



Builders' Liens



Builders' Liens Process

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Overview

The Alberta Prompt Payment and Construction Lien Act (PPCLA) has introduced significant changes to the construction industry's legal landscape, affecting lien rights, payment processes, and dispute resolution mechanisms.

While it is important that a Project Manager have a basic understanding of the Alberta Prompt Payment and Construction Lien Act (PPCLA), any circumstances that may trigger a lien by a Subcontractor or Sub-Subcontractor, or by Keller against an Owner (non-payment) must be escalated to a Project Director and VP Finance/COO.

Key points include:

- ***Lien Rights and Filing***

- The standard lien filing deadline is now 60 days from the last day of work or supply of materials, with a 90-day period for oil and gas well sites.
- Lien claimants must ensure accurate legal descriptions of properties, as liens filed against incorrect lands are typically invalid.
- The concept of major and minor lien funds triggered by certificates of substantial performance remains, with some modifications.

- ***Prompt Payment Framework***

- Contractors must submit "proper invoices" at least every 31 days.
- Owners must pay contractors within 28 days of receiving a proper invoice, unless disputed.
- Contractors and subcontractors must pay their subcontractors within 7 days of receiving payment.
- It is the Project Manager's responsibility to ensure prompt payment of Keller's progress draws. If a Project Manager has any concern regarding payment by an Owner, he/she is to escalate to a Project Director and VP Finance/COO immediately.



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- *Holdbacks and Progressive Release*

- The 10% holdback requirement continues, with new rules for progressive release on larger projects.
- For contracts valued at \$10 million or more with a completion schedule longer than one year, annual holdback releases are required unless the contract specifies otherwise.

- *Trust Provisions*

- Trust provisions now apply to all payments received by contractors or subcontractors, not just those made after substantial performance.

- *Adjudication Process*

- A new adjudication process has been introduced as an alternative to court proceedings for resolving certain disputes.
- Adjudication decisions are binding and considered final rather than interim.

- *Enforcement and Removal of Liens*

- Lien claimants must sue on their lien within 180 days of registration.
- Liens can be removed by the claimant or by court order, with new provisions for security amounts and forms.

- *Priority and Invalid Liens*

- The priority structure among lien claimants remains similar to previous legislation.
- The PPCLA maintains strict provisions against excessive or improper lien claims, with potential liability for costs and damages.

These changes aim to improve cash flow, provide faster dispute resolution, and maintain protection for subcontractors and suppliers in the construction industry. Project managers and industry professionals should familiarize themselves with these new provisions to ensure compliance and effective management of construction projects under the PPCLA.



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1 Procedure(s)

1.1 Who Is Entitled to File a Builders' Lien?

The Alberta Prompt Payment and Construction Lien Act (PPCLA) maintains similar categories of people who may file liens as the previous Builders' Lien Act:

- Persons who perform work on or in respect of an improvement
- Persons who furnish materials to be used in or in respect of an improvement
- Persons who perform services on the improvement
- Persons who rent equipment to be used in or in respect of an improvement

These categories generally include contractors, subcontractors, workers, material suppliers and equipment renters

1.2 What Lands Are Lienable?

Lands that may be subject to a builders' lien under the PPCLA include most privately owned properties. However, there are important exceptions and considerations:

- Federal lands: Properties owned by the federal government, including airports, federal penitentiaries, and national parks, cannot be liened under the PPCLA as they fall under federal jurisdiction.
- Indigenous lands: Indian reserves and Metis settlements are exempt from liens under the PPCLA due to their special status.
- Provincial government lands: The PPCLA now specifically excludes the provincial government from its scheme. For provincial government and provincial agency projects, the Public Works Act continues to provide a separate claim procedure distinct from the PPCLA.
- Municipal lands: Recent case law has held that liens may be invalid against certain municipal properties, such as those registered as "municipal reserves."
- Public highways: The PPCLA explicitly excludes liens against public highways.



