

PLAIN LANGUAGE GUIDE

TO THE *PROMPT PAYMENT AND
CONSTRUCTION LIEN ACT*

**VOLUME 1: BUILDERS' LIENS
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Construction
Association**

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PREAMBLE

The Alberta Construction Association Plain Language Guide to the *Prompt Payment and Construction Lien Act* (the “Act”) is intended to assist participants in the construction industry in understanding and generally dealing with prompt payment and builders’ lien issues in a reasonably informed manner.

The Plain Language Guide has three volumes:

1. Builders’ Liens
2. Prompt Payment
3. Adjudication

In addition to the various individual topics addressed in the Guide, fifty frequently asked questions (“FAQs”) have been included to ensure that the Guide addresses commonly expressed concerns of industry members and to enable the user to readily access those specific issues which are of practical importance to them. Answers to additional FAQs are available at the ACA website at www.albertaconstruction.net.

The information contained in the Guide relates to the *Prompt Payment and Construction Lien Act*, R.S.A. 1980, c.P26.4, and amendments thereto up to and including the print date of the Guide.

Use of the Guide should not replace individual judgement and does not, and cannot, take into account or address the particular circumstances of each and every individual situation involving the lien legislation. Accordingly, the Guide is not intended to preclude or replace consultation with other individuals and professional consultants who may be able to offer additional, or more specific, direction with respect to a particular concern, circumstance or requirement.

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ACA wishes to acknowledge Kerry Powell and Tom Brookes of Gowling WLG for the development of this guide.

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BUILDERS' LIENS IN ALBERTA

BASIC GUIDELINE

INTRODUCTION

Builders' Lien remedies are often criticized by participants in the construction industry. Over the years, many persons counting on their Builders' Liens to provide an effective remedy have been disappointed. The somewhat complicated rules regarding entitlement to a Builders' Lien, filing times, formalities and enforcement procedures have often required claimants to seek legal advice and assistance throughout the process. This Guide is intended to dispel some of the myths and misunderstandings surrounding Builders' Liens, and to provide guidance as to how to make Builders' Lien remedies worthwhile and as effective as possible.

WHAT IS A BUILDERS' LIEN

A "lien" is a legal claim or charge against property or assets. A "builders' lien" is a specific kind of lien claimed by a person who provides work, furnishes materials, performs services, or rents equipment to a construction project (collectively, a "lienholder"). This lien acts as a charge against the legal interest in the project land held by the person who requested the work performed. The amount of the lien is the amount of money the person is owed, but has not been paid, for their work.

A builders' lien gives the lienholder legal "security". It gives a lienholder a right to payment from the funds withheld by the owner of the project or, if those funds have not been retained, to have the land sold and the proceeds paid to lienholders. Without a builders' lien, a person could only sue the person with whom they had a contract.

LAWYER INVOLVEMENT

Lawyers are not required to be involved in the filing of Builders' Liens. The forms are relatively straightforward, and the filing process is not difficult. Builders' Liens do have to be registered at the Provincial Land Titles Offices in either Edmonton or Calgary and may not be registered at private registry offices. Counter clerks at the Land Titles Offices are generally very knowledgeable and helpful. Many people and businesses are able to successfully prepare and file their own liens. In straightforward situations, legal advice may not be necessary.

However, there are a number of circumstances where it may be wise to obtain early legal advice. Claims involving leasehold titles and mineral titles, for example, are complicated and claimants may benefit from a consultation with a lawyer knowledgeable in construction and Builders' Lien matters. As well, since enforcement of a filed Builders' Lien usually requires the commencement of a lawsuit in the Court of King's Bench, the services of a lawyer are generally required

if this step becomes necessary.

WHO IS ENTITLED TO FILE A BUILDERS' LIEN

There are four categories of persons who may file Builders' Liens:

- a) persons who perform work on or in respect of an improvement;
- b) persons who furnish materials to be used in or in respect of an improvement;
- c) persons who perform services on the improvement; and
- d) persons who rent equipment to be used in or in respect of an improvement.

Generally, those categories can be characterized as contractors, subcontractors, workers, material suppliers and equipment renters. "Improvement" is defined as being anything "constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land." These provisions are relatively straight forward with respect to persons performing work or services or supplying equipment.

