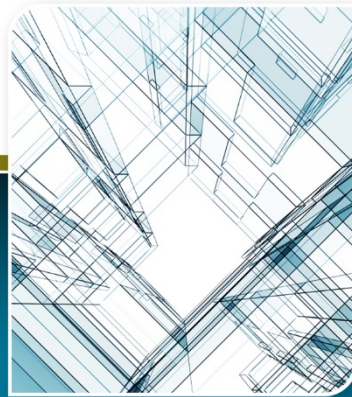


ALBERTA BUILDERS' LIEN PROCEDURES GUIDE

McLennan Ross LLP
Yellowknife • Edmonton • Calgary

Construction Industry Group
June 2012

www.mross.com



INTRODUCTION

The [*Builders' Lien Act*](#) is designed to provide contractors and suppliers of materials or equipment with security for payment. The charge created by the statute is a lien against the land (or the mineral rights) in relation to which the materials or services were provided.

Broadly speaking, a lien gives an unpaid contractor or supplier the right to foreclose on the land (or minerals) to get paid. However, the legislation also requires the construction owner to maintain a 10% holdback. If the construction owner properly maintains the holdback, it can pay the lien fund into court to remove the lien without foreclosure.

It is important to recognize that the registration of a lien does not, by itself, ensure or guarantee payment. Lien requirements are very technical and there are many reasons why lien claims can be invalidated. Also, the lien fund is sometimes insufficient to pay off all lien claimants. Therefore, although a lien is an important form of security for payment, it certainly does not guarantee payment. On the other hand, a lien can sometimes provide the only security for payment when a debtor becomes insolvent or refuses to make payment.

ENTITLEMENT TO A LIEN

A contractor or supplier is entitled to register a lien if they have:

- a) Done or caused to be done any work on or in respect of an improvement on or to land; or
- b) Furnished any material to be used in or in respect of an improvement on or to land.

A lien can only be registered in respect of an "improvement," and it attaches the lands on which the improvement is located. "Improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land, except anything that is neither affixed to the land nor intended to be or become part of the land. This generally means that work done or materials supplied in respect of things not permanently attached to the land will not support a lien.

A claimant will have a valid lien for supplying materials if the materials are actually incorporated into the improvement or consumed in the process of constructing the improvement. The material must be placed or furnished on the contract site, or in a place in the immediate vicinity of the contract site. The supplier of materials must know that the materials are intended for a specified project, or they will not be entitled to register a lien.

A renter of equipment is deemed to perform a "service," and has a lienable claim while the equipment is on the contract site or in the immediate vicinity of the contract site. The lien is limited to a "reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work."

Design professionals may have lien rights depending on the nature of their work and whether it relates to an improvement in the lands. For example, the preparation of drawings used to complete construction may support a valid lien, while the preparation of drawings used for the primary purpose of obtaining development approval will not support a valid lien.

Other construction services may support a lien if the services are necessary to the construction of the improvement. Services that will support a valid lien in the right circumstances include subsistence (camp) services, gas and plumbing services to a work camp, waste disposal, hauling and transportation.

TIME TO REGISTER A LIEN

A lien is deemed to exist from the moment work is started or materials are supplied. However, a lien expires if it is not registered within the time prescribed by statute. Subject to the exceptions set out below, a lien for materials, services or wages may be registered at any time up to **45 days** from the date the last materials, services or wages were provided or the contract was abandoned, failing which the lien expires.

If a Certificate of Substantial Performance is posted, the lien must be registered within **45 days** after the Certificate is issued, failing which the lien does not attach in respect of work done prior to the issuance of the Certificate of Substantial Performance (i.e. the major lien fund). In other words, the lien claimant's right to register a lien is not affected, but the remedies available to the lien claimant may be significantly reduced by the issuance of a Certificate of Substantial Performance (i.e. the major lien fund may be lost to the lien claimant).

With respect to improvements to an oil or gas well or to an oil or gas well site, the time for lien registration is **90 days** (from completion or abandonment or issuance of the Certificate of Substantial Performance, as the case may be) instead of 45 days. There has not been much case law as to what constitutes an oil or gas well site, so if there is any doubt the prudent lien claimant should act within 45 days.

