

## A Model Collections Process under the *Builders' Lien Act*

Christopher P. Knight, B.A., LL.B.<sup>1</sup>

The *Builders' Lien Act*<sup>2</sup> provides a very powerful collections remedy to businesses that provide materials, rentals, or labour on construction projects. A builders' lien arises automatically the instant that labour, materials or rentals are provided to a project, but most builders' liens must be formally registered within 45 days or else they cease to exist – a failure to register on time leads to an automatic loss of lien rights. Since most businesses operating in the construction industry invoice on “Net 30” terms, and since many businesses avoid registering liens unless absolutely necessary, keeping track of when to register a builder' lien is of the utmost importance. Likewise, if there are delays in issuing invoices for work on a project, lien rights can sometimes expire even before payment becomes due. As such, the following “model” collections process is proposed to businesses that provide labour, materials or rentals for construction projects.

### **The *Builders' Lien Act*:**

Builders' lien legislation originated in the United States in the early 1800's to encourage the construction of Washington DC. The legislation, which has now been widely adopted throughout both the US and Canada, provides an extraordinary remedy that was previously unknown at common law. The basic premise is that contractors and sub-contractors providing labour and materials toward a construction are partially protected by way of a lien on (that is, a “link” to) the owner's interest in the land that underlies a project, even where sub-contractors have no direct contractual arrangement with the owner itself. This is useful in case the general contractor defaults on payment. Likewise, where an owner experiences financial difficulty, all parties providing labour and materials improving an owner's land can be protected through a secured interest in the owner's land.

Prior to the creation of builders' lien legislation, a default on payment by a general contractor often left sub-contractors unable to recover as they could only make a claim against the party that they directly contracted with. Builders' lien legislation changed the situation by allowing sub-contractors a limited to right to claim against an owner's interest in the land, in addition to any claim they might have against the general contractor. Thus, builders' lien legislation provides the construction industry with a powerful collections remedy that is largely unavailable in other industries. Because the remedy is extraordinary,

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<sup>1</sup> Barrister & Solicitor with Walsh Wilkins Creighton LLP and member of the Law Societies of Alberta and British Columbia. Contact information can be found at <http://cpknight.com/> or follow @cpknight on Twitter.

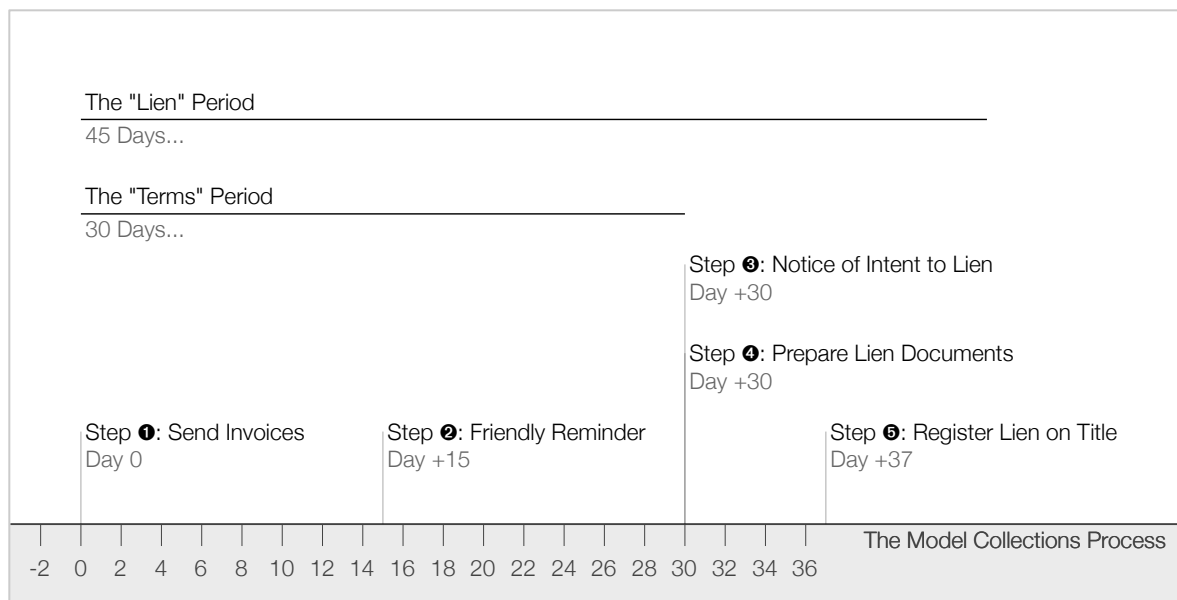
<sup>2</sup> *Builders Lien Act*, SBC 1997, c 45 in British Columbia, and *Builders' Lien Act*, RSA 2000, c B-7 in Alberta. The reader is cautioned that this paper contemplates a “typical” lien period in these two jurisdictions, but other lien periods can apply (such as the 90-day period for some oil & gas sites in Alberta), and other provinces may have different rules. There are a number of other nuances relating to builders' liens not discussed here and, as such, this paper should be taken as general information only, and does not constitute legal advice to you. It is recommended that specific legal advice be sought for any particular issues that you are facing in relation to builders' liens.

