

**Building a New Home?  
Or  
Renovating an Existing  
Home?**

**How to Help Protect  
Yourself from  
Contractor Liens**

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*Understanding Alberta's Lien Act*

If you plan to hire a General Contractor, builder, or plan to be an Owner/Builder you need to know how the Alberta Lien Act works, learn what a lien holdback is, and how it protects you as the owner, and what to do about a lien BEFORE you venture in to ANY contract to build!

**PROBABLY THE MOST IMPORTANT BOOK YOU WILL EVER READ,  
IF YOU PLAN TO BUILD or RENOVATE YOUR HOME**

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## **Sample Documents (At the end of this book)**

Declaration of substantial completion	Irrevocable assignment for work already
Declaration of substantial performance	done
Statutory declaration of full payment	Irrevocable assignment to complete
Cavitet forbidding registration	unfinished work
Certificate of Lis Pendens	Termination of contract letter
Sample of lien title	Demand removal of lien letter
Affidavit of no lien	Letter of understanding MOU
Irrevocable assignment	Letter to lender
Affidavit of no creditors	Sample of Cost to complete work-out plan

## **IMPORTANT NOTE:**

This book has been written based on The Alberta lien act and the laws of Alberta, where certain portions of the Act have been copied herein. I have also relied upon much information from McLennan Ross LLP, and the Law Firm of BLG whom I wish to acknowledge and thank for their information, however in no way am I suggesting that any included legal text herein is in any way legal advice by the Author. The reader is strongly advised to seek their own legal counsel. If you are not building your home in Alberta, you are hereby strongly cautioned that the included information may NOT apply or be relevant to your jurisdiction and you are also hereby advised to seek your own legal advice from your own lawyer, accountant and or other advisor. The information herein has been provide as general reference information only, the author and or Landen Development Inc. assumes NO liability what so ever for the use of the information contained herein. The reader assumes all liability if using the following information without first seeking their own legal advice from a qualified lawyer.

**By Greg Genereux & Landen Development Inc.**

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## HOW TO USE THIS BOOK

This book has been designed in three sections for a project owner to use:

The First Section describes what you need to know about or at least need to be aware of regarding the Lien Act and why it is so important for you to set-up a lien holdback trust account “before” starting the construction of a new home or renovation in Alberta. Further, this book outlines what you as the landowner needs to know about lien rights “before” engaging a prime contractor or builder!

The Second Section starting at page 39 walks you through what you need to know if you have already started construction and if you had not set up a proper lien holdback trust and subsequently you now have a lien mess on your hands. *(If you already have liens being recorded on your project and if for some reason you don't have a proper lien holdback trust account set-up, you should skip the first section of this book, and then come back to it later. First call your lawyer, then go right to the second section of this book to fully understand what you will need to know about how to deal with liens, as time is very much an issue to get any liens resolved.)*

The Third Section of this book is several examples of legal forms, draft letters, contract clauses, draft notices, and other documents that you should be aware of and understand how they work. However, the example forms and sample documents at the end of this book are just that, examples only, intended to show you what they should look like, and to make you familiar with them. They are NOT to be used in any way without your legal counsel first reviewing them or better yet get your lawyer to produce their own forms regarding these documents.

### How NOT to use this book!

What you should not do however, is use this book as a how-to guide for do-it-yourself legal work or do-it-yourself legal advice. To be very clear this book is NOT intended to be legal advice in any form, nor should this book be used as any form of legal advice. Nor should the example forms and example contract clauses at the end of this book be used without your legal counsel's review and advice. Everything within this book has been set-out by the author in an effort to help the reader become more fully informed about a project-owners legal lien rights and the lien rights of contractors and trades that work on the landowners project.

It should be noted that many lawyers make a good living off of clients that decide to do their own legal work such as draft their own contracts, or setting up their own lien trust account and or try and structure themselves some other required legal documents, only to find themselves in a deep legal quagmire later on. Trying to do your own legal work may in the end cost you WAY more than you could possibly ever foresee, and possibly the loss of your dream home!

**Note:** The Author of this book is NOT a lawyer, however, has 40 years' experience in dealing with lawyers, construction contracts, lien issues and project restructuring after a lien mess has been caused by a prime contractor that walked away from a project, leaving the client holding the bag with all the subcontractors and trades being left unpaid!

## ABOUT THE AUTHOR



The founder of Landen Developments Inc. and founder of Landen Design-Build Greg Genereux has four decades of custom home design and custom residential construction experience. He is also well versed in most construction contract law, and Alberta Lien Rights, and knows well the process and havoc that any registered lien against a project can cause. Greg is also well versed in what to do about lien claims if they become registered on your property.

Although Greg is somewhat experienced in construction law and construction contracts, he is not a lawyer, but understands well all sides of the Alberta Lien processes. Greg has been asked by many clients to take over projects that some other contractor started that ended up in a gigantic Lien mess. Greg not only resolved these lien issues, but also helped re-negotiate the lender's construction funding, negotiated all contractor settlements, and help get the project through to completion. As stated by many of the clients that have come to Greg for help in this type of situation, *"I don't know what I would have done without Greg's help, we would most likely have lost our home to foreclosure."* (See also our website testimonials to this effect)

Greg has designed and built well over a thousand custom homes and other building units, building in many of Calgary and areas most prestigious neighborhoods with over 40 years of construction experience. Many of Greg's clients come back to build their second, third, or even their fifth custom home. Greg has won many best in class design awards, including several SAM awards, and won the coveted Golden Hammer Award for ten years of best service from the ANHW program. Greg also holds many design certificates in Drafting, CAD, and Land Planning & Development. He is very experienced in residential structural design. Greg is also a fully accredited Red-Seal Journeyman Carpenter, and Cabinet Maker, with experience and knowledge in all aspects of new home construction, including HVAC and other mechanical design and installation, structural design, electrical design, layout, and installation, with hands-on experience in virtually all aspects of custom home building.

A Famous Courtroom Quote: **The penalty for laughing in a courtroom is six months in jail; if it were not for this penalty, the jury would never hear the evidence!** H.L. Mencken

**Notice to reader:** This booklet/paper is a general overview of the subject matter and is provided as **GENERAL INFORMATION ONLY**. Lien rights and the lien process in Alberta can be very complicated and can have varying outcomes; this document and or the content within this document should not and cannot be regarded as any legal advice whatsoever. The reader is strongly advised and cautioned to seek information or advice from legal counsel before entering into **ANY** contract with a builder/contractor, or implementing any of the advice offered herein.

## FORWARD

You might ask why am I writing this book? The main reason is that every year I see good honest hard working people get into deep trouble trying to build their dream home! Mostly because they want to try and save a buck and end up hiring the wrong builder/contractor because they thought this contractor had the best price but, in the end, this contractor could not follow through to project completion! What most people don't realize is just how much trouble they can get into by hiring the wrong guy, especially if they don't know anything about how the Alberta Lien Act works! Furthermore, most people don't understand just how much liability they actually take on by not knowing at a minimum the basics required of them as the landowner regarding the Alberta Lien Act when entering into a contract to build a custom home or major renovation. Unfortunately, I have seen several good people lose their dream home due to an unscrupulous contractor that left them high and dry, holding the bag with all the bills to pay twice!

I wrote this book to try and save as many people as possible from having to go through this nightmare. Furthermore, show you how to avoid such a lien mess or, if you do get into the lien swamp, illustrate to you how to get out of this quagmire if you do end up with a contractor that leaves you to hold the bag! I do want to make one thing very clear before you start to read this book. I am NOT a lawyer! So the advice offered within this book is that of an experienced contractor with 40 years' experience in dealing with a *lien claim mess* associated with having to take over some other failed builder/contractor's project - or projects that were started by a contractor that went out of business right in the middle of a project. I therefore highly recommend that you consult with a lawyer before you do anything related to the topics outlined herein.