Material suppliers, however, must be able to establish that the material is intended to be affixed to the land (i.e. part of the improvement and not something either temporary or which is intended to remain a "chattel" (personal property). Material suppliers must also be able to establish that they supplied materials in relation to a specific improvement. In other words, the material supplier must know which project its materials are to be used for.

In this area, the most difficult issues relate to architects, engineers and developers. Their services may, in some circumstances, give rise to a valid lien claim. In others, they may not.

It should be noted that the Act provides that any agreement purporting to waive Builders' Lien remedies is unenforceable, so even if a person has previously agreed not to file a lien, that person may still file a valid Builders' Lien. As well, a person cannot validly agree to extend the filing period for a Builders' Lien. Any agreement to extend filing periods would be unenforceable against anyone who is not a party to the agreement (such as other lien claimants, mortgage companies or other creditors).

WHEN DOES A LIEN ARISE

A lien arises when a person begins work or supplies materials to an improvement. That lien can be registered at any time until the deadlines discussed below. A person can register a lien even if the amount of the lien is being disputed through the Act's adjudication process. This means that a claimant does not need to wait until after completion of its work or services before registering a lien.

Most lien claimants wait until their work is complete or they have concerns over being paid before registering a lien. There is generally no advantage to registering a lien early, as it will negatively affect the lienholder's reputation and cause payment problems down the construction chain. So long as the lien is ultimately filed within the appropriate time, the lien claimant is generally protected. However, if payments stop or the contractor or subcontractor for whom the claimant is working runs into difficulties, this approach should be reassessed.

WHAT LANDS ARE LIENABLE

Basically, lands other than those owned by the Federal Government and the Provincial Government, or located on Indian Reserves or Métis Settlements, may be lienied. Crown Corporations are included in the prohibition, so that lands owned by Federal or Provincial agencies are not lienable. Otherwise, lien remedies are available against privately owned lands, including municipal lands and most educational and health facilities.

Determining whether a particular authority or agency is or is not an agent of the Crown and exempt from being lienied is difficult and requires legal interpretation.

For the Provincial Government and Provincial agencies, the Public Works Act provides for a claim procedure separate and distinct from the Prompt Payment and Construction Lien Act. Unpaid parties who have worked on a Provincial "Public Work" may file a claim by sending a written claim to the appropriate Minister, Board, Commission or Agency of the Crown that is responsible for the Public Work. There is no statutory form of claim, and a sample is included with this Guide. The written claim should include the name of the Claimant, the person for whom the work was being done, the project involved, a simple statement of the type of work being done, when the last work was done, the amount claimed and an address where the Claimant can be contacted. Public Works claims must be filed within 45 days after the last day on which the labour, equipment, material or services were provided. With contracts with the Crown as represented by the Minister of Infrastructure involving transportation or utility work, the claim must be sent not sooner than 30 days and no later than 90 days after the last day on which the labour, equipment, material or services were provided.

Claimants should be aware that Crown contracts with a value of more than \$100,000 are likely bonded (with performance and labour & material payment bonds). Bond remedies may be very effective, and claimants should make timely inquiries of the applicable contracting authority as to any bonding which may apply to a public project and pursue bond remedies as well as Public Works Act claims.

There are no such remedies available against the Federal Government or its agencies. Many Federal contracts incorporate provisions protecting subcontractors and suppliers, so an unpaid claimant working under a Federal Government contract should make timely inquiries of the applicable contracting authority as to any contractual provisions and as to any bonding which may apply to the project.

When an individual or non-Crown Corporation has an interest in Crown lands, it is possible that its interest may be lienable. Again, this is a complicated issue and it is recommended that someone who finds themselves in this circumstance seek legal advice regarding the filing of any claim.

MINERAL LEASES

Mineral interests owned privately can be lienied. In Alberta, over 80% of the mines and minerals are owned by the province, although when exploration and production takes place, persons or corporations will likely have taken a lease of the minerals. Their mineral lease is subject to Builders' Liens.

Builders' Liens for minerals or oil and gas work on Crown Lands should be filed at both the Land Titles Office as well as with Alberta Energy. Alberta Energy maintains a registry for mineral titles and leases. Registering a lien with Alberta Energy is especially important where the lien is against unpatented Crown lands (i.e. lands owned by the Provincial Government for which no separate title has been issued). Generally, legal advice should be sought when mineral interests are concerned to ensure that the proper procedures are followed.

