal’s failure to file a CPL, the land title office removed its claim of lien from the title to the land.

As the liens claimed by the three subcontractors who started actions and filed CPLs amounted to less than the 10% holdback which the District had maintained, the District wanted to set off its deficiency claims against the excess in the holdback fund and apply the excess to correcting the deficiencies. The District accordingly applied to the court for a declaration of the maximum amount for which it was liable, a declaration that Shimco Metal’s lien rights were extinguished, and dismissal of its action.

Shimco Metal was owed more than the entire amount of the holdback. Shimco Metal opposed the District’s application, arguing that it and the other subcontractors who had not filed CPLs were entitled to assert a separate lien against the holdback that persisted even if their liens on the land and improvement had been extinguished. Shimco Metal based this argument primarily on the wording of section 4(9) of the Act:

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156. R.S.B.C. 1979, c. 61, ss. 75(3) and (4). See *Myles Enterprises Ltd. v. Atlas Painting & Decorating Ltd.* (1997), 29 B.C.L.R. (3d) 173 (S.C.).

157. *Supra*, note 31.

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(9) Subject to section 34, a holdback required to be retained under this section is subject to *a lien under this Act*, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

[Italics added.]

Shimco Metal also argued this interpretation of section 4(9) was supported by the final words of section 8(4), which reads:

(4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or *proceedings are commenced to enforce a lien against the holdback*.

[Italics added.]

The District argued that there was only one kind of lien granted by the Act, and that after it satisfied the three liens that were not extinguished, it was free to use the rest of the holdback to correct deficiencies.

The court accepted Shimco Metal's argument that section 4(9) and the concluding words of section 8(4) italicized above indicate the legislature intended to create a separate lien against the holdback that is independent of the lien given by section 2(1) on land and improvements. The court emphasized that s. 4(9) speaks of "*a lien under this Act*" rather than "*the lien*," as it would if referring to the lien against land and improvements conferred by section 2(1).

In the result, the court held that Shimco Metal was able to pursue this separate lien against the holdback even though its other lien rights may have been extinguished. The decision and the interpretation of section 4(9) on which it was based were upheld by the British Columbia Court of Appeal.<sup>158</sup>

Both courts acknowledged an "element of unfairness" in the result that claimants who had complied fully with the Act to perfect their lien claims would have to share the holdback with those who did not. They held this was not sufficient to overcome the terms of ss. 4(9) and 8(4).

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158. *Supra*, note 153.

Sections 4(9) and 8(4) received an extremely literal interpretation in *Shimco*, just as the predecessor legislation had in the two earlier cases. How a separate lien on the holdback would interact with the rest of the Act received very cursory consideration. The owner's arguments based on the disharmony in the application of the Act that a separate holdback lien would produce were dismissed on the ground that they could not overcome what the courts considered to be the "clear and unambiguous wording of section 4(9) and section 8(4)."<sup>159</sup>

### C. Reaction to *Shimco*

The *Shimco* decision was met with surprise and concern, especially by owners, general contractors, and lending institutions.<sup>160</sup> There was a consensus that the law was now considerably different from what it had been thought to be, and a great deal of uncertainty had been injected into any dealings with holdback funds. Much of that uncertainty still remains 15 years later.

### D. A Bad Fit

Simply stated, the dual lien theory is not in harmony with the *Builders Lien Act* when read as a whole. The Act specifies who is entitled to a lien under section 2(1) on land and the improvement. It sets out detailed requirements for asserting the lien on land and the improvement and preserving it against expiration by filing a claim of lien in the land title office. The Act specifies how a lien preserved in this manner may be enforced by action, and provides a special limitation period for doing so. It also provides machinery for securing claims of lien and clearing them from the title to protect the positions of the parties pending resolution of the underlying payment dispute. The courts in *Shimco* acknowledged that the lien-clearing provisions (sections 23 and 24) can only apply to the lien against land and improvements. By contrast, the Act lacks any corresponding provisions applicable to the *Shimco* lien.

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159. 2003 BCCA 193 at para. 11.

160. See "Builders Lien Alert: Shimco Metal Erectors Ltd." (2002) *Alert!*, online at [https://www.lawsociety.bc.ca/page.cfm?cid=1215&t=Builders-lien-alert:-Shimco-Metal-Erectors-Ltd.](https://www.lawsociety.bc.ca/page.cfm?cid=1215&t=Builders-lien-alert:-Shimco-Metal-Erectors-Ltd;); Dirk Laudan, "Limiting Shimco Liability" (2003), online at [http://www.blg.com/en/newsandpublications/documents/publication327\\_EN.pdf](http://www.blg.com/en/newsandpublications/documents/publication327_EN.pdf). In *Wah Fai Plumbing & Heating Inc. v. Mai*, 2011 BCCA 26, Levine, J.A. noted at para. 26 that "the dual lien theory was not warmly received" and cited several other examples of critical commentary, including the BCLI *Report on Builders Liens After the Shimco Case*, *supra*, note 7.

The Act therefore provides no guidance regarding how notice of a Shimco lien is given or how the lien should be enforced. It has been assumed that a Shimco lien must be enforced by starting an action naming the person who is obliged to maintain the holdback as the defendant, as well as the person from whom the holdback was retained.

In the *Shimco* judgments, these anomalies were dismissed as flaws in the Act. It is exceedingly improbable nevertheless that the legislature intended to confer two lien remedies and provide extensive procedural machinery for only one, leaving the other remedy in the same statute as a matter of inference with no prescribed procedure for its exercise.<sup>161</sup> It is much more likely that the language in section 4(9) about the holdback being “subject to a lien under this Act” is mere surplusage intended to reinforce the statement in the rest of the subsection that the holdback is charged with payment of the claims of persons “engaged by or under the person from whom the holdback was retained.” Read this way, s. 4(9) would have the meaning that those with valid, unexpired liens under section 2(1) on land and the improvement which arose under that person could also look to the holdback as a source of payment.

The construction lien statutes of other jurisdictions in Canada contain language charging the holdback with payment of the claims of lienholders, but none treat this as meaning there is a lien on the holdback separate from their liens on the owner’s interest in the land and the improvement.<sup>162</sup> The dual lien theory represents the current state of the law in British Columbia nevertheless, and anyone affected by the *Builders Lien Act* must deal with its implications.

### E. Implications of the Shimco Lien

Acceptance of the dual lien theory in *Shimco* has numerous consequences for the application of the *Builders Lien Act*:

- The class of Shimco lienholders and the class of lienholders under section 2(1) are not the same. The section 2(1) lien on land and the improvement is only given to contractors (including material suppliers), subcontractors, and workers. Section 4(9) indicates that the lien is given to “*all persons engaged...by or under the person from whom the holdback is retained.*” The latter class could include persons

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161. British Columbia Law Institute, *supra*, note 7.

162 See, e.g. *Construction Act*, R.S.O. 1990, c. C.30, ss. 21, 44(6); *Builders’ Lien Act*, R.S.A. 2000, c. B-7, s. 24; *The Builders’ Lien Act*, S.S. 1984-85-86, c. B-7.1, s. 33; *Builders’ Liens Act*, CCSM, C. B91, s. 26.

expressly disentitled to claim a lien on land, such as employees of an architect, engineer, or material supplier.<sup>163</sup>

- A Shimco lien may be claimed even if the claimant's lien on land has expired for non-compliance with the filing requirement. If even one Shimco lien action is asserted before the end of the holdback period specified in sections 8(1) and (2), section 8(4) is commonly assumed to prohibit any of the holdback from being paid out.<sup>164</sup> Persons whose liens on land have expired for lack of timely filing may still share proportionally in the holdback as if they had filed on time. The *Builders Lien Act* contains no restriction on when other Shimco liens may be claimed once the holdback fund has been immobilized by the first action. As a result, an owner or other person maintaining a holdback is not in a position to know when the holdback fund may be safely dealt with.<sup>165</sup>
- The *Shimco* court said that while all subcontractors have a lien against land, only those engaged by or under a particular contractor have a lien against the holdback retained from that contractor.<sup>166</sup> Under the multiple holdback system, however, the effect of *Shimco* is that subcontractors and others may claim liens against holdbacks withheld at each level above them in the contractual chain up to the owner's holdback at the top of the chain.<sup>167</sup> It has been noted that if section 23 is used to clear the title of liens by paying in a holdback other than the owner's holdback, Shimco liens could still be asserted against the owner's holdback even by those who had never filed claims of lien.<sup>168</sup> This significantly impairs the efficacy of section 23 as a lien-clearing provision.

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163. Robert W. Jenkins and Taylor S. Galbraith, "The Holdback" in the Practice Manual, *supra*, note 87 at 7-24.

164. *Preview Builders International Inc. v. Forge Industries Ltd.*, 2013 BCSC 1532, at para. 80. See also Chapter 7 below under the heading "Making Room for Partial Payout of the Holdback In Safety: Amendment of Section 8(4)" regarding this interpretation of s. 8(4).

165. See BCLI Report No. 29, *supra*, note 7 at 12. A Shimco lien claim is likely subject to the general two-year limitation period under s. 6(1) of the *Limitation Act*, R.S.B.C. 2012, c. 13. The running of time under the limitation period may be postponed because of the discovery rules, however. Postponement for lack of discovery will be very rare in a contractual payment dispute, but there is at least a theoretical possibility that the limitation period on a Shimco lien might not even begin to run until more than two years after work has ceased on the improvement.

166. 2002 BCSC 238 at para. 19.

167. *Supra*, note 87 at 7-24.

168. *Ibid.*

- While the disharmonies created by the Shimco lien generally operate to the advantage of Shimco lien claimants over claimants relying on the lien on land, one has a paradoxical twist. The Shimco lien only lies against the 10% statutory holdback. Claimants who can enforce liens on land may stand to obtain greater recovery than those who are only able to rely on a Shimco lien, if the actual holdback is larger than the statutory 10% and if the owner does not assert a set-off against the excess to correct deficiencies or for another reason.<sup>169</sup> This is not in keeping with the principle of the Act that there are no preferences amongst claimants having valid liens.

Since the *Shimco* case was decided, the Court of Appeal has held that if there is no holdback, there is no holdback lien because there is nothing to which a lien can attach. Thus, if there never was a holdback, no Shimco lien could arise. If the holdback has been paid out in compliance with the Act at the end of the holdback period (pre-supposing that no claims of lien have been filed in the land title office or Shimco lien actions commenced), any Shimco lien existing up to that point is extinguished.<sup>170</sup>

If even one Shimco lien action is started before the end of the holdback period, however, there is nothing to stop other claimants from starting similar actions afterwards, potentially holding up the release of the holdback indefinitely.

In another notable case, a solution was judicially crafted to deal with the fact that by their terms, the mechanisms in sections 23 and 24 of the *Builders Lien Act* allowing liens to be secured and vacated do not apply to Shimco liens. A subcontractor had filed a conventional claim of lien in the land title office and then also started a Shimco lien action. This prevented release of the owner's holdback, which the head contractor needed to pay other subcontractors. Over the objections of the lien claimant, the court declared that it would be in accordance with the principles of the Act to order that the security provided for the subcontractor's land lien (a lien bond) was capable of serving as security for the Shimco lien as well.<sup>171</sup> The court outlined a process to substitute for the unavailable lien-clearing mechanism under section 24:

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169. *Ibid.* at 7-25 – 7-26.

170. *Wah Fai Plumbing & Heating Inc. v. Ma*, *supra*, note 160. In a separate concurring judgment in this case, Chiasson, J.A. mentioned the possibility that a claimant whose Shimco lien rights were defeated by the failure to retain a holdback might have a remedy against the person who failed to comply with the holdback requirement, but did not express any opinion on the point.

171. *Preview Builders International Inc. v. Forge Industries Ltd.*, 2013 BCSC 1532, at paras. 75-77, 90.

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- (a) an applicant must obtain a court order that dismisses or otherwise disposes of the portion of the claimant's civil claim that seeks to enforce the holdback lien (without prejudice to the claimant's ability to prove the lien and obtain judgment for the amount recoverable against the holdback); and
- (b) the applicant must provide security acceptable to the parties or the court to substitute for the security of the holdback lien.

If no other Shimco lien action had been started, the holdback could then be released.<sup>172</sup>

#### **F. Should the Shimco Lien Be Retained or Abolished?**

Defenders of the Shimco lien maintain that it is theoretically justified because as far as the owner is concerned, the purpose of the statutory holdback is only to give protection to the owner against lien claims that may never materialize. If the contractor defaults in fulfilling the contract with the owner, then without the Shimco lien and in the absence of claims of lien against the land, the owner could exercise a right of set-off against the holdback once the holdback period has passed. The holdback would never flow down the contractual chain and subcontractors, their suppliers, and workers might never be paid money which they would have received in the absence of the holdback requirement. The Shimco lien is said to be a safeguard against enrichment of the owner at their expense.

The purpose of the *Builders Lien Act* is not to protect those who sleep on their rights, however. The policy underlying the Act is to balance the interests of unpaid lien claimants in the construction pyramid with those of owners who may not have dealt directly with the claimants, and have no knowledge of the state of accounts between the claimants and those who engaged them. Unpaid claimants are given an extraordinary lien remedy against the property of persons with whom they may have had no direct contractual relationship. The balancing feature of the Act is that the lien is extinguished if the claimant does not follow the procedures in the Act to preserve it within the time allowed, leaving the owner and contractors able to deal with the land and project funds free of undisclosed claims.

Shimco lien claimants who have not complied with the Act by filing timely claims of lien in the regular way, and who may decide to come forward only after the time for filing has expired, nevertheless share in the same holdback with those who file within time and thereby give notice of their claims to all parties. The Shimco lien thus operates perversely to reward non-compliance by claimants who wait in the weeds.

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172. *Ibid.*, at paras. 75-77.

Judicial ingenuity in devising workaround solutions to the lack of a statutory procedural framework for the Shimco lien does not eliminate the disharmony that the very existence of the lien creates with the scheme of the Act. However effective in individual cases, judicial ingenuity cannot add to the desirable goals of clarity and accessibility in this area of the law, because knowledge of the judicially crafted procedures will always be quite limited outside of the judiciary and the construction Bar.

The Project Committee has not had any difficulty in coming to the same conclusion reached in the 2004 BCLI report, namely that the Shimco lien should be abolished. The *Builders Lien Act* and *Strata Property Act*<sup>173</sup> should be amended accordingly by removing the references that have been held to support the existence of a separate lien against the holdback.

The Project Committee recommends:

39. *The Builders Lien Act and Strata Property Act should be amended to abolish the so-called Shimco lien and the corresponding lien referred to in the Strata Property Act by*

- (a) repealing the words “, a holdback required to be retained under this section is subject to a lien under this Act, and” in section 4(9) of the Builders Lien Act;*
- (b) adding the words “under section 2(1)” after “liens” in paragraph (a) of section 5(2) of the Builders Lien Act;*
- (c) amending section 8(4) of the Builders Lien Act by deleting the words “or proceedings are commenced to enforce a lien against the holdback”;<sup>174</sup>*
- (d) repealing section 88(3) of the Strata Property Act; and*
- (e) deleting the words “, or proceedings have been commenced, to enforce a lien against the holdback,” from section 88(4) of the Strata Property Act and substituting the words “against that strata lot.”*

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173. *Supra*, note 31.

174. Regarding further amendment of s. 8(4), see the subheading “3. Making Room for Partial Payout of the Holdback in Safety: Amendment of Section 8(4)” and Recommendation 39 in Chapter 7.

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## CHAPTER 7. REMOVING OBSTACLES TO THE FLOW OF CONSTRUCTION FUNDS

### A. General

Chapter 1 mentions that the *Builders Lien Act* can have the perverse effect of restricting and interrupting the flow of construction funds down the contract chain. By raising the risk of insolvency within the chain, it is capable of harming the very interests it is intended to protect. This has long been the principal complaint about the Act, and the main reason behind calls for its repeal that are heard periodically.

The following excerpt from the 1972 report of the former Law Reform Commission of British Columbia explains this contradictory effect of the Act:

The policy of the Act is to ensure that people engaged on a construction project are paid. This policy is implemented through a requirement that moneys which would otherwise have been payable to those people are set aside for the time being. A system which gives protection to the people at the end of the construction chain by requiring those at the beginning of the chain to hold back moneys which are contractually due and owing is bound to result in a slowing-down of the flow of funds along the chain. Thus, the device used to ensure that eventually people in the chain are paid itself creates a pressure tending, in the short run, to prevent them getting paid.<sup>175</sup>

At the time of the Law Reform Commission report, the former *Mechanics' Lien Act* required a single 15 per cent holdback by the owner.<sup>176</sup> Not only was the percentage of the statutory holdback greater than it is now, but in addition the holdback was not released until the head contract or improvement was complete. The multiple holdback system introduced in the present Act not only calls for each contractor and subcontractor who is a payor in the contract chain to maintain a holdback, but also allows for the progressive release of holdback funds as subcontracts are completed, improving the flow of funds within the contract chain.

While it is generally acknowledged that the multiple-holdback system works better than the earlier single-holdback-by-owner system, payment delay issues attributa-

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175. Law Reform Commission of British Columbia, *Report on Debtor Creditor Relationships: Part II – Mechanics' Lien Act: Improvements on Land*, *supra*, note 53, at 20-21.

176. See R.S.B.C. 1960, c. 238, s. 21(1).

ble to statutory holdbacks persist. The buildup of holdbacks in multi-year, large-scale construction projects can become extreme. There is a significant financing cost associated with maintaining these large holdbacks as idle funds. The Project Committee devoted much time to finding ways to make construction funds flow more smoothly, without compromising protections under the Act. Among them are the following:

- elimination of the 10-day gap between the end of the lien filing period and the end of the holdback period;
- amendment of one provision and repeal of another that are commonly understood as preventing further payments once a claim of lien is filed, and requiring retention of the entire holdback even if the amount of lien is only a fraction of the total;
- alternative measures specifically aimed at preventing buildup of excessive holdbacks in multi-year projects, and which would be available in any project with a completion schedule in excess of twelve months;
- several reforms concerning holdback accounts;
- recommendations to improve and simplify the procedures to remove liens from the title.

This chapter explains the basis for these recommendations.

### **B. Quicker Holdback Release After End of the Lien Filing Period**

The holdback period now ends 55 days after issuance of a certificate of completion, if any. If not, it ends 55 days after the completion, abandonment, or termination of a head contract if there is a head contractor, and otherwise 55 days after the completion or abandonment of the improvement.<sup>177</sup> The lien filing period ends 45 days after whichever of those events is applicable.<sup>178</sup> The 10-day gap between the end of the lien filing period and the end of the holdback period allows for the time it formerly took for a claim of lien filed immediately before the end of the 45-day period to appear as a charge on the title and show up on a title search result.

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177. *Supra*, note 1, ss. 8(1), (2).

178. *Ibid.*, ss. 20(1), (2).

Now, however, most applications to register charges and other interests are submitted electronically and appear as pending applications on a title search very shortly afterward. A 10-day gap between the end of the lien filing period and release of the holdback is clearly no longer necessary to allow for land title office processing. There is still a need, however, to take account of lien claimants filing on their own behalf, who are permitted to submit claims of lien in paper form. A claim of lien conceivably could be filed on paper at the land title office counter just before it closes at 4:00 p.m. on the last day of the lien filing period. There is also a need to take account of the fact that a claim of lien may be filed electronically at any time before midnight on that day.

How long does the interval between the end of the lien filing period and release of the holdback need to be? Is there a need for any time gap at all? The Project Committee turned to the Land Title and Survey Authority for answers.

We were told that a claim of lien filed on paper before 3:00 p.m. on a business day will appear on a title search as a pending application within an hour after filing.

Any paper or electronic claim of lien filed after 3:00 p.m. will be processed on the next business day. A paper claim of lien would appear on a search as a pending application after the first hour in which the land title office is open on the next business day.

As some claims of lien filed late on the 45th day of the 45-day period may not appear on a title search until the next day, there is an argument for the holdback period to end at least one day later than the lien filing period so that an owner or payment certifier can be certain of being able to determine whether it is safe to release the holdback.

Some members were initially in favour of having the holdback period expire one or two days after the end of the lien filing period. As a holdback will not be released until a title search is done in any case, however, the Project Committee reached a consensus that as a practical matter, the end of the lien filing period and the holdback period could be allowed to coincide.

Accordingly, the Project Committee recommends:

*40. Sections 8(1) and (2) of the Builders Lien Act should be amended to provide that the holdback period for a contract or subcontract expires at the end of 45 days after*

- (a) issuance of a certificate of completion or cessation of work, if any, with respect to the contract or subcontract, or any contract or subcontract above it in the contractual chain;*
- (b) completion or abandonment of the improvement, if no certificate of completion or cessation of work described in paragraph (a) is issued.*

## **C. Eliminating Two Problems of Perception That Inhibit the Flow of Funds**

### **1. GENERAL**

The filing of a claim of lien generally has the effect of stopping the flow of payments within the contract chain and preventing the release of any portion of the holdback until the claim of lien is removed from the title. In part, this is based on a misperception of the effect of section 34(2)(c) and section 8(4).

### **2. PAYMENTS WITH ACTUAL NOTICE OF A FILED CLAIM OF LIEN: SECTION 34(2)(c)**

Section 34(2)(c) is linked with section 34(1), which is itself the subject of recommendations made below. Section 34(1) limits the maximum amount recoverable in total by lienholders engaged by or under the same contractor or subcontractor to the greater of (a) the amount owing to the contractor or subcontractor, and (b) the required holdback from the contractor or subcontractor. Section 34(2)(c) makes certain payments ineffective to reduce the amount owing to the contractor or subcontractor for the purposes of section 34(1):

- (2) For the purposes of subsection (1)(a),

....

- (c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made
  - (i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,
  - (ii) if the person has actual notice of the claim of lien, and
  - (iii) if the claim of lien has not been removed or cancelled from the title to the land, under section 23 or 24 or otherwise, at the time the payment was made,does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.

Essentially, section 34(2)(c) treats any payment under a contract or subcontract made after the payor knows of a claim of lien filed by a lienholder who was engaged by or under the payee similarly to a payment made in bad faith.

Under section 34(2)(b), a payment made in bad faith to a contractor or subcontractor does not reduce the amount deemed to be owed to the payee for the purpose of determining, under section 34(1), the maximum amount that the lien claimants engaged by or under that contractor or subcontractor can recover under the Act. This is true of a payment coming within section 34(2)(c) as well, but only *to the extent of the lien*.

The words “*to the extent of the lien*” in s. 34(2)(c) are frequently overlooked. As owners and lenders tend to assume that making a payment after a claim of lien is filed will not discharge liability towards any lienholder, filing a claim of lien has the tendency to freeze the movement of funds from the top of the contract chain.

Section 34(2)(c) first appeared in the 1997 *Builders Lien Act*. Earlier Acts contained a different provision stating that payments made in good faith to a lienholder up to a percentage of the value of a contract or work, services, or materials representing the total value less the statutory holdback would operate as a discharge of any lien to the extent of the payments.<sup>179</sup> “Payment in good faith” was judicially interpreted under the earlier Acts to mean a payment made honestly and without the intention to defeat the rights of a lienholder other than the payee.<sup>180</sup> There is some support in the case law under the earlier Acts for the proposition that a payment made after the payor becomes aware that a claim of lien has been filed by a lienholder other than the payee is not a payment made in good faith.

Section 34(2)(c) does appear, therefore, to be in line with the interpretation of “good faith” under the previous lien legislation. In being framed in the negative, however, it obscures a broader proposition that was reflected in the case law surrounding the positively expressed former provision. The broader proposition is this: if an amount that is sufficient to cover the statutory holdback and any claim of lien that has come to the knowledge of the payor is held back from what is owed to the payee, payment of the rest may be made in good faith.<sup>181</sup>

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179. R.S.B.C. 1996, c. 41, s. 21(3). See also R.S.B.C. 1979, c. 40, c. 20(3).

180. *Len Ariss & Co. Ltd. v. Peloso* (1958), 14 D.L.R. (2d) 178 (Ont. C.A.); *B. & T. Masonry Inc. v. Mirandis Development & Building Services Ltd.* (1977), 3 B.C.L.R. 357 (S.C.).

181. *Len Ariss & Co. Ltd. v. Peloso*, *ibid.* This broader proposition is the subject of express provisions in the lien legislation of some other provinces. See, for example, s. 24(2) of the Ontario *Construction Act*, *supra*, note 8 :

(2) Where a payer has received written notice of a lien and has retained, in addition to the holdbacks required by this part, an amount sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to

The flow of construction funds should not be frozen entirely in any case merely because a claim of lien has been filed. This effect under the present Act is counter-productive. Prudent owners will protect their position in any event by retaining an amount necessary to cover claims of lien that have been filed in addition to the statutory holdback. They do not need the inducement of a provision like section 34(2)(c) that is easily misunderstood and regularly misapplied. Likewise, they should not be discouraged by such a provision from maintaining the flow of payments even at the cost of some risk. The orderly flow of construction funding is likely to be the best safeguard against insolvencies and a proliferation of liening within the contract chain.

As section 34(2)(c) already contains the words that limit its scope to the amount of liens filed and these are commonly ignored, there is no point in seeking greater clarity by amending it. The objective of improving the flow of construction funds and minimizing the counter-productive effects of the Act will be best served by repealing it.

The Project Committee recommends:

*41. Section 34(2)(c) of the Builders Lien Act should be repealed.*

### 3. MAKING ROOM FOR PARTIAL PAYOUT OF THE HOLDBACK IN SAFETY: AMENDMENT OF SECTION 8(4)

If the holdback is greater than the total amount of any liens that have been claimed, it is unnecessary for the protection of the owner and the priority position of the owner's lenders to retain the entire holdback after the end of the holdback period. It is only necessary to retain the amount necessary to cover the total amount of the claims of lien that have been filed.

Nevertheless, section 8(4) is commonly interpreted as requiring the entire holdback to be retained if any claims of lien have been filed in time.

Here again is the current wording of section 8(4):

- (4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to

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90 per cent of the price of the services and materials that have been supplied under that contract or subcontract, less the amount retained.

See also s. 40(2) of *The Builders' Lien Act* of Saskatchewan, *supra*, note 96.

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whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

In Chapter 6 we recommended repealing the words “or proceedings are commenced to enforce a lien against the holdback.” The rest of the wording bears examining as well, because it is often understood as meaning that release of the holdback will not operate to discharge any liens if even a single claim of lien has been filed. As a result, section 8(4) tends to be treated as prohibiting the release of any portion of the holdback in those circumstances. This naturally restricts the flow of construction funds within the contract chain.<sup>182</sup>

The consultation paper contained a tentative recommendation that section 8(4) should simply state that a holdback may be paid once the holdback period has expired. On a second look, the Project Committee considered this might abbreviate section 8(4) too greatly and leave too much to implication. The Project Committee revised the recommendation to replace the rest of section 8(4) with wording that would better convey the intent that owners may pay out the entirety of the holdback if they choose, or retain or pay into court the portion of the holdback needed to discharge liens that have been preserved by timely filings, and release the excess.

Some respondents to the consultation paper urged that section 8(4) should be worded in mandatory terms to compel release of the holdback at the end of the holdback period. Emphasis was placed on the fact that the language of a counterpart provision in the Ontario *Construction Act* was changed from permissive to mandatory as part of the extensive 2017 amendments to that statute.<sup>183</sup> The concern behind these submissions likely is that permissive wording concerning holdback release provides an opportunity to owners and contractors to retain holdbacks and bring economic pressure to bear on contractors and subcontractors to agree to disputed contractual set-offs.

The Project Committee is not in favour of a change to mandatory wording. The purpose of the Act is to provide security for payment. The law of contract, not the Act,

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182. Lending institutions based in eastern Canada will often rigidly insist on retention of the entire holdback as long as any claim of lien remains on the title, possibly because they are influenced by the different wording of ss. 25-27 of the Ontario *Construction Act*, *supra*, note 8. These provisions of the Ontario statute imply that all liens that can be claimed against the holdback must have expired, have been satisfied, or have been secured and vacated from title before payment of the holdback will operate to discharge claims that could be asserted in respect of the holdback.

183. *Supra*, note 8, s. 26(1), 27.



determines whether a debt is owing and its amount. The right to set off claims against the holdback once it has served its purpose as security for payment of the claims of lienholders is well-established in case law, and is rooted in equity.<sup>184</sup> The Project Committee is disinclined to recommend the abrogation of significant non-statutory rights as a by-product of its review of the *Builders Lien Act*.

It is important to note that the Ontario statute requires mandatory release only when there are no preserved or undischarged liens.<sup>185</sup> It also preserves the ability of the owner to assert a set-off in good faith as an exception to mandatory holdback release, subject to a notification requirement and the right of the contractor to refer the matter to adjudication.<sup>186</sup> The shift to mandatory wording in the Ontario statute appears to be functionally connected with the introduction of prompt payment and adjudication provisions. If prompt payment and adjudication provisions are enacted at some future point, the matter of mandatory holdback release with appropriate exceptions might be re-examined, but it is not among our recommendations.

If section 8(4) of the *Builders Lien Act* is replaced by a provision indicating more clearly that the payor's holdback defence will not be lost by release of the portion of a holdback in excess of that needed to cover claims of lien that have been filed, there should be fewer cases of unnecessary retention.

The Project Committee recommends:

*42. Section 8(4) of the Builders Lien Act should be repealed, and substituted by one or more provisions stating:*

- (a) payment of the holdback required to be retained under section 4 may be made after expiry of the holdback period;*
- (b) the effect of payment of the holdback is to discharge the liens of the person to whom the holdback is paid, and of any person engaged by or under that person, except an unsatisfied lien of any of those persons who has preserved the lien by filing a claim of lien within the time allowed by section 20; and*

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184. See *Kinetic Construction Ltd. v. Tuscany Village Holdings Ltd.*, 2008 BCCA 417, at para. 10; *United Metal Fabricators Ltd. v. Voth Bros. Construction (1974) Ltd.* (1987), 42 D.L.R. (4th) 193 (B.C.C.A.); *Ram Construction Inc. v. JBLK Enterprises Inc.*, 2010 BCSC 1333, at para. 51.

185. *Supra*, note 8, ss. 26(1), 27.

186. *Ibid.*, ss. 13.5(1), 27.2(1).