In those 40 some years, I have had to deal with this type of failed project mess many times over. In many cases, with clients that first came to us for a building quote, and that same client then tells us after getting some other really-cheap quote, "Sorry, you guys are too much money!" only to find out later that they end up coming back to us begging us for our help to get them out of a massive mess of liens and other legal headaches associated with a contractor that has, as the old Vegas saying goes, "Elvis has left the building"! This situation can become a dire situation that if not resolved in a short time frame, could lead to the total loss of the client's dream home! This due to their bank issuing a full payment demand for the construction mortgage because of liens, and then end up foreclosing on your project to recoup the banks already advanced construction funding.

The sad thing is there are very few people or professionals that fully understand how to deal with such a mess. Nor does there seem to be anyone that can offer you any real all-inclusive-advice on what to do if you do get into this type of situation, where the outcome can be disastrous. But it does not need to be this way. Even if you find yourself in very DEEP LIEN DO-DO, this book should help you out. **(If you are already in a grave lien mess start reading at page 35).**



## INTRODUCTION

If you are considering the concept of building a new home and in particular, if you plan to be your own general contractor acting as an “Owner-Builder.” You first need to fully understand what is involved in the overall construction process. But most of all, you need to know how the lien rights of the prime contractor/builder and their sub-contractors, trades, and suppliers work here in Alberta. Further, how these lien rights can drastically affect you and your building project if not correctly managed by you as the owner-builder. This book is not intended for contractors!

So what do we mean by this? Most people that embark on the venture of building a new home or renovation for that matter, assume that if they (*the owner*) have paid in full the prime contractor/builder, then that should be the end of it! However, this can be far from the end of it! That is IF you do not PROPERLY set-up and handle how payment is made to the prime builder or main contractor and or their sub-contractors/trades and suppliers. If payment is not correctly done, you/the-land-owner could become liable for the entire amount of billing cost for all of these “sub-contractors” that worked for the prime contractor/builder, even if you have already fully paid out the prime contractor. Effectively, you end up paying the same bills twice!

Put another way, even though you, the owner, may have paid your bill entirely to the prime contractor/builder, they may not have paid some or any of their bills! Which, in turn, makes you legally liable to “**pay again**” for something that you have already paid the prime contractor/builder for! At this point, your ONLY option left would be to sue the prime builder/contractor. However, this usually is not worth the effort, as most likely the builder is going out of business or there is some other significant financial issue that caused the lien mess in the first place- and most likely will have nothing left to sue! Even IF you win the suit, you lose, as it costs time, energy, and MONEY to launch a lawsuit. Even IF you do win and get judgement against the Contractor/Builder, obtaining a judgment is one thing, but collecting on it, is quite another!

However, there is a way-out to this problem, as set out in the Alberta Lien Act. However, this solution only protects you IF you have set-up payment correctly to the prime contractor/builder and or their sub-contractors, trades, and suppliers. A correctly structured lien holdback trust account (*10% of the prime contractor/builder’s total contract amount*) will limit your liability to only that of 10%. However, you need to make sure you have done so, “**before**” any outgoing payments are made to the prime contractor/builder, and or payment to ANY of the sub-contractors, trades, or suppliers. Note the emphases is on BEFORE. This is very important because if not correctly set-up at the very beginning of the project, this formula cannot be set-up “after the fact,” meaning liens that show up can no longer be satisfied with a 10% limit. Which, in effect means, that with no lien trust funds to pay into court, you now have to entirely pay out the liens or pay into court the full amount of the liens. After that, go to court and defend yourself and try to have as many of these liens tossed out of court as possible (*we talk about that later*). The court process is a very lengthy and costly process. At the same time, your court held money just sits in court the whole time, which can take years to settle!

## SECTION ONE

**T**his book is set-up in sections for a few reasons. This first section is set-out to fully inform you of what the Lien Act in Alberta is used for and how the Lien Act directly affects you as the land/project owner. The following section sets out “what to do” if you already do have liens recorded on your title, and especially what to do if you have not properly set-up a lien holdback trust account. The order in which to read this book depends on what your situation already is. If you already have liens and don’t have a lien holdback trust set-up, you should first start reading at page 39, then after that come back to the beginning. The reason for this reading order is that the age old enemy of time is very much against you if you already have liens to deal with, where knowing and understanding the second section of this book may become much more relevant in the name of “time”. In either case you should consult with your lawyer first before doing anything!

The third section includes examples of proposed contract clauses that you should be aware of, and also includes several sample documents that you should also be aware of “before you start your project” and preferably “before” you engage a prime contractor, or any contractor!

The following headings under this first section lay out what you need to know “before” engaging any prime contractor, builder, trade, or subcontractor.

### **Why is setting-up a Lien Trust so important?**

Why is this so important? Unless you plan to use all cash to build, you will most likely need some form of construction financing, and a single lien can stop all construction funding advances dead in their tracks because of only a single lien. Second, once one individual lien claim goes on the title, the rest of the trades and suppliers and sub-contractors will most likely pile on their liens, even if their bill is not due yet. These lien claims can become a giant mess if not handled and managed properly, “before,” any payments are made to anyone.

**A heads up!** You will have some contractors tell you, “*Don’t worry about liens, we have been in business for >>>>years.*” However, setting up a proper lien holdback trust goes for ANY contractor or builder no matter what their reputation is! You **MUST** set-up an appropriate holdback lien trust account, and do so up-front no matter what they say! One reason the prime contractor/builder does not want to see a lien truss account put in place, is that you can legally hold back 10% of their bill for 45 days; this in their mind is 10% of their cash-flow. However, these prime contractors should also have a 10% lien holdback set-up “on their side” for all of their suppliers, trades, and sub-contractors that are working for them, effectively somewhat of a wash (*kind of like how GST works-but different*). Still, most contractors/builder’s don’t set up a lien

hold back on their side of the transaction, mostly because it seems to be too much paperwork for them, plus the cost and need for a lawyer to manage the trust account for them and so forth.

We at Landen Design-Build have, in the past, lost several building contracts to some other contractor/builders that “appeared to be” way cheaper than us, but in the end, the “other guy” becomes a massive lien mess for the homeowner that thought they were getting a good deal! These same clients tend to come back to us “after” the preverbal “poop” hits the fan, and there is a bunch of liens registered on their title, the project half done, with all construction funding stopped! At this point, the client is now looking to Landen to HELP them out of this mess and want us to take over the job for them! With any luck, the client/landowner should have had in place a lien holdback trust, and then any new builder could take-over the project without much issue. They would then work their way through this lien mess.

However, if no lien trust account is/was in place, or if not correctly set up, this lien mess then gets MUCH BIGGER! After that, it becomes very challenging, if not impossible, to find another builder willing to take over the project. In many cases, the owner ends up losing the home to foreclosure. We will get into how to deal with a “no lien trust account mess” in much more detail later on in this book.

## **Summary of the Alberta Lien Act**

Before we get into what you have to do, lets start with a summary of The Alberta Builders Lien Act. The Act is designed to provide contractors and material suppliers with “some” form of security for payment. The charge created by this statute is called a LIEN against the land/title to which the materials or services were installed or provided. Additionally, the same Alberta Lien Act is also designed to help protect the owner form liens (*see also a lien holdback later on in this book*).