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- Other public interest properties: Case law disallows liens where it would be against the public interest to sell the lands in question.

1.3 Landlords and Tenants

Where work is being done on tenant improvements, the lien will typically apply to the tenant's leasehold interest. However, the PPCLA provides a mechanism for extending lien rights to the landlord's fee simple interest under certain conditions. This is crucial, as obtaining remedies from tenants is often less certain than from landlords.

A person doing work or furnishing materials for tenant improvements may give the landlord "notice in writing of the work to be done or materials to be furnished" before the work is started, as per section 15(1) of the PPCLA. If the contractor/subcontractor/supplier does so, the lien may extend to the landlord's interest – unless the landlord gives notice that they will not be responsible for the work or materials within five days after receiving the notice.

1.4 Time for Filing

The basic rule is that liens must be filed within 60 days.

General contractors are entitled to file liens for work performed by them under a general contract within 60 days from total completion or abandonment of the work. Subcontractors may register a lien within 60 days from the day the work under the subcontract is totally completed or abandoned. Sub subcontractors' lien rights are the same as subcontractors, although their remedies are less effective.

Liens for the supply of materials may be registered at any time within 60 days from the day the last of the materials to be supplied under the purchase agreement is furnished, or the contract to furnish the materials is abandoned. Liens for the performance of services may be registered at any time within 60 days from the day that the performance of services is completed or the contract for the services is abandoned.

A lien for wages may be registered at any time within 60 days from the day that the work is completed or abandoned. Lien rights for equipment suppliers and renters are similar to the rights of "material suppliers."



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1.5 Proper Invoice Requirements

Prompt Payment Framework

The PPCLA introduced a new prompt payment system that mandates payment timelines:

1. Contractors must submit a "proper invoice" to the owner at least every 31 days, unless the contract specifies otherwise.
2. Owners must pay contractors within 28 days of receiving a proper invoice, unless they dispute the invoice.
3. Contractors must pay subcontractors within 7 days of receiving payment from the owner.
4. Subcontractors must pay their subcontractors within 7 days of receiving payment from the contractor.

A "proper invoice" must include:

1. The contractor's name and business address
2. The date of the proper invoice
3. The period during which the work was done or materials were furnished
4. Information identifying the authority (written or verbal contract) under which the work was done or materials were furnished
5. A description of the work done or materials furnished
6. The amount requested for payment and the corresponding payment terms broken down for the work done or materials furnished
7. The name, title, and contact information of the person to whom the payment is to be sent
8. A statement indicating that the invoice provided is intended to constitute a proper invoice



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Dispute Process

If an owner disputes a proper invoice, they must provide a notice of dispute within 14 days of receiving the invoice. The notice must be in the prescribed form and state the amount not being paid and reasons for non-payment.

1.6 Substantial Performance

“Substantial performance” can be defined as “the fulfilment of the obligations agreed to in a contract, with only slight variances from the exact terms and/or unimportant omissions or minor defects.” Substantial performance does not by itself affect the time for filing a lien. However, it does have a significant impact on the effectiveness of lien remedies.

Substantial performance is achieved when the work under the contract or subcontract is ready for use or is being used for the purpose intended and the remaining work must be capable of completion or correction at a cost not more than:

- (a) Three per cent of the first \$500,000,
- (b) Two per cent of the next \$500,000, and
- (c) One per cent of the balance

Substantial performance comes into play if a “certificate of substantial performance” is posted by the owner, contractor or subcontractor. The filing of such a certificate triggers practical filing periods for those parties wishing to share in the major lien fund (see Section 11.j. below).

Seasonal deficiencies, and other work that cannot be completed for reasons beyond the control of the contractor or subcontractor, are deducted from the contract price in determining whether or not substantial performance has been achieved.