PUBLIC HIGHWAYS AND IRRIGATION DISTRICTS

Liens may not be filed against public highways or irrigation districts. Some road works and structures may be privately owned, so that if there is any doubt as to whether or not the highway is "public", legal advice should be sought.

INDIAN RESERVE LANDS, METIS SETTLEMENTS

Builders' liens against land located on Indian Reserves are not permitted, though it is possible to register a Builders' Lien against a leasehold interest in Indian Reserve land. Issues involving First Nations (Indian) lands are complicated, difficult and are largely governed by the Federal Indian Act. Prompt legal advice should be sought in the event of concerns. Similarly, claims involving lands on Métis Settlements are not permitted. Settlements fall under Provincial legislation and claims are complicated and difficult. Prompt legal advice should be sought in the event of concerns.

LANDLORDS AND TENANTS

When a landlord rents to a tenant, the landlord will possess a legal interest in the land itself (the "fee simple") whereas the tenant will likely only possess a legal interest in its right to lease that land (the "leasehold interest"). Where work is being done on tenant improvements, the lien will apply to the tenant's leasehold interest in the lands and not the landlord's fee simple interest in the lands. The Act requires written notification to be given to the landlord if the lienholder wants their lien rights to also attach to the Landlord's interest in the lands instead of merely the leasehold interest of the Tenant. This is very important, as remedies against leasehold interests are much less certain than those against the landlord's "fee

simple” estate. A person doing work or furnishing materials for tenant improvements may give the landlord or his agent “notice in writing of the work to be done or materials to be furnished” before he starts the work. If he does so, the lien also attaches to the landlord’s interest unless the landlord or his agent gives notice that he will not be responsible for the work or materials, within 5 days after receipt of the notice.

There are other circumstances where the landlord may be responsible for work done for a tenant, but this will depend on the nature of the lease between the landlord and the tenant and the degree of involvement by the landlord in the construction process. Sometimes, even without the written notice described above, a landlord may be found to be an “Owner” for the purposes of the Act, even though the landlord has no direct contract for construction of tenant improvements. The basis for such a determination depends on the specific terms of the lease (i.e. whether the landlord may be more than just a landlord because of profit sharing arrangements, whether the landlord is paying for or contributing to the cost of the improvements, the level of approval of plans the landlord has, and whether the landlord has a say in who is hired to do the work) as well as the level of involvement the landlord has with the contractor during the construction process.

It is very important to determine whether the claimant is working for the owner or the tenant, or for the owner’s contractor or the tenant’s contractor. Liens registered against only the tenant’s interest in the lands may be of limited value. In the event the tenant goes bankrupt or otherwise defaults under its lease, the landlord may be able to terminate the tenancy and the lease to which the lien has attached, leaving the lien claimant with no remedy against any interest in the lands. This is a difficult and complex area and likely requires careful legal advice.

CONSEQUENCES OF REGISTERING A LIEN

Registering a lien has significant legal and practical consequences. Firstly, it encumbers (creates legal restrictions on) the owner’s interest in the land. Secondly, it prevents the owner from making any further payments to the contractor until the lien is discharged from the land (either by posting security for the lien or dismissing the lien). These will have the practical consequence of causing all payments down the construction chain to stop, which may then interrupt construction, or cause other parties to register their liens too. Therefore, registering a lien can harm client relationships. Registering a lien for an improper amount of money can also result in potential liability. A lien holder should carefully consider these consequences before it registers its lien.

TIME FOR FILING

The basic rule for filing of Builders’ Liens is that they must be registered at the Land Titles Office within 60 days. The question is, 60 days from when? Filing times vary, depending on whether you are a general contractor, a subcontractor, a material supplier, a supplier of services, a worker, or an equipment renter. Filing times also can become accelerated for practical reasons where a Certificate of Substantial

Performance has been posted (see below). To calculate the 60-day period, the last date worked, or the last date on which materials were supplied is excluded from the calculation. If the 60th day falls on a weekend or statutory holiday, the filing date is extended to the next business day.

There are two circumstances where a 90-day timeline, instead of a 60-day timeline will apply. Firstly, all work on an improvement for an oil and gas well or well site will have a 90-day timeline. Secondly, all suppliers of ready-mix concrete on any improvement – but not the installers of that concrete – will also have a 90-day timeline.