however, the Courts have held that those parties relying on builders' liens must be very careful to strictly comply with the terms of the legislation, or else the remedy will be lost. In most cases this means that lien claimants must "perfect" their lien claims by registering a Statement/Claim of Lien on title within 45 days from when labour or materials were last provided to a construction project.<sup>3</sup> Given the typical "Net 30"-day invoicing terms common in the construction industry it is important that the 45-day deadline be carefully monitored – as the consequence is the loss of an otherwise power collections remedy.

### The Model Collections Process:

To comply with a 45-day deadline imposed under builders' lien legislation, it is important to ensure that invoicing occurs in a timely fashion, and that the time limit for registering liens is carefully watched. When extending "Net 30" terms, it is important to consider in unison the expiration of the 30-day "terms" period and the expiration of the 45-day "lien" period for these – at most – leave an extremely tight 15-day window for the registration of a lien.

While there are many different approaches to collections that can balance "Net 30" terms and the 45-day lien period, the following is suggested as one possible method available to businesses that supply labour, materials or rentals to construction projects:



- **Step 1: Invoice on the Last Day of Work.** Often the most important step is the most difficult step, and invoicing on the same day that a job is completed (or that materials are supplied, or that rentals are returned) requires a great deal of coordination within an organization. Despite this difficulty, it is important to issue invoices and "start the clock" on the 30-day "terms" period so that there is sufficient time to register a builders' lien if payment is not rendered in that time. Good billing

<sup>3</sup> Note that there are many exceptions to the 45-day rule and these also need to be taken into account when considering whether to register builders' liens. As mentioned above in note 2, the reader is encouraged to seek legal advice.

and collections practice dictates that timely invoicing increase the likelihood of collecting upon invoices, in any event.

- **Step ②: Send a Friendly Reminder (+15 Days).** While a party will have 30 days to pay under “Net 30” terms, it does not hurt to send a friendly reminder at the half-way mark to ensure nothing has slipped through the cracks. Reminding a debtor to pay before the debt is past-due can be an effective way of conducting collections, and may well avoid having to resort to more expensive collections techniques. An example “friendly reminder” letter for this step appears as “Example 1” on page 5.
- **Step ③: Send a Notice of Intent to Lien (+30 Days).** At the end of the 30-day “terms” period, if the invoice was sent out on the first day of the “lien” period, there are only 15 days left to lien. If the job finished on a Friday, but the invoice didn’t go out until the Tuesday after a long weekend, the period could be shortened to 11 days or left. The timing is very tight, but it still may be worth sending a more formal “demand” for payment – this time with a notification that a lien may be filed. The tacit threat of a lien is a powerful one because general contractors know that a lien registered on an owner’s title will likely adversely affect the flow of payments to them on a project. General contracts will attempt to avoid this, so it may still be valuable to hold off filing the lien (and incurring the associated costs) for a few days to determine how a debtor will respond to a notice of intent to lien. Although such a notice is not required by builders’ lien legislation, it can serve to effect payment without actually having to take the step. An example “notice of intent to lien” letter for this step appears as “Example 2” on page 6.
- **Step ④: Prepare the Lien Documents in Advance (+30 Days).** Be prepared to actually file the builders’ lien, however, and do not wait until the last minute to take care of the associated preparations. At the same time that a notice of intent to lien is sent, start preparing the Statement/Claim for Lien document so that it is ready to file with the appropriate Land Titles Office. With only 15 days remaining to register the lien on title, there is just barely enough time to properly determine and verify a project’s legal land description and the related facts that must appear on the lien documents. Some jurisdictions require portions of the lien documents to be sworn before a Commissioner for Oaths or Notary Public, which can cause additional delays. As such, even if there is a possibility that payment will be received, prepare and finalize the necessary documents no later than 30 days after the last day work was performed at (or materials or rentals were supplied to) a construction project. “Be prepared” – and “better safe than sorry” are phrases to remember at this stage in the collections process. A lawyer, or a builders’ lien preparation service, can often be very helpful at this point.
- **Step ⑤: Register the Lien on Title (+37 Days).** Finally, should the debtor still refuse to provide payment, protect your interests by (as a matter of course) having the builders’ lien registered on title. As Land Titles may require some time to actually register the lien, and as some time should be allotted in case Land Titles rejects the