A lien is the legal process and notice that someone is claiming the right to be paid from the “asset” value of your property. For example, if your prime general contractor does not pay their suppliers or subcontractors for materials or work on your project, you “the landowner” could end up with a lien on your property’s Title or Deed. If this lien event happens, you-the-owner will probably be unable to renew your mortgage, nor be able to apply for or draw on any construction financing, nor be able to sell your home/property until the lien holder has been paid and the lien removed/discharged.

As for construction mortgage funding, the construction funder will STOP all construction funding advances until the lien is removed and could even DEMAND the full construction funding facility as drawn to-date be fully paid out right on the spot. This demand for payment is caused by the recording of a lien, as you are effectively in default of your financing agreement, where it is

usually outlined in the “fine print” that a lien claim is considered a default, which if not rectified within the specified time frame would mean the financing facility is called.

It should be further noted that paying in full your prime general contractor is not at any time a guarantee against a lien claim. Even if you have already paid the prime contractor in full, they may NOT have paid their bills or failed to pay their bills on time to their subcontractors, suppliers, labourers, or services installed or supplied to your project. A lien can then be placed on your property by those unpaid subcontractors/suppliers to try and collect their debt directly from “YOU” instead of the prime contractor!

In this book, we will discuss how you, as the landowner, can protect yourself from this potential problem in the following pages. Lien laws in Alberta are a provincial court matter that requires you to “first” legally and correctly set-up a lien holdback “trust,” for you/the property owner to hold back a portion of the total job cost (*usually 10%*) for up to 45 days after the work is completed, or based on agreed to scheduled payments set out under your construction contract, for milestone items that have been completed. (*See also the progressive release of holdback funds*). Suppliers and/or subcontractors during this time who did not get paid must register their liens with the courts within the 45-day duration. (*We will outline in detail what they need to do for a valid lien claim later*) but “IF” and only if, you have set-up a legally binding lien holdback trust. Further, that you have also held back the correct amounts all within a “properly structured” lien holdback trust account, then your financial liability “should be” limited to the sum of the 10% holdback (*that is IF a properly set-up lien holdback trust account is in place BEFORE any liens are placed on title, which we will discuss in more detail in later in this book*).

Furthermore, before you pay the prime general contractor/builder their final lien holdback payment, you need to check title for any liens and you also need to fully understand your rights under the Alberta Lien Act. Regularly check with a land registry to make sure that no liens have been recorded against your property/project, and do this, BEFORE you make any final payments (*see also setting up a lien holdback trust account with a lawyer*). Furthermore, I highly recommended that you have the contractor and their sub-contractors each sign a statutory declaration that they have paid all of their subtrades BEFORE you pay them! (*We get into that in more detail later on*).

Generally, loans or other forms of financing will most likely be registered/recorded ahead of any lien claimant. The Bank that is registered in first place on the title would have first right to foreclose, and then after the Bank has foreclosed, any second or third-placed registered mortgages would be dealt with, and then “IF” there are ANY funds left over from the foreclosure sale of the liquidated “land/project” (*The Asset*) those remaining funds would be distributed to any valid lien claimants, and if any funds are left, distributed to the owner!

The Lien Act legislation also requires the “construction owner” to “properly” maintain a 10% lien holdback and if the property owner has correctly maintained the lien holdback throughout the entire project construction, this then offers the owner of the land “some” protection from lien claims. If any lien claims become registered on tile, the landowner then only needs to pay into court the 10% lien holdback fund, and the court will then instruct the removal/discharge of any liens without the need for any foreclosure action by the lien claimant! **THIS IS A VERY IMPORTANT** point, that a **PROPER** lien holdback fund is set-up and that said holdback fund is correctly managed, preferably by your lawyer or some other credible “arms-length” trust account, rather than you as the owner merely setting aside funds in some bank account directly controlled by you the owner. You need to make this trust account at “arm’s length”, meaning you “personally” have nothing to do with the actual payment, and have the lawyer or trustee deal with everything! Effectively this trust account is set up for both you and the contractor’s best interest, and effectively it is to be “jointly” managed for both you-the-owner and the prime contractor!

It is imperative to recognize that the registration of a lien does not by itself, ensure or guarantee ANY payment to any contractor, or his sub-trades or suppliers. Lien claim requirements are very technical, and there are many reasons why lien claims can be invalidated. In many cases, this can happen when there is a financial melt-down on a project. Whereby a properly set-up holdback fund should be sufficient to pay into court the minimum 10% requirement, and then all lien claimants must remove their liens, even if there are not enough funds in the lien holdback trust account to pay out any of the liens fully. As the owner of the land, you need to understand that a lien claim by the prime contractor or recorded by the prime contractor’s sub-trades and or suppliers is significant to them! A lien is the only form of security that they have for their payment; however, it certainly does not guarantee full payment to any contractor, his sub-trades, or suppliers just because they registered a lien claim.

An adequately registered lien or any lien for that matter can cause “all hell” to break loose for you as the owner of the lands/project, as it generally stops ALL work, and will cause all construction funding to come to a screeching halt! It is consequently **VERY IMPORTANT** to fully understand what your “landowner rights” are concerning any lien that becomes registered on your title. Effectively a lien claim gives an unpaid contractor or supplier the right to foreclose on “your” land in the hope of getting paid. However, the bank providing any construction funding would, of course, be registered ahead of any lien claim on the title, which would trigger the funding facility to issue a demand letter stating that you are in default, and then you must have all recorded liens removed. If not removed within the demand/rectification period, then the lender will issue a demand letter for full payment of any advanced portion of the funding facility. If full payment is not received within the rectification period, the lender can then foreclose on you-the-landowner. After all of that, if any funds remain, then “maybe,” the lien holders get paid something! It should further be noted that the first place mortgage holder can have all liens removed using specific legal procedures. The slang name for this is known in the industry as having all lien’s “blown off

the title,” of course, that also means that you, the owner, are also “blown off the title.” Then the lender becomes the owner of what “used to be” your property! Also known as a BOP Bank Owned Property!

## **Basic Principles of the Lien Act**

The Alberta Builders’ Lien Act requires the owner to retain a 10% lien holdback throughout all construction.

See also a copy of the Alberta Lien Act at: <https://www.qp.alberta.ca/documents/Acts/b07.pdf>

On some projects, this can result in a significant drag on cash flow to the prime contractor and their subcontractors. In particular, many subcontract agreements issued by the prime contractor to their subtrades often have a clause that states “that payment of the subcontractor’s holdback is not due until the prime general contractor receives the corresponding amount from the owner”. This delay can result in a subcontractor waiting for an extended period to receive their holdback. However, there is a provision under the act called a “progressive release” of holdback mechanism that exists to help remedy this problem, however, if not correctly followed, the progressive release formula can backfire on you – the project owner. This progressive formula is complicated, and that is the reason that I strongly recommend that you have your conveyancing lawyer handle all lien holdback trust funds through their holdback trust account.

Furthermore, you should use a law firm that specializes in conveyancing and is very familiar with the Lien Act and fully understands the requirements needed to manage a lien holdback trust account. This selected firm should also be the same law firm that would handle your lender's construction draw advances, where the lender would first deduct a 10% holdback off of any progress advances and then advance to you-the land-owner the difference from each construction draw. We will get into that in more detail later on.

