Overview of the
BCLI *Consultation Paper on the Builders Lien Act*

HAVE YOUR SAY ON CHANGES TO THE BUILDERS LIEN ACT

The British Columbia Law Institute (BCLI) has issued a *Consultation Paper on the Builders Lien Act* and wants to hear your views on reform of the Act.

You are not limited to responding only to the tentative recommendations set out in the consultation paper. BCLI is interested in hearing your views on any aspect of the *Builders Lien Act* and its operation.

This overview does not cover all the tentative recommendations in the consultation paper. It highlights major ones we think are of greatest interest to stakeholders and provides short, informal explanations of them.

You are encouraged to refer to the full-length consultation paper, available at: https://www.bcli.org/project/builders-lien-reform-project .

Responses are requested by **15 January 2020**. If responding by e-mail, please send responses longer than 50 lines as an attachment.

YOU CAN RESPOND TO THE CONSULTATION PAPER:

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online:	*link from https://www.bcli.org/project/builders-lien-reform-project*

Background

The current version of the *Builders Lien Act* has been in force for slightly more than 20 years. Given this length of time, a review of the terms of this important Act and its operation is warranted. BCLI launched the Builders Lien Act Reform Project in response to an invitation from the Ministry of Attorney General to take a critical look at the Act.

BCLI is a not-for-profit society dedicated to improvement of the law. BCLI relies heavily on volunteers who offer their time and expertise law reform project. In this project, BCLI has the assistance of a volunteer Project Committee composed of highly experienced construction law practitioners.

BCLI has published a *Consultation Paper on the Builders Lien Act* to obtain the views of stakeholders on reform of the Act and feedback on specific proposals for changes to the Act developed by the Project Committee. We call these proposals *tentative recommendations* because they are not finalized and may be modified or abandoned in light of the responses received. With the benefit of the responses to the consultation paper, we will form our final recommendations on reform of the *Builders Lien* Act and publish them in a subsequent report that will be freely available in digital form to the public.

This overview is intended for quick reading. It only highlights the tentative recommendations for changes to the Act of prime concern to industry, property owners, developers, material suppliers, lending institutions, and surety companies. It does not cover all the 80 tentative recommendations that are made in the consultation paper. The full-length consultation paper contains more detailed explanations of all the tentative recommendations developed by the BCLI Builders Lien Act Reform Project Committee.

About BCLI

BCLI is a not-for-profit society dedicated to improvement of the law. Its publications are issued in the public interest. BCLI recommendations have no official status and are not binding on governments or legislatures. Policymakers within government and legislators are able nevertheless to make use of BCLI publications to the same extent as the general public, and as a result the recommendations they contain may influence future legislation.

Why the Consultation Paper Does Not Treat Prompt Payment as a Separate Subject

The consultation paper deals at length with ways to eliminate interruptions in the flow of construction funds down the contract chain to subtrades, material suppliers, and workers insofar as the interruptions may relate to the *Builders Lien Act*. The issue of delayed payment in construction projects is not exclusively related to the Act, however.

Payment delay occurring in the construction sector for reasons that are not referable to the *Builders Lien Act* is outside the scope of the consultation paper. The BCLI Builders Lien Act Reform Project consists of a review of the existing Act and issues associated with the Act. It is a law reform project. A broad-based inquiry into cash-flow management practices in the building sector would be an undertaking of an entirely different nature beyond the scope of BCLI's objects as an incorporated society.

These are the reasons why the consultation paper does not deal with payment delay as a subject distinct from the *Builders Lien Act*, or attempt to evaluate the need for generic prompt payment legislation of the kind recently enacted in several provinces and by Parliament in relation to federal construction projects.

Highlights of the Consultation Paper

Threshold Questions

Does the *Builders Lien Act* continue to serve a need? Does it confer essential rights and remedies in the event of non-payment for work performed or materials supplied? Or does it create more problems than it solves?

The consultation paper does not take a position on these threshold questions because opinions on them are very divergent, but readers are invited to provide their views.

