

Report on Builders Liens and Arbitration

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British Columbia Law Institute

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- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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I. Introduction - The *Builders Lien Act*

British Columbia's *Builders Lien Act*¹ was created to enhance the financial integrity of relationships within the construction industry. Legislation of this kind has been part of British Columbia Law since 1879 and over the years it has become more sophisticated and elaborate as the practices of the construction industry have evolved.

The most recent version of the act was enacted in 1997 and it is undeniably complex. Readers seeking a detailed exposition of the act and its operation should consult our publication: "Questions and Answers on the *New Builders Lien Act*."² For the purposes of this Report, the following features of the act should be noted.

The act protects participants in a construction project (the "improvement") such as subcontractors, workers and material suppliers by providing for a lien against the improvement itself and access to money that forms part of a "holdback" retained under the provisions of the act. There are two key steps that must be taken for a participant (hereafter "lien claimant") to obtain a full measure of protection under the act.

First, a claim of lien must be filed in the proper land title office within a stipulated time.³ Second, after that step has been taken, the lien claimant must commence an action in court, to enforce the lien, no later than one year from the filing to preserve the claimant's rights under the act.⁴ The act also permits the owner of the improvement to serve a notice on the lien claimant requiring that an action be commenced within 21 days after service of the notice.⁵ If these steps are not taken, the lien is extinguished.

A builders lien claim does not arise in a vacuum. Almost by definition, the assertion of a lien claim means the claimant alleges that money that is owing has not been. The fact of nonpayment may be symptomatic of one of two possibilities. First, the person who ought to have paid simply does not have the money and either has a cash flow problem or is insolvent. The second possibility is that the lien claimant's entitlement to payment is in dispute and it is here that a second legal concept, arbitration, enters the picture.

1. S.B.C. 1997, c. 45. Selected provisions of the act are set out as Appendix A to this Report.

2. British Columbia Law Institute (1997).

3. *Builders Lien Act*, ss. 15, 20.

4. S. 33(1).

5. S. 33(2).

II. Arbitration and Construction Disputes

It is a well-established practice in the construction industry not to use the courts to resolve construction disputes and to rely instead on various alternate mechanisms. This approach is exemplified in the standard form contractual documents developed by the Canadian Construction Documents Committee (CCDC). CCDC has developed a set of standard-form documents, to be used for construction projects, that encompass different kinds of financial arrangements. A common feature provides for dispute resolution through a structured group of mechanisms, to be invoked sequentially, which range from negotiation to mediation to arbitration, with litigation as a last resort.⁶ A supplementary document sets out detailed rules for the mediation and arbitration of construction disputes.⁷

If parties select arbitration as their resolution mechanism, the legal framework for the procedure is usually either the *Commercial Arbitration Act*⁸ or the *International Commercial Arbitration Act*⁹ depending on the character of the dispute and the parties. Both these acts encourage the courts to defer to the arbitration process. Thus both statutes provide that where a party to an arbitration agreement has commenced legal proceedings against another party over a matter that was agreed to be arbitrated, the other party may apply for a stay of the proceedings.¹⁰ Such a stay is normally granted.

Builders' liens and the arbitration process seem to exist in two solitudes. The *Builders Lien Act* looks primarily to the courts to resolve disputes concerning a party's entitlement to be paid. Arbitration is based on the notion that these disputes are best kept out of court. Not surprisingly, therefore, these antithetical approaches occasionally create conflicts that must, somehow, be resolved. The governing legislation is singularly unhelpful in this exercise.

6. See the general conditions in part 8 of CCDC 2, CCDC 3 and CCDC 4.

7. CCDC 40.

8. R.S.B.C. 1996, c. 65. As to the "new generation" of Canadian arbitration generally see W.H. Hurlburt, Q.C., "A New Bottle for Renewed Wine: The Arbitration Act, 1991," (1995) *Alta L. Rev.* 86.