Correcting work improperly done or omitted to be done at an earlier date is not included in calculating the time for lien registration. It is therefore not possible to extend the lien period by returning to the project site to perform additional work that should have been done earlier. The correction of deficient work does not count in the calculation of the lien period.

A "prevenient arrangement" is a legal concept that extends the time for lien registration in some limited circumstances. Under a prevenient arrangement, the supplier or subcontractor agrees that it will supply materials or services from time to time, often at multiple locations. Where materials or services are supplied under a prevenient arrangement, the time limit for registering a claim for a lien will begin to run from the date of last delivery of materials or services, and it is unnecessary to file a lien within 45 days after each delivery or service. However, a general account for materials or services is not sufficient to create a prevenient arrangement for lien purposes. Before a prevenient arrangement exists, the courts require that the parties agree to a limited time frame, a designated area of service, a guarantee of a specific amount of work, and exclusivity or other specific requirements.

WHAT LANDS CAN BE LIENED

A lien only exists in relation to the interest of an "owner" as that term is defined in the *Act*. "Owner" is defined in the legislation as follows:

"owner" means a person having an estate or interest in land at whose request, express or implied, and

- i. on whose credit,
- ii. on whose behalf,
- iii. with whose privity and consent, or
- iv. for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material.

It is important to note that the definition of “owner” in the *Act* is not necessarily consistent with other legal concepts of ownership or common sense (e.g. in some cases subsidiary interest holders such as tenants may qualify as “owners,” while the actual registered legal owner may not be an “owner” as defined in the *Act*). There may be multiple owners for lien purposes – with the consequence that multiple interests can be liened.

For example, when work is done for a tenant, the lien may be registered against the leasehold estate (and it is necessary to identify on the statement of Lien that the liens claimed against the tenant’s leasehold estate). A second lien can be registered against the estate of the holder of the fee simple title (i.e. the landlord) if the landlord also qualifies as an “owner” as defined in the *Act*, such as when the landlord requests and benefits from the work along side the tenant. The landlord’s interest may also be liened if a notice under section 15 of the *Act* was provided prior to commencing the work. Therefore, work done for a tenant entitles a claimant to register a lien against the tenant (the leasehold estate), and in some circumstances the claimant may also register a second lien against the landlord (the fee simple estate).

With respect to condominiums, work done at the request of the owner of a unit can give rise to a lien on that unit and that owner’s share in the common property. Work done in respect of the common property gives rise to a lien in the estates of all the owners in all the units and the common property.

No lien exists with respect to a public highway or to land held by the Board of Directors of an irrigation district.

The estate and the lands of the Crown are not subject to lien claims. However, lien rights may exist against the estate of a tenant or lessee of the Crown. The ability to lien the estate of a public corporate entity depends on the nature and degree of control which the Crown exercises over it.

A lien cannot be registered against an Indian Band’s interest if the land is standing in the name of the Indian Band. A lien can be registered against lands owned by a municipality.

Not all lands in the Province of Alberta have been brought under the *Land Titles Act*. This means the lands in question not only belong to the government but no “title” has ever been issued (i.e. non-patent lands). A Builders’ Lien may still be registered against such land. The Registrar endorses the lien against a “record sheet” kept for the non-patent land in question, or creates a “record sheet” for the land if none exists.

A lien is not necessarily limited to the specific lands upon which work was done. Other Certificates of Title may be liened if the work forms part of a larger integrated project or otherwise improves adjacent lands. The determining factor is not where the work took place, but where the “improvement” is located.

REGISTRATION PROCESS

Liens can be registered at the Land Titles Offices in Edmonton and Calgary, or at various private registry offices. The following information is the minimum required to register a statement of lien:

- full legal name and address of the party (individual or corporation) registering the lien
- the legal description of the land
- the full legal name and address of the “owner” of the interest in land
- the nature of the legal interest against which the lien is claimed
- a description of the work/materials/services
- the full legal name and address of the other contracting party (party who requested the work)
- the date the work was completed or abandoned, or whether work is ongoing
- total amount claimed due or to become due
- an address for service within Alberta for the lien claimant

The Statement of Lien must state the nature of the interest which is liened (eg. leasehold or freehold). If the Lien Claimant is claiming for interest charges, this should be expressly stated on the Statement of Lien.