Minimum Amount for Claiming a Lien

The minimum amount for which a claim of lien may now be filed in the land title office is $200. This threshold is outdated and unrealistic. The tentative recommendation is to raise the minimum amount for a valid claim of lien to $3000.

A *minority* of the members of the BCLI Project Committee would set the minimum value for a claim of lien by a *head* contractor at $25,000, because a head contractor is able to sue the owner directly to recover the full amount owing.

(More detail on pages 25-26 of the full-length consultation paper.)

Proposed New Claim of Lien Form

A new claim of lien form is proposed that would eliminate what the Project Committee considers to be superfluous information and common sources of errors, and also provide more guidance in how the form should be completed. Your comments on the proposed new form of claim of lien are welcome.

(More detail on pages 27-31 of the full-length consultation paper.)

Proposed New Form of Claim of Lien

Builders Lien Act

(Sections 15, 16, 18)

Claim of Lien

The lien claimant identified below claims a lien against the land or interest in land identified below for work and/or materials provided or being provided:

1. Legal name of the lien claimant: _____
2. Brief description of the work/materials: _____

   _____

   _____
3. Amount which is or will be owing to the lien claimant for the work/materials, including taxes but not including interest or legal costs: _____
4. Who owes or will owe the lien claimant that amount: _____
5. PID and legal description of the land or interest in land (or details of the mineral title if filing in the chief gold commissioner's office):

   _____

   _____
6. Lien claimant's address for service of documents. Legal documents relating to this claim of lien may be legally served on the lien claimant by delivering them to this address:

   _____ _____

Signature: _____

Date signed: _____

Print name and address of person signing: _____.

_____

IMPORTANT: All sections of this form must be filled in.

Substantial Compliance With Form Would Be Sufficient

Courts tend to require strict compliance with the requirements for completing a claim of lien. There used to be a provision in earlier versions of the Act stating that a defect in form should not invalidate a claim of lien unless someone is misled or otherwise suffers detriment because of the defect. The Project Committee thinks a provision along these lines should be restored.

(More detail on pages 32-34 of the full-length consultation paper.)

Misnomer Would Not Automatically Invalidate Claim of Lien

Misidentification of the owner or other payor, or the claimant, generally has the effect of invalidating a claim of lien at the present time, even if no one is actually misled regarding the identity of the parties involved. In court documents, however, misnomers are usually curable unless someone has been misled and suffered some harm or loss as a result. The Project Committee thinks misnomers in claims of lien should be treated the same way.

(More detail on pages 32-34 of the full-length consultation paper.)

Notification of Owners When Claim of Lien Filed

A common complaint raised by residential owners (and sometimes commercial ones as well) is that they are not made aware that a claim of lien has been filed against their property until it interferes with a property or mortgage transaction. In some other provinces, a notice to the registered owner is automatically generated by the land title office at the address officially on record for that owner when a claim of lien is filed against a title. The consultation paper tentatively recommends that a similar procedure be introduced in British Columbia.

(More detail on pages 60-64 of the full-length consultation paper.)

Protection of Landowners When Work Is Done Under a Statutory Right of Entry

What is sometimes called the "pipeline problem" occurs when lien claimants who have done work on private land under the authority of a right of entry conferred by an enactment file claims of lien against the landowner's title, despite the fact that the private landowner has not requested the improvement, obtains no benefit, and has no connection with the contract chain. A tentative recommendation calls for amendment of the *Builders Lien Act* to provide that a lien does not arise against land that is subject to a statutory right of entry with respect to any operations that are carried out under the statutory right of entry.

Operations carried out with the owner's consent that could have been carried out without consent by virtue of the statutory right of entry would be treated the same way, i.e. no lien against the private landowner's land would arise. This would protect landowners who enter into a surface lease or licence agreement with an operator involving some form of compensation for the disturbance, but who are still involuntary hosts. Filing claims of lien against the private landowner's interest in the land in connection with the operations would be prohibited in those circumstances.

(More detail on pages 157-161 of the full-length consultation paper.)