9. R.S.B.C. 1996, c. 233.

10. See Appendix A: *Commercial Arbitration Act* s. 15, *International Commercial Arbitration Act* s. 8.

III. Three Areas of Concern

Concerns and questions surrounding the interface between builders lien legislation and arbitration procedures were initially expressed by the National Construction Law Section of the Canadian Bar Association in 1995. Two years later, the section submitted a Report¹¹ to the Uniform Law Conference of Canada outlining its concerns. The CBA Report recommended the development of uniform provisions suitable for adoption in all Canadian jurisdictions as part of their local builders' lien legislation. It set out three areas of general concern:¹²

- (a) the possibility of an owner, contractor, supplier or labourer being required to undertake two procedural courses of action simultaneously (i.e. registering a lien or commencing an action in order to protect lien rights while being forced to arbitrate other issues involving the same contract or project);
- (b) the possibility of conflict between the procedural requirements of the relevant lien legislation and the arbitration agreement and the potential for a required procedural step under either process to prejudice a party's rights under the other. Related to this concern is the potential for one of the parties to the dispute to intentionally adopt a strategy of using one process to impair or delay the other party's rights or remedies under the other;
- (c) the possibility of the parties becoming involved in preliminary applications or litigation over the interrelationship of the two processes or the paramountcy of one process over the other resulting in additional cost and delay.

Out of these general concerns three particular areas of potential or actual conflict were identified.

A. The Impact of a Stay of Proceedings

The first area identified was the impact of a stay of court proceedings, pending arbitration, on the various statutory limitations peculiar to the registration of liens and the prosecution of lien actions. The CBA Report noted:¹³

In general, the court system seeks to avoid multiplicity of actions in order to save time, minimize expense, achieve a final disposition of all matters as between all affected parties, and reduce the risk of inconsistent results. Where parties to a construction contract have provided for arbitration of disputes relating to the contract, however, whichever party alleges a breach and seeks to obtain a remedy is faced with a dilemma. The party seeking redress must comply

11. Hereafter "CBA Report."

12. Uniform Law Conference of Canada 1997 proceedings, Appendix C, para. 1.

13. *Ibid* para. 11, para. 12.

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with the terms of the arbitration clause included in the contract, while at the same time meeting the statutory time limitations for registration and prosecution of claims included in lien legislation. This has the result of requiring the parties to participate in two hearing processes under different rules and perhaps in two different locations at the same time.

The solution which has been adopted to eliminate this problem where parties to a contract have agreed to refer their disputes to arbitration is to stay any court proceedings until the arbitration has been completed. In the case of a lien however, the imposition of a stay creates unusual complications due to the dual nature of the remedies available to a lien claimant. Where a contractor, subcontractor, material supplier or labourer has not been paid he can take an action for payment or for damages under his contract. He can also pursue the extraordinary *in rem* remedies which attach to his lien. In order to do so, however, a lien claimant is required to meet a strict timetable of dates for the registration of the claim, to commence an action, and in some jurisdictions, to serve the statement of claim and set the lien action down for trial. Most of these time limits are strictly construed and can not be extended. This is the price the legislation exacts for the extraordinary protection afforded by the *in rem* rights provided by the lien.

The case law on the extent to which arbitration can comfortably co-exist with builders lien legislation is unsettled.¹⁴ Clarification is desirable.

B. Waiver

The CBA Report expressed concern that a step taken in relation to preserving builders lien rights might constitute a waiver of rights in relation to arbitration.

As the Report observed:¹⁵

As the law has developed surrounding the stay of court proceedings pending arbitration, a significant jurisprudence has grown up around the issue of waiver. Numerous applications have been brought over the years with one party or the other arguing that a step taken in a lien action amounts to a binding waiver of rights under the arbitration clause. In a construction dispute, there is a serious risk that a party will be taken to have waived its right to arbitration,