lien documents due to an error, it is recommended that you file no later than 37 days after the labour, materials or rentals were provided to the construction project. A lawyer or a builders' lien registration service can often assist you here. Once the builders' lien is properly registered, your builders' lien rights are, for the time being, "perfected."

### **What needs to be done next?**

When a builders' lien is registered on title for a construction project, a general contractor will normally be placed under considerable pressure by the owner to have the lien removed. This can often "clear the logjam" so that payment will come quickly as the alternative of risking the ire of a project owner (not to mention risking a disruption in the owner's payments) may be enough to see a general contractor quickly arrange payment. If payment is not forthcoming, however, it is ultimately the lien claimant's responsibility to enforce the lien claim through the Courts. Formally enforcing the claim requires that a lawsuit be commenced within a particular timeframe (180 days in Alberta, for example). For steps beyond the registration of a builders' lien, it is normally helpful to seek legal advice before proceeding further.

### **Conclusion:**

The *Builders' Lien Act* provides a powerful remedy to parties that provide materials, rentals, or labour to construction projects, but given the typical "Net 30"-day invoicing terms common in the construction industry it is important that the builders' lien 45-day deadline be carefully monitored. The alternative is, unfortunately, the loss of an otherwise powerful collections remedy. Accordingly, the above five-step process is suggested as an effective collections approach for businesses supplying labour, materials or rentals to construction projects.

**EXAMPLE #1: Reminder Letter (Step ②, +15 days):**

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[YOUR COMPANY'S LETTERHEAD]

[DATE]

[COMPANY NAME]

Dear Madam/Sir:

Re: **INVOICE # 123456**

Please accept this letter as a friendly reminder that on [DATE], the above invoice in the amount of \$[AMOUNT] will be fully due and payable. According to our records, that is in fifteen days' time.

Please provide payment in full on or before [DATE], and if you have any questions or comments please do not hesitate to contact the undersigned directly.

Yours truly,

[YOUR NAME]

**EXAMPLE #2: Notice of Intent to Lien (Step ③, +30 days):**

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[YOUR COMPANY'S LETTERHEAD]

[DATE]

[COMPANY NAME]

Dear Madam/Sir:

Re: **INVOICE # 123456 -**  
**NOTICE OF INTENT TO LIEN PROPERTY**

Further to our previous letter to you regarding this invoice, payment is now past due. Please take notice that the undersigned has provided work, materials and equipment rental described as [INSERT DESCRIPTIONS] to the construction project located at [INSERT LEGAL DESCRIPTION OR MUNICIPAL ADDRESS OF PROJECT]. The undersigned has not been paid by [COMPANY NAME] for such work materials and equipment rental pursuant to its contract. The amount due and owing to the undersigned is \$[AMOUNT].

Be advised that should the amount due and owing to the undersigned not be paid within 5 days of the date of this notice of intent to lien, the undersigned shall cause a claim of lien to be recorded against the project in the amount of \$[AMOUNT].

We trust that a lien will not be necessary and look forward to your immediate payment.

Yours truly,

[YOUR NAME]

CC: [NAME OF PROJECT OWNER]  
[YOUR LAWYER (if applicable)]