GENERAL CONTRACTORS, SUBCONTRACTORS, AND SUB-SUBCONTRACTORS

The “contractor” is the party contracted with the owner who requests the work. Any party contracting with the contractor, except for a labourer, material supplier, or supplier of services, is a “subcontractor”. Therefore, both subcontractors and sub-subcontractors fall under the definition of the “subcontractor”.

Contractors and subcontractors may register their Builders’ Liens at any time up to 60 days from total completion or abandonment of their Contract or Subcontract. “Total completion” means all of the work intended to be performed under the contract. Total completion is sometimes described as the time when the “last doorknob” has been installed. Remedial work, correcting deficiencies and warranty work generally occur after total completion and do not extend the time for filing Builders’ Liens.

MATERIAL SUPPLIERS

Liens for the supply of materials may be registered at any time within 60 days from the day the last of the materials to be supplied under the Purchase Agreement is furnished or the Contract to furnish the materials is abandoned.

SERVICE PROVIDERS

Liens for the performance of services may be registered at any time within 60 days from the day that the performance of services is completed or the contract providing for the services is abandoned. Service providers are also affected by the posting of a Certificate of Substantial Performance.

WAGE EARNERS/WORKERS

A lien for wages may be registered at any time within 60 days from the day that the work for which the wages are claimed is completed or abandoned.

EQUIPMENT SUPPLIERS/RENTERS

Their rights are similar to the rights of Material Suppliers.

CONSULTANTS

Consultants and those working in “a consultive capacity” like architects and engineers can be considered “persons who perform services” for the improvement, and so may be entitled to register builders’ liens if their work. This occurs when their work is directly related to the process of construction.

When that is the case, it technically means that the consultant must participate in the prompt payment aspects of the Act and must have holdback withheld by the owner. To avoid holdback, architects and engineers acting in a consultive capacity can waive their lien rights if they wish.

UNPAID VENDORS’ LIENS

An often-ignored remedy is the unpaid vendor’s lien remedy provided in section 14 of the Act. Material suppliers may be able to enforce special (extra-judicial) remedies in the event that materials supplied by them have not yet been incorporated into the work. If materials are unpaid for, and are being stored on or off-site, the material supplier may be able to have these materials seized by a civil enforcement bailiff. The procedures for doing so are complicated, and it is recommended that legal assistance be sought. Once the materials have been incorporated into the work, seizure remedies are no longer available. Incorporation into the work is a question of fact, although any degree of affixation is likely sufficient to constitute incorporation. The enforcement of an unpaid vendor’s lien may be highly effective for material suppliers and may result in a greater and faster recovery.

PROCEDURE FOR FILING

Builders’ Liens are filed at the Land Titles Office (and Alberta Energy for Mineral work). There are Land Titles Offices in Edmonton and Calgary. The lien must be submitted to the Land Titles Office on or before the 60th day. The lien will be added to the Pending Registration Queue, where it will be actually registered to the land titles certificate in the order it was received. Having the lien entered into the Pending Registration Queue on or before the 60th day is sufficient, even if the Land Titles Office takes months or weeks to actually register the Builders’ Lien to the land title certificate. However, last minute filings are dangerous. If there is any concern about the timeliness of filing or backlogs in the Land Titles Office, an Examiner at the Land Titles Office should be consulted. Land Titles staff will provide assistance with respect to Builders’ Lien registrations.

A sample form of Builders’ Lien (Statement of Lien, Affidavit Verifying Claim) is included at the end of this Guide. The form must be correctly filled out including:

1. The correct legal address of the property where the work was performed;
2. The name of the owner of the property, as well as the party for whom the work was performed;
3. An accurate statement of the amount of the lien;
4. The last day work was performed or materials supplied; and
5. Completion of the Affidavit Verifying Claim.

The lien can be signed by the claimant itself, or an agent. If the claimant is a corporation, the lien can be signed by any officer or agent of the corporation and does not need to be under seal. The person signing the lien does not need personal knowledge of the circumstances giving rise to the lien but should be very confident in the accuracy of information provided to them by someone with personal knowledge of the claim.