More Certainty Regarding What Amounts to Lienable Work: Demolition and Extractive Operations

It is unsettled now whether demolition work will support a valid claim of lien in all circumstances. It usually does when it is a step in preparing a site for redevelopment. There is some doubt whether a valid claim of lien can be filed in respect of demolition operations when it is not a step towards re-building or other alteration of the land. The consultation paper proposes that demolition should be lienable whether or not it is a preliminary step in the redevelopment of the site.

The lienability of gravel extraction, the removal of ore from a surface or underground mine, and oil and gas production is also uncertain. While the installation of facilities to enable extractive activities like these to be carried out arguably adds value to the land and is probably lienable, the removal of a substance from the land to be sold as a commodity usually depletes the value of the land and for that reason cannot be characterized as an improvement. The consultation paper proposes a means of distinguishing between these two situations on the basis of a "dominant purpose" test. If the dominant purpose of the extractive work in question was to use the extracted substance somewhere other than the land from which it was removed, it would not be lienable.

(More detail on pages 49-53 of the full-length consultation paper.)

Lien Rights, Unregistered Lands and Unregistered Interests

The Act does not distinguish between registered and unpatented (unregistered) land in terms of lienability, but as a practical matter it is only possible to file a claim of lien against registered land. The only Crown tenures that are currently lienable are those issued under the *Mineral Tenure Act*, because the Act provides a mechanism for doing so. It is increasingly common, however, for industrial construction projects to take place on unpatented (unregistered) land, which is often covered by some other form of Crown tenure.

Lienable work is often performed at the request of tenants holding under unregistered leases, and there is no mechanism for filing a claim of lien in situations where the lien attaches to the unregistered leasehold, but not to the landlord's interest.

The consultation paper deals at length with these gaps in the ability to preserve and enforce lien rights. Several possible solutions are proposed. The choice between them would involve a decision about allocating fiscal resources to expand and upgrade one of several existing provincial registration systems, so it is a choice that ultimately must rest with government.

(More detail on pages 36-46 of the full-length consultation paper.)

More Certainty About the Start of the 45-Day Countdown to the End of the Lien Filing Period

The consultation paper contains tentative recommendations aimed at making it easier to determine whether a claim of lien can be, or has been, filed in time. They do this partly by reducing the number of separate triggers for the start of the 45-day period culminating in the expiration of the time allowed for filing claims of lien, and partly by simplifying the tests for determining when the 45 days start.

As it now stands, the 45-day countdown until the end of the lien filing period starts on the earliest of any of these events:

- a certificate of completion is issued for the particular contract or subcontract under which a lien claimant was engaged;
- a certificate of completion is issued for a contract or subcontract higher in the same contract chain than the subcontract under which a lien claimant was engaged;
- a head contract is completed;
- a head contract is abandoned;
- a head contract is terminated;
- the improvement is completed, if there is no head contract;

- the improvement is abandoned, if there is no head contract and the improvement is not completed;
- in the special case of a lien against a strata lot purchased from an owner-developer or that strata lot's share of common property, the earlier of (a) the earliest of any of the above-mentioned triggering events; and (b) the transfer of the strata lot to the purchaser.

The BCLI Project Committee saw no reason why the presence or absence of a head contract should make a difference as to when the countdown to the end of the filing period starts to run against a lienholder. Eliminating the triggers relating to a head contract would mean that if no certificate of completion is issued in respect of a relevant contract or subcontract, the 45 days would run from the completion or abandonment of the improvement.

The test under the Act for determining when completion of an improvement occurs is relatively straightforward. It is when a substantial part of an improvement is ready for use, or is in use for its intended purpose. "A substantial part," however, is a subjective and imprecise expression. For the sake of greater certainty, the consultation paper proposes that those words be deleted from the provision that sets out the in use/ready for use test for determining if an improvement is complete.

