10 things you might not know about the British Columbia Builders Lien Act

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The British Columbia *Builders Lien Act* (BLA) is a complex piece of legislation that should be understood by those advising, or participating in, the construction industry, particularly on the business side. Yet there are aspects of the BLA that are sometimes overlooked, misunderstood, or are inadvertently ignored. Its operation is not always obvious. Here are some of the BLA's less obvious characteristics:

1. **Completion of a subcontract does not trigger the holdback period.** A general contractor must retain a 10 per cent holdback from all amounts paid on account of the contract price to subcontractors, except for amounts paid to material suppliers, consultants, and workers. However, this holdback is retained from completion *of the general contract*, not from completion of the subcontract. The only exception is where a valid Certificate of Completion is issued for the subcontract. In that case, the holdback period is triggered for the subcontract and, if no liens arise in the interim, the holdback can be released to the subcontractor after 55 days. At the same time, the owner may release an equivalent amount to the general contractor. This process is known as "progressive release of the holdback".
2. **Certification of Completion is very technical and extremely easy to get wrong**.[1] In order to issue a valid Certificate of Completion to *start* the holdback or lien period for a contract or subcontract, the contractor or subcontract has to "request" that the payment certifier (typically, the consultant) issue the Certificate. If not, the Certificate is invalid.[2] Also, the Certificate must contain all of the information contained in the official form established by the *Builders Lien Form Regulation*, and delivered to the contractor or subcontractor. The Payment Certifier must post a *different* document, a Notice of Certification of Completion, again containing all the information in the official form, on the site,[3] and circulated to anyone who requested it. Without this, the Certificate could be ineffective.
3. **You only Certify a Contract or Subcontract complete, *not* the Project, and *not* a certain Scope of Work.** Certificates of Completion only work for contracts or subcontracts, not projects as a whole or scope of work. For instance, the Payment Certifier can be properly asked to issue a Certificate for a subcontract for steel stud, insulation, and drywall, but cannot be properly asked to certify that the steel stud, insulation, and drywall *scope* of a larger general contract is complete. It is impossible to issue a valid Certificate for one scope of work under

the contract at the same time. A Certificate issued for a scope of work is probably invalid and has no effect.

4. **BC Hydro cannot be liened.** Under the statute that created BC Hydro, the *Hydro and Power Authority Act*, BC Hydro is immune from the effects of the BLA. This means you cannot validly file a lien against its land or its interests in land (such as a statutory right of way) and it is not required to retain the official 10 per cent holdback though it may provide for a holdback in its contracts.
5. **The BLA does not apply to federal property or certain properties of federally regulated facilities, such as ports and airports.** Under the *Constitution Act, 1867*, formerly known as the *British North America Act*, only the Parliament of Canada has authority to pass legislation over federal property and certain federally regulated industries, such as shipping and navigation, railways, and aeronautics. This means land held in the name of the federal government and, in many cases, land that is essential for the operation of federally regulated industries, such as ports and airports, cannot be validly liened. In certain cases, registered *leases* on federal property can be liened. This area is tricky and subject to many disputed points and subtle distinctions.
6. **The BLA may not technically require the owner and contractor to be signatories on the Holdback Account.** In British Columbia, the owner (except where the owner is the provincial government or where the contract is for less than $100,000) must establish an account for the holdback at a savings institution, and administer that account jointly with the general contractor. The BLA does not define what "administer jointly" means. There is a widely held view that this requirement is met as long as the account is administered under an *agreement* between the owner and contractor, no matter who is technically the signatory on the account.
7. **Your property can be liened without you even knowing it.** A lien is filed in the offices of the Land Title and Survey Authority of British Columbia (the LTSA), which now undertakes the functions of the Land Title Office. When a lien is filed on title to a property, the LTSA does *not* usually inform the registered owner about the filing. A lien may be filed and the owner may remain entirely unaware, until the owner obtains a title search, as is typically required for a conveyance of the property or a mortgage loan advance. The exception is when the registered owner has set up a Parcel Activity Notifier with LTSA, in which case the owner (or anyone else who has activated a Parcel Activity Notifier in respect of a particular land parcel) is notified of *any* filing in the LTSA in respect of that parcel. Also, if the lien claimant starts a lawsuit to enforce a lien, and the lien claimant files a Certificate of Pending Litigation (CPL) on title (as is required, unless the lien has been cancelled on filing security in court), then the LTSA will automatically inform the registered owner about the filing of the CPL.
8. **COVID-19 did not significantly extend time periods under the BLA.** COVID emergency measures in British Columbia, brought in on 26 March 2020 have extended all mandatory limitation periods or other mandatory legal time periods under provincial law for approximately one year. This originally applied to time limits under the BLA but that was quickly reverse (though not retroactively). As a result, time limits under the BLA (or otherwise applicable to builders liens) that began to run before 26 March 2020 were extended for only six days.
9. **You can lien for *demolition* work but not *extraction* work.** Demolition work is considered part of the "improvement" of property, since it is a necessary step for construction, and is therefore lienable. Extraction work is not, strictly speaking, to improve the property, but rather to obtain valuable materials, so it may not be lienable.[4] As such, extraction work is *not* an improvement – unlike demolition

work, which is considered an improvement. This leads to some complicated factual issues in demolition/extraction contracts.

10. **Lien priority is *not* defined by the order of filing.** The order of priority of financial charges on title to property (mortgages, judgments, liens, etc.) is important if the real equity in the property is less than the total value of all charges. For mortgages and some other financial charges, priority is based on order of filing with the LTSA. Builders liens work differently. The order of filing liens does not affect their priority, so long as the liens have been filed in time. For instance, several trade contractors engaged directly by an owner, valid liens share *pro rata* depending on the valid amount of the lien (subject to an adjustment for the costs of the lien claim and litigation). The situation is more complicated when different tiers of claimants file liens (*e.g.* a general contractor, some subcontractors, and some sub-subcontractors). In general, all valid claimants in the same tier (or "class of lien claimants") share generally *pro rata* depending on their valid or provable claim. If mortgages, liens, and other charges are all on the same property, and there is not enough equity pay them all out, then the question of priority, and specifically who has to take a discount, becomes a complex matter. It has to take into account the two different systems of priority of liens, on the one hand, and other charges, on the other.

Construction lien law differs significantly between all of the provincial and territorial jurisdictions in Canada, so the peculiarities noted above may be entirely different in a jurisdiction outside British Columbia.

This article is intended to provide general information, not legal advice. For more information, contact any of the key contacts listed below.

[1] *Ibid*, s 7(3).

[2] *Quigg Homes WV345 Ltd v Bosma*, 2004 BCSC 1582 at paras 4-5.

[3] Technically, the "improvement", the thing being built. It is probably not sufficient to post it in the site office or trailer!

[4] *West Fraser Mills Ltd v BKB Construction Inc*, 2011 BCSC 1460, rev'd on other grounds 2012 BCCA 89; *Anderson v Kootenay Gold Mines* (1913), 18 BCR 643 (Co Ct).

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