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14. See generally, Hurlburt, *supra* n. 8. See also, *Automatic Systems Inc. v. Bracknell Corp. et al.*, (1994) 113 D.L.R. (4th) 449 (Ont. C.A.), *rev'g* 110 D.L.R. (4th) 390; *Bird Construction v. Tri-City Interiors Ltd.* (2 May 1994), Edmonton 9303-0250-AC/9303-0249-AC (Alta. C.A.); *Pigott Const. Co. v. Fathers of Confederation Memorial Citizens Foundation (No.2)*, (1965) 51 D.L.R. (2d) 367 (P.E.I.S.C.); *Kvaerner Enviropower Inc. v. Tanar Industries Ltd.*, [1994] A.J. No. 778; (1994) 24 Alta. L.R. (3d) 365; (1994) 157 A.R. 363; [1995] 2 W.W.R. 433 (Alta. C.A.); [1999] 47 C.L.R. (2d) 135; (1999) 249 A.R. 1; (1999) 74 Atla. L.R. (3d) 135; [1999] 11 W.W.R. 146; 1999 A.B.Q.B. 597; *Tanar Industries Ltd. v. Outokumpu Ecoenergy, Inc.*, [1999] A.J. No. 919; 24 Alta. L.R. (3d) 365, [1995] 2 W.W.R. 433. (Q.B.); *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*, (1992) 31 A.C.W.S. (3d) 1134 (B.C. S.C.).
15. CBA Report para 24. *Lonmar Plumbing and Heating v. Representative Holdings*, [1968] 1 D.L.R. (3d) 591 (Sask. Q.B.); *Pigott Const. Co. v. Fathers of Confederation Memorial Citizens Foundation (No. 2)*, (1965) 51 D.L.R. (2d) 367 (P.E.I.S.C.).
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either unintentionally, or because of a step taken under the Acts to preserve a lien or the right to continue with an action to enforce it. There are decided authorities which hold that the commencement of a lien action, *simpliciter*, will not constitute a waiver by the Plaintiff of its right to take the dispute to arbitration. Permitting the commencement of the action, however, does not resolve the Plaintiff's problem.

While Canadian courts appear to be reluctant to hold that simply taking steps under builders' lien legislation constitutes a waiver,¹⁶ this is an issue in California¹⁷ where it has been addressed by legislation.¹⁸

C. Multiplicity of Parties

The CBA Report also addressed the problems that can arise where there are a number of parties, not all of whom are privy to the arbitration clause:¹⁹

Mandatory deference to arbitration in construction disputes becomes problematical where third parties who are not privy to the contract containing the arbitration clause are necessary parties or are interested in the subject matter of the dispute. It will be recalled that one of the objectives of lien legislation is to permit a court to deal with the complex web of rights and obligations existing in a typical construction project between the owner, the design professionals, the general contractor, the subcontractors, material suppliers and workers. One of the peculiarities of lien legislation, therefore, is that it creates in rem remedies and rights of action as between parties who are not in privity of contract with each other. Another is that the legislation permits the inclusion of all parties with a claim relating to the project in one action. Proceedings to enforce a lien or trust claim under the Acts are therefore constituted somewhat in the nature of a class action with those in each class pro-rating amounts recovered from those above them in the construction pyramid. The Acts generally also permit flexibility with respect to the matter of adding additional parties, in some jurisdictions right up to and even after judgment.

16. See e.g. *Pigott Const. Co. v. Fathers of Confederation Memorial Citizens Foundation (No. 2)*, (1965) 51 D.L.R. (2d) 367 (P.E.I.S.C.).

17. Compare *Titan Enterprises, Inc. v. Armo Constr., Inc.*, 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456 (1973) (lien enforcement action was waiver of arbitration) with *Homestead Sav. & Loan Ass'n v. Superior Court*, 195 Cal. App. 2d 697, 16 Cal. Rptr. 121 (1961) (enforcement action was not waiver of arbitration).

18. Code of Civil Procedure, s. 1281.5. See California Law Revision Commission, *Recommendations on Stay of Mechanic's Lien Enforcement Pending Arbitration* (2001).

19. CBA Report Para. 18 and 19.

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The arbitration process, being based in contract, does not provide comparable powers to an arbitrator with respect to third parties and in particular, granting them in rem remedies. Where a lien action is stayed, therefore, special consideration must be given by the court to the rights of these third parties who are not parties to the arbitration clause, and to other actions which they may have commenced or will commence while the arbitration process runs its course. The court must also consider the interests of any parties common to the arbitration and these actions who will be required to participate in active proceedings in both forums if the court proceedings are not stayed.

The CBA Report reviewed several options, none of them wholly satisfactory.²⁰

Again, the law is unsettled but clearly there are instances in which actions brought by plaintiffs who were not parties to related arbitrations have been stayed.²¹ There is a very real potential for the rights of non-contracting lien claimants to be adversely affected by the interests of parties to the arbitration. It appears that the interests of the smaller players at the subcontractor level frequently become eclipsed by the interests of the larger players - contractors and owners - especially where there are delays in the arbitration proceedings or where those proceedings do not address all of the non-contracting claimant's issues.