Determining the date on which abandonment of an improvement occurred would often be a matter of guesswork in the absence of a declaration by an owner or a criterion set out in the Act. The Act contains a criterion now, namely that abandonment of an improvement or a contract (not a subcontract) is deemed to occur if no work in connection with the improvement or contract takes place for 30 days, unless the work stopped because of a strike, lockout, sickness, weather, holidays, a court order, material shortage "or other similar cause."

The consultation paper takes the position that 30 days is an unrealistically short period for deeming abandonment to have taken place, and that deemed abandonment after 60 days without resumption of work on a site would better reflect reality.

It can also be difficult to pinpoint the start of the 45-day countdown when work stops under an incomplete contract or subcontract, but the work on the improvement continues. There are difficulties with using abandonment and termination of particular contracts and subcontracts as triggers of the countdown in this situation, because in many cases the contractor or subcontractor will simply be replaced, and work will continue. It would not necessarily be obvious to third party lienholders that abandonment or termination had occurred.

There needs to be a way of starting the 45-day countdown with respect to liens that arose under the contract or subcontract under which work has ceased. Otherwise, liens could be filed until 45 days after the completion of the entire improvement and the holdback for the contract or subcontract would have to be retained that long as well, keeping lien claimants out of their money far longer than necessary.

The consultation paper proposes a new kind of certificate, namely a *certificate of cessation of work*, to create certainty about the relevant lien filing period when work ceases under an individual contract or subcontract before its completion and will not resume under the same contract or subcontract. The certificate of cessation of work would operate much like a certificate of completion. The same posting requirements would apply, and lienholders would have the same right to obtain copies as with certificates of completion. The lien filing period for the contract or subcontract in question would close 45 days after the date of issuance.

To sum up, a claim of lien would have to be filed not later than 45 days after the *earliest* of the following events:

- issuance of a certificate of completion *or* a certificate of cessation of work for a contract or subcontract, if the lien claimant is the contractor or subcontractor, or a person engaged by or under them;
- completion of the improvement, meaning the date on which the improvement is ready for use or is in use for the purpose intended;
- abandonment of the improvement by the owner (deemed to have taken place if work on the improvement ceases for 60 days, unless due to "a strike, lockout, sickness, weather, holidays, a court order, material shortage or other similar cause");
- in the case of a strata lot purchased from an owner-developer, the date on which the title to the strata lot was transferred to the purchaser.

(More detail on pages 65-77 of the full-length consultation paper.)

Strengthening the Reliability of Certificates

The consultation paper contains a number of tentative recommendations aimed at raising the level of certainty provided by certificates of completion and the proposed new certificate of cessation of work, and generally increasing the effectiveness of certification as a means of communicating information that lienholders require in order to be able to make effective use of their rights under the *Builders Lien Act*.

This group of tentative recommendations includes ones calling for:

- a requirement for certificates of completion or cessation of work to comply substantially with the prescribed form, in order to reduce the likelihood of invalidation for deficiencies;
- clarification that a certificate of completion is "issued" when the signed certificate is delivered to the person responsible for carrying out the work under the contract or subcontract to which the certificate relates;

- elimination of superfluous and confusing date references in the prescribed form of the certificate, as only the date of issuance is legally significant;
- posting at the site of the improvement, rather than "in a prominent place on the improvement" itself, which is sometimes an impossibility;
- abolition of notices of certification of completion, to be replaced with copies of the signed certificate;
- changing the definition of "payment certifier" to make it clear that the owner and a contractor can designate a payment certifier just to issue certificates of completion, regardless of whether the contract also calls for certification of progress payments.

Readers are also invited to comment on:

(a) the concept of authorizing use of a project website in construction projects over a given size threshold for posting certificates of completion, performance and/or labour and material bonds, permits, copies of head contracts, and similar documents of importance to providers of work and material to the project; and

(b) whether a project website for these purposes should be a requirement of the Act and, if so, how large a project should have to be (in terms of cost or otherwise) before it would be mandatory to have a project website.

(More detail on pages 77-90 of the full-length consultation paper.)