- (c) if any of those persons has filed a claim of lien within the time allowed by section 20, payment of the portion of the holdback that exceeds the aggregate amount of claims of lien that have been filed and have not been satisfied, cancelled, or removed from the title under this Act, may be made without jeopardy.

## **D. Preventing Buildup of Excessively Large Holdbacks**

### **1. GENERAL**

As noted at the beginning of the chapter, the buildup of holdbacks to excessive levels is a problem in large projects with a multi-year construction schedule, despite the multiple holdback system that allows progressive release of holdbacks as subcontracts are completed. In addition to restricting the flow of funds needed to enable all participants in the construction project to continue operating, the retention of large amounts as idle funds in a holdback account imposes a significant financing cost on the owner who has to borrow the funds, and on contractors who incur a financing cost themselves and pass this cost on to the owners in the pricing of their contracts.

Some provinces have addressed this problem in their lien legislation by providing for periodic release of the holdback in projects that are above a certain cost threshold and take more than a year to complete. The Project Committee examined these provisions and gathered information on their operation. A modified solution involving a form of periodic early holdback release is outlined at the end of this section.

### **2. PERIODIC EARLY HOLDBACK RELEASE IN LONG-TERM CONSTRUCTION PROJECTS: EXAMPLES IN OTHER PROVINCES**

#### *(a) Newfoundland and Labrador*

The periodic early holdback release provisions in the Newfoundland and Labrador *Mechanics' Lien Act* apply to contracts or subcontracts with a price greater than \$20,000,000 and a completion schedule of more than one year.<sup>187</sup> Within 10 days after each anniversary of the day on which the first services or materials were provided, the person primarily liable under the contract or subcontract must give notice of intention to release the holdback to anyone who provided services or materials in connection with its performance.<sup>188</sup>

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187. R.S.N.L. 1990, c. M-3, s. 12.1(1). The size of the contract is determined as of the time it is executed, regardless of later amendments: s. 12.1(2).

188. *Ibid.*, s. 12.2.

The requirements for giving the notice of intention are onerous. They stipulate individual notice to lienholders by personal service or registered mail, in addition to posting the notice of intention on the job site and publication in the provincial gazette.<sup>189</sup>

The holdback must be paid out within 30 days after the notice of intention to release is given, unless a proceeding to enforce a statutory charge against the holdback has been commenced in the meantime.<sup>190</sup> The amount of the holdback is calculated as of the anniversary date. All liens for services and materials provided before the anniversary date expire 30 days after the notice of intention to release is given. A claimant who commenced a proceeding to enforce the lien before the 30 days expire remains able to prove the lien in the proceeding.<sup>191</sup> The amount of the lien may be secured and the lien vacated by a court order, allowing early release of the remainder of the holdback.<sup>192</sup>

The Project Committee was told that the Newfoundland and Labrador provisions are seldom used even though they are technically mandatory. The main reason is that literal compliance with the notice requirements is a practical impossibility in large projects because every lienholder, including workers potentially numbering in the thousands, would be entitled to notice.

### *(b) Saskatchewan*

Section 46 of *The Builders' Lien Act* of Saskatchewan makes periodic early holdback release available as an option to anyone liable as a payor under a contract or sub-contract, if the price is greater than \$25,000,000 and the completion schedule is longer than one year.<sup>193</sup> After each anniversary of the day on which services or materials were first provided, the payor may give a notice of early release in the same manner as a certificate of completion is posted. If no claim of lien is registered, the payor must release the holdback 40 clear days after the notice of early release was given.

The Project Committee received information that the optional scheme for periodic early holdback release under the Saskatchewan statute is in regular use and works

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189. *Ibid.*, s. 12.2

190. *Ibid.*, s. 12.1(1). Section 12.5 of the Newfoundland and Labrador statute provides that if a lien given by the Act does not attach to land, it is a charge on the amount of the holdback.

191. *Ibid.*, ss. 12.3(1), (2).

192. *Ibid.*, s. 12.4.

193. *Supra*, note 96, s. 46(1).

well, with well-developed industry practices having crystallized around it. The scheme for periodic early release provision co-exists with general provisions of the Act regarding multiple holdbacks and progressive release following completion of subcontracts.

*(c) Prince Edward Island*

Prince Edward Island provides for early holdback release in the restricted case of provincial government highway construction contracts with a completion schedule extending past the end of a calendar year, and which are subject to supervision by an engineer. Once the engineer has certified that work scheduled for completion in the first year of the contract has been satisfactorily completed, the contract is deemed to have been completed on 1 December of the first calendar year, and the holdback is required to be reduced.<sup>194</sup>

*(d) Ontario*

The report emerging from the Construction Lien Act Review in Ontario recommended that periodic early release of holdback be permitted if the contract or subcontract under which the holdback arose provides for it. Release of the holdback would be on either an annual basis or following certification that a contractual milestone or “phase” of the work was complete.<sup>195</sup> The authors of the report considered that holdback release on an annual basis should be available only if the contract met “a significant monetary and time-based threshold.”<sup>196</sup>

These recommendations were subsequently implemented. The Ontario *Construction Act* (as now renamed) was amended to allow release of the holdback on either an annual or phased basis if the contract provides for release of accrued holdback on that basis, the completion schedule is longer than one year, and the contract price is above a prescribed amount (currently \$10,000,000). Liens that arose in relation to the contract would have to be cleared as of the date on which the holdback is paid out.<sup>197</sup>

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194. R.S.P.E.I. 1988, C. M-4, s. 14.1.

195. Reynolds and Vogel, *supra*, note 17 at 85.

196. *Ibid.*

197. *Construction Act*, *supra*, note 8, ss. 26.1, 26.2, and 27.1. See also the *Construction Act General Regulation*, O. Reg. 304/18, ss. 6, 7.

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### 3. A MODIFIED SCHEME FOR PERIODIC EARLY HOLDBACK RELEASE

#### *(a) The modified scheme*

The Project Committee believes that an optional scheme for periodic early holdback release similar to the one available in Saskatchewan has merit as a way to prevent unduly large amounts of construction funds being tied up in excessively large holdbacks in multi-year projects.

The Project Committee nevertheless considers it a drawback that in each of the Newfoundland and Saskatchewan models, the holdback is reduced to zero after each anniversary before building up again as work continues in the course of the following year. If a contractor became insolvent, the degree to which lienholders under the contractor could recover against holdback could vary greatly, depending on when the insolvency occurred during the year following an anniversary date. Knowing this, lienholders might adopt a strategy of filing claims of lien unnecessarily at an early point in the project in order to secure access to a larger holdback.

Another complication is that the volume of work and the size of progress payments typically tapers off near the end of a long project, as the bulk of work has been done and only finishing work remains. If there has been a series of holdback releases after anniversary dates, the holdback in the final stages of the project may be considerably smaller than when the pace of work and progress billings were at their height. If lien filings occur at this stage, it could be difficult to determine the holdback amount applicable to a given lien, particularly if liens have been filed at various times.

Ideally, a periodic holdback release scheme should prevent excessively large holdbacks from accumulating, while also maintaining the holdback at a relatively constant level throughout most of a multi-year project. The Project Committee has developed a proposal for a scheme of periodic early holdback release to meet these objectives. An owner could elect to apply the scheme to a project with a multi-year schedule, upon giving appropriate notice to contractors and subcontractors of the intention to use it in the project.

Under the scheme developed by the Project Committee, the holdback at any given time after the first anniversary date is intended to represent 10 per cent of the value of the previous 12 months of work.

The scheme would operate in this manner:

1. The holdback would build up normally during the first 12 months of the project.

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2. After the first anniversary, the amount held back in the month that was 12 months earlier would become payable at the end of each month. Monthly progress payments could be adjusted to avoid a need to continually issue cheques for the monthly partial releases.

If the holdback in the month to which the progress payment relates is less than the holdback for the month one year earlier, the difference would be added to the progress payment. If the holdback for the month to which the progress payment relates is larger than the holdback from the month one year earlier, the difference would be retained.

3. Partial release of holdback to a contractor under section 9(1) would still take place after subcontracts are certified as complete and the holdback period applicable to the subcontract has expired. In order to take account of partial releases of the holdback under section 9(1) following certification of completion of subcontracts and expiration of the holdback periods applicable to those subcontracts, 10 per cent of any amount released to a contractor under section 9(1) would be added to the required holdback from the contractor in each of the following 10 months to replenish the owner's holdback so that at any time after the first year of the project, the owner's holdback continues to reflect approximately 12 months of work. This takes into account the fact that different subcontractors are now likely to be working on the project.

This would leave a relatively constant amount, representing 12 months' worth of holdback, available between the first anniversary of the commencement of work and substantial completion.

In the example below, a subcontract is completed after 16 months in a three-year project, a section 9(1) partial holdback release takes place, and the project as a whole is completed at the end of 35 months:

### **Periodic Early Release of Holdback example with one subcontractor.**

**Subcontract completed end of month 16, contract completed end of month 35.**

Month	Total value of work done on project	Holdback ignoring early release to Sub	Work done by Sub	Holdback from Sub at end of month	Adjustment to contractor holdback	Holdback from contractor at month end adjusted for early release to Sub
1	\$100 M	\$10 M	\$20 M	\$2 M		\$10 M
2	\$100 M	\$20 M	\$20 M	\$4 M		\$20 M

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3	\$100 M	\$30 M	\$20 M	\$6 M		\$30 M
4	\$100 M	\$40 M	\$20 M	\$8 M		\$40 M
5	\$100 M	\$50 M	\$20 M	\$10 M		\$50 M
6	\$100 M	\$60 M	\$20 M	\$12 M		\$60 M
7	\$100 M	\$70 M	\$20 M	\$14 M		\$70 M
8	\$100 M	\$80 M	\$20 M	\$16 M		\$80 M
9	\$100 M	\$90 M	\$20 M	\$18 M		\$90 M
10	\$100 M	\$100 M	\$20 M	\$20 M		\$100 M
11	\$100 M	\$110 M	\$20 M	\$22 M		\$110 M
12	\$100 M	\$120 M	\$20 M	\$24 M		\$120 M
13	\$100 M	\$120 M	\$20 M	\$24 M		\$120 M
14	\$100 M	\$120 M	\$20 M	\$24 M		\$120 M
15	\$100 M	\$120 M	\$20 M	\$24 M		\$120 M
16 **	\$100 M	\$120 M	\$20 M	\$24 M		\$120 M
17	\$100 M	\$120 M	\$2 M	\$24 M		\$120 M
18	\$100 M	\$120 M	\$1 M	Zero	Deduct \$24M	\$96 M
19	\$100 M	\$120 M			Add \$2.4 M	\$98.4 M
20	\$100 M	\$120 M			Add \$2.4 M	\$100.8 M
21	\$100 M	\$120 M			Add \$2.4 M	\$103.2 M
22	\$100 M	\$120 M			Add \$2.4 M	\$105.6 M
23	\$100 M	\$120 M			Add \$2.4 M	\$108.0 M
24	\$100 M	\$120 M			Add \$2.4 M	\$110.4 M
25	\$100 M	\$120 M			Add \$2.4 M	\$112.8 M
26	\$100 M	\$120 M			Add \$2.4 M	\$115.2 M
27	\$100 M	\$120 M			Add \$2.4 M	\$117.6 M
28	\$100 M	\$120 M			Add \$2.4 M	\$120 M
29	\$100 M	\$120 M				\$120 M
30	\$100 M	\$120 M				\$120 M
31	\$100 M	\$120 M				\$120 M
32	\$100 M	\$120 M				\$120 M
33	\$100 M	\$120 M				\$120 M
34	\$100 M	\$120 M				\$120 M
35 **	\$100 M	\$120 M				\$120 M
36	\$25 M	\$120 M				\$120 M
37	\$10 M	Zero				Zero

While this scheme for early periodic holdback release is more complex than the Saskatchewan model, it avoids abrupt decreases in the holdback that might otherwise encourage early filing of claims of lien. Furthermore, it is designed to be an option available to the owner in large projects with a long completion schedule, in which the build-up of the owner's holdback over time becomes a financial problem in itself. In this context, the somewhat more complex holdback calculations would presumably be a lesser concern than the cost of the capital immobilized in the holdback.

In the majority of responses to the consultation paper that contained comments on this proposal, a preference was expressed for the simpler Saskatchewan model of annual release of the entire holdback. The Project Committee concluded that both models should be available at the owner's option, although there is a greater risk under the Saskatchewan model that the holdback may fall to a level that is inadequate at certain points in a multi-year construction schedule.

The Project Committee recommends:

*43. The Builders Lien Act should be amended to provide that in any construction project with a duration greater than one year, at the option of the owner,*

*(a) the holdback required to be retained at any point from any contractor and subcontractor engaged on the project is limited to 10% of the greater of*

*(i) the total of payments made to that contractor or subcontractor during the preceding twelve months, and*

*(ii) the total value of work and materials provided under the contract or subcontract of that contractor or subcontractor during the preceding twelve months;*

*or alternatively,*

*(b) the owner may give notice of early release of holdback in the manner required for posting a certificate of completion or cessation of work, and in that case a holdback required to be retained from any contractor and subcontractor must be paid 45 days after each yearly anniversary of the commencement of work under the contract, if the amount is otherwise payable under the contract or subcontract in question and no claim of lien has been filed that has not been satisfied, cancelled or removed from title under the Act.*



*(b) Should there be a minimum overall cost threshold for use of the scheme?*

As mentioned above, three of the other provinces that provide for periodic holdback release make it available when the value of the contract is above a certain cost threshold. By its nature, however, early periodic holdback release is relevant only to projects with a multi-year completion schedule. Its attraction is in relieving against the interest expense of retaining an unrealistically large holdback fund for a long period. If the periodic early release scheme is available at the owner's option, these factors will tend to restrict the use of periodic early holdback release to large, multi-year projects in any case. For these reasons, the Project Committee does not believe a monetary threshold for the availability of periodic early holdback release is necessary.

The Project Committee recommends:

*44. There should be no minimum contract value or other monetary threshold for the availability in a construction project of the procedure for periodic early holdback release described in Recommendation 43.*

#### 4. RELEASE OF HOLDBACK ON COMPLETION OF A PHASE

In Chapter 4, we recommended that the parties to a contract governing a project with multiple components be able to designate the components as separate improvements.

This recommendation was generally well-received by respondents to the consultation paper, but some respondents urged in addition that release of holdback should be permitted on completion of a phase of a multi-phase project. This is now permitted in Ontario if the owner and contractor agree that the holdback will be administered on the basis of phases clearly identified in the contract, and if the contract has a value greater than a prescribed amount.<sup>198</sup>

The Project Committee observed that allowing holdbacks to be dealt with on the basis of phases could be a useful mechanism in projects calling for the construction of several structures, such as multiple high-rise towers. This would require the phases to be treated as if they were separate improvements for the purpose of the lien filing and holdback periods, regardless of whether the contract expressly designated them

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198. *Supra*, note 8, ss. 26.2(1), (2). The prescribed amount is \$10,000,000: O. Reg. 304/18, s. 6. If the contract calls for payment of holdback on a phased basis only in connection with a specified design phase, the requirement that the contract price be in excess of the prescribed amount does not apply: *supra*, note 8, s. 26.2(3).

as separate improvements. The Project Committee did not think it necessary to make a minimum contract value a prerequisite for administering holdbacks on the basis of phases.

The Project Committee recommends:

*45. The Builders Lien Act should be amended to provide that if a contract provides for payment of the holdback required to be retained by section 4 on the basis of phases and identifies each phase,*

*(a) the time allowed for filing a claim of lien relating to the provision of work or supply of materials in relation to a phase is determined as if the phase were a separate improvement; and*

*(b) the holdback relating to the phase may be released at the end of the holdback period following completion of a phase*

*whether or not the contract also designates phases as separate improvements for the purposes of the Act.*

### **E. Financial Alternatives to the Cash Holdback**

It is now possible in Ontario for holdback requirements to be met by means of bonds and irrevocable letters of credit in a prescribed form, rather than by retaining funds.<sup>199</sup> These forms of security allow the owner to release the full amount of progress payments to a contractor, while protecting the owner against claims of lienholders in the same way as a cash holdback.

Under the bond, the surety has an unconditional obligation to pay the owner an amount up to the level of the required holdback on demand once liens have been preserved by the filing and registration of a claim for lien. The prescribed form of bond is referred to in the Act as a “demand-worded holdback repayment bond.”<sup>200</sup> It could also be described functionally as an “early payment of holdback bond.”

The prescribed “Draft Irrevocable Letter of Credit regarding Holdback Repayment” is a standby security that entitles the owner to draw upon the credit up to a fixed

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199. *Construction Act*, *supra*, note 8, s. 22(4).

200. Form 5, O. Reg. 303/18. See Ontario Court Forms, online: <http://ontariocourtforms.on.ca/en/construction-lien-act-forms/>.

amount to meet holdback obligations if the contractor fails to repay holdback paid to the contractor before the end of the holdback period.<sup>201</sup>

Multiple partial drawings are permitted under either the bond or letter of credit, so they can serve to cover holdback obligations as needed when liens arise.

The Project Committee believes it would be desirable to permit the use of similar bonds or irrevocable standby letters of credit as alternatives to retaining a cash holdback and maintaining a holdback account. Where obtainable, their use would improve the flow of funds within the contract chain. They would be a practical alternative to keeping holdback funds idle for long periods or administering periodic early release regimes.

The fact that a demand-worded holdback repayment bond or irrevocable letter of credit is in place is not, however, a complete assurance that the holder will make a timely demand under it so that its proceeds will be available to serve as a holdback fund. From the standpoint of lienholders, a holdback repayment bond or letter of credit is an illusory protection unless demand will be made on it when its proceeds are needed to cover valid claims of lien up to the extent of the statutory holdback.

A mechanism to trigger a demand in appropriate circumstances might consist of incorporating a feature of the standard lien bond into the prescribed form of holdback repayment bond or letter of credit. Under a lien bond of the kind used to secure a claim of lien and have it cleared from an owner's title under section 24, the registrar of the court is named as the obligee.<sup>202</sup> If the prescribed form of a holdback repayment bond were to name the registrar as an additional obligee, lien claimants who have proven their liens and who remain unpaid could require the registrar to demand payment under the bond if the owner or other primary obligee failed to do so. In the case of a letter of credit, the prescribed form of wording would include the registrar as an additional addressee able to draw on the credit.

In order to accommodate the possible development of other financial instruments that could be equally useful for these purposes, the Act should provide the power to

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201. Form 4, O. Reg. 303/18. See online: <http://ontariocourtforms.on.ca/en/construction-lien-act-forms/>

202. The operation of s. 24 is explained later in this chapter under the subheading "2. The Existing Provisions for Clearing Liens from the Title." See the *Practice Manual*, *supra*, note 87 at §§11.13, 11.14 and FP-50 regarding the form and function of lien bonds.

prescribe additional forms of security as permissible methods of discharging the holdback obligation, as the Ontario *Construction Act* does.<sup>203</sup>

The Project Committee recommends:

46. *The Builders Lien Act should be amended to permit persons primarily liable on a contract or subcontract to discharge the obligation to maintain a holdback by accepting and holding the following forms of security provided by the person from whom the holdback is withheld:*

*(i) a holdback repayment bond in prescribed form;*

*(ii) an irrevocable standby letter of credit in prescribed form;*

*(iii) any other form of security that may be prescribed.*

47. *The prescribed wording of a form of a security referred to in paragraph (a) should name the registrar of the court as an additional obligee or party entitled, in accordance with the terms of the security, to demand full or partial payment of the amount secured.*

### **F. Unnecessary Holdbacks: Highway Construction and Other Exempt Improvements**

By the terms of section 4(1), holdbacks are only required in relation to contracts under which a lien under the Act may arise. Section 1.1 makes the Act inapplicable to highways, continuing highway properties, a forest service road, and improvements on them commissioned by various specified public authorities. Contracts for work on lands and improvements exempted from the Act by section 1.1 cannot give rise to liens under the Act, and therefore no obligation to retain a holdback exists. The same is true of contracts for improvements on federal lands. The Act is less than completely clear about this, however, and misconceptions exist within the industry regarding the need for holdbacks in non-lienable projects.

The Project Committee recommends:

48. *The Builders Lien Act should be amended to clarify that it is not necessary to maintain a holdback in relation to work done in relation to improvements and properties referred to in section 1.1 or in other non-lienable projects.*

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203. *Supra*, note 8, s. 22(4)(c).

## G. The Holdback Account

### 1. THE MANDATORY HOLDBACK ACCOUNT REQUIREMENT AND EXCEPTIONS

#### (a) General

As stated earlier, the Act requires an owner to maintain a holdback account in a savings institution for every contract under which the aggregate value of work and material is \$100,000 or more, and to deposit into it the holdback from each payment under the contract.<sup>204</sup> The provincial government and government corporations, as defined in the *Financial Administration Act*,<sup>205</sup> are exempt from this requirement. Numerous other public bodies, including municipalities, are exempted by regulation.<sup>206</sup>

The holdback account requirement was a recommendation of the Select Standing Committee of the Legislative Assembly that reviewed the former *Builders Lien Act* between 1987 and 1990. The rationale for the requirement was that the lien remedy is effective only if there is equity in the land. If subcontractors and others situated lower in the construction pyramid could be reassured that an actual discrete fund existed from which recovery would be possible, they would be less likely to file claims of lien that would interfere with progress payments.<sup>207</sup>

Two other provinces require holdback accounts, namely Manitoba and Saskatchewan.<sup>208</sup>

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204. *Supra*, note 1, ss. 5(1), (8)(b).

205. R.S.B.C. 1996, c. 138.

206. See *Holdback Account Exemption Regulation*, B.C. Reg. 265/98. The power to designate a public body as exempt from the holdback account requirement is found in s. 5(8)(a) of the Act.

207. *Second Report of the Select Standing Committee on Labour, Justice and Intergovernmental Relations Respecting the Builders Lien Act*, 26 July 1990, Recommendation 2 at 16-17. The Select Standing Committee is referred to below by reference to its chairperson's name as the "Chalmers Committee."

208. See C.C.S.M., c. B91, s. 24(3); S.S. 1984-85-86, c. B-7.1, s. 38(2). In Saskatchewan, the holdback trust account requirement does not apply to contracts for services or materials provided to a house, nor to repairs or renovations to a four-plex or condominium unit: *supra*, note 96, s. 38(11)(b). The Chalmers Committee in British Columbia originally recommended a similar exemption for residential housing construction, but with reservations. The alternative preferred by the Chalmers Committee was to allow a single holdback account for a housing development with a single owner, instead of separate accounts for each dwelling: *supra*, note 207 at 18.

The holdback account requirement is often ignored in practice, even though section 5(7) of the Act declares that a failure to establish a holdback account constitutes a default by the owner under the contract, entitling the contractor to suspend operations on 10 days' notice.

Lenders are often disinclined to finance holdbacks. It is not uncommon for a lender to advance to an owner only the cost of construction less the 10 per cent otherwise required to be retained by the owner.

Whether the greater security for lienholders theoretically provided by the holdback account outweighs the financial burden on the owner and the drag on the economy of immobilizing funds in a holdback account is debatable. On the other hand, the holdback account is a protection for subtrades that serves as a counterweight to the protection which the holdback defence affords to the owner.

The effectiveness of the holdback account requirement in serving its original purpose is open to question. Some members of the Project Committee have never encountered a project in which a holdback account was actually opened. Others, however, are aware of instances in which a holdback account was the only means of recovery when there was no equity in the land.

In the consultation paper, readers were asked to comment on whether holdback accounts should continue to be mandatory for any contract with a value of \$100,000 or more. The comments received reflected no clear consensus amongst stakeholders on what should be done about the requirement. There is likewise no clear consensus within the Project Committee for its repeal or retention, nor for altering the \$100,000 threshold.

*(b) Exemption by regulation where holdback account confers no added protection*

The Project Committee is agreed, however, that there are projects in which a holdback account is unnecessary for the protection of parties in the contract chain because of the obvious solvency of the owner and the reliability of the owner's sources of finance. This is particularly the case with large public infrastructure projects, but potentially also with some public-private partnerships and private sector projects. In these cases where the incremental degree of protection from a holdback account is negligible, it is counter-productive to require large funds to be kept idle in a holdback account.

The consultation paper contained a tentative recommendation to expand the current power to exempt public bodies by regulation from the holdback account requirement to allow the exemption of particular projects, contracts or classes of contracts.

The Project Committee has taken note of concerns raised in some of the responses about this widening of the discretion to exempt by regulation, but continues to believe it is desirable.

The Project Committee recommends:

*49. Section 5(8) of the Builders Lien Act should be amended to enable the exclusion by regulation of a specific project, contract, or class of contract from the holdback account requirement.*

*(c) Additional public body exemption: treaty first nations*

A treaty first nation responding to the consultation paper emphasized that treaty first nations enter into contracts for the construction of public buildings and infrastructure as do municipalities, and submitted that they should have the same exemption from having to maintain holdback accounts as municipalities enjoy. The Project Committee sees no reason to oppose the designation of treaty first nations as exempt public bodies.

As the designation of treaty first nations as exempt public bodies would not involve a change to legislation, but would be accomplished through regulations made under s. 5(8)(a), we commend the matter for consideration by the Lieutenant Governor in Council.

## 2. LOCATION OF A HOLDBACK ACCOUNT

The *Builders Lien Act* does not impose any restriction on where a holdback account may be held, except that it must be in a “savings institution.”

Deposits in a bank or a federally incorporated trust and loan company licensed to accept deposits are located for legal purposes at the branch where the account is kept.<sup>209</sup> If the branch in which the holdback account is kept is outside British Columbia, it is debatable whether the statutory trust under section 5(2)(b) applies to the account, or the extent to which the account may be subject to the order of a British Columbia court applying the *Builders Lien Act*.

This point was left undecided in a 1975 case in the Supreme Court of Canada dealing with a building project in Manitoba in which holdbacks and other construction funds were being held in branches of two banks in Quebec.<sup>210</sup> The judgment in that case

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209. *Bank Act*, S.C. 1991, c. 46, s. 461(4); *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 447(4).

210. *Bank of Montreal v. Metropolitan Investigation and Security (Canada) Ltd.*, [1975] S.C.R. 546.

nevertheless contains a statement to the effect that whether a provincial lien statute may validly affect funds held outside the province could depend on whether the funds were ever advanced or paid inside the province. The implication from this statement by the Supreme Court is that a fund held at all relevant times outside a province may be beyond the scope of the legislation of that province and the jurisdiction of its courts to make an order directing its disposition.

Provinces do not have the power to enact legislation that is “in pith and substance” directed at rights, persons, or property located outside their borders, although provincial legislation validly enacted in relation to a matter within a provincial head of power may have incidental effects outside the province.<sup>211</sup>

In at least one case in British Columbia and another in Ontario, the statutory trust provisions of provincial lien legislation were “read down” to confine their operation on a territorial basis.<sup>212</sup> The courts applied the presumption of constitutionality to hold that the provincial lien statute was not intended to apply to rights or property outside the province. These two cases did not deal specifically with holdback accounts, but the reasoning suggests that if the point came before a court directly for decision, the statutory trust under section 5(2)(b) might be found inapplicable to holdback funds deposited outside British Columbia.

If the holdback account requirement is to remain a feature of the *Builders Lien Act*, the protection it is intended to confer would be stronger if the owner were required to maintain the account in British Columbia.

The Project Committee recommends:

*50. Section 5 of the Builders Lien Act should be amended to require that a holdback account must be held at a branch of a financial institution within British Columbia.*

### 3. CLARIFYING THE MEANING OF “AGGREGATE VALUE OF WORK AND MATERIALS” FOR PURPOSE OF MONETARY THRESHOLD FOR HOLDBACK ACCOUNT REQUIREMENT

Section 5(8)(b) creates an exemption from the holdback account requirement:

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211. *Ladore v. Bennett*, [1939] A.C. 468; *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 332; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) at 13-9.

212. *E.B. Horsman & Son v. Sigurdson* (1979), 13 B.C.L.R. 20 (S.C.); *Batoni Construction Inc. v. Antho-max Mechanical Ltd.* (1997), 146 D.L.R. (3d) 243 (Ont. C.A.).



(8) This section does not apply to

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- (b) a contract in respect of an improvement, if the aggregate value of work and material provided is less than \$100,000.

Reputedly, there is a division of opinion among users of the *Builders Lien Act* as to whether the phrase “aggregate value of work and material provided” relates to the specific contract or the aggregate value of the inputs in the improvement.<sup>213</sup> The Project Committee believes the value threshold was intended to be linked with the value of work and materials under a contract, as the holdback itself is based on the value of an individual contract, rather than the total cost of the improvement. Any ambiguity surrounding the point, however, could be removed by repealing the words “in respect of an improvement” in section 5(8)(b).

The Project Committee recommends:

*51. Section 5(8)(b) of the Builders Lien Act should be amended by deleting the words “in respect of an improvement” to clarify that the “aggregate value of work and materials” refers to the work and materials to be provided under a contract, rather than the total value of work and materials in an improvement.*

#### 4. CLARIFYING AMOUNT TO BE DEPOSITED IN A HOLDBACK ACCOUNT

Section 5(1)(b) requires an owner to pay into a holdback account “the amount the owner is required to retain under section 4.” The amount required to be retained under section 4 is the statutory holdback. Section 4(1) declares that the amount of the holdback is 10 per cent of the value of work and material as actually provided, or the amount of any payment on account of the price of the contract or subcontract in question, whichever is greater.

It is difficult, and sometimes impossible, to determine the value of work or material provided in a particular interval otherwise than by reference to a progress billing. Not all contracts call for regular progress payments by the owner, however. If progress payments are not required, there is nothing from which to hold anything back. What is actually held back, and paid into a holdback account if one is established, is 10 per cent of the gross amount of payments made under a contract or subcontract. Compliance with the holdback account requirement would be more straightforward if section 5(1)(b) were simply amended to reflect this reality.

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213. Practice Manual, *supra*, note 87 at 7-12.

Under some construction contracts, particularly those governing projects configured as public-private partnerships, contractual payments may occur after the expiration of the holdback period. The balance in a holdback account must be capable of being released at the end of the holdback period, however. For this reason, an amendment to clarify what needs to be deposited in a holdback account should specify that it is 10 per cent of all payments made on account of a contract *prior to the expiry of the holdback period*.

Clarity would also be served by amending section 4(1)(b) to indicate that when the holdback is based on payments on account of the contract or subcontract price, it is to be calculated on the gross amount of each payment, or in other words before deduction of the holdback.