1.7 Procedure for Filing

Builders' liens are filed at the Land Titles Office. There are land titles offices in Edmonton and Calgary. The lien must not only be submitted to the Land Titles Office on or before the 60th day, it must also be actually registered against the appropriate title on or before the 60th day.

The builders' lien form must be correctly filled out, including all of the following:



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- The correct legal address of the property where the work was performed.
- The name of the owner of the property, as well as the person for whom the work was performed.
- An accurate statement of the amount of the lien.
- The last day work was performed or materials supplied.
- Completion of an "affidavit verifying claim."

1.8 Interest and Costs

Interest:

If the contract under which the claim arises provides for interest on unpaid accounts, the lien may include interest at that rate. If no interest is specified in the contract, interest may be claimed under the Alberta Judgment Interest Act, which provides for simple interest at an annual rate set by the government.

Legal Costs:

Generally, legal costs cannot be included in the lien amount itself. However, the PPCLA has introduced some changes regarding the recovery of legal costs:

1. In lien enforcement proceedings, the court may order costs on a solicitor and client basis to a successful lien claimant.
2. In adjudication proceedings under the PPCLA, each party typically bears its own costs. However, the adjudicator has the discretion to award costs against a party if they determine that the party's conduct has been unreasonable.
3. If a lien is discharged by payment into court or by posting security, the amount paid or secured may include an additional sum for costs, typically around 10-15% of the lien amount.

It's important to note that while these costs are not included in the lien itself, they may be recoverable in the enforcement process or through adjudication. The exact amount and circumstances under which costs can be recovered will depend on the specific situation and any court or adjudicator decisions.



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1.9 Legal Descriptions

One of the biggest challenges for lien claimants and their lawyers remains determining the correct legal description for the property to be lienied. Liens filed against the wrong lands are almost always invalid. Under the PPCLA, this challenge persists and is compounded by new considerations:

1. **Expanded Lien Rights:** The PPCLA has expanded lien rights to include work done on public works projects, which may involve more complex legal descriptions.
2. **Municipal Reserves:** Recent case law has held that liens may be invalid against certain municipal properties, such as those registered as "municipal reserves." This adds another layer of complexity to identifying the correct legal description.
3. **Prompt Payment Timelines:** With the introduction of strict payment timelines, the pressure to file liens quickly has increased, potentially leading to more errors in legal descriptions if not carefully verified.
4. **Multiple Parcels:** For projects spanning multiple parcels of land, it's crucial to ensure the lien is registered against all relevant legal descriptions.
5. **Crown Land Exemptions:** The PPCLA specifically excludes certain Crown lands from being subject to liens, making it essential to verify the status of the property before filing.

Given these factors, it's more important than ever for lien claimants and their lawyers to conduct thorough due diligence when determining the correct legal description. This may include title searches, reviewing survey plans, and consulting with land title experts when necessary. Errors in legal descriptions can not only invalidate the lien but also potentially expose the claimant to liability for improper registration. Therefore, seeking professional legal advice is highly recommended to navigate these complexities and ensure the lien is properly registered.

1.10 The Lien Funds

Under the PPCLA, owners are still required to withhold 10% of the monies otherwise payable to the general contractor. This 10% "holdback" is still often referred to as the "lien fund." However, there have been some changes to how holdbacks are managed:



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1. For most projects, the basic holdback rules remain similar to those under the previous Builders' Lien Act.
2. For larger projects, there are new rules for progressive release of holdbacks:
 - A. This applies to contracts with a value exceeding \$10 million and a completion schedule longer than one year.
 - B. Unless the contract allows for progressive or phased releases, holdbacks will be released annually.
 - C. Phased or progressive holdback releases must occur less than one year apart.
3. The concept of major and minor lien funds triggered by a certificate of substantial performance still exists, but with some modifications:

- A. Major Lien Fund:

This represents 10% of the value of work done up to the time of substantial performance.

The timeline for filing liens to share in this fund is 60 days from the posting of the certificate of substantial performance.