More Certainty About When Substantial Completion Takes Place in Phased Projects

It may be unclear when substantial completion of an improvement occurs for purposes of the *Builders Lien Act* in projects with multiple phases. Does the project consist of one improvement or several? The answer depends on the facts of particular cases.

If the multiple structures or installations are part of an integrated complex, it may make sense to treat the integrated complex as a single improvement. If the structures or installations are functionally self-contained, it may make sense to treat each one as a separate improvement. This isn't a totally satisfactory test, however. Say that two highrise towers are designed to share a common parkade. Each tower without the parkade would be functionally self-contained in the sense that it could be occupied, but neither tower would be complete without the parkade extending under both towers.

It's important to lien claimants, head contractors, and owners alike to know whether a project consists of one improvement to land or several for the purposes of the *Builders Lien Act*. Determining the answer is not always straightforward, because multi-phase developments may take place under a single head contract, and the construction schedule may call for the phases to be completed at widely separated times. Later phases may not

even proceed for a variety of reasons. Say that a single contract calls for two highrise towers to be built in succession as two phases, and construction of the second phase does not start. If the entire development is treated as one improvement, the 45-day period would not run and the date for release of the holdback would not arrive until after abandonment of the second phase had indisputably taken place.

Lien claimants have to know when time is running against them, and it is also essential for owners to know when the lien filing period ends so they can release holdbacks. It is probably impossible to devise a definitive test to determine when a construction project with multiple components consists of one improvement or several that could apply to all circumstances. The most direct path to certainty is to let the owner and contractor make that determination in the terms of the construction contract. Lienholders can find out whether the terms of a contract between an owner and a contractor contain such a term, because the Act entitles them to disclosure of the terms of the contract on written request directed to the owner.

(More detail on pages 55-56 of the full-length consultation paper.)

Abolition of the Problematic *Shimco* Lien

The so-called *Shimco* lien against the holdback is named for the 2002 case in which it was held to exist on the basis of an extremely literal interpretation of certain provisions of the Act. The *Shimco* decisions holding that a second lien distinct from the lien on land exists under the Act surprised industry and construction lawyers alike. The dual-lien theory has caused uncertainty in relation to holdbacks and other aspects of the Act ever since. No other province or territory has a dual-lien model in its construction lien legislation.

Simply stated, the *Shimco* lien is a bad fit with the rest of the *Builders Lien Act*. The Act has detailed provisions for asserting, preserving, and enforcing the lien on land, and for securing and clearing claims of lien from the owner's title while protecting the positions of all parties until the underlying payment dispute is resolved. It imposes time limits for filing claims of lien and starting actions to enforce them so that holdbacks can be released. By contrast, the Act lacks any corresponding machinery applicable to the *Shimco* lien. The most likely reason for this is that the legislature did not intend to create a separate lien against the holdback, and the wording in the Act that was later held in the *Shimco* decisions to imply the existence of a separate lien was inserted without awareness of that implication.

Chapter 6 of the consultation paper explains numerous problems that flow from the recognition of a separate lien against the holdback. Most notably, a *Shimco* lien may be asserted by claimants who have allowed their liens on land to expire, potentially tying up the release of the holdback indefinitely.

In 2004 BCLI issued a report calling for the abolition of the *Shimco* lien by appropriate amendments to the Act. The report was not implemented, and 15 years later most of the

difficulties caused by the *Shimco* lien remain unresolved. The Project Committee revisited the entire matter and came to the same conclusion, namely that the *Shimco* lien should be abolished.

(More detail on pages 91-99 of the full-length consultation paper.)