The Project Committee recommends:

52. *Section 4(1)(b) of the Builders Lien Act should be amended to read:*

*“(b) the amount before deduction of such holdback of any payment made on account of the contract or subcontract price.”*

53. *Section 5(1)(b) of the Builders Lien Act should be amended to state that the amount to be deposited into the holdback account is 10 per cent of the amount, calculated before the deduction of a holdback, of all payments made on account of a contract prior to the end of the holdback period.*

## H. Improving the Means of Securing and Clearing Liens

### 1. GENERAL

The *Builders Lien Act* provides mechanisms by which a claim of lien may be removed (“cleared”) from the title to the land while the right to prove or dispute the lien is still preserved. Means of clearing the title of liens pending resolution of a payment dispute are necessary because, as noted earlier, the filing of a claim of lien usually has the effect of interrupting the flow of funds through the construction pyramid. Lenders will not make further advances to the owner while the lien remains on title because the lien will have priority over the advances. Similarly, parties in the contract chain will generally not release holdbacks or make contractual payments if they are aware that a claim of lien has been filed by someone lower in the chain.<sup>214</sup>

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214. Practice Manual, *supra*, note 87 at 6-3 and 12-22. Section 34(2)(c) of the Act provides that a payment does not reduce the amount owing by the payor to a contractor or subcontractor, to the extent of the lien, if it is made after the payor has had actual notice that a claim of lien has been

Often a lien will be secured and cleared by someone other than the owner, because construction contracts normally obligate contractors and subcontractors to keep the project clear of liens that may be asserted by those claiming under them.<sup>215</sup> If whoever owes a lien claimant is unable to clear the lien, someone higher in the same contract chain will need to do so. As a result, the burden of clearing the lien falls on the first solvent party above the lien claimant in the contract chain.<sup>216</sup> General contractors are frequently obliged to take active steps to secure and clear liens as a result of the insolvency of a subcontractor, an event that typically leads to a flurry of claims of lien being filed.

One of the complaints most commonly raised regarding the *Builders Lien Act* is the delay and cost associated with clearing liens from the title to the land where the improvement is located. The Project Committee gave considerable attention to finding ways of making it easier and faster to secure and clear liens from the title.

## 2. THE EXISTING PROVISIONS FOR CLEARING LIENS FROM THE TITLE

### *(a) General*

Sections 23 and 24 are the two provisions that allow claims of lien to be removed from title while the ability to prove or disprove the claimant's entitlement to a lien is preserved. These provisions are quite different. Which one is used depends on the circumstances, and on who is attempting to clear the lien.<sup>217</sup> Section 24 is used more frequently because of the more complicated evidence required to make use of section 23. Section 24 is discussed first for this and other reasons.

### *(b) Securing and clearing a lien from title under section 24*

Section 24(1) allows an owner, contractor, subcontractor, or anyone else liable under a contract or subcontract relating to an improvement to land to apply for an order "cancelling" (removing from the title) a claim of lien on providing "sufficient security for the payment of the claim." The security may be in any form acceptable to the court. The usual forms are cash, a bond, or a letter of credit. The order will fix

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filed by a lienholder claiming under the payee contractor or subcontractor, and the claim of lien has not been removed or cancelled.

215. *Questions and Answers*, *supra*, note 2 at 40.

216. *Ibid.*

217. *Ibid.*, at 39.

the amount of the security at a level the court considers is sufficient. This may be less than the full amount of the lien claimed.<sup>218</sup>

An order made under section 24 cancelling the claim of lien once the required security is provided does not resolve any matter in dispute between the owner, the claimant, and the person who owes the claimant. The claimant must still prove the lien, and the owner or contractor may dispute the claimant's entitlement to the lien or its value. The owner's interest in the land theoretically remains subject to the lien, assuming the lien is valid. The effect of an order under section 24 removing the lien from the title is that the security stands in place of the land pending resolution of rights between the parties.<sup>219</sup> In the meantime, the lien is removed from the title and the claimant's position is secured. If the claimant subsequently proves entitlement to the lien, the claimant will recover against the security.

*(c) Clearing liens under section 23*

Section 23 allows for the clearance of one or more liens from the title by obtaining an order authorizing payment into court of the *lesser* of

- (a) the total of the claims filed; and
- (b) the amount owing by the payor to the person engaged by the payor under whom the liens arose.

Amount (b) cannot be less than the holdback which the payor is required to retain or, if the payor is a purchaser of the improvement, less than 10 per cent of the purchase price.<sup>220</sup> Under the present wording of section 23(1), the section cannot be used if no holdback is actually owing.

When the required amount is paid into court under section 23, the money stands in place of the improvement and the land, the owner is discharged from liability for the

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218. *Supra*, note 1, s. 24(3). The court is required to take a cautious approach in exercising the discretion to fix security under s. 24 at a reduced amount. A claim should not be excluded in fixing security unless it is plain and obvious that a claim is bound to fail. The applicable principles are stated in *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, 83 B.C.L.R. (4th) 349. See also *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172.

219. *Nanaimo Contractors Ltd. v. Patterson* (1964), 46 D.L.R. (2d) 649 (B.C.C.A.).

220. *Supra*, note 1, s. 23(1). The "payor" to which s. 23(1) refers is the person who makes the payment into court that is called for by the section: *Re Lee & Sons Grocers Ltd.*, 1998 CanLII 2637 (B.C.S.C.) (Master) at para. 15.

lien(s), and the claim(s) of lien will be removed from the title.<sup>221</sup> In addition, the owner will no longer be a necessary party to any legal proceeding to determine rights between the lien claimant(s) and the person who engaged them.

Only liens of persons engaged by a contractor or a subcontractor may be removed under section 23. Section 23 cannot be used to remove the lien of anyone engaged directly by the owner.<sup>222</sup>

If additional claims of lien are filed by members of the same class of lien claimants as those whose liens have been removed under section 23, they too may be removed on a further application to pay an amount into court that would bring the fund in court up to a level that would have been required to clear the first set of liens plus the additional ones if both sets of liens had been filed at the time of the application for the first order.<sup>223</sup>

Section 23 is used where the person paying into court wishes only to discharge liability for claims of lien that have been filed, not to dispute them. An application for an order under section 23 authorizing payment into court may be made by an owner, a contractor, a subcontractor, or a mortgagee whom the owner has authorized to disburse mortgage funds.<sup>224</sup> Mortgagees seldom, if ever, are applicants under section 23. The applicant will likely be someone at or near the top of the contract chain, however.

In contrast to section 24, section 23 only allows payment into court of money, rather than providing another form of security. The payment into court called for by section 23 amounts to an abandonment by the payor of any claim to the funds. A section 24 applicant, by contrast, may hope to recover all or some portion of the value of the security.

### 3. IMPROVING SECTIONS 23 AND 24

#### *(a) General*

Unlike section 23, section 24 does not expressly take account of the limit placed by section 34(1) on the amount recoverable by lien claimants under the Act. An appli-

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221. *Supra*, note 1, s. 23(2).

222. *Ibid.*, s. 23(1). See also *Port Royal Riverside Development v. Vadasz*, 1998 CanLII 2175 (B.C.S.C.) (Master) at para. 10.

223. *Supra*, note 1, s. 23(3).

224. *Ibid.*

cant under section 24 may have to provide security in an amount greater than what is ultimately proved to be owing in order to have a claim of lien removed from title pending resolution of the claimant's rights.

The Project Committee considered whether sections 23 and 24 could be combined so that liens could be secured and removed from title by payment into court of the same amount that section 23 requires, while the ability to contest the claims of lien would still be preserved. The Project Committee ultimately concluded that sections 23 and 24 serve somewhat different purposes, and so should remain separate provisions. They could, however, be made more efficient mechanisms for removing liens from the title quickly and simultaneously protecting the position of lien claimants.

*(b) Amendments to section 24*

*(i) Clarifying the language of section 24(1)*

The intention of section 24(1) is that the class of potential applicants should include owners, contractors, subcontractors, or other persons liable on a contract or subcontract. All of these should be able to apply to secure a claim of lien and have it cancelled from the title. The current wording is somewhat unclear in this regard, as it refers to the class of potential applicants as “a person against whose land a claim of lien has been filed, *and* a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on land....” The meaning would be clearer if section 24(1) were amended to read: “An *owner, or* a contractor....”

*(ii) Application without notice if full security to be provided*

Among the complaints most commonly raised about the *Builders Lien Act* are the difficulty and cost of clearing liens and the associated delay. One of the reasons for the delay is that applications under sections 23 and 24 normally must be made on notice. The *Supreme Court Civil Rules* allow 21 days to respond to a petition.<sup>225</sup> While short notice is available, and is often ordered to reduce the time lag, this requires extra steps by the applicant.

Ontario and Saskatchewan allow applications to secure and remove claims of lien without notice if the applicant is willing to secure the full amount of the liens.<sup>226</sup> This expedites the process of removal greatly without jeopardizing the rights of the lien claimant. The Project Committee believes that it should be possible to apply

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225. B.C. Reg. 168/2009, Rule 16-1(4)(c)(i).

226. See S.O. 1990, c. C.30, s. 44(1); S.S. 1984-85-86, c. B-7.1, s. 56(1).

under section 24 without notice if the lien will be fully secured by providing security for the full amount claimed.

*(iii) Non-applicant owner as a party to subsequent proceedings*

As currently drafted and interpreted, section 24 implies that once security is in place in the amount ordered by the court, the security stands in place of the land, but *only* as security. Lien rights theoretically persist, however.<sup>227</sup> A lien action subsequently commenced to establish the claimant's entitlement to the lien is considered a proceeding *in rem* against the owner's property.<sup>228</sup> As such, the owner of the land and improvement remains a necessary party, regardless of who provides the security.<sup>229</sup>

As noted above, however, it is very often the case that the dispute underlying a claim of lien is not between the lien claimant and an owner, but between a contractor and a subcontractor, or between subcontractors. Unless the owner engaged the claimant directly or has provided the security, there will be no contractual relationship between the owner and the claimant and no debt that is directly owing between them. Security in a section 24 application is often provided not by an owner, but by a contractor or subcontractor.

When security for the full amount of a claim of lien is sitting in court and the owner's interest in the land is no longer in direct jeopardy, the owner's presence as a principal defendant is unnecessary in a subsequent lien enforcement action to establish or disprove a claimant's right to the security. The owner should not have to be named as a defendant at all. Whoever has provided the security should be the defendant instead, because it is that person's property that is really in jeopardy.

*(iv) What should follow after the order under section 24*

The existing practice following a typical order under section 24 is to file a certified copy of the order in the land title office, together with a certificate from the Deputy Registrar of the court confirming the deposit of the security specified in the order. Upon processing the order, the land title office will cancel the claims of lien and certificates of pending litigation to which the order refers. The order may spell this out expressly, but if these steps were set out in section 24 itself, the usual order could be made shorter and simpler.

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227. *Nanaimo Contractors Ltd. v. Patterson* (1964), 46 D.L.R. (2d) 649 (B.C.C.A.).

228. *Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.*, 2004 BCSC 622, at para. 26; *aff'd* 2005 BCCA 378. As mentioned in note 60, *supra*, a proceeding *in rem* involves a claim against a thing (the *res*). The owner of the *res* is a necessary party to an action *in rem*.

229. *Ibid.*

### *(v) Applications to vary amount or form of security*

If the initial order under section 24 contains a term granting leave to re-apply to reduce the amount of security, or to substitute security in another form, the court will hear an application for this relief. The court may do so even in the absence of an express term in the order giving leave to re-apply for it, but it would be useful to clarify in the Act that the court has jurisdiction to entertain applications of this kind regardless of whether the right to re-apply was reserved to the parties in the original order.

Allowing existing security to be supplemented in order to secure additional claims of lien that may be filed subsequently against the same title, similar to what may be done under section 23, would be a useful feature in addition. This is similar to what may be done now under section 23(3) to discharge claims of lien filed after a hold-back is paid into court. The difference would be that if claims of lien are filed additional to ones already secured under section 24, the person providing the security would retain the right to contest the validity of the liens and, if successful, recover the security.

### *(vi) Standardized orders and forms of security*

It would add to clarity if the Act expressly mentioned and recognized the three forms of security commonly used, i.e. money, a lien bond, or a letter of credit.

Greater standardization of forms of security and the terms for section 24 orders would facilitate the process of securing and clearing claims of lien from the title. The use of standardized forms of lien bonds, letters of credit, and orders approving them, is well-developed in Ontario. This enables Ontario court registries to pre-approve the draft orders and security before an application for an order is heard. Orders may then be signed quickly.<sup>230</sup>

An Administrative Notice issued by the Registrar of the Supreme Court of British Columbia already provides for some standard terms for inclusion in letters of credit provided to the court as security.<sup>231</sup> A further step in this direction would be to prescribe forms for a lien bond and letter of credit. This should lead to routine acceptance of security that is presented in the prescribed form, resulting in faster clearing of liens.

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230. Duncan W. Glaholt, *Conduct of a Lien Action* (Toronto: Thomson Carswell, 2004) at 145.

231. Administrative Notice AN-4, dated 1 July 2010.



## Report on the Builders Lien Act

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### *(vii) Recommendations regarding section 24*

For the above reasons, the Project Committee recommends:

*54. The Builders Lien Act should be amended to empower the court to cancel a claim or claims of lien on application by any person without notice, if the applicant*

*(a) pays into court the full amount of the claim(s); or*

*(b) provides security for that amount consisting of*

*(i) a bond in prescribed form issued by a surety on the registrar's authorized list;  
or*

*(ii) a letter of credit in prescribed form.*

*55. Section 24 of the Builders Lien Act should be amended to:*

*(a) state in clearer terms that an owner or a contractor, subcontractor, or other person liable on a contract or subcontract may be an applicant under section 24, by the substitution of "An owner or a contractor" for "A person against whose land a claim of lien has been filed, and a contractor" in section 24(1);*

*(b) provide that security under section 24 may be in any of three forms: money, a lien bond, or a letter of credit in a form acceptable to the court;*

*(c) reflect existing practice under which a certified copy of the order and a certificate of the Registrar of the Supreme Court of British Columbia confirming that security has been provided are to be submitted to the land title office or the office of the Chief Gold Commissioner to obtain cancellation of the claim(s) of lien;*

*(d) declare that when security is provided for a claim of lien and is accepted by the court, the security provided stands in place of the land, and that after cancellation of the claim of lien, the lien claimant has no further claim against the land;*

*(e) provide that whoever provides the security is a necessary defendant in an action to enforce a lien secured under section 24, and the owner is not a necessary defendant unless the owner provided the security;*

*(f) allow for an application to reduce security previously provided, or an increase to cover additional claims of lien filed against the same title.*

*56. Standard forms of the following should be prescribed for the purpose of an application without notice for an order cancelling a claim of lien:*

*(a) order;*

*(b) lien bond;*

*(c) letter of credit.*

*(viii) Comment on informal trust arrangements*

Arrangements under which claims of lien are voluntarily released in return for security being held in trust by a lawyer acting for one of the parties are sometimes used to avoid the cost and delay associated with a court application. It is thought that implementation of Recommendation 54, allowing for section 24 applications to be made without notice when security is provided for the full amount of a claim of lien, would make it unnecessary for trust arrangements to be formalized or otherwise addressed in the Act.

*(c) Amendments to section 23*

*(i) Clarifying that the applicant / payor gives up any claim to the money paid into court*

The purpose and effect of section 23 would be clearer if the section declared outright what is implied, namely that by paying the amount which section 23 calls for into court and discharging the owner's liability vis-à-vis the lien claimants, the payor is relinquishing any right to recover those funds. If the payor did not implicitly relinquish the right to recover any portion of the funds, the payment could not result in the immediate discharge of the owner for the liens.

*(ii) Allowing payment of the holdback amount into court whether or not anything is owing*

The wording of section 23(1) does not on its face permit use of the section if no amount is actually owing to the person through whom the liens are claimed.

If an applicant could pay in an amount equivalent to the holdback that should have been withheld from that person, regardless of the fact that the holdback may have been paid out early and is no longer owing, or is not owing in whole or in part because of set-off, liens that arose under that person could be cleared from the owner's

title and the lien claimants would still be able to share *pro rata* in the fund in court to the extent of the maximum recoverable by them under the *Builders Lien Act*.

The maximum amount recoverable by lienholders claiming under the same person is limited by section 34(1). It is the *greater* of the amount owing to the contractor or subcontractor under whom the liens arise and the amount of the required holdback from that contractor or subcontractor. If nothing remains owing, therefore, the maximum aggregate recovery by lienholders would be limited to the amount of the holdback required by the Act.

The Project Committee believes it would be useful to amend section 23 to expressly allow an application to be made under it even if nothing remains owing, in order that the owner's title could be cleared while the ability of unpaid lien claimants to recover to the maximum extent possible under the Act would be preserved.

*(iii) Providing for discharge of a non-owner payor as well as the owner*

In addition to the owner, section 23(1) permits a contractor, subcontractor, or a mortgagee whom the owner has authorized to disburse mortgage funds to apply to the court to discharge a claim of lien. Section 23 only provides for discharge of the owner from liability in relation to the liens, however.

Section 23 should also provide for the discharge of a payor who is not the owner from any contractual indebtedness of the payor to the person by or under whom the lien claimants were engaged, to an extent equivalent to the amount paid into court.

Allowing the discharge of a non-owner payor to the extent of the amount paid by that person into court under section 23(1) would be consistent with the reason why the Act authorizes payors at multiple tiers of the construction pyramid to retain holdbacks, namely to keep the holdback funds available to meet the claims of lienholders who are owed money by a payee from whom a holdback is retained. If those holdback funds are applied to meet the claims of unpaid lienholders engaged by the payee, the payor's liability to the payee should be reduced accordingly because the payment into court is equivalent to a payment to the payee.

*(iv) What amount should be paid into court under section 23(3)?*

As explained earlier, section 23(3) deals with the situation in which claims of lien have been removed under section 23(1) and further claims of lien are filed later by lienholders claiming through the same person. Section 23(3) provides for a further order removing the additional claims of lien upon payment into court of an additional amount. The additional amount to be paid into court under section 23(3) as

it presently stands is the sum necessary to bring the fund in court up to the amount that would have had to be paid in if the additional claims of lien had been filed *at the time of the application for the first order*.

As it now stands, section 23(3) does not take account of the fact that holdbacks and the aggregate value of work done early in a project are each normally smaller than they are at a later stage. If the initial application to remove claims of lien under section 23(1) was made at an early stage in a project when holdbacks and the value of work completed were small compared to their size at a later stage, much larger claims of lien that are filed later in the project may be removed by payment into court of an amount that could be minuscule in size compared to what would have had to be paid in if the amount by which the fund in court had to be increased were based on amounts owing at the time of the application to pay the additional sum into court.

As it is now written, section 23(3) tends to dilute the security of all claimants affected by the two orders. In order to achieve a more balanced and fair result, section 23(3) should be reworded to provide that the additional sum that must be paid into court to obtain removal of the additional claims of lien is what is necessary to bring the fund in court up to the level that would have been required to obtain removal of all the claims of lien, if they had all been filed *at the time the application under section 23(3) to pay in the further amount is made*.

(v) *Providing that liens which have been secured under section 24 may be removed under section 23 instead*

There is case authority to the effect that an owner who has secured a lien under section 24 by providing security for the full value of a lien claim may subsequently apply under section 23 to have that lien removed along with others of the same class by payment into court of the holdback from the contractor under whom the liens arose, or the amount owing to the contractor if it is more.<sup>232</sup> It would be desirable for section 23 to state on its face that this is possible, as the total amount in court would then correspond to the amount recoverable. This result would allow for claimants whose liens arise under the same subcontractor to be treated similarly.

(vi) *Clarifying who is the proper party to an action to enforce a lien removed under section 23*

Just as there is no need to name the owner as a defendant in an action to enforce a lien that has been secured and removed from title by someone else under section 24,

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232. See *Port Royal Riverside Development v. Vadasz*, *supra*, note 222.

there is no need to join the applicant / payor to an action to enforce a claim of lien against funds paid into court under section 23. As explained above, the payment into court under section 23 should operate as a discharge of both the owner and the applicant / payor (if not one and the same) from liability for the liens.

The person who should be named as the defendant in an action to enforce a lien removed from title under section 23 is the person to whom the funds paid into court were owed or from whom they were retained as holdback. If the liens are not proven, the funds in court could be claimed by that person. As with liens secured under section 24, it is the person whose property is in jeopardy who should be named as the defendant.

Section 23 should be amended to make it clear that the person to whom funds paid into court under that section would otherwise be owed or from whom they were retained as holdback is a necessary defendant in an action to enforce a lien affected by the order authorizing payment in and removal of the lien from the owner's title, and it is unnecessary to join the applicant / payor.

*(vii) Allowing more than one class of liens to be removed from title in the same application*

The present wording of section 23(1) refers to "one or more *members of a class* of lien claimants." This restricts the scope of an order under section 23 to removing only one class of liens, or in other words, only claims of lien made by lienholders engaged by the same person. If section 23(1) referred instead to "one or more lien claimants *engaged by or under* a contractor or subcontractor," more than one class of liens could be removed at the same time and under a single order. This would make s. 23 more useful to an owner, head contractor, or other potential applicant / payor near the top of the contract chain who needs to clear liens down two or more steps in the chain at the same time.

*(viii) Specifying what should follow after an order under section 23 is made*

An amendment to section 23 formalizing existing practice following the order would lend clarity and completeness to the section. The amendment would mirror the one recommended above in relation to the practice following a section 24 order. It would state that upon filing a certified copy of the order in the land title office, together with a certificate from the Deputy Registrar of the court confirming the receipt of the amount specified in the order to be paid into court under section 23(1), the land title office will cancel the claims of lien and certificates of pending litigation to which the order refers.

### *(ix) Clarifying the meaning of section 23(5)*

Section 23(5) deals with a situation involving three factual elements. The first is that claims of lien have arisen under a contractor or subcontractor engaged by the payor. The second is that the contractor or subcontractor has defaulted in some manner in performing the contract. The third is that the payor wishes to make use of section 23 to remove the liens and also use retained funds to correct the default or complete the contract.

Section 23(5) declares that in these circumstances what the payor owes to the contractor or subcontractor for the purposes of sections 23(1) and 23(3) does not include an amount that a payor is entitled to apply to correct the deficiency or complete the work. In other words, that amount may be subtracted from what is owing by the payor to the defaulting contractor or subcontractor in determining what must be paid into court to obtain removal of the liens.

Section 23(5) does not make reference to an important point, namely that the amount that may be subtracted from what is owing to be applied to correct the default cannot include the 10 per cent holdback required by the Act. This flows from section 6(1), which prohibits the use of holdback funds to complete a contract or subcontract in the event of a default in performance. Reading section 23(5) in isolation could be misleading and result in a breach of the Act. For this reason, wording should be added to section 23(5) to clarify that the amount a payor is entitled to apply to correct a default or complete a contract or subcontract is restricted to the excess retained over and above the holdback required by the Act.

### *(x) Minor amendments*

Section 23(1) refers to “a mortgagee authorized by the owner to disburse money secured by a mortgage” as being among the class of potential applicants under the section. This reference to mortgagees would be more appropriately grouped with other provisions of the Act relating to the ability of mortgagees who retain holdbacks to exercise the same rights as owners, namely sections 4(4) and (5).

Section 23(1)(b) contains a reference to purchasers to whom section 35 applies, stating that the amount they must pay into court to clear a lien under section 23(1) is 10 per cent of the purchase price of the improvement. A more logical location for this reference would be in a subsection of section 35. That section deals specifically with the maximum amount claimable by lienholders against the interest of a purchaser in an improvement.

Section 23(4) deals with matters of procedure that are covered by the *Supreme Court Civil Rules*.<sup>233</sup> It is superfluous and should be repealed in the interest of brevity.

*(xi) Recommendations regarding section 23*

The Project Committee recommends:

*57. Section 23 of the Builders Lien Act should be amended to:*

- (a) expressly reflect the principle that the person making payment into court is giving up any claim to the money paid in;*
- (b) permit payment of the holdback amount into court even if it is not actually owing;*
- (c) provide for discharge of the applicant from liability, in addition to discharge of the owner;*
- (d) provide that the additional amount that must be paid into court on an application under section 23(3) following the filing of additional claims of lien is the amount necessary to bring the total amount paid into court up to the level that would have been required to obtain removal of all the claims of lien, if they had all been filed at the time the application to pay in the further amount is made;*
- (e) allow lien claims which have already been secured and cancelled under section 24 to be treated as if removed under section 23 instead, with all persons being in the same position as if the claims had been initially the subject of an application under section 23;*
- (f) provide that the person to whom funds paid into court under that section would otherwise be owed is a necessary defendant in an action to enforce a lien affected by the order authorizing payment in and removal of the lien from the owner's title, and the applicant / payor is not a necessary party;*
- (g) refer in section 23(1) to one or more lien claimants "engaged by or under a contractor or subcontractor," rather than one or more members of a class of lien claimants;*
- (h) confirm the existing practice under which a certified copy of the order and a certificate of the Deputy Registrar of the Supreme Court confirming that funds have*

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233. *Supra*, note 225.

*been paid into court pursuant to the order are to be submitted to the land title office or the office of the Chief Gold Commissioner to obtain cancellation of the claim(s) of lien;*

- (i) provide greater clarity to section 23(5) by stating that the amount which the payor is entitled to apply to correct a default or complete the contract or subcontract cannot include the statutory holdback;*
- (j) delete the wording in section 23(1) that empowers a mortgagee authorized by the owner to disburse mortgage funds, and insert instead a reference in section 4(5)(a) to the ability of such a mortgagee to apply under sections 23(1) and (3) to pay funds into court;*
- (k) delete the references in section 23(1) to a purchaser to whom section 35 applies, and insert corresponding references in section 35 itself;*
- (l) delete section 23(4).*

#### 4. ALTERNATE PROCEDURE FOR SECURING LIENS USING STANDARD FORMS OF SECURITY WITHOUT A COURT APPLICATION

In order to minimize cost and expedite the removal of claims of lien, practices have developed whereby liens are consensually secured and removed from title without an application involving a petition and chambers hearing. The informal trust arrangement described earlier is one of these practices. Another involves a consent order providing that a lawyer acting for one of the parties will hold the security in trust. A copy of the consent order and a letter from the lawyer confirming that the security is being held in trust are filed in the land title office with a standard Form 17. This procedure is accepted by the court and the land title office.

Prescribed standard forms of security, as recommended above, would provide further possibilities for clearing liens from the title without the formality of a court application and order. Once standard forms of security are established, financial institutions could be officially designated as approved issuers. On receipt by the land title office of notification by either the issuing financial institution or a lawyer that security in a standard form for the full amount of the lien claimed is being held as if pursuant to an order under section 24, the land title office could remove the claim of lien from the title. This out-of-court procedure based on use of standardized forms of security could be recognized in the *Builders Lien Act* as an alternative means of clearing a claim of lien from title pending a determination of its validity.



The Project Committee recommends:

*58. The Builders Lien Act should provide an alternative procedure for securing liens and vacating lien registrations through notification to the land title office by either the issuing financial institution or a lawyer that security has been provided for the full amount of a claim of lien in a prescribed standard form of lien bond, letter of credit, or cash, and is being held as if pursuant to an order of the court under s. 24 of the Act.*

### **I. Adjusting Priorities to Enable Flow of Funds to Complete Construction**

#### **1. BASIC PRIORITY RULES UNDER THE BUILDERS LIEN ACT**

##### *(a) General*

Claims of lien have a high priority relative to the claims of other creditors which, in theory, is intended to ensure that those who have contributed work and materials to an improvement increasing the value of the land are paid. The basic rules regarding this high ranking are found in sections 21 and 32(1) and (2) of the *Builders Lien Act*.

Section 21 provides that a claim of lien has priority over judgments, executions, attachments (garnishing orders) and “receiving orders” obtained or issued after the date on which the work for which the lien is claimed began, or the first material is supplied.

Sections 32(1) and (2) state, in effect, that advances made under a registered mortgage before a claim of lien is filed rank ahead of the lien, and advances made afterwards rank after the lien.<sup>234</sup> In other words, if the land and improvement were sold to pay off the mortgage and lien claimant, the mortgagee would recover the amounts actually advanced under the mortgage before the claim of lien was filed, the lien would be paid off next, followed by any amounts the mortgagee may have advanced subsequently.

##### *(b) Amending sections 21 and 32 in the interests of clarity*

The reference to “receiving orders” in section 21 is ambiguous. The term “receiving order” refers to the appointment of a receiver as a means of equitable execution to enforce a judgment when other means are ineffective, but it was also the term formerly used in federal legislation for a bankruptcy order. The first meaning of “receiving order” is covered by the words “executions” and “attachments” in section 21,

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234. Amounts secured in good faith by registered rights to purchase are treated in the same way as amounts secured by registered mortgages for the purposes of sections 31(1) and (2), and the vendors are deemed to be mortgagees: ss. 32(7), (8).

and the second meaning is obsolete as well as lending an element of unconstitutionality, because provincial legislation cannot override the scheme of priorities in bankruptcy. The presence of the term “receiving order” in section 21 is unnecessary and confusing. For those reasons, section 21 should be amended to delete that term.

Section 32(2) is sometimes misunderstood as giving liens filed subsequent to a mortgage advance priority over the advance. This misconception is particularly prevalent within lending institutions, and possibly results from greater familiarity of their personnel with construction lien legislation in other provinces that allows liens to be “sheltered” by being protected against extinguishment if at least one other claimant has started an action to enforce its claim of lien within time.<sup>235</sup>

Sheltering does not take place under British Columbia’s *Builders Lien Act*, but this would be more readily apparent if section 32 contained an additional subsection stating that a claim of lien filed after an advance is made under a previously registered mortgage does not affect the priority of the advance as determined under section 32(1).