- B. Minor Lien Fund:

This represents 10% of the value of work performed after the posting of the certificate of substantial performance.

The timeline for filing liens to share in this fund is the same as the general lien filing deadline, which is 60 days from the last day of work or supply of materials.

4. For oil and gas well sites, the lien period remains 90 days.

These changes aim to improve cash flow in the construction industry while still providing protection for subcontractors and suppliers. It's important for all parties to be aware of these new timelines and requirements to properly manage their lien rights and obligations.



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1.11 Holdbacks

Prompt Payment and Adjudication Regulation Section 10.1 of the PPCLA states that for contracts with a value of \$10 million or more at the time the contract is entered into, if the contract does not provide for the release of accrued holdback on a phased basis, the holdback must be released annually.

1.12 Progressive Release of Holdback

According to Section 24(1) of the PPCLA, progressive release of holdbacks is required when:

- A. The contract provides for a completion schedule that is longer than one year, or
- B. The contract provides for the release of accrued holdback on a phased basis or after specified time intervals

1.13 Payment Following Completion

One of the challenges created by the PPCLA is the timing of lien filings following total performance of work. The act now gives contractors and those claiming under them 60 days in which to file their liens in the event of nonpayment. An owner may not safely release final holdbacks until this 60-day period has elapsed, and owners will typically retain the holdback until the 60-day period has expired to ensure that no valid liens have been filed. For the contractor, the release of holdbacks will often occur after their lien filing deadline has passed. As such, the general contractor must either:

1. File a lien for the holdback amount, even though it is not yet due and payable, or
2. "Take a chance" that the owner will actually release the holdback, even though the contractor's lien rights will have expired.

To mitigate this risk, contractors are advised to:

1. Have alternative security for the holdback
2. Arrange for the holdback to be held in trust or escrow pending expiry of the lien period
3. Utilize the new adjudication process introduced by the PPCLA to resolve payment disputes quickly



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Subcontractors face similar challenges with respect to receipt of holdback amounts from the contractor. However, the PPCLA has introduced some measures to address these issues:

1. For larger projects (over \$10 million and longer than one year), progressive or phased release of holdbacks is now required, which can help improve cash flow.
2. The prompt payment provisions require contractors to pay subcontractors within 7 days of receiving payment from the owner, which can help reduce payment delays.

1.14 Transfer of Title

Lien rights are generally preserved even if the owner transfers title to a third party before any liens have been filed, provided that the lien is registered within the prescribed time limits. The PPCLA includes provisions to protect lien claimants in such situations:

1. Section 14(3) of the PPCLA states that a lien attaches to the estate or interest of the owner in the land when the lien arises, regardless of whether a claim of lien is registered.
2. Section 14(4) further clarifies that a lien that has arisen but has not been registered continues to exist even if the owner's interest in the land is transferred to a third party.
3. However, to maintain the lien against subsequent purchasers or mortgagees, the lien must be registered within the prescribed time limits.
4. If a lien is registered within the prescribed time limits, it takes priority over any transfer or mortgage registered after the lien arose, even if the transfer or mortgage was registered before the lien.

1.15 Trusts

Alberta has trust provisions in the Prompt Payment and Construction Lien Act (PPCLA), which are more comprehensive than those in the previous Builders' Lien Act. The trust provisions now apply to all payments received by a contractor or subcontractor on account of the contract or subcontract price, not just those made after the posting of a certificate of substantial performance. Specifically:



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1. All funds received by an owner, contractor, or subcontractor on account of the contract or subcontract price of an improvement constitute a trust fund.
2. The trust fund is for the benefit of the persons who have provided services or materials to the improvement and are owed payment.
3. The trustee (owner, contractor, or subcontractor) may not appropriate or convert any part of the trust fund to their own use or any use inconsistent with the trust until all beneficiaries have been paid.
4. The trust obligations continue throughout the payment chain, from owner to contractor to subcontractor and so on.