IV. The Uniform Provisions

The Uniform Law Conference 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 Conference's deliberations. This was done²² and with some fine-tuning the draft legislation brought forward by the CBA was adopted by the Conference as uniform legislation.

The Uniform Provisions are set out as Appendix B to this Report. Appendix B also reproduces the commentary prepared by the Uniform Law Conference explaining the operation of the individual provisions.

20. *Ibid* para. 22.

21. The cases appear to be inconsistent in their treatment of non-contracting lien claimants. While some courts base inclusion in arbitration proceedings on whether non-contracting claims are interwoven with contractual matters subject to arbitration, other courts have appeared to take the view that contractual rights must be given primacy even in the absence of connection. *See City of Prince George v. A.L. Sims & Sons Ltd. and McElhanney Engineering Services Ltd.*, [1995] B.C.W.L.D. 684 (B.C.S.C.), 23 C.L.R. (2d) 253 (B.C.C.A.); *BWV Investments Ltd. v. Saskferco*, [1994] S.J. No. 629 (C.A.) (QL), *rev'g* [1993] 4 W.W.R. 553 (Q.B.); *Fuller Austin Insulation Inc. v. Saskferco Products Inc.*, (1996) 61 A.C.W.S. (3d) 645; Kvaerner, *supra* n. 14 .

22. Uniform Law Conference of Canada 1998 proceedings, Appendix D.

V. Our Conclusions

We have reviewed the materials on which the Uniform Provisions are based and agree with the National Construction Law Section that the relationship between builders liens and construction arbitration is a source of uncertainty that can and should be eliminated. We believe that the Uniform Provisions would provide a much needed clarification of the legal position of the parties to a construction dispute and would be beneficial to all aspects of the construction industry.

We therefore recommend that, with the modifications discussed below, the Uniform Provisions be adopted as sections 46.1, 46.2 and 46.3 of the *Builders Lien Act*.

VI. Fine-tuning the Uniform Provisions

Because the Uniform Provisions were prepared for adoption in multiple jurisdictions they were necessarily drafted in a somewhat more general way than would have been the case if they had been designed as legislation for one province only. We believe that it is possible to make the Uniform Provisions more specific to British Columbia without compromising uniformity.

A. The Arbitration Legislation

The opening words of each of the three provisions refers to “legislation comparable to” certain uniform acts. Those references can be replaced by references to the *Commercial Arbitration Act* and the *International Commercial Arbitration Act*.

B. Provision XX.1 (now section 46.1)

In addition to revised references to the arbitration legislation, the following changes are called for. Paragraphs (a) and (b) should be revised to read:

- (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).

This will tie these paragraphs more closely to the language and concepts of the British Columbia legislation.

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Paragraph (c) appears to need no changes. It might be noted that section 39(2) of the *Builders Lien Act* expressly authorizes an application to court for an order restraining the removal of material from land. There may, however, be authority for a similar application in other legislation. The closing words of the first part of the section refer to “any step pursuant to this act.” That may be too limiting and we suggest that the language should be “any step pursuant to this act or another enactment.”

Paragraph (d) raises a similar question. In some provinces, the builders’ lien legislation expressly authorizes the appointment of a trustee for the purpose of preserving or completing an improvement. An example is section 68 of the *Construction Lien Act* of Ontario.²³ There is no such authorization in the British Columbia legislation although section 39(1) of the *Law and Equity Act*²⁴ authorizes the appointment of “a receiver or receiver manager ... in all cases in which it appears to the court to be just or convenient...” This provision might well be invoked in litigation over construction disputes. Paragraph (d) should be changed to read:

- (d) to have a receiver, receiver manager or trustee appointed to preserve or complete the improvement.

C. Provisions XX.2 and XX.3 (now sections 46.2 and 46.3)

Along with rewording the arbitration legislation references in both provisions and updating the cross-reference in (now) section 46.2, there is one further change that should be considered.

Paragraph (a) of section 46.3 would immunize from a stay of proceedings only those claimants whose rights arise under a contract that does not provide for arbitration. We think this casts the net too widely. A claimant’s contract or subcontract may provide for arbitration but it may be in relation to persons or issues that have no connection whatever to the arbitration that is alleged to justify a stay. Surely the key question is whether the claimant is, or could be made, a party to the main arbitration. Paragraph (a) should be changed to reflect that distinction.