The Project Committee recommends:

59. *Section 21 of the Builders Lien Act should be amended by deleting the term “receiving order.”*

60. *Section 32 of the Builders Lien Act should be amended by adding a subsection to clarify that a claim of lien filed after an advance is made under a previously registered mortgage does not affect the priority of the advance under s. 32(1).*

## 2. DISCRETIONARY ADJUSTMENT OF MORTGAGE ADVANCE PRIORITIES

### (a) General

In practice, mortgagees do not make further advances while liens appear on the title because they know they will not have priority. This leads to a paradox created by these basic priority rules that are intended, as is the rest of the Act, to increase the likelihood that lienholders are paid. The practical effect of the statutory priority given to builders’ liens over subsequent mortgage advances is to freeze the flow of construction funding once a claim of lien has been filed, with the consequence that work on a project may stop. Yet everyone is usually better off when the project can proceed to completion, especially in projects that are financially troubled, because claims may then be met out of the increased value of the land and improvement.

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235. See, for example, s. 36(4) of the Ontario *Construction Act*, *supra*, note 8.

*(b) The enabling provisions: sections 32(5) and (6)*

Sections 32(5) and (6) allow a mortgagee to obtain an order making a discretionary exception to the rule in section 32(2) that a claim of lien takes priority over mortgage advances made after the date of filing:

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

- (a) the advances will be applied to complete the improvement, and
- (b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

The effect of an order made under section 32(5) is that if the land and improvement are sold after completion to satisfy the mortgage and claims of lienholders, the applicant mortgagee would have the right to recover further advances from the proceeds of sale before the lienholders would receive payment of their claims.

*(c) Limitations of sections 32(5) and (6)*

While sections 32(5) and (6) can give additional comfort to a lender willing to finance the completion of construction, they have significant limitations. As they only apply to “further advances,” they may only be used in relation to a registered mortgage granted to the applicant mortgagee by the original borrower.<sup>236</sup> They cannot be applied to give priority to amounts lent to a receiver to finance completion of construction when a developer becomes insolvent in the course of a project, and a receiver is appointed with the power to borrow on the security of the land and improvement. This is true even if the lender is the original mortgagee and is willing to provide further loans to the receiver in the hope that completion will enhance the prospects of full repayment.<sup>237</sup>

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236. *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4, 346 D.L.R. (4th) 495.

237. *Ibid.*

Another limitation of sections 32(5) and (6) is that they do not take account of circular priorities resulting from their interaction with section 28 of the *Property Law Act*<sup>238</sup> and the presence of intervening charges on the title other than builders' liens.

Section 28 of the *Property Law Act* deals with the priority of further advances under a registered mortgage and registered judgments. It states that further advances under a registered mortgage rank in priority to other mortgages and judgments registered after the mortgage in question, in any of these four circumstances:

- (a) the subsequent mortgagees and judgment creditors agree in writing that the further advances will have priority;
- (b) the mortgagee has not received notice in writing of the registration of the subsequent mortgage or judgment;
- (c) the subsequent mortgage or judgment is not registered at the time the further advances are made;
- (d) the terms of the mortgage require the mortgagee to make the further advances.

A scenario could arise in which, first, an owner's bank (the mortgagee) registers its mortgage granted to finance construction of an improvement. Second, a lien claimant begins work on the project. Third, a judgment creditor registers the judgment against the owner in the land title office and gives written notice of the judgment to the mortgagee. Fourth, the lien claimant files a claim of lien. Following this, the mortgagee obtains an order under section 32(5) that further advances under the mortgage will have priority over claims of lien, and makes a further advance of funds to the owner.

In this scenario, the further advances will rank ahead of the claims of lien because of the section 32(5) order, and the lien claimant will have priority over the previously filed judgment because section 21 causes the priority of the claim of lien to relate back to the point when the claimant began work on the improvement. Under section 28 of the *Property Law Act*, however, the registered judgment would have priority over the further advances because they were made after the mortgagee received written notice of its registration. Clearly, section 32(5) of the *Builders Lien Act* and section 28 of the *Property Law Act* can come into conflict, and a way should be found to prevent the circular priorities this may cause.

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238. R.S.B.C. 1996, c. 377.

Last, it may be noted that an application under section 32(5) may only be made by a mortgagee, and only in respect of the mortgage held by the applicant. It is conceivable that other stakeholders in the play might be motivated to seek an order adjusting priorities, such as a receiver wishing to encourage a potential lender to finance the completion of a project. There does not seem to be a reason to restrict the class of potential applicants under section 32(5) to mortgagees.

### 3. OVERCOMING THE LIMITATIONS OF SECTIONS 32(5) AND (6)

#### (a) General

The Project Committee examined various approaches to improve upon the current sections 32(5) and (6). In doing so, the Project Committee took the legislative history of these two provisions into account.

In 1986, the former Law Reform Commission of British Columbia issued a report pointing out the difficulty created by the priority structure reflected in the equivalent of sections 32(1) and (2) when an insolvency occurs at or near the top of the construction pyramid.<sup>239</sup> It recommended that advances made by a lender in good faith to permit completion and create an opportunity for all encumbrancers to realize the completed value of the improvement should be given priority as an incentive to construction lenders to provide this financing.<sup>240</sup> A definition of “construction mortgage” was proposed, being a mortgage clearly expressed as such, and securing amounts lent for the purpose of making an improvement on the land that it charged.<sup>241</sup> Amendments to what is now section 28 of the *Property Law Act* were recommended to give priority over the interests of all intervening encumbrancers to advances under a construction mortgage, regardless of their timing.<sup>242</sup> The equivalent of sections 32(1) and (2) would only apply to mortgages other than a construction mortgage.

Similar treatment was recommended by the former Commission for advances of funds to a court-appointed receiver or trustee borrowing for the purpose of com-

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239. Law Reform Commission of British Columbia, *Report on Mortgages of Land: The Priority of Further Advances*, LRC 85 (Vancouver: The Commission, 1986) at 26.

240. *Ibid.*, at 27.

241. *Ibid.*, at 30 (Recommendations 2 and 3).

242. *Ibid.* (Recommendation 4).

pleting or partially completing an improvement, or to preserve the land and improvement.<sup>243</sup>

In reviewing the *Builders Lien Act* in 1990, the Chalmers Committee quoted from the Law Reform Commission report approvingly, and acknowledged that if a lender is induced to make advances to complete the project by according the advances priority over claims of lien, “the lien claimant’s position may be improved to the extent that the equity is increased.”<sup>244</sup> Nevertheless, the Chalmers Committee took the position that giving mortgage advances priority over previously filed builders’ liens would be “a fundamentally different and unfamiliar system.”<sup>245</sup>

Instead, the Chalmers Committee recommended empowering the court to override the usual rules and give priority over claims of lien to further advances under a mortgage that would enable completion of an improvement, if it appeared the increase in value of the land and improvement would be equal to or greater than the amount of the advances.<sup>246</sup> An enabling provision corresponding to the Chalmers Committee’s recommendation appeared in a 1990 bill for a new *Builders Lien Act*, but the bill did not progress to third reading. In the 1997 Act, the provision was divided into two subsections, namely the present sections 32(5) and (6).

The Chalmers Committee did not recommend a mechanism to adjust priorities between variously timed advances under a construction mortgage and intervening registered judgments, and none appears in the present Act.<sup>247</sup>

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243. *Ibid.*, at 38 (Recommendation 5). This recommendation would have reversed *Yorkshire Trust Co. v. Canusa Construction Ltd.* (1984), 54 B.C.L.R. 75 (C.A.). The former Commission endorsed the provision found in Ontario’s construction lien legislation whereby anyone having an interest in the improvement or the land, including a builder’s lien claimant, may apply for the appointment of a trustee who may, *inter alia*, act as a receiver-manager and borrow to complete an improvement. See now *Construction Act*, *supra*, note 8, s. 68(1). The recommendation would also have addressed the problem illustrated by *Bank of Montreal v. Peri Formwork Systems Inc.*, *supra*, note 236 of the inability under the present s. 32(5) to give priority to amounts lent to a court-appointed receiver over builders’ liens and other intervening encumbrances to enable completion of a construction project.

244. *Supra*, note 207 at 34.

245. *Ibid.*, at 33-34.

246. *Ibid.*, at 34 (Recommendation 20).

247. The former Law Reform Commission criticized the provision in the 1990 bill (Bill 52) that was inspired by the Chalmers Committee, and urged that the provincial government give further consideration to its own recommendations from its 1986 *Report on Mortgages of Land: the Priority of Further Advances*, *supra*, note 239. The Commission maintained the court application which the provision in the bill required was unnecessary, because the precondition for an order

The BCLI Project Committee was divided on the merits of the different approaches of the former Law Reform Commission and the Chalmers Committee to the basic priority rules governing advances under a construction mortgage and builders' lien claims, and on the need for a court application to revise the priority ranking in favour of a construction lender. A minority favoured the approach of the former Commission that would not require a court application. The majority view was that the application and order called for by s. 32(5) provided an opportunity for all interests to be heard, enabling holders of those interests to have confidence that the usual priorities were being varied for valid reasons and that new construction funds would be properly applied. It was also noted that the appointment of a receiver with power to borrow additional construction funds would require an application and order in any event.

The Project Committee was in full agreement, however, that if sections 32(5) and (6) are retained, they should be amended significantly to overcome their present limitations as mechanisms to re-start or sustain the flow of construction funds to finish an improvement. The Project Committee also agreed that the issue of circular priorities resulting from their combined effect with section 28 of the *Property Law Act*<sup>248</sup> must be addressed.

*(b) Section 32(5) should not be restricted to reprioritizing "further" advances*

The powers of the court under section 32(5) should not be limited to adjusting the priority of advances made under a previously registered mortgage and previously filed claims of lien. The court should be empowered to give priority over any intervening charges to advances made under a pre-existing or a new mortgage if it is satisfied that the conditions in section 32(6) are met. As section 32(5) now refers only to "further" advances, the adjective "further" should be deleted.

*(c) Section 32(5) should not be restricted to conventional mortgage security*

Crucial construction financing needed to complete an improvement may be secured otherwise than by a conventional land mortgage. This may include the "receiver's borrowing charge" contemplated by the terms of standard receivership orders. The

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giving further mortgage advances priority over intervening claims of lien, namely that the advances would increase the value of the land and improvement by an amount at least equal to the advance, would be satisfied in virtually every case in which a lender would willingly make a further advance following the filing of liens. See Law Reform Commission of British Columbia, *Minor Report on Priority of Builders Liens Under Bill 52* (LRC 114), Appendix to Annual Report 1990/91 (Vancouver: The Commission, 1991) at 33-34.

248. *Supra*, note 238.

generic term “charge” may be used to give wide scope to the various forms of construction lending security that may be encountered. Section 32(5) should accordingly empower the court to reprioritize one or more advances under “the mortgage or charge,” not merely “under the mortgage.”

*(d) Registered judgments and other intervening charges*

In order to prevent the circular priority described earlier, the court should be empowered to make an order giving priority to advances under a mortgage or other charge that are made to finance the completion of an improvement over registered judgments and other intervening encumbrances, notwithstanding the general rules under section 28 of the *Property Law Act*. Section 32(5) should be amended accordingly.

*(e) The class of potential applicants should extend beyond mortgagees*

It is notable that the *Construction Act* of Ontario allows “any person having a lien, or any other person having an interest in the premises” to apply for appointment of a trustee-receiver for an improvement.<sup>249</sup> Potential construction lenders, owners, lienholders, and other creditors are among the stakeholders who potentially may benefit from a reprioritization to facilitate a continued flow of construction funds. They as well as a mortgagee under a pre-existing mortgage should be able to apply for an order under section 32(5). The Project Committee does not think the class of potential applicants under section 32(5) needs to be restricted to particular categories of stakeholders in a construction project.

*(f) Recommendations on priority adjustment to enable completion of construction*

The Project Committee recommends:

61. Section 32(5) of the Builders Lien Act should be amended by

*(a) replacing “a mortgagee” with “any person”;*

*(b) adding the words “or charge” after “the mortgage”;*

*(c) deleting “further” from the phrase “one or more further advances.”*

62. Section 32(6) should be amended by deleting “by a mortgagee” following “application.”

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249. *Supra*, note 8, s. 68(1).



*63. Section 32(5) of the Builders Lien Act should be amended to allow for an order giving priority, on the grounds set out in section 32(6), to advances under a mortgage or charge over intervening charges, including but not limited to:*

*(a) claims of lien; and*

*(b) despite section 28 of the Property Law Act, registered judgments.*

## CHAPTER 8. THE STATUTORY TRUST

### A. Clarifying Who Can Benefit from the Trust

Section 10(1) of the Act establishes the trust attaching to payments received by a contractor or subcontractor under a contract or subcontract. It states as follows:

**10** (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

The phrase “persons engaged in connection with the improvement” in section 10(1) is misleading. Read literally, it could cover persons providing services that do not give rise to lien rights. This is contrary to the general scheme of the Act. For example, section 10(4) declares that section 10(1) is inapplicable to money received by an engineer, architect, or material supplier. Thus, subcontractors and employees of engineers, architects, or material suppliers cannot be beneficiaries of the trust.

Rather than forcing users of the Act to infer who can benefit from the statutory trust, section 10(1) should refer to “subcontractors and workers engaged in connection with the improvement” instead of “persons engaged” so that it is immediately clear who the classes of beneficiaries are. Note that the definition of “subcontractor” in section 1(1) extends to material suppliers, and expressly excludes persons engaged by engineers, architects and material suppliers. This change would have an additional benefit in terms of brevity and simplicity, as it would make section 10(4) unnecessary.

The Project Committee recommends:

*64. Section 10 of the Builders Lien Act should be amended by*

*(a) substituting the words “subcontractors and workers engaged” for “persons engaged” in section 10(1); and*

*(b) repealing section 10(4) as a consequence of the amendment in paragraph (a).*

## **B. Clarifying That Recovery Under the Trust Is Not Limited by Section 34(1)**

Section 34(1) limits the maximum amount of recovery by lienholders claiming under the same contractor or subcontractor. The maximum recovery is the greater of the amount owing to that contractor or subcontractor and the amount of required hold-back in relation to the contract under which that person was engaged. A literal reading of section 34(1) could suggest that this subsection limits recovery under the section 10 trust as well as recovery on the basis of lien rights.

Section 34(1) is not intended to limit recovery under the trust, however. The trust and the lien are independent remedies.<sup>250</sup> A reduction in the liability of an owner vis-à-vis lienholders does not reduce a contractor's or subcontractor's indebtedness to those whom they engage, nor lessen their obligations as trustees.

Section 10(3) implies that recovery as a trust beneficiary may exceed what a claimant may recover through lien rights. Section 10(3) subrogates lien claimants whose liens have been discharged by an amount less than what is owed to the person who engaged them to that person's right to recover on the basis of the trust. In other words, those claimants whose liens have been discharged may exercise the right of the person above them in the contract chain to recover as a trust beneficiary what is owed to that person. They may then share in that recovery to the extent of the balance owed to them.

A subsection should be added to section 34 stating that section 34(1) does not limit the amount recoverable by a lien holder as a beneficiary of the trust established by section 10.

The Project Committee recommends:

*65. Section 34 of the Builders Lien Act should be amended by adding a subsection stating that section 34(1) does not limit the amount recoverable by a lienholder as a beneficiary of the trust established by section 10.*

## **C. The Limitation Period for a Section 10 Trust Claim**

Section 14 of the *Builders Lien Act* provides for a special one-year limitation period to enforce claims against a trustee under the statutory trust under section 10, running from completion, abandonment, or termination of the head contract, or from completion or abandonment of the improvement if there is no head contract.

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250. *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43, [2015] 3 S.C.R. 127.

The limitation period under section 14 differs from the one-year limitation period applicable to actions to enforce the lien against land under section 33(1), which runs from the filing of the claim of lien. As some liens may be filed after completion or abandonment, a trust claim may become statute-barred under section 14 before a corresponding lien action.

Furthermore, as the trust under section 10 does not arise until the contractor- or subcontractor-trustee receives money owing under the contract or subcontract, it is possible under some circumstances for a trust claim to be barred before it can be asserted. For example, if the trustee actually receives the trust money more than a year after completion of the head contract or improvement, the rights of those engaged by the trustee to recover what they are owed on the basis of the trust will already be barred and the trustee can retain the trust money in relative safety. Technically, the trustee would be committing an offence under section 11(1) by converting the trust fund in this way, but prosecution is unlikely.

The current one-year limitation period under section 14 is consistent with a recommendation made in 1972 by the former Law Reform Commission of British Columbia.<sup>251</sup> At that time, however, there was no general limitation period for a claim by a beneficiary under an express trust to recover trust property from a trustee who withheld it. The recommendation was made in that context in order to encourage creditors holding the special privileged statutory rights to assert them promptly. The legislative context has changed, however, and now a general limitation period applies to claims against a withholding trustee.<sup>252</sup>

Of the other provinces and territories that have trust provisions in their construction lien statutes, two provide a special limitation period for trust claims. Manitoba requires a trust claimant to commence an action to enforce the trust within 180 days after becoming aware of a breach of trust.<sup>253</sup> Saskatchewan provides a two-year limitation period running from the completion or abandonment of a head contract.<sup>254</sup>

In the other two provinces with trust provisions, Ontario and Alberta, the provisions of the general limitations statute concerning actions by beneficiaries against trustees govern actions to enforce the statutory trust. In each case, the basic limitation

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251. *Supra*, note 53 at 97-99.

252. *Limitation Act*, S.B.C. 2012, c. 13, ss. 6(1) and 12(2).

253. *Supra*, note 208, s. 8.

254. *Supra*, note 96, s. 19(1).

period is two years from the discovery of the cause of action by the beneficiary.<sup>255</sup> This is subject to an ultimate limitation period of 10 years in Alberta and 15 years in Ontario, running from the occurrence of the events amounting to the cause of action.<sup>256</sup>

The Project Committee considered two proposals to modify the limitation period applicable to *Builders Lien Act* trust claims. Under the first, section 14 would be amended so that the time would run from the later of (a) completion, abandonment, or termination of a head contract (as now), and (b) the date on which the trustee receives the trust money. This proposal would maintain a one-year limitation period, but would prevent the kind of situation in which a trust claim could be barred before the trust ever arose.

The second proposal was simply to repeal section 14. The provisions of the *Limitation Act*<sup>257</sup> applicable to claims against trustees would then apply to actions to enforce the statutory trust. The basic limitation period under section 6(1) of the *Limitation Act* would be two years from the discovery of the claim by the plaintiff. Section 12(2) of the *Limitation Act* provides a special discovery rule for claims to recover trust property from a trustee. A plaintiff in a trust claim is not considered to have discovered the claim until becoming “fully aware” of the facts surrounding a trust claim.<sup>258</sup>

The **majority** of the members of the Project Committee are in favour of repealing section 14 of the *Builders Lien Act* and allowing the *Limitation Act* to govern claims under the statutory trust. In their view, discoverability will rarely be an issue in statutory trust claims because claimants will usually know they have not been paid and funds are being withheld from them. A **minority** would keep section 14 because the running of time can be postponed under the *Limitation Act*.

A **majority** of the members of the Project Committee recommend:

66. *Section 14 of the Builders Lien Act should be repealed.*

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255. *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4.

256. R.S.A. 2000, c. L-12, s. 3(1); S.O. 2002, c. 24, Sch. B, s. 15(1).

257. *Supra*, note 252.

258. Section 12(2) of the *Limitation Act*, *supra*, note 252 sets out a test with several branches to determine when discovery of a trust claim takes place and the two-year basic limitation period starts to run.

## CHAPTER 9. CURBING ABUSES OF THE BUILDERS LIEN ACT

### A. Abusive Practices Relating to the Builders Lien Act

Improper use of the remedies given by the *Builders Lien Act* is, unfortunately, far from uncommon. Filing claims of lien for inflated amounts is probably the most common form of abuse. Other abusive practices are filing claims of lien for work or services in question that have not been performed, have not been requested, or are not lienable. Liens have been claimed deliberately against land on which no improvement has taken place in order to force a settlement in respect of an improvement on other land.

A different kind of abusive practice is to interfere with the ability of a lienholder or trust beneficiary to assert rights and remedies given by the Act. One way in which this occurs is when a party with superior bargaining power extracts contractual terms from a lienholder that are intended to prevent or discourage the lienholder from exercising those rights and remedies. Another is to collude with others to defeat the priority of a lien right.

The Act contains several anti-abuse provisions. There is scope for making them more effective.

### B. The Existing Anti-Abuse Provisions

#### 1. OVERVIEW

The existing anti-abuse provisions in the Act are sections 19, 25, 42 and 45. They address the matter of abusive lien filings from different aspects. Section 19 gives a civil remedy for loss resulting from the wrongful filing of a claim of lien, while section 25(2) provides a mechanism for summary removal of wrongfully filed claims of lien from title. As will be seen, they have relatively narrow scope and their effectiveness is limited. Section 42 makes it impossible to waive the benefit of the Act, and renders various means of defeating rights or priorities conferred by the Act legally ineffective. Section 45 makes it a provincial offence to file a claim of lien containing a false statement, providing for a fine not exceeding the greater of \$2,000

and the amount of any excess amount claimed over the actual amount of the lien. Prosecutions under section 45 are virtually unknown, however.

## 2. CIVIL LIABILITY FOR WRONGFUL FILING: SECTION 19

Section 19 states:

### **Liability for wrongful filing**

19 A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

Section 19 appears to have arisen in response to a recommendation by the Chalmers Committee in 1990 that British Columbia should enact a provision modelled on one in force in Alberta which imposed liability for legal costs and other damages for the wrongful filing of a claim of lien.<sup>259</sup> That provision is now section 40 of the *Alberta Builders Lien Act*, which reads:

### **Wrongful registration**

40 In addition to any other grounds on which the person may be liable, a person who registers a lien against a particular estate or interest in land or a particular parcel of land

- (a) for an amount grossly in excess of the amount due to the person or that the person expects to become due to the person, or
- (b) when the person knows or ought reasonably to know that the person does not have a lien,

is liable for legal and other costs and damages incurred as a result of it unless that person satisfies the court that the registration of the lien was made or the amount of the lien was calculated in good faith and without negligence.

As is readily apparent, however, this Alberta provision is broader than the British Columbia section 19, which only applies when a claim of lien is filed against land to which the lien does not attach.<sup>260</sup> The Alberta provision covers the common abuse

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259. *Supra*, note 205, Recommendation 24 at p. 35.

260. This single ground of liability under the B.C. s. 19 corresponds to the conduct of the lien claimant held liable in damages under common law tort principles of abuse of process in *Guilford Indus-*

of filing for a grossly excessive amount, and all cases in which a claim of lien is asserted which the claimant knows or ought to know is invalid.

Ontario and Saskatchewan have provisions on liability for wrongful claims of lien that are very similar to the Alberta section 40 above.<sup>261</sup> They too apply in cases of filing for an excessive amount and knowingly asserting a lien that is not supported by law, but they also appear to make negligence or deliberate fault prerequisites for liability on the part of the lien claimant. Alberta's provision differs slightly from them in having the feature of casting the burden of proving good faith and lack of negligence on the claimant.

Although considerably narrower in scope, section 19 of the *Builders Lien Act* appears more stringent in one respect than the Alberta, Ontario and Saskatchewan provisions, namely that it does not expressly recognize a defence of good faith and due diligence (lack of negligence). It has been suggested that liability under s. 19 could arise through mistake or inadvertence.<sup>262</sup>

### 3. REMOVAL OF CLAIMS OF LIEN UNDER SECTION 25

#### (a) *Extinguished and unproven liens: section 25(1)*

Sections 25(1) and (2) each provide for an application to cancel a claim of lien and remove it from the title. Section 25(1) addresses circumstances in which a lien has ceased to be in effect or has not been proven. It empowers the court, the land titles register, or a gold commissioner to cancel a claim of lien if

- a lien has been extinguished because it was filed out of time or has lapsed for failure to commence an action to enforce it and file a certificate of pending litigation;
- an action to enforce the claim of lien has been dismissed and not appealed;
- an action to enforce the claim of lien has been discontinued; or
- the lien has been satisfied by payment.

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*tries Ltd. v. Hankinson Management Services Ltd.* (1973), 40 D.L.R. (3d) 398 (B.C.S.C.). The wording of s. 19 may have been inspired by that case, which involved filing against land unaffected by the improvement for the ulterior purpose of extorting a settlement. The Chalmers Committee recommended, however, that an anti-abuse provision for the British Columbia lien statute should additionally apply to grossly inflated claims of lien and filing a claim of lien when the claimant knows or ought to know that there is no lien: *supra*, note 205 at 35.

261. See R.S.O. 1990, c. C.30, s. 35; S.S. 1984-85-86, c. B-7.1, s. 53.

262. *Practice Manual. supra*, note 87 at 4-13.

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The application under section 25(1) may be made by an owner, contractor, subcontractor, lien claimant or an agent of any of them.

*(b) Abusive claims of lien: section 25(2)*

Section 25(2) empowers the court, and only the court, to cancel a claim of lien if it

- does not relate to the land against which it is filed, or
- is vexatious, frivolous or an abuse of process.

An application under section 25(2) may also be made by an owner, contractor, subcontractor, lien claimant or an agent.

The first ground on which a claim of lien may be removed under section 25(2) corresponds to the conduct for which section 19 imposes liability for costs and damages.

The terms in which the second ground is expressed are borrowed from rules of court and refer to the basis on which a court may strike a pleading in a civil action. The Court of Appeal has held authoritatively that the same criteria apply to the interpretation of the words “vexatious, frivolous or an abuse of process” in section 25(2) as are applied in an application under the rules of court to strike a pleading.<sup>263</sup> Those criteria are extremely high. A claim of lien will only be cancelled under section 25(2) as being frivolous if it is “plain and obvious” that there is “no question fit to be tried.” All that is required is that a claim be arguable.<sup>264</sup>

Proof of an abuse of process requires proof of an ulterior motive, such as using the machinery of the *Builders Lien Act* as a means of exerting economic pressure to extort payment or a settlement.<sup>265</sup> As the Court of Appeal has held that the substantive validity of a lien cannot be contested under section 25(2), it is difficult to see how

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263. *West Fraser Mills Ltd. v. BKB Construction Inc.*, 2012 BCCA 89 at paras 24-25. Dicta in *Tuscany Village Holdings Ltd. v. Conquest Development Corp.*, 2005 BCSC 1392 at paras. 30-31 suggesting that the test of abuse of process is lower under s. 25(2)(b) than for striking out a pleading because lien claimants have the alternative remedy of suing to recover a contract debt are likely unreliable now because of very clear statements by the Court of Appeal in *West Fraser Mills* that the tests are the same.

264. *West Fraser Mills Ltd. v. BKB Construction Inc.*, *supra*, note 263. See also *Libero Canada Corp. v. Kwee*, *supra*, note 86.

265. *Guilford Industries Ltd. v. Hankinson Management Services Ltd.*, *supra*, note 260.

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the power to cancel a claim of lien as an abuse of process could be invoked unless the relevant facts were first established in a separate proceeding.

Earlier cases in which liens were removed or said to be potentially removable under s. 25(2) on such grounds as an excessive or inflated amount being claimed,<sup>266</sup> that the services provided by the claimant were not “an integral and necessary part of the physical construction of the project”,<sup>267</sup> or naming non-existent parties<sup>268</sup> are now of dubious authority insofar as the scope of section 25(2) is concerned. Removal of liens on grounds like these now likely require, at the very least, summary trial in a lien enforcement action under section 33. An owner or other party seeking their removal would need first to secure them, deliver a section 33(2) notice to force the commencement of an action, and then bring a summary trial application in the action.

It is highly questionable whether s. 25(2) accomplishes what it was apparently intended to do, namely to provide a fast remedy to eliminate lien claims that have no basis.

### C. Making Anti-Abuse Provisions More Effective

#### 1. A MORE EFFECTIVE PROCEDURAL ANTI-ABUSE MECHANISM: REFORM OF SECTION 25

The language drawn from the rules of court (“vexatious, frivolous or an abuse of process”) has contributed to the narrow interpretation placed on section 25(2) and has frustrated the purpose of the provision. Section 25 should be detached from language and principles relating to applications to strike out pleadings and address instead the particular context of the *Builders Lien Act*. Only then will it be possible for section 25(2) to fulfil its original purpose of providing an expeditious means of eliminating lien claims that are demonstrably false, exaggerated, or abusive in the sense of being asserted for an improper reason.

The Project Committee believes that it should be possible to dispute the validity of a claim of lien that is defective on its face, is demonstrably false, or obviously insupportable in law without having to go the length of securing the lien, serving a 21-day

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266. *Henderson Land Holdings (Canada) Ltd. v. Micron Construction Ltd.* (1999), 49 C.L.R. (2d) 311 (B.C.S.C.). (As there was a previously agreed lower amount that was not in dispute, the court set the security under s. 24(2) at that lower amount rather than cancelling the lien entirely.)

267. *Elderly Citizens Recreation Association v. Loeppky Consulting Ltd.* (1999), 45 C.L.R. (2d) 122 (B.C.S.C.); *Tuscany Village Holdings Ltd. v. Conquest Development Corporation*, *supra*, note 263.

268. *Nita Lake Lodge Corporation v. Compact Systems (2004) Ltd.*, *supra*, note 33; 581582 B.C. Ltd. v. *Habib*, *supra*, note 33.

notice under section 33(2), waiting for the claimant to start an action to enforce it and then seek a summary trial. It should be possible for an owner or a general contractor to move quickly to remove such a claim of lien.

The grounds for summary cancellation and removal of a claim of lien under section 25(2) should be framed in terms of the ways in which the Act can be, and is, abused. Summary cancellation and removal should also be possible if a claim of lien is non-compliant with the Act in the sense of having a non-curable defect. These grounds would include:

- the claim of lien does not relate to the land against which it is filed (i.e., the present s. 25(2)(a));
- the amount claimed is grossly excessive or inflated;
- the subject-matter of the claim of lien (i.e. services or supply of materials) is non-liable;
- the claimant knew or ought to have known at the time of filing that the claim of lien is unsupportable, i.e. has no basis;
- the claim of lien does not comply with the Act.

In order to take account of situations where issues of fact cannot be determined in an application by petition, section 25 should have a further subsection empowering the court to make procedural orders for expeditious determination of an issue, including a direction to commence an action within a specified time.<sup>269</sup>

The fact that section 25(3) permits applications without notice under section 25(2) as well as section 25(1) may have been a factor contributing to the narrow interpretation of section 25(2) as it now stands. Applications under section 25(2) or an equivalent provision will invariably be contentious. It is unlikely that a claim of lien would ever be cancelled under s. 25(2), either in its current state or reformed as recommended above, without notice to the lien claimant. For these reasons, section 25(3) should permit applications without notice only under section 25(1).