It is also essential to understand that either the prime general contractor or a subcontractor can post a Certificate of Substantial Performance (CSP) in respect of the work of the prime contractor or their subcontractors. This posting gives the subcontractor a measure of control over the timing of the release of holdback by the project owner. It also provides a mechanism for which the overall holdback amounts on the project can be reduced in several stages, as various subcontracts have completed their work. If a Certificate is posted correctly, and no liens are registered, the project owner may then safely release that portion of the statutory holdback associated with the Substantial Performance Certificate 46 days after the Certificate has been posted. This means funds are held for 45 days and released on the 46th day; it is also essential to understand that it is NOT legal for the land owner to hold lien holdback funds longer than 46 days, which could also get you in trouble. There is also the need for you the owner of the land (especially if you are

deemed an owner-builder) to post a certificate of substantial completion/performance at the correct time; this will also ensure that any legitimate liens must be placed within the legal limit of 45 days after this certificate is correctly posted. We will get into that in much more detail later on (*see sample Substantial Performance Certificate*) at the end of this book. Furthermore, your lawyer managing the lien trust account should be able to help you with any certificate notices needed and when and how to post them.

### **Basic Example of a Lien**

For example, let's say you have a construction project that is expected to be built over a year or more, and a subcontractor who does all his work in the first 30 days of the build, and does not want to wait over a year to receive their "small" portion of the owner's lien holdback fund. So, the Act allows the general contractor or the subcontractor to post a Certificate of Substantial Performance, also known as Substantial Completion Certificate, for when the subcontractor's work is substantially performed. Assuming no liens are registered at this point, the owner can then safely release that portion of the holdback attributable to that particular subcontractor in 45 days - on the 46<sup>th</sup> day after the Certificate of Performance was correctly posted.

As an example, a \$1,000,000 contract/agreement to build a custom home with a holdback at the end of the home building project would add up to \$100,000 assuming there are no progressive release of holdback issued along the way. It should be noted that early progressive payments can be made as set out in the lien act provisions. However, in this case let's assume there has been a progressive release of holdback by the owner concerning the "early completion" of some tasks done by a few of the sub-contractors, say in an amount of \$25,000 (*out of the \$100,000*) which would then reduce the statutory holdback to \$75,000 (*i.e., 10% of the remaining contract value*) - this means the owner's statutory requirement of holdback is reduced to \$75,000 at the end of the project, or possible next early progressive milestone payment. In this case the owner retains the "remaining" holdback in a trust to comply with the Builders' Lien Act, but also to protect the landowner against the possibility of insolvency or default by any contractor working on the owner's project. In this example, (*assuming the owner has also complied with the legislation in progressive releases of early payment*) upon completion of the contract, the owner's maximum liability for any liens that might arise is substantially reduced, in this example case, down to \$75,000 out of the total \$1,000,000 contracted amount. If, for some reason, the "poop-hits-the-fan", and the prime contractor "hit the road" and leaves everyone unpaid, all you as the landowner need to pay is \$75,000! - even if most of the \$1,000,000 has not been paid by the prime contractor!

**Side Note:**

A law firm that does a lot of real estate conveyancing would be very familiar with this process. Once again I would highly recommend that you as the project-owner engage a law firm to do this for you, even though you could save a few bucks here and do it yourself, I think it is way too important not to have this handled by a pro. Never mind the fact that most of the lien holdback risk is transferred to the law firm, and if, for some reason, the law firm does not handle the holdback trust account properly, they then assume all this liability. And even if the law firm files bankruptcy over this mess, you would then have the Law Society to go after for damages! However, we won't deal with defaulting law firms related to lien holdback trust accounts in any depth within this book.

**When is a Contractor or Supplier ENTITLED TO A LIEN**

**A contractor and or supplier are entitled to register a lien if they have:** Done or caused to be done any type of work on or in respect of an improvement on or to land; or

They have furnished any material to be used in or in respect of an improvement on or to land or to a structure on the property. A lien can only be registered in respect of an "improvement," and it attaches to the lands on which the improvement is located. "Improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in-land, except anything that is neither affixed to the land nor intended to be or become part of the property. This generally means that any work that is done or materials supplied in respect of things not permanently attached to the land will not support a lien. A claimant will have a valid lien for supplying materials if the materials are "actually" incorporated into the improvement or consumed in the process of constructing the improvement. The material or product must be placed or furnished on the contract site, or in a place in the "immediate vicinity" of the contract site. The supplier of materials must know that the materials are intended for a specified project, or they will not be entitled to register a lien. A renter of equipment is deemed to perform a "service," and has a lien-able claim while the equipment is on the contract site or in the "immediate vicinity" of the contract site. The lien is limited to a "reasonable" and just rental of the equipment while it is used or is reasonably required to be available for "the purpose of the work." Design professionals may have lien rights depending on the nature of their work and whether it relates to an improvement in the lands. For example, the preparation of drawings used to complete construction may support a valid lien. In contrast, the preparation of drawings used for the primary purpose of obtaining development approval will not support a valid lien.

**Side Note:** *even if the Design professionals that did the design work for the project has been paid, (or may not have been paid), their plans, renderings, specifications, etc. still belong to the designer/architect under copyright law, and the design professional may be able to restrict any*



*subsequent owner, such as the bank in foreclosure, etc. from using their plans to complete the project! See also our e-Book on the copyright of design/architectural rights.*

A lien can also be registered if the lien claimants are construction services deemed necessary for the construction of the improvement. To list a few services that will support a valid lien in the right circumstances, include such services as waste disposal, hauling, and transportation of goods to the project site, etc.

## **Understanding Alberta's Lien Act**

Before we get into what you need to do, we should first understand what the Alberta Lien Act is, how it works and what it does for you as the landowner vs. the contractor/builder, in the following headings we will walk through most of the information that you need to know. Still, it should be noted that the Alberta Lien Act is a very complicated thing, and each situation has its unique circumstances that you should engage a lawyer in order to flush out your individual project options.

### **Why the lien act was set-up in the first place**

The Builders' Lien Act in Alberta was effectively put in place to help protect the average contractor, their sub-trades or suppliers, who may have provided work or material to a construction project, new home build, or renovation, effectively the "Land" that the project is "attached to." The Act covers off both residential and commercial projects with equal attention to both categories of construction. The Act comes into play when these contractors, sub-trades, or their suppliers have not been paid. The Builders' Lien Act is also designed to help protect land/project owners of property by limiting their liability to only that of a 10% lien fund (*that is if correctly set-up*) in the event a prime general contractor does not pay their subcontractors and suppliers. However, this same lien holdback fund can only be used for this type of 10% payment IF and only if a PROPER and correctly set-up lien holdback trust is in place BEFORE any liens are registered! If not correctly set up in the first place, then, you as the landowner, can become liable for the entire lien amount! In other words, instead of only being responsible for 10% of the lien debt amount, you can then become 100% liable to pay the liens off at full face value, even if you have already paid the prime contractor in FULL!

The Builders' Lien Act is in place for a contractor, or their sub-trades and suppliers to be able to secure a claim for payment of money owed to them. It is a legal charge against the property for work done or materials supplied that have been "attached" to the project/land, where any money that is still owed then comes under the Act, and works the same way no matter if the project is a large commercial development, new home build, or a small home renovation.

## Why do other contractors & subs also lien after a “first lien” is registered?

Once a first/single lien is registered, it does not take long before all trades and suppliers know about it, and then they all come rushing into register their lien claims, even if their bill is not due yet. Why is this? Because most of these trades and suppliers have “been-there-done-that-before,” and if there is any money left on the job, they “believe” liens are the only processes that they have to help secure their position on the title, meaning, they think “first-come-first-serve.” However, broadly speaking, lien claimants of the “same class” will all share in “any leftover” lien proceeds on a pro-rated base (*this, after the Bank or other pre-registered mortgages are dealt with first*), after which the liens are then paid out on a pro-rata basis, regardless of the sequence of lien registration.