The legal land description can be obtained in most cases by doing a Tax Search in relation to the municipal address. The municipal Tax Departments will not certify the correctness of the information they provide, but confirmation can be obtained by obtaining a Certificate of Title from the Land Titles Office. If possible, legal land descriptions should be obtained in advance in case a lien must be registered quickly.

It is not necessary to use a lawyer to register a statement of lien, but it is recommended in any case where there is some legal complexity of a significant sum of money at stake.

The [Statement of Lien](#) form is prescribed by statute. Care is required in completing the Statement of Lien form, particularly the description of the lands and the parties; certain errors may invalidate the lien or otherwise prejudice the claimant’s lien rights. The statement of lien must be signed by the lienholder or its agent. It is required to attach an affidavit of execution, unless the lien is executed under seal by a corporation. Finally, the statement of lien must also be verified by affidavit by the lien holder or the agent of the lien holder. When the affidavit of verification is made by a person other than the lien holder, it may include not only facts within the personal knowledge of the deponent, but also the facts of which the deponent is informed, provided the deponent gives the source of this information and states that he believes the facts to be true.

Avoid last day lien registration if possible. There are numerous reasons lien registration may be rejected or delayed.

MINERAL LIENS

A lien may also be claimed in respect of an estate or interest in minerals if work is done or materials are furnished preparatory to, in connection with, or for an abandonment operation in connection with, the recovery of a mineral. The lien attaches to the minerals both in the ground and after they are extracted (“severed”) from the land.

It is possible that the same work may entitle the Lien Claimant to register liens against both the lands and mineral interests.

A mineral lien attaches to all estates and interests in the mineral concerned (not just the estate of the “owner” as defined in the *Act*). But the mineral lien does not attach to the estate in fee simple in the minerals unless the holder of the estate in fee simple expressly requested the work.

In the case of a mineral lien, the Statement of Lien must be registered with the Land Titles Office if the mineral interest is registered under the *Land Titles Act* (i.e. because the minerals are privately owned). When dealing with mineral interests that are not registered under the *Land Titles Act* (which is the case with most mineral interests in Alberta), the Statement of Lien must be registered with the Minister of Energy and not with the Land Titles Office.

Note that there is a specific form of [Statement of Lien](#) for mineral liens.

PRESERVING A LIEN

A Statement of Claim must be issued to enforce a lien, and a *lis pendens* must be registered on title, within 180 days of the registration of the lien. (A *lis pendens* is a certificate issued by the court to confirm that a Statement of Claim relating to the land has been issued.) A failure to do both of these things will result in expiry of the lien. If another lien claimant commences an action within the 180 day time period to realize upon the same lien fund, it is not necessary to file a Statement of Claim, but a *lis pendens* is still required. That is, more than one Statement of Claim is required only where there is more than one prime contract and hence, more than one lien fund. Also, if the lien fund or security for the lien is paid into court, the requirement to start an action or register a *lis pendens* within 180 days is waived.

The owner of the lands or any other party affected by the lien may serve the lien claimant with a Notice to Commence Action to realize on its lien. If served with such Notice, proceedings by way of Statement of Claim and *lis pendens* must be started within 30 days or the lien ceases to exist.

ENFORCING A LIEN

Enforcing a lien typically means applying to obtain a court order declaring that the lien requirements have been met and the associated debt is valid (i.e. the court will declare the lien to be valid and grant judgment on the underlying debt). The *Builders’ Lien Act* permits for such an application to be made using a summary procedure, that is, using Affidavit evidence instead of live witnesses and trial. Substantial legal process can nevertheless be required, such as cross-examinations regarding disputed factual issues. It is recommended that you consult your legal counsel before your lien issues get to this stage.

It is common to see parties negotiate a resolution of lien issues, particularly when the facts are clear and the parties or their legal counsel understand their lien rights. In such cases, the parties may resolve lien issues outside of court, or if necessary they may obtain a court order by mutual consent to put an agreed resolution into effect. The parties may also engage in mediation or arbitration by agreement. An agreement to resolve disputes by mediation or arbitration does not preclude a claimant from exercising its statutory lien rights.