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269. Rules of court are in place to support orders of this kind, such as Rule 22-1(7)(d) allowing the court to order the trial of an issue in the course of a petition proceeding, summarily or otherwise. The court could also direct an inquiry by a master or deputy registrar under Rule 18-1 to determine matters such as the proper amount of a lien.

The Project Committee recommends:

67. *Section 25(2) of the Builders Lien Act should be amended by*

- (a) deleting the words “vexatious, frivolous or an abuse of process” from section 25(2)(b);*
- (b) substituting the following as the grounds for cancellation of a claim of lien under s. 25(2):*
  - (i) the claim of lien does not relate to the land against which it is filed;*
  - (ii) the amount claimed is grossly excessive or inflated;*
  - (iii) the subject-matter of the claim of lien (i.e. services or supply of materials) is non-lienable;*
  - (iv) the claimant knew or ought to have known at the time of filing that the claim of lien is unsupportable, i.e. has no basis;*
  - (v) the claim of lien does not comply with the Act.*

68. *A provision should be added to the Builders Lien Act empowering the court to make appropriate procedural orders to allow the expeditious determination of an issue arising in relation to a claim of lien, including a direction to commence an action within a specified time.*

69. *Section 25(3) of the Builders Lien Act should be amended:*

- (a) to permit applications without notice only under section 25(1), but not under section 25(2) as amended according to Recommendation 67; and*
- (b) by deleting the words “to any other person” after “notice.”*

## 2. COMPENSATION FOR UNJUSTIFIED LOSS THROUGH ABUSE OF THE ACT

Section 19 is clearly inadequate. It is narrow in scope, applying only to one relatively less common type of abuse of the Act: filing a claim of lien against land not subject to the lien. It provides a remedy only to the owner to recover expense and damages, not to others like general contractors who often incur significant expense in being

contractually obligated to make court applications to seek the removal of wrongfully filed or excessive claims of lien.

The Project Committee considers that the principle guiding the reform of this substantive anti-abuse position should be that where loss that should not have occurred must be borne by someone, it should be borne by the person who caused the loss. Effective implementation of this principle would encourage greater care and accuracy when the remedies under the Act are invoked.

The Project Committee debated whether liability for loss resulting from an improper claim of lien should arise regardless of intent, negligence, or recklessness. Consensus was eventually reached that the dual aims of compensating for loss and inducing good practice would best be served by imposing liability for damages and costs resulting from filing an improper or excessive claim of lien irrespective of fault, limited only by foreseeability of harm.

The Project Committee concluded that the cause of action for damages under section 19 or its equivalent should be expanded to cover reasonably foreseeable loss and damage caused by the filing of a claim of lien to which, for any reason, the claimant is not entitled. The loss and damage recoverable should include legal expenses, as it is necessary for the owner, contractor, and other affected parties to invoke and engage in a court process in order to deal with a claim of lien that should not have been filed.

In order to curb the commonly encountered practice of claiming for excessive amounts, the Project Committee proposes a separate provision requiring a claimant to compensate a provider of security for the incremental cost incurred to secure the claim of lien by reason of the excess. This requirement would apply in all cases when an amount is claimed in excess of the actual lien to which the claimant is entitled, regardless of the reason for the excessive claim, and regardless of whether or not the claimant may be liable for other costs or damages under the expanded section 19 or its equivalent. It would lead to greater care in calculating the value of liens and investigating the lien filing period, and induce the voluntary removal of claims of lien that should not have been filed.

The Project Committee recommends:

*70. The Builders Lien Act should be amended to provide that a person who files a claim of lien, to which for any reason that person is not entitled, should be liable for all reasonably foreseeable loss and damage, including legal expense, incurred by any person as a result of the filing of the claim of lien.*

71. *The Builders Lien Act should be amended to provide that a claimant who files a claim of lien for an amount greater than the amount owed to the claimant is automatically liable for the costs incurred by anyone who provides security for the lien, to the extent that the costs are increased by the inflated claim.*

### 3. CURBING CONTRACTUAL TERMS RESTRICTING EXERCISE OF LIEN RIGHTS

#### *(a) Overview of section 42*

Section 42 contains four subsections, each declaring a means of seeking to defeat or overcome rights, remedies, or priorities conferred by the Act to be legally void. Section 42(1) states a conveyance, mortgage or land charge granted for the purpose of giving a lienholder a preference or priority is void for that purpose. Section 42(2) prevents “contracting out” of the benefit of the Act. It is the key provision intended to protect lienholders and trust beneficiaries from being unduly pressured by superior bargaining power to relinquish their statutory rights. Section 42(3) declares any device aimed at defeating the priority under the Act of claims by a worker for wages to be void. Section 42(4) invalidates assignments by contractors and subcontractors of amounts due in respect of a contract or subcontract as against a lien or trust created by the Act.

#### *(b) Clarifying the effect of section 42(1)*

Section 42(1) currently reads:

(1) A conveyance, mortgage or charge of or on land given for the purpose of granting a lien holder a preference or priority is void for that purpose.

The meaning of “void for that purpose” is somewhat ambiguous. It could be read as meaning that the purpose of the conveyance, mortgage or other charge renders it void. That is not the correct interpretation, but it is one that the wording might bear.

The intent and effect of section 42(1) is to prevent one lienholder from gaining a preference over others by accepting a transfer, mortgage or other charge created by contract. The lienholder who becomes a transferee, mortgagee, or chargeholder does not lose all rights with respect to the land because of section 42(1), but the lienholder’s claim merely retains the same priority it would have had if asserted through a claim of lien, and ranks with the claims of other lienholders of the same class.<sup>270</sup> The meaning would be made clearer if the provision simply stated that a

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270. See *Hayter Construction Ltd. v. JR Concept Developments Inc.*, 2008 BCSC 1213 (Master).

transfer, mortgage, or other charge of or on land given to a lienholder for that purpose is not void for that reason alone, but has the same priority the lienholder's claim would otherwise have had.

The Project Committee recommends:

*72. Section 42(1) of the Builders Lien Act should be amended to provide that a conveyance, mortgage or charge of or on land that is granted for the purpose of giving a lienholder a preference or priority is not void for this reason alone, but the lienholder will have the lower of: (a) the priority a claim of lien by that lienholder would have had; and (b) the priority the conveyance, mortgage or charge would have had, apart from section 42.*

*(c) The general prohibition against contracting-out of the Act: section 42(2)*

Section 42(2) now reads as follows:

(2) An agreement that this Act is not to apply, or that the remedies provided by it are not to be available for a person's benefit, is void.

Although considerably broader than the non-waiver provisions in the pre-1997 Act,<sup>271</sup> which only applied in favour of workers earning less than 15 dollars per day, section 42(2) only covers the most overt contracting-out terms. As presently worded, it would not cover provisions that indirectly prevent or discourage exercise of rights under the *Builders Lien Act*. For example, head contracts will often require a general contractor to keep the project free of liens. Arguably, this prevents a general contractor from exercising its own lien rights without being in breach of contract.

A minority within the Project Committee believe that the wording of section 42(2) is satisfactory, and that a general contractor should be able to agree not to file a lien. The majority view, however, is that the policy underlying section 42(2) is to prevent economic pressure from being exerted to deny the benefit of the Act at any level in the construction pyramid, and that policy is not adequately served if bargaining power may be used to indirectly impose a liability or penalty on the use of statutory rights.

A **majority** of the members of the Project Committee recommend:

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271. See R.S.B.C. 1996, c. 41, ss. 9(1)-(3).

*73. Section 42 of the Builders Lien Act should be amended to also provide that a term of any agreement that directly or indirectly imposes a liability or penalty on any person for exercising a right under the Act is void.*

The **minority** position is that section 42(2) should remain unchanged.





## CHAPTER 10. THIRD PARTIES AND THE BUILDERS LIEN ACT

### A. Third Party Landowners and Improvements Made Under Statutory Rights of Entry

#### 1. THE “PIPELINE PROBLEM:” FILING AGAINST TITLE TO SERVIENT LAND

Numerous Acts provide for rights of entry and use of private land without the consent of the owner for purposes relating to the construction, installation, or repair of facilities connected with resource development or a public utility. These include the *Forest Act*,<sup>272</sup> *Petroleum and Natural Gas Act*,<sup>273</sup> the *Oil and Gas Activities Act*,<sup>274</sup> the *Mineral Tenure Act*,<sup>275</sup> the *Mining Right of Way Act*,<sup>276</sup> the *Coal Act*,<sup>277</sup> the *Water Users Communities Act*,<sup>278</sup> and the *Water Sustainability Act*.<sup>279</sup>

When builders’ liens arise in connection with improvements made on private land under statutory rights of entry, such as pipelines, access roads, buried cables, sewer and water lines, etc., lienholders will frequently register claims of lien against the title to the privately owned land. Borrowing a term from the law of easements, we refer to land subject to a statutory right of entry as “servient,” and its owner as a “servient landowner.”

If the work is done on a right of way, the lienholders will often file claims of lien against the title to the land subject to the right of way. In the case of subsurface works like pipelines, they will often file claims of lien against the surface owner’s ti-

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272. R.S.B.C. 1996, c. 157.

273. R.S.B.C. 1996, c. 361, s. 142(e).

274. S.B.C. 2008, c. 36, s. 34(3).

275. R.S.B.C. 1996, c. 292, ss. 11, 14 and 19.

276. R.S.B.C. 1996, c. 294, s. 2(1).

277. S.B.C. 2004, c. 15, s. 2(1), (2).

278. R.S.B.C. 1996, c. 483, s. 100.1(1)(a).

279. S.B.C. 2014, c. 15, ss. 89-90.

tle. They do so despite the fact that the servient landowner has no financial interest in the improvement itself, derives no benefit from it, and is not involved in the contract chain.

Liens appearing on the title are not easily removable by the landowner without considerable expense. Their appearance on the title interferes with the landowners' ability to sell, mortgage, or deal otherwise with the land, despite the fact that the landowner is financially disinterested and does not directly benefit from the improvement. Furthermore, the interest of the landowner may be itself subject to the lien if the landowner has not filed a notice of interest in the land title office.

Surface rights leases and surface rights arbitration generally compensate the servient landowner only for the use of the land by the holder of the statutory right of entry. The harm to the landowner from having liens appearing on the title that have nothing to do with any improvement for the benefit of the landowner is separate from the inconvenience resulting from exercise of the right of entry itself.

Liening servient land belonging to a financially disinterested landowner has been referred to as the "pipeline problem," although it is not limited by any means to pipeline installations. It was acknowledged to be an unresolved issue in the Legislative Assembly when the present *Builders Lien Act* was passed in 1997.<sup>280</sup> At that time, the government committed to finding a resolution.<sup>281</sup> The issue was the subject of a BCLI report published in 2003.<sup>282</sup> No legislative action has been taken to address it, and it remains unresolved at the present time.

## 2. POTENTIAL SOLUTIONS TO THE "PIPELINE PROBLEM"

### (a) General

The *Builders Lien Act* was not intended to provide security for payment at the expense of third party landowners who have no financial interest in the improvement, have not requested any services, and whose only connection to the improvement is in playing the role of involuntary host to a public utility or a resource sector operator and its contractors. The "pipeline problem" is one of long standing, and should be resolved as part of a general reform of the Act.

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280. Debates (Hansard), vol. 7, no. 10, 28 July 1997, Part 1, p. 6407, reproduced in British Columbia Law Institute, *Report on the Builders Lien Act and the Pipeline Problem*, *supra*, note 6 at 2-3.

281. *Ibid.*

282. BCLI, *Report on the Builders Lien Act and the Pipeline Problem*, *supra*, note 6.

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The Project Committee considered three potential solutions to the “pipeline problem,” and bases its recommendation on one of them.

*(b) Deem the servient landowner to have filed a notice of interest*

If the Act were amended to deem a servient landowner to have filed a notice of interest under section 3(2), a lien in respect of an improvement on or in the servient land would not bind the landowner’s title, provided that the landowner has not requested any services in connection with the improvement. Thus, in theory the landowner should have no financial liability for liens arising from the exercise of the right of entry.

A deemed notice of interest may not suffice to protect the servient landowner against liability for the lien if the landowner has entered into a surface lease or other agreement for compensation with the operator who engaged the lien claimant, however. A notice of interest only protects an owner against liens if the owner has not made an express request for services or materials. If the compensation agreement refers to operations on the land needed for the construction and operation of the improvement, it arguably contains an express request for those services.<sup>283</sup> The point does not appear to have been directly decided, but there is enough uncertainty surrounding it to justify looking for another solution.

In addition, a notice of interest does not necessarily make it easier or faster to clear the title of claims of lien even though the landowner has no financial liability towards lien claimants.

*(c) Deem the servient landowner to have filed a notice of interest and impose a penalty for liening servient land where a registered right of way exists*

The second solution considered would involve coupling the first proposed solution, namely amending the Act to deem the servient landowner to have filed a notice of interest, with a financial penalty for filing a claim of lien against the servient title if it could have been filed against a registered right of way. This would discourage needless filings against servient land to bolster security, and help to relieve servient landowners from the difficulty and expense of clearing their titles.

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283. In *Libero Canada Corporation v. Kwee*, *supra*, note 86, a lien claimant successfully resisted an application under s. 25 to summarily remove a lien against a landlord’s interest because the lease contemplated leasehold improvements to be carried out completely by the tenant at the tenant’s expense. The court held that it was arguable that the lease constituted a request by the landlord for the improvements.

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This second proposed solution may not suffice to protect a servient landowner who has entered into a surface lease or other compensatory agreement with the holder of the statutory right of entry, however. As under the solution first proposed, the terms contemplating operations to be carried out under the right of entry might arguably amount to a request for the work for the purposes of the *Builders Lien Act*.

In any case, the second proposed solution would only be an improvement over the first if a right of way has been expropriated and a new title for it has been raised. In other cases, the lien claimant would still be tempted to file against the servient title. Not all statutory rights of entry allowing use and alteration of land involve expropriation of a right of way capable of raising an interest that can be liened separately from adjacent private land.

*(d) Amend the Act to provide that no lien exists against servient land with respect to an improvement made under a statutory right of entry*

The third solution is to provide that no lien exists against servient land in respect of an improvement made on that land through an exercise of the statutory right of entry. This is the solution recommended in the 2003 BCLI report, and it is the one favoured by the Project Committee as well.

The 2003 BCLI report also recommended the insertion of an extended definition of “statutory right of entry” into the Act. The extended definition would include a right to enter and use privately owned land under authority of an enactment or under an agreement with the landowner, if the right could have been exercised under statutory authority without the landowner’s agreement. The Project Committee agrees with this as well to protect servient landowners who enter into surface leases or other compensatory agreements from lien liability.

Once an amendment to the Act has made it clear that lien rights do not arise against servient land, a servient landowner would have a direct and quick remedy under section 25(2) if a claim of lien were to be filed in disregard of this. The claim of lien would be summarily removable as abusive on the ground that its subject-matter is non-lienable.<sup>284</sup> Costs of the application for removal would be awarded against the lien claimant in nearly all cases.

This third solution would resolve any doubt about the invalidity of a claim of lien filed against the servient land of a financially disinterested landowner. It removes any force from the argument that a consensual entry to conduct operations on the

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284. See Recommendation 61 in Chapter 9, *supra*, calling for the amendment of s. 25(2) to include non-lienable subject-matter as a ground for summary removal of a claim of lien.

servient land which could be carried out under statutory authority without the owner's consent is equivalent to a request by the landowner for lienable services. In combination with the changes to section 25(2) that we have recommended, it would relieve the difficulty a servient landowner now faces in clearing liens filed by the contractors engaged by the holder of a statutory right of entry. The third solution addresses aspects of the pipeline problem that the first two do not.

The Project Committee recommends:

74. *The Builders Lien Act should be amended to provide that:*

- (a) a lien does not arise against land that is subject to a statutory right of entry with respect to an improvement made on the land pursuant to the statutory right of entry;*
- (b) no claim of lien may be filed against the title to land subject to a statutory right of entry in respect of an improvement on, in or under the land that was made by exercising a statutory right of entry; and*
- (c) for the purpose of paragraph (a), a "statutory right of entry" is a right to enter and use privately owned land under the authority of an enactment, and includes a right to enter and use private land under an agreement with the landowner, if the right could have been exercised under statutory authority without the landowner's agreement.*

## **B. Requirements to Pay Issued by the Canada Revenue Agency**

### **1. GENERAL**

A requirement to pay (RTP) is often issued by the Canada Revenue Agency (CRA) to a party in the contract chain to collect unpaid tax liabilities from another party to whom the recipient of the RTP is indebted. An RTP may seriously complicate the application of the Act to a construction payment dispute and lead to very capricious results, exposing the recipient or someone else in the contract chain to duplicate payment obligations.

Requirements to pay are issued under section 224(1.2) of the federal *Income Tax Act*<sup>285</sup> or section 317(3) of the *Excise Tax Act*.<sup>286</sup> These provisions authorize a form

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285. R.S.C. 1985, c. 1 (5th Supp.).

286. R.S.C. 1985, c. E-15.

of garnishment as an aid to CRA in collecting unpaid tax, remittances, interest and penalties. They empower CRA to issue an RTP to someone who owes money to a tax debtor, or who may become liable to make a payment to the tax debtor within one year.

On receipt of the RTP, the funds that would otherwise be payable to the tax debtor become the property of the federal Crown, and must be paid to the Receiver General, either immediately or when they would otherwise become payable to the tax debtor. By virtue of the constitutional paramountcy of federal legislation and the express terms of the RTP provisions, the payor's obligation to divert payment from the tax debtor to the Receiver General takes priority over the claims of other secured and unsecured creditors, including those of lien claimants under the *Builders Lien Act*.<sup>287</sup>

### 2. RTPs AND OBLIGATIONS UNDER THE *BUILDERS LIEN ACT*

Payment under an RTP operates to discharge the original liability of the RTP recipient to pay the tax debtor to the extent of the amount paid to the Receiver General.<sup>288</sup> Other obligations of the recipient that are created by the *Builders Lien Act* are not discharged, however.

Anyone required by the *Builders Lien Act* to retain a holdback from a tax debtor is not relieved of that obligation by payment under an RTP, even if the payment completely extinguishes the indebtedness of that person to the tax debtor.<sup>289</sup> The holdback obligation imposed by the *Builders Lien Act* is a purely statutory one. It is not the "original liability" of the RTP recipient, namely the contractual debt owed to the tax debtor.

Similarly, if an RTP is addressed to an owner in respect of a tax debt owed by a head contractor and the owner pays funds to the Receiver General that would otherwise be payable to the head contractor, the owner's interest in the land and the improvement remain subject to unextinguished liens of unpaid subcontractors. The owner may still raise a holdback defence or pay an amount up to the equivalent of the required holdback into court under section 23 to remove the liens, but will in effect be paying out the holdback twice.

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287. *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, [1994] 3 S.C.R. 753; aff'd (1993), 101 D.L.R. (4th) 238, additional reasons (1993), 101 D.L.R. (4th) 238 at 266; 1993 CanLII 4413 (Sask. C.A.).

288. *Income Tax Act*, *supra*, note 285, s. 224(2); *Excise Tax Act*, *supra*, note 286, s. 317(5).

289. *M.E. Quinn Associates Inc. v. Klein* (1998), 40 C.L.R. (2d) 417 at paras. 25 and 30 (B.C.S.C.) (Master). But see *APM Construction Services Inc. v. Caribou Is. Electrical Ltd.*, 2013 NSCA 62.

If an owner has already paid funds owing to the tax debtor into court under section 23 at the time an RTP is issued, they automatically become the property of the federal Crown. The lien claimants lose out in that case, because section 23 will have operated already to discharge the owner's liability to them when the funds were paid into court.

These examples show that an RTP addressed to someone in a construction contract chain may have arbitrary and capricious results, depending on its timing. One British Columbia judge described this state of affairs as the product of "two legislative schemes designed by two levels of government, neither mindful of the other."<sup>290</sup>

It is beyond the power of the provincial legislature to alter the superpriority given to an RTP by federal legislation. Still, it would be an improvement over the existing state of affairs to eliminate the potential for duplicate liabilities, and make the effects of the interaction between the federal legislation and the *Builders Lien Act* more predictable. The Project Committee believes that those effects should unfold on the basis of principle instead of happenstance.

### 3. ADDRESSING THE EFFECT OF AN RTP ON A PRINCIPLED BASIS

The RTP provisions clearly show that Parliament intended this collection mechanism to give the federal Crown, as a tax creditor, priority over the claims of other secured and unsecured creditors of the tax debtor, including builders' lien claimants. As the RTP provisions expressly declare that payment under an RTP discharges the recipient of the RTP from the original liability to the tax debtor, however, it is obvious that Parliament did not intend the RTP mechanism to operate to the detriment of a recipient who complies with the RTP.

The scheme of the *Builders Lien Act* is to provide security for payment for those who have contributed work or materials to an improvement to land, *as long as the owner is not thereby prejudiced*.<sup>291</sup> For example, the holdback mechanism is structured so that as long as an owner complies with the obligation to maintain the holdback, the owner will not be out of pocket as a result of the operation of the Act. Issuance of an RTP can throw this scheme into disarray. Allowing an RTP to cause a compliant owner or other person who is required to maintain a holdback to lose money runs counter to the scheme of the Act.

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290. *PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc.*, 2009 BCSC 95, per Arnold-Bailey, J. at para. 86.

291. *Noranda Exploration Co. Ltd. v. Sigurdson*, [1976] 1 S.C.R. 296, per Spence, J. at 301-302, citing with approval a dictum of Masten, J.A. in *Freedman v. Guaranty Trust Co. of Canada* (1929), 64 O.L.R. 200 at 205.



It would be consistent with the intent of the federal RTP provisions and the general scheme of the *Builders Lien Act* to provide that if someone is obliged by issuance of an RTP to pay all or part of a holdback to the CRA, the required holdback ought to be reduced by the amount remitted to the CRA.

Likewise, it would not be unjust if, as between an owner and lien claimants, the risk of loss due to issuance of an RTP fell on the lien claimants. It is the lien claimants, rather than the owner, who have extended credit to the tax debtor and assumed the risk of non-payment that is normally present to some extent in commercial dealings. They may have a claim against the tax debtor, its principal, or its property under the *Builders Lien Act* trust provisions. The lien claimants also have remedies other than the ones conferred on them by the *Builders Lien Act*. They retain the right to sue the tax debtor for breach of contract. If the tax debtor becomes bankrupt, they can claim in the bankruptcy for the unpaid balance owed to them.

Nevertheless, the exposure of the lien claimants to loss resulting from issuance of an RTP could be reduced to some extent by an additional amendment deeming the amount paid to CRA under the RTP to have been received by the tax debtor for the purpose of the statutory trust under section 10 of the *Builders Lien Act*. This could be accompanied by a declaration that the tax debtor is liable to account to the trust beneficiaries for that amount to the same extent as if the tax debtor had actually received it.

In this way, the owner or other person to whom the RTP is addressed would not have to pay twice, and the lien claimants would be at least partially compensated for the reduced holdback protection by a corresponding increase in the amount they can seek to recover from the tax debtor as trust beneficiaries.

The Project Committee recommends:

*75. The Builders Lien Act should be amended to provide that if a person required by the Act to retain a holdback has paid money that would otherwise constitute holdback funds to the Receiver General of Canada pursuant to a requirement to pay (RTP) issued under s. 224 of the Income Tax Act (Canada) or section 317 of the Excise Tax Act (Canada), then:*

*(a) the required holdback is reduced to the extent of the payment;*

- (b) the amount paid to the Receiver General pursuant to the RTP is deemed for the purposes of the trust created by section 10 of the Builders Lien Act to have been received by the tax debtor named in the RTP; and*
- (c) the tax debtor named in the requirement to pay is liable to account to the beneficiaries of the trust created by section 10 of the Builders Lien Act for the equivalent of the amount paid to the Receiver General.*



## CHAPTER 11. PROCEDURE FOR ENFORCING RIGHTS UNDER THE BUILDERS LIEN ACT

### A. Introduction

This chapter concerns various issues connected with the procedural provisions of the *Builders Lien Act*. It also concerns arbitration and the exercise of rights under the Act.

### B. Lien Enforcement Actions

#### 1. THE LOCAL VENUE RULE: SECTION 27

A regular civil action may be started in any Supreme Court of British Columbia registry, and the court may also transfer a proceeding between registries for a particular purpose or for all purposes.<sup>292</sup> A proceeding under the *Builders Lien Act*, however, is governed by the same rules concerning venue as a mortgage foreclosure action. This is because section 27 of the Act declares section 21 of the *Law and Equity Act*<sup>293</sup> applies to a proceeding under the *Builders Lien Act* “in the same way that section applies to a foreclosure proceeding on a mortgage.”

Section 21(2) of the *Law and Equity Act* requires a foreclosure proceeding to be started at the Supreme Court registry in the municipality or judicial district where the land it concerns is located, unless the court otherwise orders. It also requires all applications in the proceeding to be made there, subject to the *Supreme Court Civil Rules*.<sup>294</sup> As mentioned above, those rules permit a later transfer between registries.

The local venue rule under section 21 of the *Law and Equity Act* leads to delay and cost, especially if it requires a lien enforcement action or proceeding to clear a claim of lien to be started in a venue where civil chambers sittings are held infrequently. An improvement may be located in a remote, rural area of the province, but the immediate parties, other lien claimants, other creditors, and their lawyers are likely to

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292. *Supreme Court Civil Rules*, *supra*, note 225, Rule 23-1(13).

293. R.S.B.C. 1996, c. 253.

294. *Supra*, note 225.

be based in an urban centre. It can also be somewhat difficult to determine the judicial district in which a particular parcel of rural land is situated.

In light of present-day communications and ways of doing business, it is unnecessary for a lien enforcement action to be started at the court registry closest to the improvement. Section 21(5) of the *Law and Equity Act* appears to allow the registered owner of the land to agree with a plaintiff or petitioner to allow the proceeding to be commenced at a particular registry, but agreement would not be achievable in all cases.

The Project Committee recommends:

*76. Section 27 of the Builders Lien Act should be repealed, and a provision substituted requiring only that a proceeding relating to a claim arising out of the Act must be started in the Supreme Court of British Columbia.*

## 2. THE 21-DAY NOTICE UNDER SECTION 33(2)

### (a) General

A preserved lien is extinguished if the claimant does not start an action to enforce it and register a certificate of pending litigation within a year from the date on which the claim of lien was filed.<sup>295</sup> It is often in the interest of others to cause the action to be started sooner, however. An owner may need to clear the title of liens to get new financing. Claimants who have proved their liens cannot be paid from a hold-back until all other liens of the same class have been proved or otherwise disposed of. For this reason, the *Builders Lien Act* contains a mechanism to compel a claimant to start an enforcement action sooner than the one-year limitation period under section 33(1).

Section 33(2) allows an owner, or a lien claimant who has commenced an action, to serve a notice on a lien claimant to start an action to enforce a claim of lien and register a certificate of pending litigation within 21 days after service of the notice. The notice must be in a prescribed form (Form 6), served personally or mailed or delivered to the address of service set out in the claim of lien.<sup>296</sup> If an action is not commenced and a certificate of pending litigation registered within 21 days after service of a notice under s. 33(2), the lien is extinguished.<sup>297</sup>

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295. *Supra*, note 1, ss. 33(1), (5).

296. *Supra*, note 1, ss. 33(3). If service is by mail, the notice is conclusively deemed to have been served on the eighth day after mailing: s. 33(4).

297. *Supra*, note 1, s. 33(5).

### *(b) Expansion of the class eligible to give a 21-day notice*

Others in the contract chain besides an owner or a plaintiff in a lien enforcement action may have reason to force a lien claimant to “move it or lose it.” Head contractors are often contractually bound to owners to remove any liens. A contractor who has provided security under section 24 should not have to wait for lien claimants who sit on their rights before having the opportunity to dispute the validity of the lien and seek the return of the security. A mortgagee whose mortgage ranks subsequent to liens with respect to one or more advances will be impeded from recovering the mortgage debt until the liens are proven and quantified. A judgment creditor may be similarly delayed in enforcing the judgment by the existence of unproven liens when no active steps are being taken by claimants to prove their entitlement to them.

Three other provinces have notice mechanisms in their construction lien legislation that resemble the 21-day notice under section 33(2), although the notice periods vary. The class of persons capable of serving the notice under their legislation is considerably broader. In Alberta, an owner or any person “affected by a lien” may deliver the notice.<sup>298</sup> In Manitoba, anyone claiming any interest in the land that is subject to the claim of lien, and any person having or claiming a mortgage or other charge on the land, may take advantage of the notice provision.<sup>299</sup> Similarly, anyone claiming an interest in or to the land subject to the claim of lien may give the notice in Prince Edward Island.<sup>300</sup>

Some Project Committee members are inclined towards the Alberta provision, reasoning that even persons outside the contract chain, such as a mortgagee, may have a legitimate economic interest in forcing the resolution of a disputed lien in order to break a logjam in the flow of construction funds. Others are concerned that broadening the class of authorized senders to that extent could make it difficult to determine whether a particular sender is within the authorized class. Still others are concerned that the ability to require someone to file a certificate of pending litigation should not be extended to anyone who has not provided security.

A consensus formed that the class of persons who can give the 21-day notice under s. 33(2) should be enlarged at least to include anyone who has provided security for a claim of lien.

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298. *Supra*, note 76, s. 45(1).

299. *Supra*, note 208, s. 50(1).

300. *Supra*, note 194, s. 28(1).

The Project Committee recommends:

*77. Section 33(2) of the Builders Lien Act should be amended to include anyone who has provided security for a claim of lien in the class of persons who may give a notice requiring the claimant to commence a proceeding to enforce the lien within 21 days after service of the notice.*

### 3. GIVING NOTICE OF TRIAL OR AN APPLICATION FOR JUDGMENT TO OTHER LIEN CLAIMANTS

If more than one lien enforcement action has been, or may be, commenced in relation to the same improvement, it is usually good practice for the actions to be consolidated or tried together when there are common issues to be resolved.<sup>301</sup> This is because the claimants' recoveries come from the same fund, and no lien claimant obtains priority over another by being the first to obtain a judgment or declaration of lien for the full amount owed to that claimant.

