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BCLI Report no. 22—Report on Builders Liens and Arbitration

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British Columbia's *Builders Lien Act* was created to enhance the financial integrity of relationships within the construction industry. The most recent version of the Act was enacted in 1997, and it is extremely complex. The Act protects participants in a construction project such as subcontractors, workers, and suppliers of material by providing for a special claim on property for the payment or performance of some debt, obligation, or duty called a lien. A lien is claimed against the construction project itself, and if successful will allow a claimant to access the "holdback," which is a percentage of a contract price retained by a contractor or lender until the project is complete and all bills are paid. The assertion of a lien claim generally means the claimant alleges that money owed has not been paid. This can occur in situations where the person who ought to have paid does not have the money, or where the lien claimant's entitlement to payment is disputed at which point arbitration may occur.

A claim of lien must be filed in the proper land title office within a stipulated time. After filing the lien claimant must commence an action in court to enforce the lien no later than one year from that date to preserve the claimant's rights under the Act. The Act also permits the owner of the improvement to serve notice on the lien claimant requiring that an action be commenced within 21 days after service of the notice. This procedure is in contrast to the well-established practice in the construction industry not to use the courts to resolve construction disputes. If parties select arbitration as their resolution mechanism, the legal framework for the procedure is usually either the *Commercial Arbitration Act* or the *International Commercial Arbitration Act*.

Arbitration is often selected on the common notion in the industry that these types of disputes are best kept out of court. In contrast, the *Builders Lien Act* looks primarily to the courts to resolve disputes concerning a party's entitlement to be paid. These opposite approaches have resulted in concerns and questions surrounding the interface between builders lien legislation and arbitration procedures. Three particular areas of potential or actual conflict were identified in the report submitted by the National Construction Law Section of the Canadian Bar Association to the Uniform Law Conference of Canada in 1997. The CBA Report recommended the development of uniform provisions suitable for adoption in all Canadian jurisdictions as part of their local builders' lien legislation.

The ULCC considered the CBA report and referred the matter back to the National Construction Law Section with a request to bring forward a further report in 1998 along with draft legislation reflecting the ULCC's deliberations. The draft legislation subsequently brought forward by the CBA was adopted by the ULCC as uniform legislation.

This report reviews the materials on which the Uniform Provisions are based and agrees with the National Construction Law Section that the relationship between builders' liens and construction arbitration is a source of uncertainty that should be eliminated. The Uniform Provisions clarify the legal position of the parties to a construction dispute and would be beneficial to all aspects of the construction industry. This report recommends that with a few modifications the Uniform Provisions should be adopted and incorporated into the *Builders Lien Act*. The changes proposed are incorporated into a revised draft of the Uniform Provisions included as an appendix to the report.