## Entitlement to a Lien

The recording of a lien can only happen in respect of an “improvement” to the land and is attached to the land, effectively the title to the land on which the improvement is located. As stated earlier “Improvement” can mean any item that is constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in-land, except anything that is neither affixed to the land nor intended to be or become part of the land. What this implies, is that work happening or materials that were supplied concerning items that are not permanently attached to land will NOT support a lien claim registration, period! This point is essential to know when it comes time to try and have improperly recorded liens tossed out of court! (*We will talk more on that later on*)

## Lien Registration Process

Liens (*in Alberta*) can be registered at the Land Titles Offices in Edmonton and Calgary or various private registry offices. The following information is some of the requirements to register a statement of lien from a contractor, supplier, or tradesman:

- Full legal name and address of the individual or corporation registering the lien.
- The full legal description of the land, along with the full and correct legal name and address of the “owner” of the land.
- The nature of the legal interest against which the lien is claimed, including a full description of the work/materials/services.
- The full legal name and address of the party who requested the work.
- The date the work was completed or abandoned, or whether work is ongoing.
- The total amount claimed due or to become due.
- An address for service within Alberta for the lien claimant.
- The Statement of Lien must state the nature of the interest, which is liened (*e.g., leasehold or freehold*).
- If the Lien Claimant is claiming for interest charges, this should be stated on the Statement of Lien.

A lien claimant can obtain the legal land description to the owners land in most cases by doing a Tax Search concerning the municipal address. However, the municipal Tax Departments will not certify the correctness of the information they provide. Still, confirmation can be obtained by obtaining a Certificate of Title from the Land Titles Office. *(This is one area of information collection where many liens can end up being tossed out of court due to any incorrect information being used by a lien claimant when recording their lien, we will talk about that in more detail later on).*

I point out the above because, in many cases, lien claims filed may not meet the above criteria and could be then tossed out of court. However, experienced contractors will get this legal land description information up-front before they even start the job, and will have obtained this information in advance in case a lien must be registered quickly. As it is not legally necessary for a contractor or supplier to use a lawyer to record a statement of lien, they tend to make mistakes that lawyer most likely wouldn't, and these mistakes can also become the reason for a lien to get tossed out of court if not correctly done as per The Statement of Lien form as prescribed by statute. See also, [https://www.qp.alberta.ca/documents/Regs/2002\\_051.pdf](https://www.qp.alberta.ca/documents/Regs/2002_051.pdf) for a copy of the Lien Forms Act. Also see, <https://www.alberta.ca/assets/documents/sa-statement-lien-form.pdf> for a copy of the actual form that a lien clamant needs to fill in. Care is required by the party registering a lien in completing the Statement of Lien form accurately, particularly the description of the lands and the correctly named parties; any errors may invalidate the lien or otherwise prejudice the claimant's lien rights. Furthermore:

- The statement of lien must be signed by the lienholder or its acting agent.
- The Lien Claimant is also required to attach an affidavit of execution unless the lien is executed under seal by a corporation.
- Finally, the statement of lien must also be verified by an affidavit by the lienholder or the agent of the lien holder.

When the affidavit of verification is made by a person other than the lienholder, it may include not only facts within the personal knowledge of the deponent (testifying witness), but also the facts of which the deponent is informed, provided the deponent gives the source of this information and states that they believe the facts to be true.

Any contractors that have been around for a while understand that they need to avoid last day lien registration if possible. There are numerous reasons lien registration may be rejected or delayed, but the most common reason is when they have run out of "time" *(we will talk about that in more detail later on).*

## **PRESERVING A LIEN (Very important to know)**

A Statement of Claim (*In Alberta*) must be issued to enforce a lien, and a lis pendens must then be registered on title, within 180 days of the registration of the lien. (*A lis pendens is a certificate issued by the court to confirm that a Statement of Claim relating to the land has been issued.*) Failure by a lien registrant to do both of these things can result in the expiry of their lien. If another lien claimant commences an action within the 180 days to realize upon the same lien fund, it is not legally necessary to file a Statement of Claim. However, a lis pendens is still required by the person/company trying to register a lien. In other words, more than one Statement of Claim may be necessary where there is more than one prime contract and, therefore, can be more than one lien fund. If the lien fund or security for the lien is paid into court, the requirement to start an action or register a lis pendens within 180 days may be waived by the court. The owner of the lands or any other party affected by the lien may serve the lien claimant with a Notice to Commence Action to realize on its lien. If served with such Notice, proceedings by way of Statement of Claim and lis pendens must be started within 30 days, or the lien ceases to exist.

These are essential things to know as the owner of the project if, for any reason, you have someone trying to lien your project/title, as any single one of these events, if not correctly done or properly registered may give you the landowner an “out clause”! You should note that if you think you will go to court on your own “without a lawyer,” to challenge a lien, (*to save money*) that the court will not point out to you any possible glaring issues/mistakes. It is up to you as the person/owner being liened to PROVE your point in law. Therefore, I would highly recommend you hire a lawyer experienced with Alberta lien rights and lien issues if you do need to go to court! Keep in mind that lawyers are like Doctors, each may have a good “general understanding” of what it takes to be a Lawyer or Doctor, however, would you want a GP doing heart surgery on you, same thing with Lawyers, you need one that specializes in Lien law and is well versed with the Lien Act.

There is one other way for a lien claimant to preserve their position if they have, for some reason, first “made a mistake” on their lien filing, and that is to “do more work” on the project. Effectively they try to extend the deadline date for registration of any lien. A favorite tactic is to ask you/the land/project owner to allow them back on-site to “fix or complete” a task. NEVER let this happen after a lien is registered! (*We will get into that in more detail later on.*)

## **How a Contractor Enforces their Lien**

Any contractor, sub-contractor, trade and or supplier will need to “enforce their lien claim,” meaning they can’t just “sit-there” and wait to be paid after registering a lien. Therefore they need to be enforcing a lien claim, which typically means applying for a court order declaring that the lien requirements have been met and the associated debt is valid (*i.e., the court will declare the lien to be valid and grant judgment on the underlying debt*). The Builders Lien Act allows for

such an application to be made using a summary procedure, effectively, using affidavit evidence instead of a “live witnesses” and a trial. There is a substantial legal process that is required by the party registering a lien, such as cross-examinations regarding disputed factual issues such as non-performance of contracts, etc. This is where someone recording a lien should be using proper legal counsel before any lien issues get to this stage, and as many smaller contractors don’t tend to use a lawyer, this is where the land/project owner can have their legal counsel look to see if everything has been “properly/correctly filed by the lien claimant” and if not there could be a way for the owner to have the lien discharged and the case tossed out of court.

Judges are supposed to be impartial, but after hearing thousands of cases of the “little guy” being the small contractor getting screwed over in court by land-owners, many Judges tend to rule in favor of the “Little guy” which means that you as the landowner tend to be considered the “Big-guy.” To be clear, this is not a legal issue, it is simply what the author has found to happen in court when dealing with lien issues over some 40 years of being in the construction business. In other words, Judges are only human, and the sorrows of some small contractor can pull on the heartstrings of a judge, and then you as the “Big-guy” end up paying even though you are legally in the right, with the only option at that time being an application for appeal, which in most cases tends not to happen because that all cost money to do, and the “Little guy” gets paid!