The extent of a successful lien claimant's recovery is determined by the proportion that the claimant's lien bears to the total of the liens of claimants of the same class.<sup>302</sup> If a claimant is allowed to recover the full amount of a lien ahead of other claimants of the same class, a holdback or the distributable fund created by a judicially ordered sale may be depleted to an extent that is greater than that claimant's proportionate share.

The steps taken by lien claimants in enforcement actions therefore invariably affect other claimants. The courts have generally held that a judgment in favour of a lien claimant cannot be enforced through execution process while other existing lien claims against the same fund remain unresolved.<sup>303</sup>

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301. See remarks in *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186 per Punnett, J. at para. 35. See also *Tylon Steepe Homes Ltd. v. Landon*, 2010 BCSC 192 at paras. 22-25; *Practice Manual* at 10-45. Section 33 of the pre-1997 Act required the owner or contractor to apply for consolidation if more than one lien enforcement action was commenced in relation to the same contract. If neither applied for consolidation, they were liable for the costs of additional actions that might be brought. Section 34 allowed for consolidation of lien actions on the application of "any person interested." These provisions were omitted in the 1997 Act, but s. 26 provides that a lien action is subject to the *Supreme Court Civil Rules*, *supra*, note 225. Rule 22-5(8) permits an order for the consolidation or simultaneous trial of two or more actions.

302. *Supra*, note 1, ss. 37(5), 38(2).

303. *Arctic Distributors Ltd. v. Nordine* (1984), 52 B.C.L.R. 110 (Co. Ct.) (execution of judgment stayed); *Rempel Bros. Concrete Ltd.*, *supra*, note 301 (declaration of lien refused pending resolu-

In several cases, courts have emphasized that all claimants who are affected should receive notice of an application or step in an action that may lead to a declaration of lien chargeable against a holdback.<sup>304</sup> If other claimants do not receive notice, they will lose the ability to contest the validity or the value of the competing claims.<sup>305</sup> The Project Committee is of the view that rather than leaving this as a matter of practice, the Act should require notice of the trial of a lien enforcement action (including a summary trial) or of an application by a lien claimant for judgment in a lien enforcement proceeding.

The Project Committee recommends:

*78. The Builders Lien Act should be amended to require that in a lien enforcement action, all lien claimants whose recovery may be affected by the outcome of the action should receive notice of trial or an application for judgment.*

#### 4. ENFORCING A LIEN AGAINST COMMON PROPERTY IN A STRATA PLAN

A claimant starting a lien enforcement action respecting an improvement to the common property of a strata complex can face great inconvenience and cost. The difficulties originate in the ownership structure of a stratified development. There is no separate title or PID for common property, and common property cannot be sold separately from the rest of a strata plan. The strata corporation does not own the common property. Instead, a fractional interest in the common property is appurtenant to each strata lot. For these reasons, the land title office does not endorse claims of lien on the common property folio. Claims of lien filed in connection with improvements exclusively relating to common property must be endorsed on the title to each strata lot. This requires the claimant to list the PID for each strata lot in the claim of lien. As a result, lien claimants sometimes file liens against a few selected strata lots in the hope this will be sufficient to induce payment.

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tion of other lien claims); *Hollyburn Lumber Co. v. Pacific 2000 Design and Development Ltd.*, [1995] B.C.J. No. 1748 (S.C.) (execution on judgment for full amount of lien stayed). But see *Limen Forming West Ltd. v. Stuart Olson Dominion Construction Ltd.*, 2017 BCSC 1485, at paras. 159-161. There a declaration of lien was granted for the full value of Limen's judgment, despite the fact no notice had been given to third party claimants. This was because the total of the claims of Limen, a subcontractor, and its sub-subcontractors did not exceed the value of a lien bond provided by the head contractor, and the defendants did not argue that the amount claimable under the *Builders Lien Act* was less than the amount of the judgment to which Limen and its subcontractors were entitled.

304. See *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, *supra*, note 301 at para. 33; *Patent Construction Systems v. Greater Vancouver Sewerage and Drainage District*, 1999 CanLII 6559.

305. *Rempel Bros. Concrete Ltd.*, *supra*, note 301.



Furthermore, the land title office will not register a certificate of pending litigation against a strata lot unless the registered owner is named as a defendant in the relevant action. This requires the plaintiff to search the title to each strata lot to obtain the identity of the owner. Once the action is commenced, the plaintiff must serve the notice of civil claim on the individual strata lot owners. In large developments, the number of defendants who must be served may number in the hundreds.

Orders for substitutional service on the strata corporation as agent of the owners and to abbreviate the style of cause may be obtainable after the action is commenced, but the cost and loss of time involved in searching the titles to all strata lots cannot be avoided as matters stand.

This situation prevails, despite the fact that the *Builders Lien Act* deems the strata corporation to be the owner of the common property or common assets for certain limited purposes. Section 1(4.1) deems a strata corporation to be the owner for the purposes of sections 7 and 41, meaning that the strata corporation is entitled to receive copies of certificates of completion, may act as a payment certifier, and must respond to information requests from lienholders that section 41 entitles them to make. Section 1(4.2) deems a reference to an owner in section 25 to include a strata corporation with respect to common property and common assets, which allows the strata corporation to apply to cancel a claim of lien on specified grounds. This does not help a lien claimant who must name and serve all the strata lot owners as defendants when commencing a lien enforcement action.

Each of sections 1(4.1) and (4.2) allows for regulations deeming a strata corporation to be an owner of common property or common assets for additional purposes, but no such regulations have been passed.

Section 163(1) of the *Strata Property Act*<sup>306</sup> provides that the strata corporation may be sued as a representative of the owners with respect to any matter relating to the common property and common assets. Nevertheless, this provision has been held insufficient to relieve a lien claimant of the necessity of naming individual strata lot owners as defendants in an action to enforce a claim of lien relating to the common property.<sup>307</sup>

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306. *Supra*, note 31.

307. See *Primex Industries Inc. v. The Owners, Strata Plan LMS 1751*, *supra*, note 65, at para. 41. The court applied the rule of statutory interpretation that specific provisions prevail over general ones to the extent of any conflict, and classified s. 163(1) of the *Strata Property Act* as a general provision. As such, it had to yield to the specific provisions of the *Builders Lien Act* concerning in

The consultation paper tentatively recommended a solution whereby the land title registrar would be authorized to designate a single PID for the common property in a strata plan for the restricted purpose of filing claims of lien concerning an improvement affecting only common property.<sup>308</sup> In order not to disturb the basic scheme of strata property ownership, the enabling legislation would have specified that if a claim of lien were filed against the single PID for the common property, the lien would attach to the fractional interest of each strata lot owner in the common property. This would have been accompanied by provisions making it possible to register a certificate of pending litigation naming the strata corporation as a representative defendant in an action to enforce such a lien, without the need to name each strata lot owner as a defendant.

The tentative recommendation to designate a restricted-purpose PID for common property was strenuously opposed by the Land Title and Survey Authority on the ground that it would require extensive change to the electronic registration and record-keeping system. The Authority emphasized that the “Relate to plan” field in the user interface already allows a charge to be registered electronically against all strata lot titles and the common property entitlements attaching to them without the need to list all strata lots in the application for registration.

A response from a large law firm suggested that even if a single, restricted-purpose PID were created for common property in a strata plan, lawyers would continue to advise their clients to file against individual strata lots as well.

In the face of the objections by the Land Title and Survey Authority and the suggestion that the single PID solution would not necessarily change the practice of listing all or selected strata lots in the claim of lien, the Project Committee abandoned that approach and decided to focus instead on procedural changes to relieve against onerous search and service requirements and the associated cost. The necessary amendments could be made in either the *Builders Lien Act* or Division 5 of Part 5 of the *Strata Property Act*, which deals with the application of the *Builders Lien Act* to a strata plan. They would include an express provision declaring that section 163 of the *Strata Property Act* applies to an action to enforce a claim of lien relating to an improvement to the common property, and that it is unnecessary to name or serve

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*rem* lien remedies, together with s. 90 of the *Strata Property Act*, which allows a strata lot owner to obtain removal of a lien from a strata lot on payment into court of the proportionate share of that strata lot of the amount secured by the lien.

308. Essentially the same solution was recommended in the report of the Construction Lien act Review in Ontario. See Reynolds and Vogel, *supra*, note 17 at 54. It was not among the recommendations implemented in the 2017 amendments to the *Construction Lien Act*, however.

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the owners of individual strata lots as defendants in such an action. This would allow the strata corporation to be named as a defendant representing the strata lot owners in pleadings and the certificate of pending litigation. Service on the strata corporation as the representative defendant would amount to service on the owners of the strata lots.

The land titles registrar would be expressly authorized to register a certificate of pending litigation in a lien action naming the strata corporation as the representative defendant against strata lot titles, without the owners of the strata lots having to be individually named.

Once the lien enforcement action is commenced, sections 166 and 167 of the *Strata Property Act* would come into play. Section 167(1) of the *Strata Property Act* would require the strata corporation to inform the strata lot owners of the action. Section 167(2) would provide for apportionment of the expenses of defending the action amongst the strata lot owners according to the same formula as liability for a judgment against the strata corporation would be shared.

In an action to enforce a lien with respect to an improvement only affecting common property, there would be no order for sale as common property cannot be severed and sold separately from the strata lots. Instead, judgment would be given against the strata corporation. Section 166 of the *Strata Property Act* would then make the strata lot owners proportionally liable for the judgment according to the formula used to determine contributions from individual strata lots to the operating and contingency reserve funds.

The Project Committee recommends:

*79. For the purpose of preserving and enforcing a lien under the Builders Lien Act in respect of an improvement exclusively to the common property in a strata plan, the appropriate enactments should be amended to provide that*

- (a) section 163 of the Strata Property Act applies to an action to enforce such a lien in which the strata corporation is named as a defendant representing all owners of strata lots;*
- (b) a certificate of pending litigation in an action to enforce a lien in respect of an improvement exclusively relating to common property that names the strata corporation as the defendant representing all owners of strata lots is registrable against the title to each strata lot, and it is unnecessary to list each owner individually as a defendant in the certificate of pending litigation;*

(c) *in an action to enforce such a lien, no order for sale may be made, but the court may instead give judgment against the strata corporation for the maximum amount recoverable under the Builders Lien Act, and section 166 of the Strata Property Act applies to make the strata lot owners liable for the judgment according to their proportionate shares under section 166(2).*

### 5. DEALING WITH DELAYED OR DORMANT BUILDERS' LIEN ACTIONS

When lien claimants delay in prosecuting lien enforcement actions, non-lien creditors of the same debtor with already established, quantified claims are sometimes impeded from pursuing their remedies until the builders' liens are proven.<sup>309</sup> This is a consequence of the priority that potentially could attach to the unproven claims of lien. Other creditors should not be compelled to wait indefinitely to enforce their rights against a fund when a lien claimant delays inordinately in proving the lien. There are judicial remarks in the case law to the effect that there is an expectation of expediency in builders' lien actions, because the Act is one that creates a special privilege.<sup>310</sup>

Civil procedure provides two means of obtaining relief against inordinate delay that apply to proceedings under the *Builders Lien Act* as they do to other civil proceedings. These are an application to dismiss for want of prosecution, and an application for cancellation of a certificate of pending litigation under s. 252 of the *Land Title Act*.<sup>311</sup>

The test for want of prosecution that may justify an exercise of discretion to dismiss a builders' lien action is the same as in other civil proceedings.<sup>312</sup> An applicant must establish all of the following:

1. There has been inordinate delay;
2. The delay is inexcusable;

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309. See *Vancouver City Savings Credit Union v. Avicenna Group Holdings (Chilliwack) Ltd.*, 2015 BCSC 31 for an extreme example of this scenario.

310. *Hanna's Construction Services Ltd. v. Blue River III Inc.*, 2006 BCCA 142, per Thackray, J.A. at para. 21; *Lebon Construction v. Wiebe* (1995), 10 B.C.L.R. (3d) 102 per Rowles, J.A. at para. 44. In *Kamal & Bros. Enterprises Inc. v. Mohan*, 2004 BCSC 1620, a builders' lien action in which a nine-year delay had occurred was dismissed for want of prosecution.

311. *Supra*, note 67.

312. *Hanna's Construction Services Ltd. v. Blue River III Inc.*, *supra*, note 310.

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### 3. The applicant is likely to be seriously prejudiced by the delay.<sup>313</sup>

Only an opposing party to a proceeding may apply to have it dismissed for want of prosecution. This does not avail a creditor who is not a party to a builders' lien action, but who is delayed by the failure of the claimant to pursue the action with ordinary diligence.

An application under section 252 of the *Land Title Act*,<sup>314</sup> on the other hand, is available to non-parties as well as parties to an action. Section 252(1) provides that if no step has been taken in an action for a year, anyone claiming to be entitled to an interest in the land may apply for an order cancelling a certificate of pending litigation. Section 252(2) provides expressly that an applicant who is not a party to the action to which the CPL relates may apply by petition.

Recourse to section 252 does not require that the applicant's interest rank in priority over the right or title claimed by the plaintiff in the proceeding to which the certificate of pending litigation relates. It is only necessary that the applicant have an estate or interest in the land that the certificate of pending litigation affects. Other builders' lien claimants would be able to apply under section 252 of the *Land Title Act*, inasmuch as a builder's lien is a secured interest in land. Section 252 would also appear to be available to judgment creditors who have registered certificates of judgment against the title to the land on which the improvement is located. They too have an interest in the land by virtue of the judgment lien created by section 86(3) of the *Court Order Enforcement Act*.<sup>315</sup>

While section 252 may be used by non-parties, it is of chief benefit to registered owners and other persons who desire that some dealing with the land take place free of a claim being asserted in litigation. It is only a partial solution at best for a creditor frustrated by a dormant builders' lien action, as the lien itself would remain alive and capable of proof despite the cancellation of the certificate of pending litigation.<sup>316</sup>

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313. *Irving v. Irving* (1982), 38 B.C.L.R. 318 (C.A.).

314. *Supra*, note 67.

315. R.S.B.C. 1996, c. 78.

316. Section 33(5) of the *Builders Lien Act* only requires that a certificate of pending litigation be registered within the one-year period from the filing of the claim of lien, not that it remain registered throughout the entire duration of the action to enforce the lien.

Several provinces have provisions in their construction lien legislation to prevent multi-year delays in proving liens. Section 37(1) of the Ontario *Construction Act*<sup>317</sup> provides that once an action to enforce a lien has been commenced, the lien will expire on the second anniversary of the commencement of an action to enforce it, unless the action has been set down for trial or an order is made for the trial of an action in which it can be enforced. When a lien has expired under s. 37(1), the court is empowered under s. 46(1) to dismiss the action and vacate the registration of the claim for lien on the application of “any person.”

Saskatchewan has a similar provision providing for the expiry of a lien if an action in which the lien may be enforced is not set down for trial within two years of the commencement of the action, but the court has a discretion to extend the time.<sup>318</sup>

New Brunswick provides that an action to enforce a lien is deemed to have been discontinued one year after an action to enforce it is commenced unless either the action has been set down for trial, or an application has been made for the continuation of the action and served on the defendant.<sup>319</sup> If the court allows continuance of the lien action, it may impose terms and give directions as it finds appropriate.<sup>320</sup>

Newfoundland and Labrador provides that where no appointment for trial has been taken out within one year after registration of the certificate of action (corresponding to a certificate of pending litigation), a judge may vacate the certificate of action and discharge all liens that are dependent on it.<sup>321</sup>

Alberta has a provision stating that if no trial occurs within two years from the date of registration of a certificate of *lis pendens*, any interested party (which presumably could include another creditor) may apply to have the *lis pendens* vacated and the lien to which it relates discharged.<sup>322</sup>

The Project Committee considered these precedents, but did not look favourably on imposing arbitrary deadlines for setting down actions for trial. The reason was that forcing all actions towards trial within a specified timeframe would tend to drive up costs to a point at which the benefit of the lien could effectively be lost. In the expe-

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317. *Supra*, note 8.

318. *The Builders' Lien Act*, *supra*, note 96, ss. 55(1), (2).

319. *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6, s. 52.1(1).

320. *Ibid.*, s. 52.1(2).

321. *Supra*, note 186, s. 23(4).

322. *Builders' Lien Act*, *supra*, note 76, c. B-7, s. 46(2).

rience of the Project Committee members, the majority of lien enforcement actions are settled before reaching the trial stage.

The Project Committee considered another option whereby a lien would automatically expire if the action did not reach trial stage within a specified period. The action could still continue in respect of the contractual claim. In other words, the dilatory lien claimant would cease to be a secured creditor.

A third option would be to allow financially interested persons, whether parties to the action or not, to apply to dismiss the action for delay and empower the court to make orders appropriate in the circumstances. The provision would not employ the terms “want of prosecution” or other wording that might imply adoption of the test for want of prosecution in general civil procedure. It would not preclude an application by a defendant to dismiss for want of prosecution on the basis of the conventional requirements for that relief, however.

A consensus formed around a variant of the second and third options, embodied in the recommendation below. The provision on delay that is envisioned would include a statement that a claimant who commences a lien enforcement action must pursue it expeditiously. The purpose of the statement would be to serve as a guiding principle for application of the provision on delay. The ability to apply for relief against delay by the plaintiff would be extended to anyone who is financially interested in the outcome of the action. This would include other lien claimants, other creditors, and persons in the contract chain who could be exposed to economic loss as a result of delay in a pending lien action. Last, the provision would give wide discretion to the court to give directions for conduct of the action to ensure it proceeds on an expeditious footing. In cases of extreme and indefensible delay, the court should be empowered to dismiss the action insofar as it concerns the enforcement of a lien on land. Associated contract and statutory trust claims asserted in the same action would not be subject to summary dismissal for delay alone, and would remain subject to the usual test for determining whether a proceeding should be dismissed for want of prosecution.

The Project Committee recommends:

*80. The Builders Lien Act should be amended to provide that:*

*(a) a lien claimant must conduct an action to enforce the lien expeditiously;*

- (b) anyone with a financial interest in the disposition of an action under the Act may apply to the court for relief because of a failure to conduct the action expeditiously; and
- (c) the court may make any order that it considers appropriate on the application, including dismissal of a claim to enforce a lien under section 2(1) of the Builders Lien Act that is advanced in the action, for failure to conduct the action expeditiously.

## C. Miscellaneous Procedural Issues

### 1. RULES FOR SERVICE OF SECTION 23 AND 24 PETITIONS

Section 33(3) specifies that a 21-day notice to a lien claimant to commence a lien enforcement action may be served personally or by mail or delivery, and the sender of the notice may use the address for service in the claim of lien if serving by mail or delivering it by hand. There are no corresponding rules in the Act authorizing use of the address for service in the claim of lien for the various other proceedings possible under the Act, such as applications under sections 23 and 24, the sections that allow for removal of liens from title by paying the holdback into court or providing security deemed adequate by the court. It is often necessary in those proceedings to serve documents on claimants with whom the sender of the document has had no prior contact, however.

There are practical grounds why the service rules applicable to a 21-day notice should be available in any application or proceeding relating to a claim of lien, supplementing those in the *Supreme Court Civil Rules*.<sup>323</sup> In particular, it should always be possible to use the address for service in a claim of lien. Proceedings under the *Builders Lien Act* may be viewed as a continuum beginning with the filing of a claim of lien. The address for service in a claim of lien is placed on public record in the land title office at the beginning of the continuum. It is more easily found than an address for service appearing in a court file.

In one respect, however, it would make sense for the rules currently applicable to service of a 21-day notice by mail to be harmonized with those in the *Supreme Court Civil Rules* rather than supplementing them. That is the case of service by mail. Section 33(4) provides that service of a 21-day notice by mail is conclusively deemed to occur on the eighth day after mailing within Canada. Service of a document by mail under the *Supreme Court Civil Rules* is deemed to occur one week after mailing on

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323. Rule 4-1(2) of the *Supreme Court Civil Rules*, *supra*, note 225, allows a party to have more than one address for service.



the same day of the week as the date of mailing, unless that falls on a Saturday or a holiday, in which case service is deemed to occur on the next day that is not a Saturday or holiday.<sup>324</sup> Having two separate rules for determining when service by mail of a document linked to the initiation of court proceedings is deemed to occur is unnecessarily complicated and confusing. Section 33(4) should be amended to adopt the same rule for deemed service of a 21-day notice as is applicable to a document served in a Supreme Court proceeding.

The Project Committee recommends:

*81. The address for service set out in the claim of lien should be capable of use as the address for service of the claimant for the purpose of any application or proceeding relating to the lien.*

*82. The rules in section 33(3) of the Builders Lien Act for service of a notice to commence action should be applicable for the purpose of serving a document on a lien claimant in any application or proceeding under the Act, in addition to the rules for service under the Supreme Court Civil Rules.*

*83. Section 33(4) of the Builders Lien Act should be amended to adopt the same rule for determining when service by mail of a notice under section 33(2) is deemed to occur as is applicable to a document served by mail under the Supreme Court Civil Rules.*

## 2. DESCRIPTION OF LAND IN ACKNOWLEDGMENT OF RECEIPT OF MATERIAL

Section 29 states that an acknowledgment of receipt of material for incorporation into an improvement at a named address, signed by the person to whom it is supplied, is proof in the absence of evidence to the contrary that the material was delivered to the land described by the address.

Many construction and installation projects occur in areas where there are no civic addresses, although all projects can generally be identified by a descriptive name. Section 29 is not of assistance to material suppliers to prove delivery in those cases. It should be possible to indicate the location of an improvement in an acknowledgment of receipt by other means sufficient to identify the specific land in question. For example, the name of the project might be used for this purpose in some cases, though obviously not in ones where a project covers many separate parcels of land.

The Project Committee recommends:

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324. *Supra*, note 225, Rule, 4-2(4).

84. *Section 29 of the Builders Lien Act should be amended to permit land to be described by means other than an address in an acknowledgment of receipt of material, including by means of a project name, if sufficient to identify the location.*

### 3. DELIVERY OF COPY OF BOND VS. PARTICULARS

Among the information that an owner is obliged by section 41(1)(a) to provide on request to a lienholder or statutory trust beneficiary are “particulars of any labour and material payment bond” relating to the contract under which the lienholder or beneficiary claims. The requirement to provide particulars is archaic. Nowadays a copy of a document may be generated at least as easily as compiling “particulars.” Section 41(1)(a)(iv) should be amended to require provision of a *copy* of a labour and material payment bond.

The Project committee recommends:

85. *Section 41(1)(a) of the Builders Lien Act should be amended to require delivery of a copy of a labour and material payment bond on request, rather than particulars of the bond.*

## D. Arbitration and the Builders Lien Act

### 1. INTRODUCTION

The procedural requirements and timelines of the *Builders Lien Act* and the legislative framework for arbitration do not fit together easily. The court-based process under the Act has been characterized as being similar to a class action in which each class of lien claimants obtains a pro rata share of the recoveries by those above them in the construction pyramid, with ample powers in the court to deal with multiple parties.<sup>325</sup> Arbitration, on the other hand, is a process specific to the parties who have contractually submitted to it, and arbitrators generally do not have power to add additional parties or deal in other ways with multiparty situations.<sup>326</sup>

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325. Submission addressed to the Uniform Law Conference of Canada (ULCC) by the National Construction Law Section of the Canadian Bar Association: ULCC, *Proceedings of the Seventy-ninth Annual Meeting* (Ottawa: ULCC, 1997) at 162-163.

326. *Ibid.* While arbitration clauses in some U.S. construction contracts may contemplate joinder of subcontractors as additional parties, this is not typical of construction contracts used in Canada. A subcontractor cannot be bound implicitly to an arbitration submission in a head contract through incorporation by reference. Express language in the subcontract is necessary: *Dynatec Mining Ltd. v. PCL Civil Construction (Canada) Ltd.* (1996), 25 C.L.R. (2d) 259 (Ont. Gen. Div.).

The National Construction Law Section of the Canadian Bar Association submitted a report on this subject to the Uniform Law Conference of Canada (ULCC) in 1997.<sup>327</sup> It noted that lien legislation and a construction contract containing an arbitration clause may require a party to pursue inconsistent courses of action. The report pointed out that:

- a stay of proceedings that arbitration legislation requires a court to impose if a party commences a legal proceeding in respect of subject-matter covered by an arbitration clause may be in conflict with requirements under builders lien legislation to take procedural steps within a specified time;
- filing a claim of lien or commencing an action to enforce a lien could amount to a waiver of the right to arbitration;
- the position of third parties who are interested in a construction dispute, but who are not parties to the contract under which an arbitration stay of proceedings is imposed, may be prejudiced in the ability to assert their rights effectively by the stay. Arbitration does not provide the flexibility to deal with multiple parties that builders' lien procedure does.

In response, the ULCC developed uniform provisions to prevent arbitration stays from interfering with the ability to preserve lien remedies, while also protecting the right to arbitration under construction contracts.<sup>328</sup>

The uniform provisions also prevent a lien enforcement action commenced by a non-party to the arbitration from being stayed because of an arbitration that is underway in a dispute that relates to the same improvement.

BCLI recommended enactment of a version of the uniform provisions adapted for British Columbia by using the appropriate references to the relevant British Columbia statutes and their terminology in its *Report on Builders Liens and Arbitration*, issued in 2002.<sup>329</sup> As envisioned in that report, the uniform provisions would appear as sections 46.1 to 46.3 of the *Builders Lien Act*.

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327. Uniform Law Conference of Canada, *Proceedings of the Seventy-ninth Annual Meeting* (Ottawa: ULCC, 1997), Appendix C.

328. Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Ottawa: ULCC, 1998), Appendix D. Nova Scotia enacted the provisions in 2004. See *Builders' Lien Act*, R.S.N.S. 1989, c. 277, ss. 33A-33C, as enacted by S.N.S. 2004, c. 14, s. 17.

329. British Columbia Law Institute, *Report on the Builders Lien Act and Arbitration*, Report No. 22 (Vancouver: The Institute, 2002), Appendix C.

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### 2. THE UNIFORM PROVISIONS ON ARBITRATION AND THE BUILDERS LIEN ACT

The uniform provisions, as adapted for enactment in British Columbia and recommended in the 2002 BCLI report, were as follows:

#### **Certain steps not affected by stay**

**46.1** Notwithstanding the *Arbitration Act*<sup>330</sup> or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, a stay of proceedings granted by any court of competent jurisdiction to assist the conduct of an arbitration does not prohibit the taking of any step pursuant to this Act or another enactment:

- (a) to file a claim of lien under section 15;
- (b) to commence an action to enforce a lien and register a certificate of pending litigation for the purpose of preventing the extinguishment of the lien under section 33(5);
- (c) to preserve the land or personal property to which a lien attaches or any estate or interest in land or personal property to which a lien attaches; or
- (d) to have a receiver, receiver manager or trustee appointed to preserve or complete the improvement.

#### **Right to arbitrate not waived**

**46.2** Notwithstanding the *Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in section 46.1 does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract.

#### **Certain actions not stayed by arbitration**

**46.3** Notwithstanding the *Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction:

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330. The *Commercial Arbitration Act*, R.S.B.C. 1996, c. 65 was renamed the *Arbitration Act* after the BCLI *Report on the Builders Lien Act and Arbitration*, supra, note 5, was issued.

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- (a) an action by a lien claimant to enforce a lien is not stayed by the commencement or continuation of arbitration proceedings with respect to a matter that, in whole or in part, deals with the subject-matter of the action if the lien claimant is not, and could not be made, a party to the arbitration; and
- (b) no order shall be made directing a stay of an action described in paragraph (a) solely on the ground that arbitration proceedings have been commenced or continued between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action.

### 3. REVIEW OF THE UNIFORM PROVISIONS AND RECOMMENDATION

The Project Committee was invited to consider the matter of arbitration stays and the *Builders Lien Act* independently and come to its own conclusions. While initially having some reservations regarding section 46.3 of the uniform provisions, the Project Committee endorses the amendment of the *Builders Lien Act* to include these provisions with two changes in section 46.1.

The first change is the deletion of the words “for the purpose of preventing the extinguishment of the lien under section 33(5)” from section 46.1(b), as the Project Committee considered them superfluous.

The second change is to add “to apply to remove a claim of lien” to the list in section 46.1 of steps that may be taken pursuant to the *Builders Lien Act* that should not be affected by an arbitration stay. The Project Committee saw no reason why an arbitration at some point in the contract chain should prevent the securing and removal of a claim of lien.

The Project Committee recommends:

*86. The Builders Lien Act should be amended to incorporate the provisions originating with the Uniform Law Conference of Canada that appear, slightly modified for enactment in British Columbia, in Appendix C of the BCLI Report on Builders Liens and Arbitration as sections 46.1, 46.2, and 46.3, with the following additional modifications:*

- (a) section 46.1 should contain a further paragraph stating “to remove a lien”;*
- (b) the words “for the purpose of preventing the extinguishment of the lien under section 33(5)” should be deleted from paragraph (b) of section 46.1.*

## CHAPTER 12. CONCLUSION

The history of the *Builders Lien Act* and predecessor statutes reveals that construction lien legislation in British Columbia has been a continual work in progress. Each successive review over the course of the 140 years during which this legislation has been in effect has had the aim of improving its function and adapting it to change in the construction industry and general commercial environment.

This report reflects the latest re-examination of the legislation and its operation. Its recommendations are the product of lengthy and intensive deliberations and consultation. They have been informed both by the knowledge of the Project Committee, whose members work daily with the *Builders Lien Act*, and by the diverse viewpoints of owners, contractors, building professionals, other legal practitioners, and many other stakeholders who made their views known in the course of the Builders Lien Act Reform Project. BCLI is highly appreciative of the efforts of the Project Committee and the contributions of stakeholders to the revision of this complex and important statute, and its members firmly believe that implementation of the recommendations in this report will be of major benefit to the construction sector and the general economy.