Removing Obstacles to the Flow of Construction Funds Down the Contract Chain

A major focus of the consultation paper is to minimize the propensity of the *Builders Lien Act* to interrupt the flow of construction funds down the contract chain, but without impairing the function of the holdback as a source of payment for subtrades and others when needed. Among the numerous tentative recommendations having this aim are the following:

- elimination of the 10-day gap between the end of the lien filing period and the end of the holdback period, so that the holdback could be released immediately following a clean title search result 45 days after issuance of a certificate of completion, a certificate of cessation of work, or completion or abandonment of the improvement, as applicable in the circumstances;
- amendment of the Act to remove wording that is commonly understood to require retention of the entire holdback after the end of the holdback period if any claims of lien have been filed, rather than only the portion needed to cover the total amount of the claims of lien filed in time;
- prevention of unnecessarily large holdbacks in projects with a multi-year construction schedule through an optional scheme for gradual periodic release of the holdback after the first year. The scheme for periodic release would allow approximately twelve months' worth of holdback funds to be in place at any point after the first year until completion;
- clarification that holdbacks are not required in projects that are exempted from the Act entirely, such as highway projects and work on forest service roads.

The procedures for securing and clearing claims of lien from the owner's title are crucial in maintaining the flow of funds from lender to owner to contractor to subcontractors and others. The consultation paper contains numerous tentative recommendations for changes to make these procedures faster and less expensive. In particular:

- applications for orders securing and removing claims of lien from the title could be made without notice if security for the full amount of a claim of lien is offered;
- standard forms would be prescribed by regulation for lien bonds and letters of credit used as security to obtain the removal of claims of lien from title, allowing orders to be obtained faster because there would be no room for dispute about the form of security offered;

- an alternative procedure for clearing claims of lien from title that would not require a court order would be possible once standard forms of lien bonds and letters of credit are prescribed. This alternative would build upon existing practices whereby security is held in trust by consent and claims of lien removed from title by a consent order to avoid the need for a court application.

  Financial institutions and bonding companies could be officially designated as approved issuers. The land title office could be empowered to cancel a claim of lien endorsed on the owner's title without the need for a court order, upon being notified by an approved issuer or a lawyer that security for the full amount of the claim of lien has been provided in a prescribed form and that the security is being held in trust as if a court order approving the security and directing cancellation of the claim of lien had been made.

(More detail on pages 120-133 of the full-length consultation paper.)

Holdback Accounts

The consultation paper notes that the requirement for non-exempt owners to maintain a holdback account segregating holdback funds if the value of the contract is $100,000 or more is often ignored. Readers are asked for their views on whether it should be retained.

In the event that the holdback account remains a feature of the Act, however, the consultation paper proposes:

- a requirement for holdback accounts to be held at a branch of a financial institution in British Columbia in order to ensure that the funds in them are subject to orders made by a British Columbia court;
- expansion of the current power to exempt public bodies from the holdback account so as to allow exemption by regulation of specific projects, contracts, or classes of contracts to take account of other cases in either the public or private sectors where a holdback account is unnecessary for the protection of participants in a construction project due to the unquestioned solvency of the owner or the owner's sources of finance.

(More detail on pages 115-119 of the full-length consultation paper.)

Trust Claims

The *Builders Lien Act* imposes a trust on funds received by a contractor or subcontractor on account of the price of the contract or subcontract. The trust is for the benefit of persons engaged by that contractor or subcontractor in connection with the improvement to which the contract or subcontract relates. Until all those persons are paid, the funds must not be used for the contractor's or subcontractor's own purposes.

A civil action for breach of this trust created by the *Builders Lien Act* must be started within one year after completion, abandonment, or termination of the head contract if there was one, or within a year after completion or abandonment of the improvement if there was not. By contrast, the general limitation period applicable to civil actions against a trustee for breach of trust is two years, and it runs from the point at which the claimant becomes aware of the facts surrounding the claim.

The trust under the *Builders Lien Act* is an important remedy for unpaid subcontractors and workers, because it allows them to recover the full amount owed to them if contract money has been received by the party who engaged them, but has been withheld or diverted. Their recovery as beneficiaries of the trust is not limited to a pro-rated share of the holdback, as their recovery as lienholders may be. This is not obvious on the face of the Act, and the consultation paper tentatively recommends an amendment to clearly indicate that the amount recoverable by a lienholder for breach of trust is not limited to the amount the same claimant could recover as a lienholder.