VII. A British Columbia Draft

The changes we propose have been incorporated into a revised draft of the Uniform Provisions. That revised draft is set out as Appendix C and constitutes the final recommendation of the Institute in this Report.

23. R.S.O. 1990, c. C-30.

24. R.S.B.C. 1996, ch. 253.

Appendix A

Applicable Legislation - Selected Provisions

BUILDERS LIEN ACT

SBC 1997 CHAPTER 45

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.
- (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.

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.

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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.

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.
- (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.

COMMERCIAL ARBITRATION ACT

RSBC 1996 CHAPTER 55

Stay of proceedings

15. (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

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- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.
- (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

INTERNATIONAL COMMERCIAL ARBITRATION ACT

RSBC 1996 CHAPTER 233

Stay of legal proceedings

8. (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
- (3) Even if an application has been brought under subsection (1) and even if the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

Interim measures by court

9. It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure.

Appendix B
Uniform Law Conference of Canada
Uniform Liens and Arbitration Provisions

PART N
LIENS AND ARBITRATION

Comment: This Uniform legislation is drafted to be added as a new Part to an existing statute of the enacting province or territory that provides for builders' liens.

Certain steps not affected by stay

XX.1 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform 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:

- (a) to register a claim of lien;
- (b) to prevent the expiry of a lien;
- (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 trustee appointed pursuant to [provision of builders' lien legislation or other statute that provides for the appointment of a trustee in relation to a construction project].

Comment: Section XX.1 ensures that a lien claimant will not be prevented from taking all steps required under the construction lien legislation to preserve its lien or the security to which it attaches as a result of a stay of proceedings ordered pending completion of an arbitration process in which the lien claimant is participating. Required steps in most provinces and territories include the commencement of a lien action, service of the statement of claim and setting the action down for trial within mandatory time limits which vary from place to place. Paragraph (d) also makes it clear that an application by a lien claimant to appoint a trustee to complete or preserve a construction project is permitted.

Right to arbitrate not waived

XX.2 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform 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 XX.1 does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract.

Comment: Section XX.2 is intended to eliminate the possibility that a court will find that the taking of a step required under the builders' lien legislation to preserve a lien or the security to which it attaches constitutes a waiver of the lien claimant's right to proceed to arbitration under the terms of its contract or subcontract. So long as the lien claimant only takes the minimum steps required to preserve its lien under the Act, it will then still be permitted the benefit of the arbitration provisions included in its contract or subcontract.

Certain actions not stayed by arbitration

XX.3 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform International Commercial Arbitration Act*] or equivalent legislation of any other jurisdiction:

- (a) an action to enforce a lien that is commenced by a lien claimant whose contract or subcontract does not provide for arbitration is not stayed by the commencement or continuation of arbitration proceedings between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action; and
- (b) no order shall be made directing a stay of an action described in paragraph (a) solely on the grounds 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.

Comment: Section XX.3 is intended to preclude the possibility that a court will order a lien claimant's action stayed where arbitration relating to the same construction project or improvement is pending between other parties under an arbitration agreement to which the lien claimant taking action is not privy.

This issue arises because of the nature of the construction pyramid, the relationship between the contracts existing between the owner, its general contractor, and the various sub-contractors and suppliers involved in a project or improvement and the fact that lien statutes permit limited remedies to be enforced upwards by those at the bottom of the pyramid against parties with whom a claimant is not in privity of contract. Recently, courts have ordered a stay of all actions commenced by parties claiming through a party who is involved in an arbitration, even though the parties

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being stayed are not privy to the contract which contains the arbitration agreement and are therefore not able to participate in the arbitration process. Section XX.3 provides that the effect of a stay of proceedings pending arbitration shall be limited to the parties to the arbitration agreement and makes it clear that third party actions commenced to enforce lien claims will not be stayed notwithstanding that a party above them in the construction pyramid is involved in an arbitration process.

Appendix C

Recommended Legislation

BUILDERS LIEN (ARBITRATION) AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Builders Lien Act*, S.B.C. 1997, c. 45 is amended by adding the following sections:

Certain steps not affected by stay

46.1 Notwithstanding the *Commercial Arbitration Act* 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 *Commercial 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 *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction:

- (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.
- 2.** This Act comes into force by regulation of the Lieutenant Governor in Council.

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