## **Negotiating a Lien**

It is normal to see parties negotiate a resolution of lien issues, mainly when the facts are unclear and the parties or their legal counsel understand their client’s lien rights. In a lot of cases, lien issues can be settled outside of court. If necessary, the parties may obtain a court order by mutual consent to put an agreed resolution into effect. The parties may also engage in mediation or arbitration. However, an agreement to resolve disputes by mediation or arbitration does not prevent a lien claimant from exercising their lien rights. Although Alberta lien legislation provides for a summary process, in some cases, disputes become too complicated for resolution based on an affidavit of evidence. This is most often the case when there are significant issues of contract interpretation, delays, or deficiencies that most likely led to the payment dispute in the first place. *(We get into this in much more detail later on in this book, see also Assignment of funds and direction to pay as a way to negotiate a lien later on in this book.)*

In such cases, the court will direct the dispute to go to trial. At this point, the claimant’s lien rights will continue until a possible judgment is issued following trial. *(However, the lien will commonly be discharged from the land and replaced with alternate security such as the lien holdback fund or an assignment of funds etc.)* Once a lien is declared valid, the court may order the lands to be sold (*i.e., foreclosure*) to satisfy the claim of lien.

After foreclosure all proceeds from the sale of land, or alternate security, are distributed among lien claimants and other secured creditors once all lien rights have been determined as being valid. Generally speaking, lien claimants of the “same class” will share in lien proceeds on a pro-rata basis, regardless of the order of lien registration. In this situation, lien claimants are deemed to be of the “same class” if they are contracted to the same party within the construction chain. Priorities among lien claimants of different classes and between lien claimants and other secured creditors can be very complicated, where I strongly advise that you should obtain legal advice in such cases.

### **Lien Expiration Period**

A lien is technically considered to be in existence since the moment work is started, or materials are supplied to/on the project/lands. And a lien claimant can resister a lien at ANY time during his/her contract for services are in place. However, a lien claim has an expiration period. A contractor and or their sub-trades and or suppliers lien right expire if they have not registered their lien within the time prescribed within the Act statute. A lien for materials, services, or wages can be registered at any time up to 45 days from the date the last materials, services or wages have been provided on the contract, or the contractor abandoned the project/site. Failing to register a lien “on time” leads to the expiration of the contractor’s lien, and or his sub-trades and or supplier's lien rights. The key wording here is “Contract,” if the contractor, sub-contractor, trade, or supplier has NO contract, then their lien rights are substantially reduced, as they then have to prove some “form of contract” existed. This becomes a very key point when it comes time to try and “clean-up a lien claim mess,” and we will talk about that in more detail later on.

### **Lands that a contractor/supplier can lien**

It is important to understand what the definition of “owner” is within the Lien Act, as it is not necessarily the same thing as other legal concepts of ownership. There may be multiple owners for lien purposes, with the consequence that multiple interests can have a lien registered against them. However, in most residential homes or renovation cases, there is only one owner; this issue usually only applies to condominiums, apartment buildings, and the like where there can be many owners.

### **Can your Architect or Designer lien your property?**

Design professionals such as architects, designers, or drafting technicians may have lien rights depending on the description of their work and how it relates to being considered an improvement in the lands. For example, the preparation of drawings/blueprints used to apply for a building permit, or used to complete the construction of the project on the land may support a valid lien. However, the preparation of drawings used for the primary purpose of obtaining development approval will not support a valid lien. On a side note, there are also copyright issues concerning

building plans/blueprints that you may also need to concern yourself with if you do need to complete a project using a designer's plans, no matter if the designer/architect has been paid or not! (*We cover the issue of copyright in another Landen e-book*)

### **Can a Contractor/trade/supplier remove “attached items” if not paid for?**

Once a contractor/trade/supplier has attached their work/product/materials to your project/lands, they no longer have the right to remove anything from your project site even if they have not been paid for their materials, work, or services! However, this does not necessarily stop this from happening, and when it does, the land owner's only recourse is to report the “theft” to the police and let them deal with it from there. However, having filed a police report in this event can be crucial evidence come court date, as such “theft” directly related to a lien concerning a particular trade or supplier can directly affect the court outcome. On a side note, once any lien claims start to show up on the title, it is a VERY GOOD IDEA to have all the locks changed or re-keyed for your project! Furthermore, you might also want to consider temporary construction fencing or some other means of restricting access to your property until all lien issues are resolved. Also, setting up cellular linked video surveillance and or security systems will help hinder theft. Posting signage that states “**These Site Is Being Monitored by Cellular Link Video Surveillance**” You should also post several NO TRESPASSING Signs!

### **The time frame a contractor/trade/supplier can register a lien**

As stated earlier, a lien is deemed to exist from the instant work is started, or materials are delivered. However, a lien expires if it is not registered within the time prescribed by statute. Subject to some exceptions, a lien for materials, services or wages may be recorded at any time up to 45 days from the date the last materials, services or wages were provided to the building site/lands, or if the contractor has abandoned the job, failing which the lien expires. This time frame is critical to know if a lien is correctly filed or if, for some reason, the lien filed was not register in the proper time frame, as it can be tossed out of court if time has run out even if the claimant is still owed money!

### **Certificate of Substantial Performance**

**VERY IMPORTANT:** If the contractor posts a “proper” Certificate of Substantial Performance, the contractor/trade/supplier’s lien must be registered within 45 days after this Certificate is issued and correctly posted on-site, failing which the lien cannot attach in respect of work done before the posting/issuance of the Certificate of Substantial Performance (*i.e., the major lien fund*). In other words, the prime contractor, or sub-contractors, or supplier’s lien right to register their lien’s is not affected/or-become-valid, and the remedies available to these contractors or trade/supplier’s

liens will be significantly reduced by the “proper” issuance and posting of a Certificate of Substantial Performance (CSP) (*i.e., the major lien fund may be lost to these contractors, sub-contractors, or suppliers*). So, prudent contractor/trade/suppliers have to act within 45 days of last work done. However, correcting work that was incorrectly done or omitted to be done at an earlier date is not included in calculating the time for any lien registration, and using this excuse, will not make it possible to extend the contractor/trade/supplier’s lien period by returning to the project site to perform additional work that should have been done earlier. Further, the correction of deficient work does not count in the calculation of the lien period. However, this is one way that many contractors “try” to extend their rights to a lien, and where a good lawyer can have this type of lien tossed out of court. (*See also a draft copy of Substantial completion of the home certificate at the end of this book*)

### **What is a Preventive Arrangement?**

There is one other method that a lien claimant may use in an effort to try and extend the time of their lien right, called a “preventive arrangement,” which is a legal concept that extends the time for lien registration. However, a preventive arrangement is used only in limited circumstances. If you run into this, you need to ask your lawyer about it. Under a preventive arrangement, the supplier or subcontractor agrees that it will supply materials or services from time to time under a preventive agreement, the time limit for registering a claim for a lien will begin to run from the date of last delivery of materials or services. Under this formula, it is unnecessary to file a lien within 45 days after each delivery or service. However, a general account for materials or services is not sufficient to create a preventive arrangement for lien purposes. Before a preventive mechanism exists, the courts require that the parties agree to a limited/set time frame, a designated area of service, a guarantee of a specific amount of work, and exclusivity or other particular requirements.

### **What Lands can a lien be attached to?**

A lien can only be registered on land that is “owned” by the person that engaged the contractor and only exists concerning the interest of an “owner” as that term is defined in Alberta under the Act. “Owner” is defined in the legislation as a person having an estate or interest in land at whose request, express or implied, and:

- i. on whose credit,
- ii. on whose behalf,
- iii. with whose privity and consent, or
- iv. for whose direct benefit, work is done on, or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the Furnishing of the material.



The issue of who the owner of the land/tile is a key point here, as any sub-contract issued by a party “**other than the owner**” would not necessarily have ANY lien rights. The only other way around this would be if the lien claimant can prove that the party that entered into a contract with them for the lands/project had the owners full authority to do so, such as a project manager, whereby the lien claimant would have to prove in court that the owner gave the project manager full authority to engage contractors directly.