The one-year limitation period is capable of barring a *Builders Lien Act* trust claim before a lien enforcement action by the same lienholder is time-barred. This is because the limitation period for an action to enforce a lien runs from the time the claim of lien is filed, which may be up to 45 days later than the start of the limitation period for an action to enforce a trust claim.

There is an additional problem with the one-year limitation period for *Builders Lien Act* trust claims. As the trust does not arise until the contractor or subcontractor receives money owing under the contract or subcontract, it is possible under some circumstances for a trust claim to be time-barred before it can be made. For example, if the contractor or subcontractor receives the trust money more than a year after completion of the head contract or improvement, the rights of persons engaged by that contractor or subcontractor to recover what they are owed on the basis of the trust will already be time-barred.

The consultation paper sets out the view, held by the majority of Project Committee members, that the special one-year limitation period for breach of the *Builders Lien Act* trust should be repealed, so that the general two-year limitation period for claims against trustees, running from the time the claimant becomes aware of the facts surrounding the claim, would apply instead.

A minority view, also explained in the consultation paper, is that the one-year limitation period for Builders Lien Act trust claims should remain in place, because the interval of time before the general two-year limitation period would start to run could be excessively long.

(More detail on pages 143-146 of the full-length consultation paper.)

Curbing Abuses of the Builders Lien Act

Under tentative recommendations aimed at curbing misuse of the remedies under the *Builders Lien Act*, it would be easier to have wrongfully filed claims of lien removed from the title and stronger monetary sanctions would be imposed for claiming liens for inflated amounts.

The bar for removing an abusive claim of lien from title would be lowered. Context-specific grounds for removal similar to those found in the builders' lien legislation of other provinces would be substituted for the current threshold, which is borrowed from the rules of court and sets too high a test. The new grounds for removal of a claim of lien would be that it is for an inflated amount, or for non-lienable services or for work not relating to the land in question, knowingly filed when it is baseless to the claimant's knowledge, or that it is non-compliant with requirements of the Act.

The monetary sanctions against misuse of the Act would be based on a compensatory principle. Anyone filing a claim of lien when not entitled to one would be automatically liable for all reasonably foreseeable loss, including legal expenses, incurred by another person as a result of the wrongful filing. Filing for an inflated amount would render the claimant liable for the additional expense incurred by someone (usually an owner or general contractor) in providing security for the lien, to the extent that that expense is increased by the inflated amount.

Measures to counteract delay in proceeding to prove entitlement to a lien after filing are proposed later in relation to the tentative recommendations dealing with procedure.

Abuse of another kind consists of using superior bargaining power to discourage unpaid lienholders from exercising their rights under the Act. There is a provision in the Act now that prevents contracting out of the protection of the Act. A majority within the Project Committee favours broadening this provision to make any term that directly or indirectly imposes a liability or penalty for exercising a right under the Act unenforceable. A minority view is that a general contractor, but not a subcontractor or worker, should be able to agree not to file a claim of lien.

(More detail on pages 147-156 of the full-length consultation paper.)

CRA Requirements to Pay and the Builders Lien Act

When the Canada Revenue Agency issues a requirement to pay (RTP) to an owner or another payor in the construction contract chain to collect unpaid tax liabilities owed by another party in the chain, very arbitrary and unfair results can follow. These include duplicate payment obligations, because paying the amount demanded by the RTP will discharge the

original contractual indebtedness for that amount, but not purely statutory obligations under the *Builders Lien Act*.

Provincial legislation cannot alter the superpriority an RTP has under the *Income Tax Act* (Canada) and the *Excise Tax Act*, but there is some room to eliminate duplicate liabilities for holdback funds and make outcomes more predictable. A tentative recommendation in the consultation paper calls for amendment of the *Builders Lien Act* to:

- reduce the required holdback by the amount of any holdback funds obligatorily paid to CRA under an RTP; and
- treat the amount paid under the RTP as if it had been received by the tax debtor for the purpose of the *Builders Lien Act* trust.

The owner or other person to whom the RTP is addressed would then not have to pay twice, and the lien claimants would be at least partially compensated for the reduced holdback protection by a corresponding increase in the amount they could claim from the tax debtor as beneficiaries of the trust.

