



BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

Backgrounder

Builders Lien Act Reform Project

Introduction

The *Builders Lien Act* is one of the major cornerstones of construction and insolvency law. The Act protects participants in a construction project such as contractors, material suppliers, and individual workers by giving them several forms of security for payment for work done or materials supplied to a building site, most notably a lien on the land. The Act also lets building owners and general contractors limit their exposure to claims by sub-contractors and workers who have not been paid by those who hired them.

With the encouragement of the Ministry of Justice and Attorney General, the British Columbia Law Institute has undertaken a major law reform project on the *Builders Lien Act*.

Objectives

The objectives of the project are to:

- carry out a comprehensive review and overhaul of the *Builders Lien Act* with the aid of an expert volunteer Project Committee; and
- generate a report to the Ministry of Justice and Attorney General containing concrete, balanced recommendations for reform of the Act.

Methodology

The Project Committee will meet on a regular monthly basis to develop tentative recommendations. At approximately the midpoint of the project, BCLI will issue one or more consultation papers to seek reaction and comment from industry stakeholders, landowners, lawyers, and the general public regarding specific proposals (“tentative recommendations”) for reform of the Act. These tentative recommendations will reflect the consensus within the Project Committee at that point on appropriate legislative solutions for the issues examined.

This consultative stage will be followed by review of the responses to the consultation paper(s) and formulation of the final recommendations with the benefit of the input received from stakeholders and the public.

The project will culminate in the submission of a report to the Minister of Justice and Attorney General containing concrete law reform recommendations reflecting the final views of the Project Committee and the BCLI Board. It may also contain annotated draft legislation to illustrate how the recommendations could be implemented. BCLI will publish the report electronically and in print.

Overall, this project is foreseen to take a minimum of two years to complete, commencing in April 2014 with the formation of a Project Committee.

Members of the Project Committee

Donald A. Thompson - Chair
Jenkins Marzban Logan LLP

Leslie J. Armitstead
Armitstead & Company

Heather Ferris
Lawson Lundell LLP

Arthur L. Close, Q.C.
Member Emeritus, BCLI

Helmut K. Johannsen
Singleton Urquhart LLP

Dirk Laudan
Borden Ladner Gervais LLP

John Logan
*Jenkins Marzban Logan LLP
(2014-2015)*

J. Marc MacEwing
*Shapiro Hankinson & Knutson Law
Corporation*

Karen Martin
Dentons LLP

Marina Pratchett, Q.C.
Fasken Martineau DuMoulin LLP

David Mckenzie
*Jenkins Marzban Logan LLP
(2015- present)*

Tyler Nyvall
*(Ministry Observer and Liaison)
Ministry of Attorney General
Civil Legislation & Policy Office*

James R. White
*Shapiro Hankinson & Knutson Law
Corporation*

Rationales for Reform

British Columbia's *Builders Lien Act* is a complex piece of legislation created to enhance the financial integrity of relationships within the construction industry. The current *Builders Lien Act* was passed in 1997. It introduced changes that were generally seen as improvements over the previous legislation. Since then, however, the construction and development industries have continued to evolve. In addition, important appellate decisions have interpreted the legislation in ways surprising to many veteran practitioners. Continually evolving practices of builders and developers have also changed the milieu in which the *Builders Lien Act* applies. For example, it is widely recognized that there are difficulties in applying the Act to multiple-unit and phased construction projects.

Government receives complaints regularly about improperly claimed liens and the difficulty and expense of removing them. In many larger projects, the Act is actually circumvented by financial arrangements in order to avoid interruptions in the flow of construction funding down the contract chain and the interest cost of very large amounts of money being immobilized for long periods because of the Act's holdback requirements. While the Act was originally intended as a safeguard against insolvency of an owner or general contractor in the course of construction, it frequently disrupts the flow of payments in a project, paradoxically increasing the very risk that it was intended to prevent.

Larger industrial construction projects often take place on public lands that are not registered in the land title system. While lien rights ostensibly exist under these projects, they are unenforceable in effect because a claim of lien cannot be filed against a title to specific land. Another anomaly under the present *Builders Lien Act* is that the Act has a mechanism to enforce claims of lien in relation to work done on hardrock minesites and mining claims, but not for work related to coal mining or oil and gas exploration and drilling. These and other anomalies should be addressed and corrected.

Previous Work by BCLI in Area of Builders Liens

BCLI has issued three previous reports on discrete issues connected with the *Builders Lien Act*. These are: *Report on Builders Liens and Arbitration* (Report No. 22, 2002); *Report on the Builders Lien Act and the Pipeline Problem* (Report No. 27, 2003); *Report on Builders Liens After the Shimco Case* (Report No. 29, 2004). As the present Builders Lien Act Reform Project is intended as a comprehensive examination of problems with the present Act, these previous BCLI reports on particular builders lien issues will be considered for the purposes of the project as points of departure. They will not, however, limit the ability of the Project Committee to take a fresh look at the same matters in the context of the comprehensive review that BCLI has been commissioned to undertake.

About the British Columbia Law Institute

The British Columbia Law Institute was incorporated in 1997 under the British Columbia *Society Act*. Its mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform.

Project Contact

Greg Blue, Q.C.

Senior Staff Lawyer

British Columbia Law Institute

1822 East Mall, University of British Columbia

Vancouver, BC V6T 1Z1

Tel.: (604) 827-5337

E-mail: gblue@bcli.org