If the statement of lien is found to be incomplete, not in the proper form, or not fit for registration, the Land Titles Office may return the statement of lien for correction, and if not corrected within 30 days, the statement of lien will be rejected. Even if the statement of lien is not rejected by the Land Titles Office, deficiencies in the statement of lien may invalidate it. Great care must be taken with the legal description of the property, as well as the description of the parties and their relationships.

Because liens are a statutory remedy, the Courts have taken a strict approach to compliance. Errors or mistakes in liens or procedures generally render the lien invalid. Getting things right the first time is very important.

INTEREST AND COSTS

If the contract under which the claim arises provides for interest on unpaid accounts, the lien may include interest at that rate. If no interest is specified, interest under the Alberta Judgment Interest Act may be claimed (which provides for simple interest at an annual rate set by the government). Generally, legal costs cannot be included in the lien, although there are some circumstances in the enforcement process where legal costs may be recoverable. Damage claims (against the Owner by the Contractor, or against the Contractor by a Subcontractor) cannot generally be included in the lien and usually will have to be the subject of separate action or dispute resolution proceedings.

LEGAL DESCRIPTIONS

One of the biggest challenges for lien claimants and their lawyers is determining the correct legal description for the property to be lienied. Liens filed against the wrong lands are almost always held invalid. The “legal description” is the description of the property at the Government Land Titles Office and is often difficult to find. It may also be time-consuming to obtain the correct information. For lands within a

municipality, the municipal tax office will usually (for a fee) provide the legal description for a given municipal address. For rural lands, maps showing townships, ranges and sections may need to be consulted. Locating legal descriptions for mineral leases can be especially problematic because some lands have not yet been brought within the Land Titles system. This is another area which may require early legal advice. An example of a certified copy of title with a lien registered against it is included at the end of this Guide.

SUBSTANTIAL PERFORMANCE

As noted at the beginning of this Guide, a builders' lien gives the lienholder legal "security". It gives a lienholder a right to payment from the funds withheld by the owner of the project. The Act defines Substantial Performance to trigger lien holdback releases. Substantial Performance does not affect the time for filing a Builders' Lien, but it has a significant impact on the amount of money a lienholder may recover through its Builders' Lien. Substantial Performance comes into play if a Certificate of Substantial Performance is posted by the Owner, Contractor or Subcontractor. The filing of a Certificate of Substantial Performance triggers practical filing periods for those parties wishing to share in the major lien fund. Substantial Performance is defined as when the work under the Contract or Subcontract is ready for use or is being used for the purpose intended and the remaining work must be capable of completion or correction at a cost of not more than:

- a) 3% of the first \$500,000.00;
- b) 2% of the next \$500,000.00; and
- c) 1% of the balance.

Seasonal deficiencies and other work which cannot be completed for reasons beyond the control of the Contractor or Subcontractor are deducted from the Contract Price in determining whether or not Substantial Performance has been achieved.

There is no "mandatory" form of Certificate of Substantial Performance. Sample forms are included at the end of this Guide. These forms are standard ACA documents and may be purchased from your local Construction Association.

The certificate of substantial performance may be posted electronically, if permitted by the contract or agreement. In all other cases, a signed copy of the certificate of substantial performance must be posted in a conspicuous place on the job site.

THE LIEN FUND

The Act requires Owners to withhold 10% of the monies otherwise payable to the General Contractor. This 10% "holdback" is often referred to as the "lien fund". There is one lien fund for each general contractor. The lien fund becomes split into two pieces if a Certificate of Substantial Performance is issued for the Contract: the "major" and "minor" lien funds:

(a) Major Lien Fund

This fund represents at least 10% of the value of work done to the time of Substantial Performance. By definition, the Major Lien Fund will be based on at least 97% of the Contract Price. Anyone other than the General Contractor who does work before the performance of a Certificate of Substantial Performance must file within 60 days from the posting of the Certificate to be sure of sharing in the Major Lien Fund.

(b) Minor Lien Fund

The Minor Lien Fund represents at least 10% of the value of work performed after the posting of the Certificate of Substantial Performance. Therefore, the Minor Lien Fund is much smaller than the Major Lien Fund. The Minor Lien Fund is intended to be available only to those persons performing work after the posting of a Certificate of Substantial Performance.

10% of the value of work done is what the Act says must be held back. If an Owner holds back more than 10%, then the applicable lien fund will be as much as the full amount held back by the owner. There is no statutory requirement that the General Contractor hold back money from Subcontractors, or that Subcontractors hold back money from Sub-Subcontractors.