(More detail on pages 161-165 of the full-length consultation paper.)

Arbitration and the Builders Lien Act

In the event that a payment dispute is dealt with by arbitration, requirements under the *Builders Lien Act* to take certain procedural steps involving the land title office or the court within certain time limits may conflict with stays of proceedings that the court may be required to impose under the relevant arbitration enactment.

The consultation paper tentatively recommends that provisions originally developed by the Uniform Law Conference of Canada be added to the *Builders Lien Act* in slightly modified form to reconcile the conflict between the enactments. These provisions state that an arbitration stay of proceedings will not prevent a party from taking steps required by the *Builders Lien Act* to prevent liens from being extinguished. Specifically, an arbitration stay of proceedings would not prevent:

- filing a claim of lien;
- starting an action to enforce a lien and registering a certificate of pending litigation;
- preserving land or personal property (e.g. materials delivered and not yet incorporated into the improvement) or any estate or interest in it to which a lien attaches;
- appointment of a receiver, receiver-manager, or trustee to preserve or complete the improvement;
- applying to court to remove a lien from title.

Taking those steps would not amount to waiving the right to arbitration. In addition, a lien enforcement action would not be stayed if the claimant cannot be made a party to the arbitration.

(More detail on pages 181-185 of the consultation paper.)

Procedure Under the Builders Lien Act

The consultation paper contains numerous tentative recommendations relating to procedure. There are among the more significant changes they call for:

- the rule that a lien enforcement action must be started at the British Columbia Supreme Court registry nearest the land on which the improvement is located would be repealed;
- the address for service in a claim of lien could be used as the address for service of the claimant in any court application or other proceeding relating to the same lien;
- in addition to the owner and a plaintiff in a lien enforcement action, anyone who has provided security for a claim of lien would be entitled to serve a notice on a lien claimant requiring the lien claimant to start an action to enforce the claim of lien within 21 days;
- the rule regarding when service by mail of a notice requiring a claimant to start an action to enforce a claim of lien within 21 days is deemed to occur (currently 8 days after mailing) would be changed to harmonize with the deemed service by mail rule in the *Supreme Court Civil Rules*, namely 7 days after the date of mailing;
- all lien claimants whose recovery could be affected by the outcome of a lien enforcement action would be entitled to receive notice of trial or an application for judgment in the action;
- to address the problem of dormant lien enforcement actions holding up a final determination of priorities and payout of funds held in court, the Act would impose a requirement to conduct lien enforcement actions expeditiously, backed up by empowerment of the court to make case management orders and to dismiss a claim to enforce a lien for delay alone, even if other claims in the action are allowed to proceed.

(More detail on pages 167-181 of the full-length consultation paper.)

Liening Common Property in a Strata Plan

There are also tentative recommendations dealing with the special case of actions to enforce liens in connection with work on an improvement to common property in a strata plan. In order to start an action to enforce a lien affecting common property now, a lien claimant has to search the title to every strata lot and name each strata lot owner as a defendant, because

the strata corporation doesn't own the common property. Each strata lot owner must be served with the pleadings and other documents in the action, and a certificate of pending litigation must be filed against each strata lot.

The consultation paper tentatively recommends that the land title office be empowered to designate a single property identifier (PID) for the common property in a strata plan for the restricted purposes of filing claims of lien and certificates of pending litigation in relation to common property. It would be sufficient to name the strata corporation as the defendant to represent the owners in a certificate of pending litigation. A single certificate of pending litigation referring to the strata corporation as a defendant representing the owners could be filed. The amendments would specify that the lien, if proven, would attach to the fractional interest in the common property appertaining to each strata lot. A judgment in favour of the lien claimant would not result in an order for sale. Instead, the court would give judgment nominally against the strata corporation, and under the *Strata Property Act*, they would become liable to satisfy the judgment according to their proportionate shares in the common property.

(More detail on pages 171-175 of the consultation paper.)