## **The Statement of Lien**

The “Statement of Lien form” is stipulated by statute. The Contractor/sub-contractor/supplier must take care in completing the Statement of Lien form “correctly,” particularly the full legal description of the lands and the correct spelling of the names of all the parties involved. Many times lien recording errors can invalidate a lien, or prejudice the lien rights of the lien claimant. The statement of lien must be signed by the lien claimant and is required to be attached as an affidavit of execution. Finally, the statement of lien must also be verified by an affidavit by the lien claimant, and if not all correctly done, can give numerous reasons for the lien registration to be delayed or rejected altogether. See also: <https://www.alberta.ca/assets/documents/sa-statement-lien-form.pdf> for a copy of this form.

## **Once a lien is declared valid, then what?**

After a lien claim has been declared valid, the court may order the lands to be sold (*in foreclosure*) to satisfy the claim of lien, however, the bank that funded the project would have (*first right to foreclose in this event*), so in practice, the bank will not let any liens get head of their security **no matter what!** Any remaining cash proceeds from a foreclosure sale would then be distributed among lien claimants and other secured creditors after all lien rights have been determined as being valid, and would then share in any court held lien proceeds (if any exist) on a pro-rata basis. Lien claimants’ priorities of different lien classes, and or between liens claimants and or other secured creditors can be complicated, and I strongly recommended that you obtain specific legal advice in such matters.

## **The HOLDBACK & the LIEN FUND**

The holdback and the lien fund are two different funds, however, still related to each other. The holdback is the amount required by the Act to be retained by the land/owner, this being 10% of the value of work performed or material furnished. The holdback is also the owner’s protection from liens. The owner who fails to retain holdback risks paying all lien claim amounts IN FULL,

out of the owners' pocket. The holdback can be released by the owner after the relevant lien period expires, provided no liens are registered. Roughly stated, the lien fund consists of the holdback plus any additional amount payable but not yet paid under the contract when lien claims are registered. The lien fund is the amount the land-owner must pay into court to remove liens from the title to the lands (*unless the lien claims are less than the lien fund*). Calculation of the lien fund is often very complicated, and you should have a pro do this calculation for you, such as the law firm handling the holdback trust account. The following is a general guide only, and reference should be made to the relevant provisions of the Act. The legislation defines the lien funds as:

(1) 10% of the value of the work actually done (or materials furnished) plus

(2) any amount payable under the prime contract over and above the 10%, which has not been paid by the owner under that contract before the registration of a lien claim. In the case of completed contracts, the value of the work is the amount of the contract. Where a project is only partly complete, the value of the work is determined by finding the extent of the completion, as a percentage of work done, and adjusting it to the contract price balance (*as opposed to using an estimate of the cost of Completion subtracted from the contract price*). It should be noted that there can be a big difference between these two types of calculations. It should also be further noted that any payments made after a lien is registered do not reduce the lien fund. If you do need to calculate an unfinished contract amount, I strongly recommend that you hire an arm's length third party qualified to do so and then have that third party endorse this amount in a formal letter/report. The reason for this is that your word as the land-owner against that of an expert in the field is two totally different points of view in law, as well as in the minds of lien holders. This calculation is also known as the cost to complete calculation. We will talk about that in more detail later on.

It is a highly recommended practice for owners to regularly check the title to ensure no liens are registered “before” advancing any funds to Contractors/sub-contractors/suppliers. It is also important to note that the second part of the lien fund may be reduced on account of set-offs (*such as for cost overruns*) on the basis that this reduces the amount “payable.” The first part of the lien fund (*i.e. 10%*) cannot be reduced on account of set-offs. Hence, the lien fund consists of at least a 10% holdback. I highly recommended that you have a lawyer handle the lien holdback account inside a separate trust account that he/she sets-up just for your project! In other words, this trust account does not co-mingle funds from other projects!

If a Certificate of Substantial Performance (CSP) is issued, that then creates both a major lien fund and a minor lien fund. The major lien fund is 10% of the value of the work done plus any additional amount payable and unpaid for work done up to the date of issuance of the Certificate of Substantial Performance. The minor lien fund is set-up for those who do work after the date of

issue of the Certificate of Substantial Performance. The minor lien fund calculation is 10% of the value of the work done after the date of issue of the Certificate of Substantial Performance, plus any additional amount payable and or unpaid related to work done after that date. If no CSP is issued, then there is only one lien fund. In all cases, the owner can make a formal application to pay the lien fund into court to discharge any related liens on the title. The lien fund, if correctly set-up and managed, is the owner's maximum liability to discharge any liens provided the owner has also complied with the requirements under the Lien Act.

## **Certificate of Substantial Performance**

A Certificate of Substantial Performance can be issued by any contractor with respect to its own contract or by the prime general contractor with respect to any subcontracts. A prime general contractor may wish to issue a Certificate of Substantial Performance (CSP) to obtain a release of the major lien fund holdback. A subcontractor or supplier may wish to issue a CSP to obtain the release of the holdback associated with just their work. The prime contractor is required to post the CSP certificate in a conspicuous place on the job site within three days of issuance. Posting this Certificate triggers a deadline for registering a lien that attaches the major lien fund 46 days after the CSP certificate is posted, after which the owner can then safely release the major lien fund holdback (in the case of a prime general contractor's CSP Certificate). Or the holdback associated with any subcontractor's work (in the case of a subcontractor's CSP Certificate) if no liens have been registered. However, you should note that "the contract" between the "Prime Contractor & the Owner" determines if the owner is required to release the relevant holdback when a Certificate is posted. So, you need to read carefully any contracts between you and the prime contractor or that you, as the owner/builder have entered into with your contractor's subcontractors. The test for determining "substantial performance" is set out in section 2 of the Lien Act, which states: a contract or a subcontract is substantially performed:

- a) when the work under a contract or a subcontract, or a substantial part of it is ready for use or is being used for the purpose intended, and
- b) when the work to be done under the contract or subcontract is capable of completion or correction at the cost of not more than
- c) 3% of the first \$500,000 of the contract or subcontract price,
- d) 2% of the next \$500,000 of the contract or subcontract price, and
- e) 1% of the balance of the contract or subcontract price.

**NOTE:** It is also a good idea to have all contractors sign off a statutory declaration that they have paid all of their bills concerning your project BEFORE issuing any payment to them, even if there are no liens recorded! We discuss that in more detail later on. On another note, it is also a very good idea to demand a WCB clearance letter before paying any contractor! (*See also our e-book, How to Avoid a Bad Contractor*)

## Certificate of Substantial Completion of the Home

A Certificate of Substantial Completion is similar to a Substantial Performance Certificate, the difference is the Substantial Completion Certificate is issued by the owner/builder, stating the home/project is 97% complete, with possibly the exception of seasonal holdbacks (*see also seasonal holdback*). The Substantial Completion Certificate triggers the final lien right time for any Contractors/Trades that may still have “some” lien rights. On the 46th day after posting the Substantial Completion Certificate, **NO** Contractor Trade or Supplier can then legally lien the project (*other than for any work that needs to be done for seasonal holdback*). The Owner/builder is required to post the Certificate in a conspicuous place on the Home/Project/Jobsite within three days of issuance. Posting this certificate triggers a deadline for registering a lien that attaches the major lien fund. Forty-six (46) days after this certificate is posted, the owner can safely release the major lien fund holdback. If there is seasonal work not done, then a minor lien holdback trust account should be retained for such seasonal work.