The General Contractor has a lien against the Owner's property for the full value of all work done under the General Contract. There is no limit as regards to the General Contractor's claim, and it is entitled to a 100% charge against the appropriate lands for the unpaid value of its work.

Subcontractors who have not been paid by the General Contractor share the funds held back by the Owner from the General Contractor - 10% of the value of work performed under the General Contract plus any other monies due and unpaid to the General Contractor by the Owner. Subcontractors share this fund pro rata, based on the proven or accepted amounts of their liens. These provisions apply to all those who contract directly with the General Contractor (suppliers, service providers and workers).

For Sub-subcontractors, and persons contracting with Subcontractors rather than the General Contractor, their recovery is limited to a "notional" lien fund based on 10% of the value (or the unpaid portion of the value if it is more than 10%) of work done under the particular Subcontract under which they worked or supplied materials or services. This limits the recovery of persons unpaid by a Subcontractor to share in a fund based on 10% of the monies earned by the Subcontractor under its Subcontract and so is likely smaller than the lien fund available to Subcontractors.

HOLDBACKS

Owners, Contractors and Subcontractors who maintain a holdback from those doing

work, performing services, supplying materials or renting equipment for them are not required to maintain a holdback account or otherwise segregate holdback monies from their own funds. In most circumstances, the “holdback fund” is notional, and does not exist as a separate, identifiable account. The Owner’s failure to maintain a holdback does not require the Owner to actually pay such funds. Instead, the Owner may choose to allow its lands to be sold to satisfy the claims against it. The Owner’s liability is ultimately limited to the lands themselves, and the Owner’s equity in them, and the Owner is not liable to Subcontractors, workers, service providers, equipment renters, etc. for any shortfall.

Unfortunately for lien claimants, the Owner may have little equity in the lands, as they may be heavily mortgaged, or be subject to prior encumbrances, or the value of the property may have declined for any number of reasons.

PROGRESSIVE RELEASE OF HOLDBACK

The Act permits, but does not require, partial holdback to be released by the Owner in respect of Subcontractors who have completed the work to be done under their Subcontracts. Whether the Owner will agree to progressive release of holdback, however, is a matter between the Owner and Contractor, and the Owner cannot be compelled to release holdback funds at all before total completion of the Work.

This is a significant issue for Subcontractors whose work is performed early in a Construction Contract. If a Subcontractor is substantially complete, it can post a Certificate of Substantial Performance, and the Owner may release the holdback relating to Work done under that Subcontract to the Contractor who in turn may release it to the Subcontractor. Standard form contracts generally contemplate progressive holdback release. The lien rights of those working for or providing materials, services or equipment to a Subcontractor are triggered by the posting of a Certificate of Substantial Performance of the Subcontract by the Subcontractor or the Contractor. If the Owner refuses to agree to progressive release of holdback, from a practical perspective there is little that the Contractor can do to force the issue. The one exception is for contracts of at least \$10 million in value. For those contracts, if a lien is not registered, the Owner must release the accrued holdback to the Contractor on an annual basis.

PAYMENT FOLLOWING COMPLETION

One of the problems created by the Act is the difficulty Contractors face in filing liens following total performance of their work. The Act gives them and those claiming under them 60 days in which to file their liens in the event of nonpayment. An Owner may not safely release final holdbacks until the 60-day period has elapsed, and Owners will almost always retain the holdback until the 60-day period has expired to ensure that no valid liens have been filed. For the Contractor, that will be after it is entitled to file its lien. As such, the General Contractor must either file a lien for the holdback amount, even though it is not yet due and payable, or “take a chance” that the Owner will actually release the holdback, even though the Contractor’s lien rights will by then have expired. To avoid this situation,

contractors are advised to have alternative security for the holdback, or to attempt to arrange for the holdback to be held in trust or in escrow, pending expiry of the lien period. Subcontractors face the same problems with respect to receipt of holdback amounts from the Contractor.

The release by the Owner of the remaining holdback following completion is again a matter between the Owner and Contractor, even though in most cases the Contractor will be holding monies back from its Subcontractors. If there are issues between the Owner and Contractor (such as deficiencies, incomplete work or outstanding claims), the Owner may refuse to release the holdback until all issues are resolved. The Owner has no right to use the holdback to complete the work or satisfy its claims against the Contractor, and the Owner is ultimately responsible to lien claimants for the holdback, with limited ability to make deductions for deficiencies in the Contractor's work. The matter may be forced if the Owner pays money or security into Court to discharge any liens.