## APPENDIX A

### List of Recommendations

1. *The Builders Lien Act should be amended to increase the minimum amount for which a claim of lien may be filed to \$3,000 (majority) (minority: \$25,000). (p. 26)*
2. *The present Form 5 (Claim of Lien) should be replaced by the form set out below: (see pp. 30-31)*
3. *The Builders Lien Act should be amended to include a provision declaring that*
  - (a) *only substantial compliance with the provision of the Act concerning the form of a claim of lien is necessary; and*
  - (b) *a claim of lien is not invalidated for the reason only that it fails to comply with any provision of the Act concerning form or misnames a person unless, and then only to the extent that, a person is prejudiced by the failure or misnomer.*  
(p. 34)
4. *The Builders Lien Act should be amended to provide that*
  - (a) *a claim of lien that is the subject of a notice under section 308(1) of the Land Title Act may be removed pursuant to an order under section 23 or cancelled pursuant to an order under section 24 of the Builders Lien Act, notwithstanding that at the time the order is made, the claimant has not fulfilled the registrar's requirements stated in the notice to permit the claim of lien to be filed against title;*
  - (b) *upon receiving a certified copy of an order under section 23 or section 24 of the Builders Lien Act applicable to a claim of lien that is the subject of a notice under section 308(1) of the Land Title Act, the registrar must treat the claim of lien as being immediately subject to the order, regardless of whether the claimant later fulfils the registrar's requirements stated in the notice; and*
  - (c) *if the claimant fulfils the registrar's requirements stated in the notice under section 308(1) of the Land Title Act to permit the application to file the claim of lien to*



*proceed, the claim of lien must appear on the title as having been removed or cancelled by virtue of the order under the Builders Lien Act. (majority) (p. 36)*

*4a. A claim of lien with one or more defects that prevent its acceptance for filing by the land title office should simply be rejected, without any defect notice being issued. (minority) (p. 36)*

*5. Claims of lien against provincial Crown tenures under the Petroleum and Natural Gas Act, the Coal Act, and the Land Act should be capable of preservation in addition to those against mineral titles as defined in the Mineral Tenure Act. (p. 44)*

*6. For the purpose of facilitating implementation of Recommendation 5, a definition of “interest in land” extended to include tenures issued under the Land Act, the Mineral Tenure Act, the Coal Act, and the Petroleum and Natural Gas Act should be added to the Builders Lien Act. (p. 44)*

*7. A filing mechanism should be available to enable a lien claimant to preserve a claim of lien against an unregistered interest, including an interest in unpatented land, from expiration. (p. 44)*

*8. In the event that Recommendation 7 is not implemented, the Builders Lien Act should be amended to provide that subject to section 34, a contractor, subcontractor, or worker who has provided labour, services or materials in relation to an improvement situated on, in, or under unpatented land may claim against the holdback to recover the amount owing to that person by commencing an action for a declaration that the holdback is charged with payment of that person, within the time in which that person would have been able to file a claim of lien if the land had been brought under the Land Title Act. (p. 44)*

*9. An exception to section 199 of the Land Title Act should be created (either by direct amendment to section 199 or amendment of the Builders Lien Act) to permit a claim of lien against an unregistered leasehold interest to be filed despite the prohibition against registration of a subcharge if the principal charge has not been registered. (majority) (p 48)*

10. *The Builders Lien Act should be amended to expressly state that sales and value-added taxes (PST and GST) are to be included in the price or value of work or materials under sections 2(1) and 4(1) for the purposes of calculating the amount of a lien and a holdback, respectively.* (p. 49)
11. *The definitions of “contractor” and “subcontractor” in the Builders Lien Act should be amended by adding the words “in exchange for payment” following “improvement.”* (p. 51)
12. *The definition of “improvement” should be amended to expressly include demolition.* (p. 51)
13. *The removal of anything from land for the dominant purpose of using it elsewhere should be expressly excluded from the definition of “improvement” under the Builders Lien Act.* (p. 55)
14. *Section 2(1)(g) of the Builders Lien Act should be amended to clarify that a lien under the Act for the supply of material attaches only to the material delivered to or placed on the land by the lienholder, rather than to all material delivered to or placed on the land.* (p. 56)
15. *Section 3(2) of the Builders Lien Act should be amended to provide that section 3(2) does not apply to an improvement “commenced,” rather than “made,” after the owner has filed a notice of interest in the land title office.* (p. 57)
16. *The Builders Lien Act should be amended to allow agreement between owners and contractors on what will be considered separate improvements for the purposes of the Act in a project involving multiple components.* (p. 58)
17. *Section 41(1)(a) of the Builders Lien Act should be amended to expressly include terms relating to the designation and completion of phases or separate improvements as being among the terms that must be disclosed on the written request of a lienholder or trust beneficiary.* (pp. 58-59)
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18. *The definition of “owner” in the Builders Lien Act should be amended by deleting the words “who has, at the time a claim of lien is filed.” (p. 60)*

19. *The Builders Lien Act should be amended to provide that if a provincial, municipal, treaty first nation, or other public entity enters into an agreement with a private party that requires the private party to undertake to finance and build an improvement on behalf of the public entity, and/or maintain and operate the improvement after its completion, and to enter into one or more agreements for work and supply of materials for that purpose,*

- (a) the private party has the duty to comply with the requirements of the Act respecting holdbacks;*
- (b) the amount of any holdback must be calculated on the basis of the payments made on account of the agreement between the private party and the provider of work or material supplier. (p. 63)*

20. *The Builders Lien Act should be amended to provide for a notice in prescribed form of the filing of a claim of lien to be sent by the land title office by ordinary mail to*

- (a) the registered owner at the address provided under section 149 of the Land Title Act, or*
- (b) if the claim of lien affects common property in a strata plan, to the strata corporation at the address provided under section 62(1) of the Strata Property Act,*

*once the claim of lien has been endorsed on the title to the land it describes. (p. 69)*

21. *The Builders Lien Act should be amended to provide that voluntary discharge of a claim of lien does not in itself prevent the claimant from filing further claims of lien in relation to the same work or materials.*

*(p. 69)*

22. *Section 20(2) of the Builders Lien Act should be amended by*

- (a) repealing paragraph 20(2)(a) referring to the completion, abandonment or termination of a head contract; and*
- (b) providing simply that a claim of lien to which section 20(1) does not apply may be filed no later than 45 days after the improvement has been completed or abandoned.*

(p. 77-78)

23. *The words “or a substantial part of it” in section 1(3) of the Builders Lien Act should be repealed.* (p. 80)

24. *Section 1(5) of the Builders Lien Act should be amended:*

- (a) to provide that an improvement is deemed to have been abandoned after 60 days in which no work was done in connection with the improvement, unless the cause of the cessation of work is among those listed in the proviso to section 1(5); and*
- (b) to add “an order made by a public authority exercising statutory powers” to the causes of cessation of work listed in the proviso to section 1(5) as being exceptions that do not lead to deemed abandonment.* (p. 81)

25. *The Builders Lien Act should be amended to allow a certificate of cessation of work, having the same effect as a certificate of completion with respect to the time within which a claim of lien may be filed, to be issued by or on behalf of the party liable for payment under a contract or subcontract if work under the contract or subcontract has stopped and will not resume.* (p. 82)

26. *The Builders Lien Act should require certificates of completion and certificates of cessation of work to be dealt with similarly in terms of issuance, publication, and distribution of copies.* (p. 82)

27. *Section 1(4) of the Builders Lien Act and section 88(1) of the Strata Property Act should be relocated to section 20 of the Builders Lien Act.* (p. 83)

28. *The 3-2-1 formula should be applied with reference to the cost to complete or correct the work as would be incurred by the owner, based on the terms of the contract or subcontract in question.* (p. 85)

29. *The Builders Lien Act should be amended to provide that the cost of materials already delivered to the site of an improvement (whether or not installed) should not be included in the cost of work remaining to be done when the 3-2-1 formula is applied. The cost of materials not yet delivered to the site of the improvement should be included in the cost of work remaining.* (p. 86)

30. *The Builders Lien Act should be amended to require that a certificate of completion or a certificate of cessation of work must comply substantially with the prescribed form.* (p. 88)

31. *The form of certificate of completion should be amended to delete reference to the date of completion.* (p. 88)

32. *The form of a certificate of completion or cessation of work should incorporate a warning to lien claimants that the time for filing a claim of lien is limited and the Builders Lien Act should be consulted to determine the time allowed for filing.* (p. 89)

33. *Section 7(1)(a) of the Builders Lien Act should be amended for reasons of clarity by repealing the words “person responsible for payment certification” and substituting “person responsible for certifying the amounts to be paid to the contractor or subcontractor.”* (p. 90)

34. *The Builders Lien Act should be amended to expressly authorize the parties to a contract or subcontract to appoint a payment certifier solely for purposes of issuing certificates of completion or cessation of work.* (p. 90)

35. *The Builders Lien Act should be amended to clarify that issuance of a certificate of completion or a certificate of cessation of work consists of delivery of the signed certificate by any method to the person responsible for carrying out the work under the contract or subcontract to which the certificate refers.* (p. 92)

36. *The Builders Lien Act should be amended to abolish the notice of certification of completion under section 7(4).* (p. 93)

37. *The Builders Lien Act should be amended to require delivery of a copy of a certificate of completion or a certificate of cessation of work to a lienholder requesting the same, instead of “particulars” of the certificate.* (p. 94)

38. *The Builders Lien Act should be amended to require posting of a copy of a certificate of completion on the site of the improvement within 7 days after issuance.*  
(p. 95)

39. *The Builders Lien Act and Strata Property Act should be amended to abolish the so-called Shimco lien and the corresponding lien referred to in the Strata Property Act by*

*(a) repealing the words “, a holdback required to be retained under this section is subject to a lien under this Act, and” in section 4(9) of the Builders Lien Act;*

*(b) adding the words “under section 2(1)” after “liens” in paragraph (a) of section 5(2) of the Builders Lien Act;*

*(c) amending section 8(4) of the Builders Lien Act by deleting the words “or proceedings are commenced to enforce a lien against the holdback”;*

*(d) repealing section 88(3) of the Strata Property Act; and*

*(e) deleting the words “, or proceedings have been commenced, to enforce a lien against the holdback,” from section 88(4) of the Strata Property Act and substituting the words “against that strata lot.”* (p. 105)

40. *Sections 8(1) and (2) of the Builders Lien Act should be amended to provide that the holdback period for a contract or subcontract expires at the end of 45 days after*

*(a) issuance of a certificate of completion or cessation of work, if any, with respect to the contract or subcontract, or any contract or subcontract above it in the contractual chain;*

*(b) completion or abandonment of the improvement, if no certificate of completion or cessation of work described in paragraph (a) is issued. (p. 109-110)*

*41. Section 34(2)(c) of the Builders Lien Act should be repealed. (p. 112)*

*42. Section 8(4) of the Builders Lien Act should be repealed, and substituted by one or more provisions stating:*

*(a) payment of the holdback required to be retained under section 4 may be made after expiry of the holdback period;*

*(b) the effect of payment of the holdback is to discharge the liens of the person to whom the holdback is paid, and of any person engaged by or under that person, except an unsatisfied lien of any of those persons who has preserved the lien by filing a claim of lien within the time allowed by section 20; and*

*(c) if any of those persons has filed a claim of lien within the time allowed by section 20, payment of the portion of the holdback that exceeds the aggregate amount of claims of lien that have been filed and have not been satisfied, cancelled, or removed from the title under this Act, may be made without jeopardy. (pp. 114-115)*

*43. The Builders Lien Act should be amended to provide that in any construction project with a duration greater than one year, at the option of the owner,*

*(a) the holdback required to be retained at any point from any contractor and subcontractor engaged on the project is limited to 10% of the greater of*

*(i) the total of payments made to that contractor or subcontractor during the preceding twelve months, and*

*(ii) the total value of work and materials provided under the contract or subcontract of that contractor or subcontractor during the preceding twelve months;*

*or alternatively,*

*(b) the owner may give notice of early release of holdback in the manner required for posting a certificate of completion or cessation of work, and in that case a holdback required to be retained from any contractor and subcontractor must be paid 45 days after each yearly anniversary of the commencement of work under the contract, if the amount is otherwise payable under the contract or subcontract in question and no claim of lien has been filed that has not been satisfied, cancelled or removed from title under the Act. (p. 121)*

*44. There should be no minimum contract value or other monetary threshold for the availability in a construction project of the procedure for periodic early holdback release described in Recommendation 43.*

*(p. 122)*

*45. The Builders Lien Act should be amended to provide that if a contract provides for payment of the holdback required to be retained by section 4 on the basis of phases and identifies each phase,*

*(a) the time allowed for filing a claim of lien relating to the provision of work or supply of materials in relation to a phase is determined as if the phase were a separate improvement; and*

*(b) the holdback relating to the phase may be released at the end of the holdback period following completion of a phase*

*whether or not the contract also designates phases as separate improvements for the purposes of the Act. (p. 123)*

*46. The Builders Lien Act should be amended to permit persons primarily liable on a contract or subcontract to discharge the obligation to maintain a holdback by accepting and holding the following forms of security provided by the person from whom the holdback is withheld:*

*(i) a holdback repayment bond in prescribed form;*

*(ii) an irrevocable standby letter of credit in prescribed form;*

*(iii) any other form of security that may be prescribed. (p. 125)*



47. *The prescribed wording of a form of a security referred to in paragraph (a) should name the registrar of the court as an additional obligee or party entitled, in accordance with the terms of the security, to demand full or partial payment of the amount secured.* (p. 125)

48. *The Builders Lien Act should be amended to clarify that it is not necessary to maintain a holdback in relation to work done in relation to improvements and properties referred to in section 1.1 or in other non-lienable projects.* (p. 125)

49. *Section 5(8) of the Builders Lien Act should be amended to enable the exclusion by regulation of a specific project, contract, or class of contract from the holdback account requirement.* (p. 128)

50. *Section 5 of the Builders Lien Act should be amended to require that a holdback account must be held at a branch of a financial institution within British Columbia.*  
(p. 129)

51. *Section 5(8)(b) of the Builders Lien Act should be amended by deleting the words “in respect of an improvement” to clarify that the “aggregate value of work and materials” refers to the work and materials to be provided under a contract, rather than the total value of work and materials in an improvement.* (p. 130)

52. *Section 4(1)(b) of the Builders Lien Act should be amended to read:*

*“(b) the amount before deduction of such holdback of any payment made on account of the contract or subcontract price.”* (p. 131)

53. *Section 5(1)(b) of the Builders Lien Act should be amended to state that the amount to be deposited into the holdback account is 10 per cent of the amount, calculated before the deduction of a holdback, of all payments made on account of a contract prior to the end of the holdback period.* (p. 131)

54. *The Builders Lien Act should be amended to empower the court to cancel a claim or claims of lien on application by any person without notice, if the applicant*

- (a) pays into court the full amount of the claim(s); or*
- (b) provides security for that amount consisting of*
  - (i) a bond in prescribed form issued by a surety on the registrar's authorized list; or*
  - (ii) a letter of credit in prescribed form. (p. 138)*

55. *Section 24 of the Builders Lien Act should be amended to:*

- (a) state in clearer terms that an owner or a contractor, subcontractor, or other person liable on a contract or subcontract may be an applicant under section 24, by the substitution of "An owner or a contractor" for "A person against whose land a claim of lien has been filed, and a contractor" in section 24(1);*
- (b) provide that security under section 24 may be in any of three forms: money, a lien bond, or a letter of credit in a form acceptable to the court;*
- (c) reflect existing practice under which a certified copy of the order and a certificate of the Registrar of the Supreme Court of British Columbia confirming that security has been provided are to be submitted to the land title office or the office of the Chief Gold Commissioner to obtain cancellation of the claim(s) of lien;*
- (d) declare that when security is provided for a claim of lien and is accepted by the court, the security provided stands in place of the land, and that after cancellation of the claim of lien, the lien claimant has no further claim against the land;*
- (e) provide that whoever provides the security is a necessary defendant in an action to enforce a lien secured under section 24, and the owner is not a necessary defendant unless the owner provided the security;*
- (f) allow for an application to reduce security previously provided, or an increase to cover additional claims of lien filed against the same title. (p. 138)*

56. *Standard forms of the following should be prescribed for the purpose of an application without notice for an order cancelling a claim of lien:*

*(a) order;*

*(b) lien bond;*

*(c) letter of credit. (p. 139)*

*57. Section 23 of the Builders Lien Act should be amended to:*

*(a) expressly reflect the principle that the person making payment into court is giving up any claim to the money paid in;*

*(b) permit payment of the holdback amount into court even if it is not actually owing;*

*(c) provide for discharge of the applicant from liability, in addition to discharge of the owner;*

*(d) provide that the additional amount that must be paid into court on an application under section 23(3) following the filing of additional claims of lien is the amount necessary to bring the total amount paid into court up to the level that would have been required to obtain removal of all the claims of lien, if they had all been filed at the time the application to pay in the further amount is made;*

*(e) allow lien claims which have already been secured and cancelled under section 24 to be treated as if secured under s. 23 instead, with all persons being in the same position as if the claims had been initially the subject of an application under s. 23;*

*(f) provide that the person to whom funds paid into court under that section would otherwise be owed is a necessary defendant in an action to enforce a lien affected by the order authorizing payment in and removal of the lien from the owner's title, and the applicant / payor is not a necessary party;*

*(g) refer in section 23(1) to one or more lien claimants "engaged by or under a contractor or subcontractor," rather than one or more members of a class of lien claimants;*

*(h) confirm the existing practice under which a certified copy of the order and a certificate of the Deputy Registrar of the Supreme Court confirming that funds have been paid into court pursuant to the order are to be submitted to the land title office or the office of the Chief Gold Commissioner to obtain cancellation of the claim(s) of lien;*

- (i) provide greater clarity to s. 23(5) by stating that the amount which the payor is entitled to apply to correct a default or complete the contract or subcontract cannot include the statutory holdback;*
- (j) delete the wording in s. 23(1) that empowers a mortgagee authorized by the owner to disburse mortgage funds, and insert instead a reference in s. 4(5)(a) to the ability of such a mortgagee to apply under sections 23(1) and (3) to pay funds into court;*
- (k) delete the references in section 23(1) to a purchaser to whom s. 35 applies, and insert corresponding references in section 35 itself;*
- (l) delete section 23(4). (pp. 144-145)*

*58. The Builders Lien Act should provide an alternative procedure for securing liens and vacating lien registrations through notification to the land title office by either the issuing financial institution or a lawyer that security has been provided for the full amount of a claim of lien in a prescribed standard form of lien bond, letter of credit, or cash, and is being held as if pursuant to an order of the court under s. 24 of the Act.*  
(p. 146)

*59. Section 21 of the Builders Lien Act should be amended by deleting the term “receiving order.” (p. 147)*

*60. Section 32 of the Builders Lien Act should be amended by adding a subsection to clarify that a claim of lien filed after an advance is made under a previously registered mortgage does not affect the priority of the advance under s. 32(1). (p. 147)*

*61. Section 32(5) of the Builders Lien Act should be amended by*

- (a) replacing “a mortgagee” with “any person”;*
- (b) adding the words “or charge” after “the mortgage”;*
- (c) deleting “further” from the phrase “one or more further advances.” (p. 153)*

62. *Section 32(6) should be amended by deleting “by a mortgagee” following “application.”* (p. 153)

63. *Section 32(5) of the Builders Lien Act should be amended to allow for an order giving priority, on the grounds set out in section 32(6), to advances under a mortgage or charge over intervening charges, including but not limited to:*

*(a) claims of lien; and*

*(b) despite section 28 of the Property Law Act, registered judgments.* (p. 154)

64.. *Section 10 of the Builders Lien Act should be amended by*

*(a) substituting the words “subcontractors and workers engaged” for “persons engaged” in section 10(1); and*

*(b) repealing section 10(4) as a consequence of the amendment in paragraph (a).*  
(p. 155)

65. *Section 34 of the Builders Lien Act should be amended by adding a subsection stating that section 34(1) does not limit the amount recoverable by a lienholder as a beneficiary of the trust established by section 10.* (p. 156)

66. *Section 14 of the Builders Lien Act should be repealed. (majority)* (p. 158)

67. *Section 25(2) of the Builders Lien Act should be amended by*

*(a) deleting the words “vexatious, frivolous or an abuse of process” from section 25(2)(b);*

*(b) substituting the following as the grounds for cancellation of a claim of lien under s. 25(2):*

*(i) the claim of lien does not relate to the land against which it is filed;*

- (ii) the amount claimed is grossly excessive or inflated;*
- (iii) the subject-matter of the claim of lien (i.e. services or supply of materials) is non-lienable;*
- (iv) the claimant knew or ought to have known at the time of filing that the claim of lien is unsupportable, i.e. has no basis;*
- (v) the claim of lien does not comply with the Act. (p. 165)*

68. *A provision should be added to the Builders Lien Act empowering the court to make appropriate procedural orders to allow the expeditious determination of an issue arising in relation to a claim of lien, including a direction to commence an action within a specified time. (p. 165)*

69. *Section 25(3) of the Builders Lien Act should be amended:*

- (b) to permit applications without notice only under section 25(1), but not under section 25(2) as amended according to Recommendation 67; and*
- (b) by deleting the words “to any other person” after “notice.” (p. 165)*

70. *The Builders Lien Act should be amended to provide that a person who files a claim of lien, to which for any reason that person is not entitled, should be liable for all reasonably foreseeable loss and damage, including legal expense, incurred by any person as a result of the filing of the claim of lien. (p. 166)*

71. *The Builders Lien Act should be amended to provide that a claimant who files a claim of lien for an amount greater than the amount owed to the claimant is automatically liable for the costs incurred by anyone who provides security for the lien, to the extent that the costs are increased by the inflated claim. (p. 167)*

72. *Section 42(1) of the Builders Lien Act should be amended to provide that a conveyance, mortgage or charge of or on land that is granted for the purpose of giving a lienholder a preference or priority is not void for this reason alone, but the lienholder will have the lower of: (a) the priority a claim of lien by that lienholder would have*

*had; and (b) the priority the conveyance, mortgage or charge would have had, apart from section 42. (p. 168)*

*73. Section 42 of the Builders Lien Act should be amended to also provide that a term of any agreement that directly or indirectly imposes a liability or penalty on any person for exercising a right under the Act is void. (p. 169)*

*74. The Builders Lien Act should be amended to provide that:*

- (a) a lien does not arise against land that is subject to a statutory right of entry with respect to an improvement made on the land pursuant to the statutory right of entry;*
- (b) no claim of lien may be filed against the title to land subject to a statutory right of entry in respect of an improvement on, in or under the land that was made by exercising a statutory right of entry; and*
- (c) for the purpose of paragraph (a), a “statutory right of entry” is a right to enter and use privately owned land under the authority of an enactment, and includes a right to enter and use private land under an agreement with the landowner, if the right could have been exercised under statutory authority without the landowner’s agreement. (p. 175)*

*75. The Builders Lien Act should be amended to provide that if a person required by the Act to retain a holdback has paid money that would otherwise constitute holdback funds to the Receiver General of Canada pursuant to a requirement to pay (RTP) issued under s. 224 of the Income Tax Act (Canada) or section 317 of the Excise Tax Act (Canada), then:*

- (a) the required holdback is reduced to the extent of the payment;*
- (b) the amount paid to the Receiver General pursuant to the RTP is deemed for the purposes of the trust created by section 10 of the Builders Lien Act to have been received by the tax debtor named in the RTP; and*
- (c) the tax debtor named in the requirement to pay is liable to account to the beneficiaries of the trust created by section 10 of the Builders Lien Act for the equivalent of the amount paid to the Receiver General. (pp. 178-179)*

76. *Section 27 of the Builders Lien Act should be repealed, and a provision substituted requiring only that a proceeding relating to a claim arising out of the Act must be started in the Supreme Court of British Columbia.* (p. 182)

77. *Section 33(2) of the Builders Lien Act should be amended to include anyone who has provided security for a claim of lien in the class of persons who may give a notice requiring the claimant to commence a proceeding to enforce the lien within 21 days after service of the notice.* (p. 184)

78. *The Builders Lien Act should be amended to require that in a lien enforcement action, all lien claimants whose recovery may be affected by the outcome of the action should receive notice of trial or an application for judgment.* (p. 185)

79. *For the purpose of preserving and enforcing a lien under the Builders Lien Act in respect of an improvement exclusively to the common property in a strata plan, the appropriate enactments should be amended to provide that*

- (a) section 163 of the Strata Property Act applies to an action to enforce such a lien in which the strata corporation is named as a defendant representing all owners of strata lots;*
- (b) a certificate of pending litigation in an action to enforce a lien in respect of an improvement exclusively relating to common property that names the strata corporation as the defendant representing all owners of strata lots is registrable against the title to each strata lot, and it is unnecessary to list each owner individually as a defendant in the certificate of pending litigation;*
- (c) in an action to enforce such a lien, no order for sale may be made, but the court may instead give judgment against the strata corporation for the maximum amount recoverable under the Builders Lien Act, and section 166 of the Strata Property Act applies to make the strata lot owners liable for the judgment according to their proportionate shares under section 166(2).* (pp. 188-189)

80. *The Builders Lien Act should be amended to provide that:*

- (a) a lien claimant must conduct an action to enforce the lien expeditiously;*



- (b) anyone with a financial interest in the disposition of an action under the Act may apply to the court for relief because of a failure to conduct the action expeditiously; and*
- (c) the court may make any order that it considers appropriate on the application, including dismissal of a claim to enforce a lien under section 2(1) of the Builders Lien Act that is advanced in the action, for failure to conduct the action expeditiously. (pp. 192-193)*

*81. The address for service set out in the claim of lien should be capable of use as the address for service of the claimant for the purpose of any application or proceeding relating to the lien. (p. 194)*

*82. The rules in section 33(3) of the Builders Lien Act for service of a notice to commence action should be applicable for the purpose of serving a document on a lien claimant in any application or proceeding under the Act, in addition to the rules for service under the Supreme Court Civil Rules. (p.194)*

*83. Section 33(4) of the Builders Lien Act should be amended to adopt the same rule for determining when service by mail of a notice under section 33(2) is deemed to occur as is applicable to a document served by mail under the Supreme Court Civil Rules. (p. 194)*

*84. Section 29 of the Builders Lien Act should be amended to permit land to be described by means other than an address in an acknowledgment of receipt of material, including by means of a project name, if sufficient to identify the location. (p. 195)*

*85. Section 41(1)(a) of the Builders Lien Act should be amended to require delivery of a copy of a labour and material payment bond on request, rather than particulars of the bond. (p. 195)*

*86. The Builders Lien Act should be amended to incorporate the provisions originating with the Uniform Law Conference of Canada that appear, slightly modified for enactment in British Columbia, in Appendix C of the BCLI Report on Builders Liens and*

*Arbitration as sections 46.1, 46.2, and 46.3, with the following additional modifications:*

- (a) section 46.1 should contain a further paragraph stating “to remove a lien”;*
- (b) the words “for the purpose of preventing the extinguishment of the lien under section 33(5)” should be deleted from paragraph (b) of section 46.1. (p. 198)*



## APPENDIX B

These materials contain information that has been derived from information originally made available by the Province of British Columbia at: <http://www.bclaws.ca/> and this information is being used in accordance with the Queen's Printer License—British Columbia available at: [http://www.bclaws.ca/standards/2014/QP-License\\_1.0.html](http://www.bclaws.ca/standards/2014/QP-License_1.0.html). They have not, however, been produced in affiliation with, or with the endorsement of, the Province of British Columbia and THESE MATERIALS ARE NOT AN OFFICIAL VERSION.

### Builders Lien Act

#### Definitions and interpretation

1 (1) In this Act:

**"certificate of completion"** means a certificate under section 7 stating that work under a contract or subcontract has been completed and includes an order made under section 7 (5);

**"claim of lien"** means a claim of lien in the prescribed form;

**"class of lien claimants"** means all lien claimants engaged by the same person in connection with an improvement;

**"completed"**, if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed;

**"contractor"** means a person engaged by an owner to do one or more of the following in relation to an improvement:

(a) perform or provide work;

(b) supply material;

but does not include a worker;

**"court"** means the Supreme Court;

**"head contractor"** means a contractor who is engaged to do substantially all of the work respecting an improvement, whether or not others are engaged as subcontractors, material suppliers or workers;

**"holdback period"** means the period of time calculated under section 8;

**"improvement"** includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

**"land title office"** means the land title office for the land title district or districts in which the land or any part of it is located and on which the improvement is made or is being made;

**"lien claimant"** means a person who files a claim of lien under this Act;

**"lien holder"** means a person entitled to a lien under this Act;

**"material"** means movable 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, including equipment rented without an operator;

**"material supplier"** means a contractor or subcontractor who supplies only material in relation to an improvement;

**"notice of certification of completion"** means a notice in the prescribed form stating that a certificate of completion or a court order to the same effect has been issued;

**"notice of interest"** means a notice in the prescribed form warning other persons that the owner's interest in the land described in the notice is not bound by a lien claimed under this Act in respect of an im-

provement on the land unless that improvement is undertaken at the express request of the owner;

**"notice to commence an action"** means a notice in the prescribed form requiring a claim holder to commence an action to enforce a claim of lien;

**"operator"** means an individual who operates equipment at an improvement site but does not include an individual who temporarily or periodically is present at the improvement site to install, inspect, service, empty or remove equipment;

**"owner"** includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and

(a) on whose credit,

(b) on whose behalf,

(c) with whose knowledge or consent, or

(d) for whose direct benefit

work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land;

**"registrar"** means the registrar of a land title office;

**"required holdback"** means, in relation to a contract or subcontract, the amount required under section 4 to be retained from payments under that contract or subcontract, less any payments made under an entitlement to payment arising under section 9;

**"services"** includes

(a) services as an architect or engineer whether provided before or after the construction of an improvement has begun, and

(b) the rental of equipment, with an operator, for use in making an improvement;

**"subcontractor"** means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

(a) perform or provide work;

(b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

**"wages"** means money earned by a worker for work and includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and that relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63 of the *Employment Standards Act*, required to be paid by an employer to an employee under that Act,

(d) money required to be paid in accordance with a determination or an order of the tribunal under the *Employment Standards Act*,

(e) money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person and includes money payable under Parts 10 and 11 of the *Employment Standards Act*, and

(f) money required to be paid under a collective agreement;

**"work"** means work, labour or services, skilled or unskilled, on an improvement;

**"worker"** means an individual engaged by an owner, contractor or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

(2) For the purposes of this Act, a head contract, 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

(a) 3% of the first \$500 000 of the contract price,

(b) 2% of the next \$500 000 of the contract price, and

(c) 1% of the balance of the contract price.

(3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

(4) For the purposes of this Act, the construction of a strata lot, as defined by the *Strata Property Act*, is completed, or a contract for its construction is substantially performed, not later than the date the strata lot is first occupied.