Although the lien legislation provides for a summary process, in some cases the dispute will be too complex for resolution on the basis of affidavit evidence. This is most often the case when there are serious issues of contract interpretation, delays or deficiencies that led to the payment dispute. In such

cases, the court will direct the dispute to go to trial, and the claimant's lien rights will continue until a judgment is issued following trial. (However, the lien will frequently be discharged from the land and replaced with alternate security.)

Once a lien is declared valid, the court may order the lands to be sold (i.e. foreclosure) in order to satisfy the claim of lien. In practice, this almost never occurs because liens are typically discharged from the affected lands and replaced with alternate security well before this stage in the process.

Cash proceeds from the sale of land, or alternate security, will be distributed among lien claimants and other secured creditors once all lien rights have been determined. Broadly speaking, lien claimants of the "same class" will share in lien proceeds on a pro-rata basis, regardless of the sequence of lien registration. In this context, lien claimants are of the "same class" if they are contracted to the same party in the construction chain. Priorities among lien claimants of different classes, and between lien claimants and other secured creditors, can be complex and it is recommended that you obtain specific legal advice in such cases.

THE HOLDBACK AND THE LIEN FUND

The holdback and the lien fund are distinct, but related, concepts.

The holdback is the amount required to be retained by the owner pursuant to s.18 of the Act, being 10% of the value of work performed or material furnished. The holdback is the owner's protection from liens. The owner who fails to retain a holdback risks paying lien claims out of pocket. The holdback may be released by the owner after the relevant lien period expires, provided no liens are registered.

Broadly speaking, the lien fund consists of the holdback plus any additional amount payable but not yet paid under the contract when liens are registered (the distinction between the major and minor lien fund is discussed later.) The lien fund is the amount the owner must pay into court to remove liens from title to the lands (unless the lien claims are less than the lien fund.)

Calculation of the lien fund is often a complex and contentious issue. the following is a general guide only and reference should be made to the relevant provisions of the *Act*.

The legislation defines the lien funds as (1) 10% of the value of the work actually done (or materials furnished) plus (2) any amount payable under the prime contract over and above the 10% which has not been paid by the owner under that contract in good faith prior to the registration of a lien.

In the case of a completed contract, the value of the work is the amount of the contract. Where a project is incomplete, the value of the work is determined by finding the extent of the completion, as a percentage, and applying it to the contract price (as opposed to using an estimate of the cost of completion subtracted from the contract price).

Payments made after a lien is registered do not reduce the lien fund. For this reason it is ordinary and recommended practice for owners and mortgagees to check title to ensure no liens are registered before advancing funds.

It is important to note that the second part of the lien fund may be reduced on account of set-offs (eg. for cost overruns) on the basis that this reduces the amount "payable." The first part of the lien fund (ie. 10%) cannot be reduced on account of set-offs. Thus, the lien fund consists of at least the 10% holdback.

If a Certificate of Substantial Performance is issued, there is both a major lien fund and a minor lien fund. The major lien fund is 10% of the value of the work done plus any additional amount payable and unpaid for work done up to the date of issue of the Certificate of Substantial Performance.

The minor lien fund is available for those who do work subsequent to the date of issue of the Certificate of Substantial Performance. The minor lien fund is 10% of the value of the work done on or after the date of issue of the Certificate of Substantial Performance, plus any additional amount payable and unpaid with respect to work done on or after that date.

If no Certificate of Substantial Performance is issued, there is only one lien fund.

In all cases, the owner is entitled to make a formal application to pay the lien fund into court to discharge any related liens on title. The lien fund is therefore the owner's maximum liability to discharge any liens, provided the owner has otherwise complied with the requirements under the *Act*.

CERTIFICATE OF SUBSTANTIAL PERFORMANCE

A Certificate of Substantial Performance may be issued by any contractor with respect to its own contract or by the general contractor with respect to any subcontract. A general contractor may wish to issue a Certificate of Substantial Performance to obtain a release of the major lien fund holdback. A subcontractor or supplier may wish to issue a Certificate of Substantial Performance to obtain the release of the holdback associated with its work.