The intent of these expanded trust provisions is to ensure that monies paid by the owner flow down through the entire construction pyramid, from the general contractor to subcontractors and material suppliers, and from subcontractors to their sub-subcontractors and material suppliers. This provides additional protection for those who have contributed to the improvement, even in situations where lien rights may not be available or effective.

1.16 Priority

Builders' liens continue to take priority over judgments, executions, assignments, attachments, garnishments and receiving orders. A claimant's lien rights typically arise as soon as they begin work under their contract. Judgments, executions, and similar encumbrances filed before work commences will generally take priority over subsequent lien claims.

Lien claims are still affected by interests in land filed before the builders' lien, such as mortgages. Mortgages generally maintain priority over builders' liens for all amounts advanced under the mortgage before the filing of any lien. Other registered interests against title may take priority over liens depending on the specific circumstances and nature of the interest.

The PPCLA maintains a similar priority structure among lien claimants:

5. Labourers retain priority to the extent of six weeks of wages over other lien claims.
6. After labourers, lien claimants of the "same class" rank equally without preference for their amounts.



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7. Among other lien claimants, the general contractor remains the last to be paid.

The general order of priority remains:

1. Labourers
2. Sub-subcontractors
3. Subcontractors
4. General contractor

It's important to note that the PPCLA introduced new prompt payment rules and an adjudication process, which may impact the practical aspects of enforcing lien rights and receiving payment. While these changes don't directly alter the priority structure, they provide additional mechanisms for ensuring timely payment throughout the construction pyramid.

1.17 Enforcement

After a lien has been filed, the lien claimant must sue on its lien within 180 days from the day the lien was registered. In addition to issuing a statement of claim in the Court of King's Bench (formerly Queen's Bench), the lien claimant must also file a "certificate of lis pendens" (action pending) against the title at the Land Titles Office, within this 180-day period. If the lien claimant fails to do both, the claim against the land is lost.

It is possible for one lien claimant to make its claim under another lien claimant's lawsuit, but each lien claimant must file its own certificate of lis pendens. The PPCLA maintains that if someone serves a "notice to prove lien" on a lien claimant, which is a written demand for proof that the lien is valid, the lien claimant is required to file an affidavit proving its lien within 15 days from the date the notice is served. If the lien claimant fails to do so, its lien may be lost. This remains a very important deadline for lien claimants to follow.

The provision allowing for a notice requiring a lien claimant to commence an action to enforce its lien within 30 days from receipt of such notice is still in effect. This continues to be a very important deadline to observe. Legal advice is generally helpful in preparing an appropriate "affidavit proving lien," or commencing action.

Any lawsuit to enforce a builders' lien may only be brought in the Court of King's Bench. Alberta Provincial Court does not have jurisdiction to deal



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with builders' liens, even though the amount of the lien may be less than the current small-claims limit.

It's important to note that the PPCLA has introduced an adjudication process as an alternative to court proceedings for resolving certain disputes. This process is designed to provide faster and less costly dispute resolution, but it does not replace the lien enforcement process described above. Parties may still choose to pursue lien claims through the Court of King's Bench as outlined in this section.

1.18 Removal of Liens

Once filed, liens can generally only be removed by the lien claimant or by order of the Court of King's Bench (formerly Queen's Bench). Lien claims can be removed by the lien claimant by filing a "notice of discharge of lien." This usually happens when the lien claim is paid or settled.