(4.1) With respect to common property or common assets held by a strata corporation under the *Strata Property Act*, for the purposes of sections 7 and 41 of this Act, and any other provision of this Act specified in the regulations, the strata corporation is deemed to be the owner.

(4.2) With respect to common property or common assets held by a strata corporation under the *Strata Property Act*, for the purposes of section 25 of this Act and any other provision of this Act specified in the regulations, a reference to an owner includes the strata corporation.

(5) For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness,



weather conditions, holidays, a court order, shortage of material or other similar cause.

(6) Anything that may be done under this Act by or with reference to an owner, contractor, subcontractor, worker or mortgagee is valid if done by or with reference to an agent of that person.

### Exemptions

1.1 Nothing in this Act extends to any of the following:

(a) a highway, as defined by the *Transportation Act*, or to any improvement done or caused to be done on it by a municipality, the minister responsible for the administration of the *Transportation Act*, the Transportation Investment Corporation, a concessionaire as defined by the *Transportation Investment Act*, the BC Transportation Financing Authority or its subsidiaries, the South Coast British Columbia Transportation Authority or its subsidiaries or any other public body designated by regulation;

(a.1) continuing highway properties, as defined in section 30 (1) of the *Coastal Ferry Act*, or any improvement done or caused to be done on them by a municipality, the minister responsible for the administration of the *Transportation Act* or BC Transportation Financing Authority or its subsidiaries or by the ferry operator, within the meaning of the *Coastal Ferry Act*, to which those properties are leased under that Act;

(b) a forest service road, as defined in the *Forest Act*, or any improvement done or caused to be done by or for the minister responsible for the administration of the *Ministry of Forests and Range Act*.

### **Lien for work and material**

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

(a) performs or provides work,

(b) supplies material, or

(c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

(d) the interest of the owner in the improvement;

(e) the improvement itself;

(f) the land in, on or under which the improvement is located;

(g) the material delivered to or placed on the land.

(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

### **Deemed authorization**

3 (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

(2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.

(3) Subsection (1) does not apply to an improvement on land owned by the government.

## Holdback

4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

(2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.

(3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.

(4) Subject to section 5 (4), if a mortgagee is a savings institution and is authorized by the owner to disburse the money secured by a mortgage, the mortgagee may retain as a holdback the amount required to be retained by the owner as the payor on the contract and the retention by the mortgagee of that amount is deemed to be compliance with this section by the owner.

(5) Subject to section 5 (4), a mortgagee who retains or agrees to retain a holdback under subsection (4) of this section

(a) has the same rights and obligations in relation to the holdback as if it had been retained by the owner, and

(b) is liable to the owner or any lien holder who suffers loss or damage as a result of the failure of the mortgagee

(i) to retain the holdback as agreed, or

(ii) to fulfill the mortgagee's obligations in relation to the holdback.

(6) Despite subsection (1) (a), a holdback must not be retained from a worker, material supplier, architect or engineer.

(7) and (8) [Not in force.]

(9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

### **Holdback account**

5 (1) Subject to subsection (8), an owner must

- (a) establish at a savings institution a holdback account for each contract under which a lien may arise,
- (b) pay into the holdback account the amount the owner is required to retain under section 4, and
- (c) administer the holdback account together with the contractor from whom the holdback was retained.

(2) Subject to sections 9 and 34, all amounts deposited into a holdback account

- (a) are charged with payment of all liens arising under the contractor from whom the holdback was retained,
- (b) subject to paragraph (a), are held in trust for the contractor referred to in paragraph (a), and
- (c) must not be paid out of the account without the agreement of all the persons who administer the account.

(3) An administrator of a holdback account may apply to the court for directions respecting administration of the account, and the court may make any order it considers appropriate, including one or more of the following orders:

(a) that the owner establish and maintain a holdback account as sole administrator;

(b) that some or all of the money in the holdback account be paid into court under section 23 for the removal of claims of lien;

(c) that an administrator be removed or replaced;

(d) that a lien holder be paid.

(4) If the mortgagee retains a holdback under section 4 (4), this section other than this subsection does not apply.

(5) If there is more than one owner, only one of the owners is required to establish and administer the holdback account.

(6) Unless otherwise agreed, interest on the holdback account accrues to the owner during the holdback period and after that accrues to the credit of the contractor from whom the holdback was retained.

(7) Failure by the owner to comply with subsection (1) (b) constitutes an act of default under the contract and the contractor, on 10 days' notice, may suspend operations for as long as the default continues.

(8) This section does not apply to

(a) if it is an owner, the government, a government corporation as defined in the *Financial Administration Act* or any other public body designated, by name or by class, by regulation, or

(b) a contract in respect of an improvement, if the aggregate value of work and material provided is less than \$100 000.

### **Prohibited application of holdback**

6 (1) If a contractor or subcontractor defaults under a contract or subcontract, the required holdback must not be applied to the completion of the contract

or subcontract, or for the payment of damages, or for any other purpose until the possibility of any lien arising under the person in default is exhausted.

(2) A payment applied contrary to this section does not reduce the liability under this Act of the person making the payment.

(3) This section does not apply to money held in excess of the required holdback.

### Certificate of completion

7 (1) In this section, "**payment certifier**" means

(a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or

(b) if there is no person as described in paragraph (a),

(i) the owner acting alone in respect of amounts due to the contractor, or

(ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.

(2) A lien holder in respect of an improvement may, by making a written request, require that the payment certifier for the improvement deliver to the lien holder

(a) particulars of any certificate of completion issued under this section before and after the request, or

(b) particulars of certificates of completion issued, before and after the request, with respect to stipulated contracts or subcontracts.

(3) On the request of a contractor or subcontractor, the payment certifier must, within 10 days after the date of the request, determine whether the contract or subcontract has been completed and, if the payment certifier de-

termines that it has been completed, the payment certifier must issue a certificate of completion.

(4) If a certificate of completion is issued, the payment certifier must, within 7 days,

(a) deliver a copy of the certificate to the owner, the head contractor, if any, and the person at whose request the certificate was issued,

(b) deliver a notice of certification of completion to all persons who submitted a request under subsection (2) in relation to the contract or subcontract, and

(c) post, in a prominent place on the improvement, a notice of certification of completion.

(5) If the payment certifier fails or refuses to issue a certificate of completion as provided in subsection (3), the court may, on application by the person who requested the certificate and on being satisfied that the contract or subcontract has been completed, make an order declaring that the contract or subcontract has been completed.

(6) An order under subsection (5)

(a) may be made on terms and conditions as to costs or otherwise that the court considers just, and

(b) has the same effect as a certificate of completion issued by a payment certifier.

(7) If an order is made under subsection (5) declaring that a contract or subcontract has been completed, the payment certifier must comply with subsection (4) as if the order were a certificate of completion.

(8) A payment certifier who receives a request under subsection (3) and who fails or refuses, without reasonable excuse and within the time specified in that subsection, to issue a certificate of completion respecting the

contract or subcontract is liable to anyone who suffers loss or damage as a result.

(9) A payment certifier who fails or refuses to comply with subsection (4) or (7) is liable to anyone who suffers loss or damage as a result.

(10) A certificate of completion may be in the prescribed form and, if it is in the prescribed form, it is sufficient to comply with this Act.

### **Holdback period**

**8** (1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to

(a) the contract or subcontract, and

(b) any subcontract under the contract or subcontract

expires at the end of 55 days after the certificate of completion is issued.

(2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after

(a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or

(b) the improvement is completed or abandoned, if paragraph (a) does not apply.

(3) [Not in force.]

(4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.



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### Rights on payment of holdback

**9** (1) A contractor is entitled to receive, from the holdback retained by the owner from the contractor, an amount equal to the holdback amount applicable to a subcontract if

- (a) a certificate of completion has been issued in respect of the subcontract to which the contractor was a party, and
- (b) the holdback period established under section 8 (1) has expired without any claims of lien being filed that arose under the subcontract.

(2) An owner is deemed to have complied with the requirements of section 4 even if the amount retained has been reduced to a lesser percentage than is required by that section if

- (a) an amount is paid to a contractor in accordance with subsection (1) of this section, and
- (b) the amount retained by the owner would have complied with the requirements of section 4 had no payments been made under this section.

(3) Subsections (1) and (2) apply if a certificate of completion is given in relation to a subcontract to which a contractor is not a party.

(4) If a contractor is entitled to an amount under subsection (1), payment may be made from the holdback account established under section 5.

### Contract money received constitutes trust fund

**10** (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

(4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

### **Certain applications of trust fund deemed not to be appropriation or conversion**

**11** (1) A contractor or subcontractor commits an offence if that person

(a) appropriates or converts any part of a fund in contravention of section 10, or

(b) contravenes section 13 (2).

(2) A person who commits an offence under subsection (1) (a) is liable to a fine of not more than \$10 000 or to imprisonment for a term of not more than 2 years, or both.

(3) If a contractor or subcontractor is a corporation, a director or officer of the corporation who knowingly assents to or acquiesces in an offence under subsection (1) (a) by the corporation commits the offence in addition to the corporation.

(4) Despite subsections (1) to (3),

(a) to the extent that a contractor or subcontractor has paid for work or material supplied under a contract or subcontract, the retention by the contractor or subcontractor of trust money in an amount equal to the amount paid is not an appropriation or conversion that contravenes section 10, and

(b) if money is loaned to a person on whom a trust is imposed by section 10 and is used to pay for all or part of work or material supplied, trust money may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and money so applied is not an appropriation or conversion that contravenes section 10.

(5) An information must not be laid in respect of an alleged offence under subsection (1) or (3) more than 3 years after the alleged offence occurred.

(6) Subsection (4) (b) does not limit the rights of a lender who, in the ordinary course of business, receives money in good faith from a person on whom a trust is imposed under section 10.

(7) If a contractor or subcontractor commingles, with other money, any part of the fund referred to in section 10, that, of itself, does not constitute a breach of the trust created under section 10 (1) or a contravention of section 10 (2).

### **Crediting of money earmarked for particular improvement**

**12** If a person makes a payment from money in a trust fund constituted in respect of a particular improvement, a person who receives the money must credit it against the debt in respect of the improvement.

### **Garnishment and money in court**

**13** (1) In the case of money owing to a contractor or subcontractor that would, if paid to the contractor or subcontractor, be subject to a trust under section 10, the money, if it is paid into court under an attachment under the *Court Order Enforcement Act*, is subject to a trust as if it had been paid to the contractor or subcontractor, and the interest of the garnishor is subordinate to the interest of the beneficiaries of the trust.

(2) A garnishee under an attachment referred to in subsection (1) must, at the time of payment into court, file in the court registry a notice in the prescribed form and deliver a copy of the notice to the garnishor.

(3) If a notice is filed under subsection (2), the registrar of the court must not pay out of court without an order of the court any money paid into court under subsection (1).

(4) Money held in a holdback account established under section 5 is not subject to garnishment.

(5) If money is paid into court under this Act by a contractor, subcontractor or owner, the money becomes or remains subject to the trust imposed by section 10.

### **Limitation period**

**14** An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after

(a) the head contract is completed, abandoned or terminated, or

(b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available.

### **Claim of lien to be in prescribed form**

**15** (1) Except as provided in section 18, a claim of lien is made by filing in the land title office a claim of lien in the prescribed form.

(2) An agent who represents more than one lien claimant may, with respect to a particular improvement, make a single claim of lien on behalf of all of the lien claimants represented, and the prescribed form may be altered accordingly for that purpose.

(3) The registrar must not allow a claim of lien to be filed unless satisfied that the land is adequately described.

(4) On the filing of the claim of lien in the land title office, the registrar must endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land described in the claim of lien.

### General lien

**16** (1) If an owner enters into a single contract for improvements on more than one parcel of land, a lien claimant providing work or material under that contract, or under a subcontract under that contract, may choose to have the lien follow the form of the contract and be a lien against each parcel for the price of all work and material provided to all of the parcels of land.

(2) If a lien is claimed under subsection (1) against several parcels of land, on application to the court by any person with an interest in or charge on the land, the court may apportion the lien among the parcels for the purpose of determining the lien claimant's rights as against persons having rights in particular parcels.

### No claim under \$200

**17** A claim of lien must not be filed if the amount of the claim or aggregate of joined claims is less than \$200.

### Procedure to file a claim of lien under the *Mineral Tenure Act*

**18** (1) In order to file a claim of lien in respect of a mineral title held under the *Mineral Tenure Act* other than a Crown granted mineral claim, the lien claimant must

(a) file in the office of the gold commissioner in which the mineral title is recorded a claim of lien in the prescribed form, and

(b) if the property that is the subject of a mineral title is registered in a land title office, also file in the land title office a copy of the claim of lien.

(2) On the filing of the claim of lien under subsection (1), the gold commissioner must endorse a memorandum of the filing on the record of the mineral title in the gold commissioner's office.

(3) If the property that is the subject of a mineral title described in the claim of lien is registered in a land title office, the registrar must endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land or mineral title described in the claim of lien.

### **Liability for wrongful filing**

- 19** A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

### **Time for filing claim of lien**

- 20** (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of

(a) the contractor or subcontractor, and

(b) any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the certificate of completion was issued.

(2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after

(a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or

(b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

(3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if

(a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or

(b) time had started to run under subsection (2).

(4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

#### **When claim of lien takes effect**

**21** A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

#### **Lien extinguished if not filed as required by Act**

**22** A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

#### **Removal of claims of lien by payment of total amount recoverable**

**23** (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of

(a) the total amount of the claim or claims filed, and

(b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed provided the amount is at least equal to the required holdback in relation to

the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.

(2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and

(a) the money paid into court stands in place of the improvement and the land or mineral title, and

(b) the order must provide that the claims of lien be removed from the title to the land or mineral title.

(3) If an application has been made under subsection (1) and the claims of lien have been removed under subsection (2), and if additional claims of lien are filed by persons claiming through the same person engaged by the payor with respect to the lien claimants whose claims of lien were removed under subsection (2), application may be made under subsection (1) to have the additional claims of lien removed under subsection (2) on payment into court of whatever additional sum is necessary to bring the amount in court up to the amount that would have been paid into court if the additional claims of lien had been filed at the time of the prior application.

(4) An application under subsection (1) or (3) may be brought by an application in proceedings that have been commenced to enforce a claim of lien, or by petition, and the court may

(a) hear and receive evidence, by affidavit or orally or otherwise, that it considers necessary in order to determine the proper amount to be paid into court,

(b) direct the trial of an issue to determine the amount to be paid into court, and

(c) refuse the application if it is of the opinion that the determination of the total amount that may be recovered by lien claimants should be made at the trial of the action.



(5) If the amount held back by the payor from the person engaged by the payor through whom the liens are claimed exceeds the required holdback in relation to the contract or subcontract between the payor and that person, and that person has defaulted in completing or carrying out the contract or subcontract with the payor, for the purposes of subsections (1) and (3) the amount owing by the payor to that person does not include any amount that the payor is entitled to apply to remedy the default or complete the contract or subcontract.

### **Cancellation of claim of lien by giving security**

**24** (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

(4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.

(5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

**Powers of court, registrar or gold commissioner to remove claim of lien**

**25** (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

(a) a lien is extinguished under section 22 or 33,

(b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,

(c) an action to enforce the claim of lien has been discontinued, or

(d) the claim of lien has been satisfied.

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

(a) the claim of lien does not relate to the land against which it is filed, or

(b) the claim of lien is vexatious, frivolous or an abuse of process.

(3) An application under subsection (1) or (2) may be made without notice to any other person.

**Enforcement of claim**

**26** A claim of lien may be enforced by an action according to the Supreme Court Civil Rules.

### Local venue for proceedings under this Act

- 27** Section 21 of the *Law and Equity Act* applies to a proceeding in respect of a claim of lien or other proceeding under this Act in the same way that section applies to a foreclosure proceeding on a mortgage.

### Proof of filing of claim of lien

- 28** In a proceeding to enforce a claim of lien, the production of a copy of the claim of lien disclosing the date of its filing and certified by the registrar or gold commissioner is proof, in the absence of evidence to the contrary, of the filing of the claim of lien and the date of its filing.

### Evidence of delivery of material

- 29** If a person to whom material is supplied signs an acknowledgement of receipt of the material stating that it is received for inclusion in an improvement at a named address, the acknowledgement is proof, in the absence of evidence to the contrary, that the material was delivered to the land described by the address.

### Counterclaim and judgment for creditor

- 30** (1) Subject to the rights of lien claimants engaged by or under the plaintiff, a defendant in an action to enforce a claim of lien may set up by way of counterclaim any right or claim arising out of the same transaction for any amount, whether the counterclaim is for damages or not.
- (2) On the trial of an action to enforce a claim of lien, the court may, so far as the parties before it are debtor and creditor, give judgment for any indebtedness or liability arising out of the claim of lien in the same manner as if the indebtedness or liability had been the subject of an action in the court without reference to this Act.

### Court may order sale

**31** (1) In an action to enforce a claim of lien, the court may declare that the lien claimant is entitled to a lien for the amount found to be due.

(2) If the owner has not been discharged under section 23 (2) of all liability for claims of lien, the court may order the sale of the land or the improvement, or the material supplied or the interest of the owner in any of them.

(3) If an estate or interest sold in proceedings under this Act is a leasehold interest, the purchaser at the sale is conclusively deemed to be an assignee of the lease.

(4) For the purpose of effecting a sale of the land, the court may order that any or all claims of lien filed in connection with the improvement be removed from the title subject to conditions that it considers appropriate.

(5) The proceeds of the sale under this section must be paid into court and must be allocated in accordance with section 36.

(6) No order for the sale of an interest in land owned by the Crown or a municipality may be made, but the court may give judgment for an amount equal to the maximum liability under this Act, as owner against either of them, and any money realized on the judgment must be dealt with as if it were the proceeds of a sale of the interest in land.

### Priority of secured lender

**32** (1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.

(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

(3) In a proceeding for the enforcement of a claim of lien,

(a) the court may order the sale of mortgaged land at an upset price of at least the amount secured by all registered mortgages that have priority over the claim of lien, court ordered costs and the costs of the sale, and

(b) the amount secured by any registered mortgages must be satisfied out of the proceeds of the sale in the order of their priorities and in priority over the claim of lien to the extent provided under this section.

(4) A mortgagee who applies mortgage money in payment of a claim of lien that has been filed is subrogated to the rights and priority of the lien claimant to the extent of the money applied.

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

(a) the advances will be applied to complete the improvement, and

(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

(7) An amount secured in good faith by a registered right to purchase land has the same priority over the amount secured by a claim of lien as has the amount secured by a registered mortgage under subsections (1) and (2).

(8) For the purposes of this Act, the vendor under a registered right to purchase is deemed to be a mortgagee under a registered mortgage, and the amount secured in good faith by the registered right to purchase is subject

to this section as though the amount had been secured in good faith under a registered mortgage.

### **Limitation and notice to commence an action**

**33** (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.

(2) Despite subsection (1),

(a) an owner, or

(b) a lien claimant who has commenced an action

may serve on a lien claimant, or other lien claimants, as the case may be, a notice to commence an action to enforce the claim of lien and to register in the land title office or in the gold commissioner's office, as the case may be, a certificate of pending litigation within 21 days after service of the notice.

(3) The notice served under subsection (2) must be in the prescribed form, and service is validly effected if the notice is

(a) served personally on the lien claimant, or

(b) mailed or delivered to the address for service given in the claim of lien.

(4) If service is by mail the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada.

(5) Unless an action to enforce a claim of lien is commenced and a certificate of pending litigation is registered within the time provided in this section, the lien is extinguished.

**Limit of claims**

**34** (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of

(a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and

(b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.

(2) For the purposes of subsection (1) (a),

(a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person,

(b) a payment that is made in bad faith to a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person, and

(c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made

(i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,

(ii) if the person has actual notice of the claim of lien, and

(iii) if the claim of lien has not been removed or cancelled from the title to the land, under section 23 or 24 or otherwise, at the time the payment was made,

does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.

(3) Despite subsection (2), a person may, on the default of another person that the first person engaged, apply money held by the first person in excess of the required holdback in order to remedy that default or compensate for damage caused by the default.

### **Maximum claim against purchaser's interest**

**35** The amount that may be claimed under this Act against the interest of a purchaser in good faith of an improvement in respect of claims of lien filed after the latest of

(a) acceptance for registration of the purchaser's interest at a land title office or gold commissioner's office,

(b) completion, abandonment or termination of the head contract for construction of the improvement, and

(c) completion or abandonment of the improvement if the owner did not engage a head contractor

must not exceed 10% of the purchase price of the improvement.

### **Allocation of proceeds from sale**

**36** (1) In this section, "**owner's discharge sum**" means an amount that, if paid into court by the owner under section 23, would be sufficient to discharge the owner from liability with respect to all claims of lien filed by persons other than contractors or workers engaged by the owner.

(2) Subject to any order of the court in relation to the discharge of any prior encumbrances or an order under section 32 (3), the proceeds from a sale under section 31 must be distributed as follows:

(a) the lesser of



(i) the difference between the owner's discharge sum and any amount previously paid into court by or on behalf of the owner under section 23, and

(ii) the proceeds from the sale under section 31

must be applied to the payments of the claims of persons other than persons engaged by the owner and be distributed under section 37;

(b) proceeds in excess of the amount allocated under paragraph (a) must be applied to pay the claims of lien of persons engaged by the owner and to pay the owner, and be distributed under section 38.

### **Distribution among claimants not engaged by owner**

**37** (1) In this section:

**"available holdback fund" or "holdback funds available"** means

(a) the amount paid into court under section 23, and

(b) the amount available for distribution under this section as calculated under section 36 (2) (a);

**"priority computation base"** of a class of lien claimants means the lesser of

(a) the amount owing to the person who engaged the class of lien claimants, and

(b) the total amount of the claims of the class members.

(2) The available holdback funds must be applied to pay and be distributed to subcontractors and workers other than workers engaged by the owner according to the following priority:

(a) the costs of the lien claimants of and incidental to the proceedings of filing and enforcing their claims of lien;

(b) up to 6 weeks' wages, if that much is owed, to workers;

(c) the amount of money owed

(i) to the workers in excess of 6 weeks' wages, and

(ii) to the subcontractors.

(3) The holdback funds available to a category of lien claimants constituted under subsection (2) (a) or (b) must be distributed proportionally among the members of the category so that a single member of the category is entitled to that proportion of the amount recovered that the amount of the member's lien bears to the aggregate amount of the liens of all members of the category.

(4) Before the holdback funds available to lien claimants in the category constituted under subsection (2) (c) are distributed, the holdback funds must be allocated proportionally among the classes of lien claimants so that each class is allocated that proportion of the available holdback funds that the priority computation base of the class bears to the aggregate amount of the priority computation bases of all classes, including that of the class whose allocation is being assessed.

(5) The portion of the available holdback funds allocated to a class under subsection (4) must be distributed proportionally among the members of the class so that a single member of the class is entitled to that proportion of the allocated funds that the amount of the member's lien bears to the aggregate amount of the liens of all members of the class.

(6) In a distribution under this section a lien claimant is not entitled to recover more than the amount of the claimant's lien claim and entitlement to costs under subsection (2) (a).

(7) Money distributed under this section is subject to sections 10, 11 and 14.

**Distribution among claimants engaged by owner**

**38** (1) The portion of the proceeds of sale allocated under section 36 (2) (b) must be applied to pay the claims of lien of contractors and workers engaged by the owner, and to pay the owner, and distributed according to the following priority:

- (a) the costs of lien claimants of and incidental to the proceedings of filing and enforcing their claims of lien;
- (b) up to 6 weeks' wages, if that much is owed, to workers;
- (c) the amount of money owed
  - (i) to the workers in excess of 6 weeks' wages, and
  - (ii) to the contractors;
- (d) the owner.

(2) The funds available to the members of a category of lien claimants constituted under each of subsection (1) (a), (b) or (c) must be distributed proportionally among the members of that category so that a single member of the category is entitled to that proportion of the amount recovered that the amount of the member's lien bears to the aggregate amount of the liens of all members of the category, but a lien claimant is not entitled to recover more than the amount of the claimant's lien and entitlement to costs under subsection (1) (a).

(3) Money distributed under this section is subject to sections 10, 11 and 14.

**During continuance of lien, property not to be removed**

**39** (1) During the continuance of a lien, material must not be removed from the land or the improvement to the prejudice of a lien holder.

(2) An attempt at removal may be restrained on application to the court.

### **Subcontractor's lien enforceable despite noncompletion by another**

- 40** A subcontractor may enforce the subcontractor's lien despite the noncompletion or abandonment of the contract or subcontract by the contractor or other subcontractor under whom the first subcontractor claims.

### **Right to information**

- 41** (1) A lien holder or a beneficiary of a trust under this Act may, at any time, by delivering a written request, require

(a) from the owner

(i) the terms of the head contract or contract under which the lien holder or beneficiary claims, including the names of the parties to the contract, the contract price and the state of accounts between the owner and the head contractor,

(ii) the name and address of the savings institution in which a holdback account has been opened, and the account number,

(iii) particulars of credits to and payments from the holdback account, including the dates of credits and payments, and the balance at the time the information is given, and

(iv) particulars of any labour and material payment bond posted by the contractor with the owner in respect of the head contract or contract under which the lien holder or beneficiary claims, and

(b) from a mortgagee or an unpaid vendor

(i) the terms of the mortgage or agreement for sale,

(ii) in the case of a mortgage, particulars of the amount advanced under the mortgage, including the dates of advances, and of any arrears in payment, and

(iii) in the case of an agreement for sale, particulars of the amount secured under the agreement for sale and any arrears in payment.

(2) The owner may request in writing from

(a) a subcontractor when a claim of lien has been filed or a written notice of a claim of lien has been received by the owner, and

(b) the contractor, at any time,

the following information:

(c) the terms of any subcontract, including the names of the parties to the subcontract, the subcontract price and the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor, or any other person providing work or material;

(d) particulars of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

(3) The person to whom a request is made under subsection (1) or (2) must comply within 10 days after the day the request is delivered.

(4) A person who fails to comply in writing with a request within the time provided in subsection (3), or who knowingly or negligently misstates the information requested, is liable to the person requesting the information for any resulting loss or damage.

(5) On the failure of a person to comply with a request made under subsection (2) within the time provided, the owner may also, if the request is made of

(a) a contractor, withhold further payments to the contractor,  
or

(b) a subcontractor, instruct the contractor or another subcontractor to withhold further payments to the subcontractor

until the contractor or subcontractor, as the case may be, has complied with the request.

(6) The court may, on application by an interested person at any time before or after an action is commenced for the enforcement of a claim of lien,

(a) order that the owner, mortgagee, vendor, contractor or subcontractor produce for inspection all contracts, subcontracts, documents, books or records relating to the contract or subcontract or to the payment of the contract or subcontract price,

(b) order that any person referred to in paragraph (a) deliver to the applicant copies of any documents referred to in that paragraph, and

(c) make an order as to the costs of the application.

**Certain acts, agreements, assignments void**

**42** (1) A conveyance, mortgage or charge of or on land given for the purpose of granting a lien holder a preference or priority is void for that purpose.

(2) An agreement that this Act is not to apply, or that the remedies provided by it are not to be available for a person's benefit, is void.

(3) A device by an owner, contractor or subcontractor adopted to defeat the priority given by this Act to a worker for the worker's wages is void as against the worker.

(4) No assignment by the contractor or subcontractor of any money due in respect of the contract or subcontract is valid as against any lien or trust created by this Act.

### Lien may be assigned

- 43 A lien holder may assign in writing the lien holder's lien rights and, if not assigned, lien rights may pass by operation of law.

### Insurance money

- 44 If all or part of property subject to a lien under this Act is destroyed by fire, insurance money receivable by the owner, mortgagee or other encumbrancer as a result of the fire stands in place of the property so destroyed, and is, after satisfying any mortgage, charge or encumbrance, in the manner and to the extent set out in section 36, subject to the claims of all persons for liens to the same extent as if the insurance money were realized by the sale of the property in an action to enforce a claim of lien.

### Offence

- 45 (1) A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence.
- (2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of \$2 000 and the amount by which the stated claim exceeds the actual claim.

### Application of *Offence Act*

- 46 Section 5 of the *Offence Act* does not apply to this Act or to the regulations.

### Power to make regulations

- 47 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
- (2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
- (a) prescribing forms for the purposes of this Act;

(b) prescribing a fee to be paid for filing a claim of lien, and providing for the fee to be calculated on

(i) the number of parcels of land to which the claim of lien purports to attach, or

(ii) the amount of the claim of lien;

(c) respecting the administration of holdback accounts;

(d) governing rights in relation to holdback accounts on a sale of an improvement by an owner.

(3) The Lieutenant Governor in Council may make regulations the Lieutenant Governor in Council considers necessary or advisable for meeting or removing any difficulty arising out of the transition to this Act from the Act repealed by this Act and for preserving and giving effect to the rights of persons arising under the repealed Act except as those rights are expressly varied by this Act, and the regulations may be made to apply generally or to a particular case or class of cases.

### Transition

**48** (1) In this section, "**transition project**" means an improvement for which the time for filing liens has not yet expired under the Act repealed by this Act.

(2) This Act applies to a transition project unless all parties agree that the Act repealed by this Act continues to apply.

(3) Despite this Act there is no obligation to create or maintain a holdback account under section 5 on a transition project.

(4) If this Act requires a person not previously required to retain a holdback under the Act repealed by this Act to retain a holdback, it is sufficient compliance with this Act if, in relation to a transition project, the person retains a holdback only with respect to advances or payments made after this Act comes into force.



(5) Despite subsection (4), for the purposes of sections 23 and 34, in relation to a transition project, "**required holdback**" means the amount that would have been retained if this Act had applied to the transition project from the time the improvement was started.

(6) In respect of a transition project, nothing done in compliance with the law in force immediately before this Act comes into force is invalidated by subsection (2).

(7) [Not in force.]

(8) In respect of a transition project, on the coming into force of this Act money paid into court under section 20 (4) of the Act repealed by this Act or under an order of the court under section 33 (2) of the Act repealed by this Act is deemed to be money paid into court under section 23 of this Act.

(9) Parties to a dispute respecting a transition project may apply to the court for directions as to the application of this section and the regulations to the circumstances of the dispute.

### Spent

**49–54** *[Consequential amendments and repeal. Spent. 1997-45-49 to 54.]*

### Commencement

**55** This Act comes into force by regulation of the Lieutenant Governor in Council.

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