The contractor is required to post the Certificate in a conspicuous place on the jobsite within three days of issuance. Posting the Certificate triggers a deadline for registering a lien that attaches the major lien fund, as discussed above. Forty-six days after the Certificate is posted, the owner can safely release the major lien fund holdback (in the case of a general contractor's certificate) or the holdback associated with a subcontractor's work (in the case of a subcontractor's Certificate) if no liens have been registered. However, the contract determines whether the owner is *required* to release the relevant holdback when a Certificate is posted.

The test for determining "substantial performance" is set out in section 2 of the *Act*.

2 For the purposes of this *Act*, a contract or a subcontract is substantially performed

- a) when the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and
- b) when the work to be done under the contract or subcontract is capable of completion or correction at a cost of not more than
- c) 3% of the first \$500 000 of the contract or subcontract price,
- d) 2% of the next \$500 000 of the contract or subcontract price, and
- e) 1% of the balance of the contract or subcontract price.

LIEN REMOVAL

Section 27 of the *Act* permits the owner or a mortgagee to give security or pay the amount of the lien fund into court. That security or payment does not constitute an admission of the validity of any of the lien claims. The court will order that the liens be discharged upon receipt of the security or payment. If

necessary, litigation or negotiation will then proceed to resolve any dispute regarding entitlement to the funds. An application under section 27 can only be made by the owner or mortgagee authorized by the owner to disburse money secured by a mortgage.

Section 48 provides for the removal of liens where the court is given cash or security for the full amount of the lien claims. An application under section 48 may be made by any party. The court will set the amount of cash or security required, plus interest if claimed in the Statement of Lien, plus an allowance for costs (typically 10% or 15% of the claim is used as an allowance for interest and costs). The court will direct the manner in which the remaining issues between the parties are to be resolved.

Section 27 and 48 applications can be made on very short notice if there is any urgency and there is no basis to dispute the amount of security or payment required.

Section 48 also gives the court the discretion to remove a lien where it is beyond doubt that the lien claimant is not entitled to lien; e.g. where the lien was filed out of time. Such an application is more contentious, and cannot usually be made without a more involved process compared to simply giving security or making payment into court. We recommend engaging your legal counsel for all such applications.

A lien may also be removed pursuant to section 29, which allows a party to pay a lien claim of a subcontractor and have such payment operate as an effective payment under the payor's own contract. However, five days' advance notice must be given to all affected parties, and such payment cannot be validly made if any objection is raised.

As well, a lien can be discharged voluntarily by the registration of a Discharge of Lien. It is common to see alternative security provided (e.g. funds paid into trust) on appropriate conditions (including removal of the lien) rather than making payment into court, or the parties may come to a settlement requiring the lien to be discharged without going to court.

If a lien holder fails to bring a lawsuit and register *lis pendens* within 30 days from the date of service of a Notice to Commence Action, the lien may be removed by a letter to the Registrar of Land Titles enclosing proof of service of the Notice to Commence Action (e.g. by Statutory Declaration). If a lien holder fails to register a *lis pendens* within 180 days from the date of registration of the lien, a letter to the Registrar is likewise sufficient to have the lien discharged. If a lien claimant fails to get to trial within two years from the date of registration of the *lis pendens*, it is possible to have the lien removed, but a court application is required, and the court has discretion to refuse the application if there is adequate explanation for the passage of time.

COMMON PITFALLS

A common pitfall arises in the context of transfers of title (i.e. when property is sold). When a transfer in title takes place, it is possible that the builders' lien claimant loses its right to register a builders' lien. If the lien has already been registered, it will survive the transfer. However, if the transfer occurs and then the contractor wishes to register the lien, he can only do so if the new owner (the purchaser) falls under the statutory definition of "owner." If the purchaser did not expressly or impliedly request the work to be performed or materials to be supplied (a fairly common scenario in new home construction, where the new home purchaser has no active involvement in construction), he is not an "owner" as that term is defined in the *Act*, and the transfer has the effect of extinguishing lien rights.

There are numerous potential pitfalls for lien claimants, particularly associated with lien registration. Although the Statement of Lien appears to be a simple one-page form, there are strict requirements regarding the timing of registration and content of the Statement of Lien form that must be respected. For one thing, processes and requirements prescribed by the Registrar of Land Titles must be respected in addition to the statutory requirements found in the *Builders' Lien Act* ([click here](#) to view relevant section of the Land Titles Procedures Manual). As lien registration is often time sensitive, simple mistakes can and frequently do result in loss of lien rights.