TRANSFER OF TITLE

Usually, lien rights are lost in the event that the Owner transfers title to a third party before any liens have been filed. Few exceptions to this basic rule exist, but if the transferee has had some involvement with the construction process, it is possible that the transferee may be considered to be an "Owner" for the purposes of the Act. An example of this situation is the purchase of a building under construction. If the purchaser becomes involved in construction issues, such as selection of materials, approval of plans, changes in the work and other details, this may result in the purchaser being subject to lien claims. For this reason, some purchasers (especially home buyers) insist on maintaining a holdback themselves even following transfer of title to them. The ability to maintain a holdback is to some extent governed by the terms of the contract between the parties, and the issue is often problematic at the time of possession of the property.

TRUSTS

Some jurisdictions in Canada have comprehensive trust provisions with respect to payments made on a construction project. Alberta's Act has trust provisions, but they are of limited application. Essentially, only payments made after the posting of a Certificate of Substantial Performance are impressed with a trust (restricted in who the payments may be made to). In the event a Certificate of Substantial Performance is posted, payments made after that time are considered to be trust monies and must be paid to persons who have performed work, services or materials on the construction project. The intent of the trust provisions is to ensure that monies paid by the Owner flow down through the General Contractor to Subcontractors and material suppliers, and from Subcontractors to their Sub-subcontractors and material suppliers. The trust provisions in Alberta are of limited benefit because they will only attach the holdback fund and any progress claims paid after the posting of the Certificate of Substantial Performance.

PRIORITIES

Builders' Liens take priority over judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after the claimant's lien rights arise. Generally, a claimant's lien rights arise as soon as it begins work under its contract. Judgments, executions etc. which have been filed before work commences will generally take priority over lien claims. Lien claims are also affected by interests in land filed ahead of the Builders' Lien such as mortgages. Mortgages take priority over Builders' Liens for all amounts advanced under the mortgage before the filing of any Builders' Lien. Other registered interests against title may take priority over Builders' Liens depending on the circumstances and nature of such other interest.

In the event there are other claims with priority over Builders' Liens, it is possible that lien claimants may recover little if anything, even though they have a valid Builders' Lien. Basically, Builders' Liens are a charge against the property, and the ultimate remedy is to have the property sold to satisfy the claims against it. Prior claims (such as mortgages or other types of charges) are paid out first, and if there is nothing left after such claims are fully satisfied, the lien claimants may get nothing. Where the property is worth less than the total of the claims against it, the Owner may simply walk away, leaving the mortgage company to foreclose, or the lien claimants to pursue a Court order requiring that the property be sold. Circumstances such as this can produce very disappointing results for lien claimants.

As among lien claimants, labourers are given priority to the extent of 6 weeks' wages over other Builders' Lien claims. After labourers, lien claimants of the "same class" rank without preference for their amounts. Among such other lien claimants, the General Contractor is the last to be paid. Generally, labourers are paid first, Sub-subcontractors are paid next, Subcontractors following that and finally the General Contractor.

ENFORCEMENT

After a lien has been filed, the lien claimant must sue on its lien within 180 days from the day the lien was filed. In addition to issuing a Statement of Claim in the Court of King's Bench, the lien claimant must also file a Certificate of Lis Pendens (action pending) against the title at the Land Titles Office, within this 180-day period. If the lien claimant fails to do both, the claim against the land is lost. It is possible for one lien claimant to make its claim under another lien claimant's lawsuit, but each lien claimant must file its own Lis Pendens. Legal assistance is generally required to ensure that these steps are completed properly.

In addition, if someone serves a Notice to Prove a Lien on a lien claimant, which is a written demand for proof that the lien is valid, the lien claimant is required to file an affidavit providing particulars of its lien within 15 days from the date the notice is served. If the lien claimant fails to do so, its lien may be lost. This is a very important deadline for lien claimants to follow. Another form of notice may be served, requiring a lien claimant to commence action to enforce its lien within 30 days from

receipt of such notice. This is also a very important deadline to observe. Legal advice is generally helpful in preparing an appropriate Affidavit Proving Lien or commencing action.