In disputed situations, liens can be discharged from title by court application and the payment of security for the lien claim. The PPCLA maintains similar provisions for discharging liens as the previous Builders' Lien Act, with some modifications:

1. The amount of security required to discharge a lien may include an additional sum for costs, typically around 10-15% of the lien amount.
2. Payment into court can be made by way of:
 - A. Cash
 - B. Letter of credit
 - C. Lien bond (often available from the contractor's bonding company and similar to a payment bond)
 - D. Any other form of security acceptable to the court
3. The court may order the discharge of a lien upon the posting of security without holding a hearing, if all parties consent.
4. The PPCLA introduces an adjudication process that may impact lien discharge procedures. While adjudication decisions do not directly remove liens, they may influence the court's decision in lien discharge applications.
5. The timeline for enforcing a lien remains 180 days from the date of registration, but the calculation of this period has been clarified. The



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Alberta Court of King's Bench has ruled that the 180-day period runs from when the lien is registered, not when it is submitted for registration.

1.19 Invalid Liens

It remains crucial for a lien claimant to ensure the contents of their lien claim are as accurate as possible. Excessive claims, improper claims, or late claims may result in costs and damages. Under the PPCLA, a person who registers a lien:

- for an amount grossly in excess of the amount due to them or that they expect to become due to them; or
- that they know or ought reasonably to know that they do not have a lien;

is liable for legal and other costs and damages incurred as a result thereof unless that person satisfies the Court that the registration of the lien was made or the amount of the lien was calculated in good faith and without negligence.

Additionally, the PPCLA has introduced some new provisions related to this matter:

1. The court may now order costs on a solicitor and client basis to a successful lien claimant, which can increase the potential liability for improper liens.
2. In the new adjudication process, an adjudicator has the discretion to award costs against a party if they determine that the party's conduct has been unreasonable.
3. The PPCLA maintains the court's ability to discharge a lien upon application if the lien was improperly filed or is otherwise invalid.
4. The Act also preserves the court's power to reduce the amount of a lien claim if it is found to be exaggerated.

Given these provisions and the potential consequences, it's more important than ever for lien claimants to ensure their claims are accurate, properly filed, and made in good faith. Seeking legal advice before filing a lien claim is highly recommended to avoid potential liabilities and ensure compliance with the PPCLA.



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1.20 6.19.2 Lien Rights

The PPCLA remains the primary security for unpaid work or materials in Alberta. Project managers should be aware of the following key points:

5. Lien filing deadline: The standard lien filing deadline is now 60 days from the last day of work or supply of materials.
6. Extended deadlines: For oil and gas well sites, the lien period remains 90 days.
7. Timing recommendation: It's recommended to file liens at least 7 days before the deadline to ensure timely registration.
8. Internal notification: Always notify your manager and the COO before placing a lien.
9. Proper invoices: Be aware of the new "proper invoice" requirements and payment timelines introduced by the PPCLA.
10. Adjudication process: Familiarize yourself with the new adjudication process for resolving payment disputes, which can be used as an alternative to lien claims in some situations.
11. Holdback release: For projects with a minimum \$10 million contract value and exceeding 12 months in duration, be aware of the new rules allowing for quicker release of holdbacks.

1.21 6.19.3 Potential Subcontractor Liens

If a Project Manager suspects that a subcontractor is contemplating placing a lien on a project, it is the Project Manager's responsibility to inform his/her Manager and the COO.

1.22 6.19.4 Adjudication Process

The PPCLA introduced an adjudication process for resolving payment disputes. Key points include:

- Either party to a contract or subcontract can initiate adjudication, but only between parties with direct contractual relationships.
- Adjudication is intended to provide faster and less costly dispute resolution than court proceedings.



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- Adjudication decisions are binding and, according to recent court interpretation, are considered final rather than interim.
- Adjudication decisions can only be challenged through:
 1. A court order
 2. Judicial review (on limited grounds)
 3. Arbitration (if agreed upon by the parties)
 4. A subsequent agreement between the parties
- The adjudication process determines only contractual rights, not lien rights.
- Lien validity is irrelevant to an adjudicator's decision regarding contractual disputes.
- The adjudication process in Alberta differs from Ontario, where adjudication decisions are considered interim and temporarily binding.

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Revision History		
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1	October 9, 2024	Original Document Created by Peter Jonkman
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