A common problem for lien claimants relates to registering the lien against the wrong legal interest. As discussed above, a lien can only be registered against the interest of a party who meets the statutory definition of an "owner." So, if a tenant is contracting for the construction work, the statement of lien must specifically identify that the lien is claimed against the tenant's leasehold interest in the lands. It is too common to see lien claimants unfamiliar with this distinction losing their lien rights because they only register a lien against the landlord's interest (fee simple title) when work is in fact done for a tenant.

A related problem is the occasional failure to recognize the full extent of potential lien rights. In many circumstances, more than one lien can be registered in respect of the same work. Work in respect of the recovery of a mineral may justify both a lien against the lands and a separate lien against the minerals. There may also be more than one party that qualifies as an "owner" under the *Builders' Lien Act* (e.g. landlords, tenants and mortgagees), in which case more than one Statement of Lien should be registered. Further, more than one parcel of land may be "improved" by the work or materials supplied, in which case additional lands should be identified in the Statement of Lien. Of course, wrongful lien registration can result in liability on the part of the lien claimant, and so we recommend obtaining legal advice if there is any question about the extent of the claimant's lien rights.

Missed deadlines is probably the most common pitfall for lien claimants. The time frames for lien registration are short and the commencement date is not always clear (e.g. there is often dispute as to whether the completion of deficiencies counts in the calculation of the lien period). The 180 day deadline for starting a lawsuit and registering a *lis pendens* on title is often missed by those unfamiliar with the finer details of the lien legislation. A summary of the key statutory deadlines is included at the end of this section.

Contractors and suppliers should not make the mistake of relying exclusively on lien rights when contracting with a party with limited cash flow or questionable credit. There are many other ways to obtain security for payment, but most of these mechanisms must be negotiated at the outset. Consult your legal counsel about the available options, before signing the contract and taking on the credit risk.

The *Builders' Lien Act* also presents numerous potential pitfalls for construction owners and lenders. The most obvious risk is the failure to maintain the holdback in accordance with the lien legislation. It is important to note that the holdback exists for the protection of the owners (and lender, if applicable). As discussed above, the failure to maintain the holdback can result in the owner having to pay twice to discharge lien claims in some circumstances.

A rule of thumb for owners and lenders is to check title each time payment is made to ensure no liens are registered. If a lien has been registered, payment should be suspended until arrangements are made to remove the lien from title. A title search should be done on the same day as payment is to be made. The legislation provides that payment can safely be made in reliance on a clear certificate of Title, if even if a lien is registered later that same date.

Finally, a potential risk for owners and contractors alike is the use of a construction contract that is not consistent with the lien legislation. Standard form industry contracts have been developed with statutory lien requirements in mind. However, it is not uncommon to see construction contracts developed outside Alberta that are not consistent with Alberta Lien legislation.

In Alberta, any contract provisions that purport to waive the requirements of the *Builders' Lien Act* are void.

SUMMARY OF DEADLINES IN THE ALBERTA *BUILDERS' LIEN ACT*

<u>Event</u>	<u>Deadline</u>	<u><i>Builders' Lien Act</i> Reference</u>
Registration of Statement of Lien	45 days from the date that the last of the materials is furnished, the performance of services or work is completed, or the contract to provide same is abandoned (90 days in the case of work etc. done on or in respect of an oil or gas well site)	s. 21
Registration of Statement of Lien in respect of work done prior to issuance of Certificate of Substantial Performance	45 days from the date of issuance of the Certificate of Substantial Performance (90 days in the case of work etc. done on or in respect of an oil or gas well site)	ss. 21, 27
Commencement of Action and registration of <i>Lis Pendens</i>	180 days from the date of registration of the Lien; 30 days from the date of service of Notice to Commence Action	ss. 43, 45
File Affidavit Proving Lien	15 days from date of service of Notice to Prove Lien	s. 48
Pretrial Application	Before setting the action down for trial	s.53
Trial	2 years from the date of the registration of the Certificate of Lis Pendens	s. 46

This paper is a general overview of the subject matter and cannot be regarded as legal advice. For further information or advice please contact your legal counsel.