Any lawsuit to enforce a Builders' Lien may only be brought in the Court of King's Bench. The Alberta Court of Justice (previously named the Alberta Provincial Court) does not have jurisdiction to deal with builders' liens, even though the amount of the lien may be less than the current small claims limit.

REMOVAL OF LIENS

Once filed, liens can generally only be removed by the lien claimant or by order of the Court of King's Bench. Lien claims can be removed by the lien claimant by filing a Notice of Discharge of Lien. This usually happens when the lien claim is paid or settled. In disputed situations, liens can fairly quickly be discharged from title by court application and the payment of the amount of the lien into Court as security for the lien claim. Payment into Court can be made by way of either cash, letter of credit or lien bond (often available from the Contractor's bonding company and similar to a payment bond) as may be directed in the Court Order. Typically, a Court Order will preserve a lien claimant's right to maintain lien rights against the security, as well as the Owner's right to challenge the lien. The amount of security is generally the face amount of the lien plus an allowance for enforcement costs. Interest accruing during the dispute is often secured as well. When the project has been completed, it is also possible to discharge any liens by having the Owner establish the appropriate Lien Funds and paying those funds into Court. Court Applications to have security posted and liens discharged as a result generally require the involvement of lawyers.

The posting of security for a lien involves the discharge of any filed liens, so that the lien "disappears". However, the resulting Court Order will specify who has the obligation to act, and what procedures are to follow. In this process, there is generally, no determination as to the validity of any lien, and any party (including other lien claimants) may have the right to contest the validity of a lien. The lien claimant is not prejudiced by the removal of its lien, as the lands will have been replaced by a fund of money or other security for any valid liens, to the extent of the Owner's lien fund obligations. In many circumstances, lien claimants may be better off by having such security posted, instead of having to enforce their claims against lands which may fluctuate in value or have prior claims such as mortgages registered against them.

Voluntary Discharges of Liens can be done by the parties themselves. A form of Discharge of Builder's Lien is included at the end of this Guide. Unlike Court-ordered discharges of a lien, which the Land Titles Office will process fairly quickly, Voluntary Discharges of Liens will be added to the bottom of the Pending Registration Queue and may take weeks or months to be proceeded by the Land Titles Office.

INVALID LIENS

It is very important for a Lien Claimant to make the contents of its Lien Claim as accurate as possible. Excessive claims, improper claims or late claims may result in costs and damages. The Act provides that a person who registers a lien:

- a) for an amount grossly in excess of the amount due to them or that they expect to become due to them; or
- b) that they know or ought reasonably to know that they do not have a lien;
- c) is liable for legal and other costs and damages incurred as a result thereof 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.

CONCLUSION

The foregoing is intended to be a general guide to Builders' Lien remedies in Alberta. The Prompt Payment and Construction Lien Act and Builders' Lien practice are complicated and it must be recognized that the information in this Guide is general and may not be applicable to all circumstances. When in doubt, seek prompt legal advice. Time deadlines are short and generally absolute: if appropriate action is not taken within the required time, rights may be irrevocably lost. There are no provisions for extending time limits.

Unpaid persons or entities involved in a construction project should also consider the possibility of other remedies. Some projects, especially public projects (Federal, Provincial or Municipal), are bonded so that unpaid parties may have claims against a Labour and Material Payment Bond. Information on bonds may be difficult to obtain and may require contact with the Owner or Owner's consultant. For work done under Provincial Government Contracts, remedies are also available under the Alberta Public Works Act. Material suppliers should consider their unpaid vendors' lien remedies. Unpaid construction workers may have effective remedies under the provisions of the Alberta Employment Standards Code, which provides for inexpensive and relatively speedy procedures against non-paying employers. Employment Standards, part of the Alberta Department of Labour, should be contacted for information in this regard.

It is hoped that the information in this guide may assist in making Builders' Lien remedies better understood, and more effective.

APPENDIX: FORM LINKS

- [Builders' Lien Forms](#)
- [Statement of Public Works Act Claim](#)
- [Prompt Payment and Builders' Lien Form Regulation](#)
- [Land Titles and Survey Forms](#)
- **ACA Contractor Forms** can be purchased at your [local construction association](#)

Links are subject to change. Please contact policy@albertaconstruction.net, if any updates are required.