## Statutory Declaration (Stat-Dec)

When paying any Contractor or Trade any amount of their contract, the owner should also have the Contractor or Trade sign off on a Statutory Declaration, also known in the industry as a “Stat-Dec,” which states that the Contractor/Trade has paid all their bills and subcontracts in full. Ask your lawyer to prepare this document for you, and have all contractors sign the Stat-Dec before any payment is made, furthermore before you release the final 45-day holdback have another Stat-Dec signed off. These signed off Stat-Dec’s further protects you/the-owner in the event the prime contractor or their subcontractors did not pay their bills (*see Sample of a Stat-Dec at the end of this book*). This way, if a lien is registered by a sub-trade to the prime contractor you can then go to court with your signed Stat-Dec. And the court should discharge the lien, instructing the lien claimant that they need to sue the prime contractor instead of trying to lien your property.

## Lien Removal

Section 27 of the Act permits the owner or a mortgagee to give security or pay the amount of the lien holdback fund into court. This payment into court “does not constitute an admission of the validity or guilt of owing the debt” of any of the lien claims. The court will then order the liens be discharged upon receipt of the lien holdback fund or full lien payment if there is no lien holdback fund. Then litigation and or negotiation can then proceed to try and resolve any dispute regarding entitlement to the court held funds. An application under section 27 can only be made by the owner or mortgagee authorized by the owner to disburse money secured by a mortgage. Section 48 provides for the removal of lien claims where the court is given cash or security for the full amount of the lien claims. An application under section 48 may be made by any party. The court will set the amount of cash or security required, plus interest if claimed in the Statement of Lien, plus an allowance for costs (*typically 10% or 15% of the claim set aside for interest and costs*).

The court will also direct how the outstanding issues between the parties are to be resolved in Section 27 and 48; applications can be made on very short notice if there is any urgency, and there is no basis to dispute the amount of security or payment required. Section 48 also gives the court the discretion to remove a lien where it is beyond doubt that the lien claimant is not entitled to a lien, e.g., where the lien was filed out of time. Such an application is more argumentative, and cannot usually be made without a more involved process compared to simply giving security or making payment into court. I strongly recommend engaging legal counsel for all such applications.

A lien may also be removed according to section 29, which allows a party to pay a lien claim of a subcontractor and have such payment function as an effective payment under the payer's contract. However, five days advance notice must be given to all affected parties, and such payment cannot be validly made if any objection is raised. As well, a lien can be discharged voluntarily by the registration of a Discharge of Lien. It is common to see alternative security provided (e.g., funds paid into trust) on appropriate conditions (including removal of the lien) rather than making payment into court, or the parties may come to a settlement requiring the lien be discharged without going to court. If a lienholder fails to bring a lawsuit and register *lis pendens* within 30 days from the date of service of a Notice to Commence Action, the lien may be removed by a letter to the Registrar of Land Titles enclosing proof of service of the Notice to Commence Action (e.g., by Statutory Declaration). If a lienholder fails to register a *lis pendens* within 180 days from the date of registration of the lien, a letter to the Registrar is likewise sufficient to have the lien discharged. If a lien claimant fails to get to trial within two years from the date of registration of the *lis pendens*, it is possible to have the lien removed, but a court application is required, and the court has the discretion to refuse the application if there is an adequate explanation for the passage of time.

## **Common Mistakes Lien Registrants Make**

There are common mistakes made by lien claimants when recording a lien claim that may give a reason for dismissal or removal. Although the Statement of Lien appears to be a simple one-page form that a contractor/supplier can fill out, there are strict requirements regarding the timing of registration and content of the Statement of Lien form that must be respected. For one thing, processes and conditions prescribed by the Registrar of Land Titles must be respected in addition to the statutory requirements found in the Builders' Lien Act. As lien registration is very time-sensitive, simple mistakes can and frequently do result in loss of lien rights. A common problem for lien claimants relates to registering the lien against the wrong legal interest. A lien can only be registered against the interest of a party who meets the statutory definition of an "owner." It is very common to see lien claimants unfamiliar with this distinction losing their lien rights because they register a lien against the wrong party. There may also be more than one party that qualifies

as an “owner” under the Builders’ Lien Act (e.g., landlords, tenants, and mortgagees), in which case more than one Statement of Lien should be registered.

Further, more than one parcel of land may be “improved” by the work or materials supplied. And further, wrongful lien registration can result in liability on the part of the lien claimant. Missed deadlines are probably the most common mistake for lien claimants. The time frames for lien registration are short, and the commencement date is not always clear (e.g., there is often a dispute as to whether the completion of deficiencies counts in the calculation of the lien period). The 180-day deadline for starting a lawsuit and registering a *lis pendens* on the title is often missed by those unfamiliar with the “finer details” of the lien legislation.

There are many other ways for a contractor to obtain security for payment, based on how they draw up their contract, most of these mechanisms “must be” negotiated at the outset. Consult your legal counsel about ANY contractor’s contract “Before” you as the owner sign them.

The Builders’ Lien Act also presents numerous potential pitfalls for owners and lenders. The most glaring risk is the failure to maintain a lien holdback in accordance with the lien legislation. It is important to note that the holdback exists for the protection of the owners (*and lender, if applicable*). As discussed above, the failure to maintain the holdback can result in the owner having to pay twice to discharge lien claims in some circumstances. A rule of thumb for owners and lenders is to check the title each time payment is made to ensure no liens are registered. If a lien has been registered, all payment should be suspended until arrangements are made to remove the lien from the title. A title search should be done on the same day as payment is to be made. The legislation provides that payment can safely be made in reliance on a clear certificate of title, even if a lien is registered later that same date.

A potential risk for both owners and contractors alike is the use of a construction contract “format” that are not consistent with the Alberta lien legislation. Standard “form type” industry contracts have been developed with statutory lien requirements in mind. However, it is not uncommon to see construction contracts developed outside Alberta or even from outside of Canada for that matter that are NOT consistent with Alberta Lien legislation. In Alberta, any contract provisions that purport to waive the requirements of the Builders’ Lien Act are deemed void. IF you can later prove a contract “waived the provision for a lien holdback,” would give you a reason to have that particular contract’s lien rights revoked, and tossed out of court.

## **Recap of deadlines set out in AB LIEN ACT (Summary)**

Deadlines under Builders’ Lien Act references the Registration of Statement of Lien 45 days from the date that the last of the materials are furnished, the performance of services or work is completed, or the contract to provide the same is abandoned. Or, the Registration of Statement of

Lien in respect of work done before issuance of Certificate of Substantial Performance 45 days from the date of posting publication of the Certificate of Substantial Performance, and/or the commencement of Action and registration of Lis Pendens 180 days from the date of filing of the Lien; 30 days from the time of service of Notice to Commence Action File Affidavit Proving Lien 15 days from date of service of Notice to Prove Lien Pretrial Application Before setting the action down for trial, with trial two (2) years from the time of the registration of the Certificate of Lis Pendens.

## **Can the lien holdback be used to make contractors come back for service work?**

No, the lien holdback is not to be used to “extort contractors” to come back and do service work. For clarity, a lien holdback is the “last” 10% of the total value of the contract you have with the prime contractor, subcontractor, supplier or trade; this "hold back" being put in place before ANY funds are advanced to ANYONE, and needs to be there at “substantial completion” of the project as and when it is done by each contractor, subcontractor, supplier or trade. However, there are some homeowners and owner-builders that think the holdback exists to make sure the contractor comes back to finish the job, this is far from the truth, or what a lien holdback fund can be used for, and trying to use these funds as a Carrot & Stick to having a contractor come back for service work could be illegal if used in this way. Effectively its extortion, which is not only very wrong but could have serious legal consequences for you as the owner. In Alberta, contract law states that the owner has 45 days to pay the last 10% of the contract price on your new home build or renovation, once the owner and contractor or an arm's length third party have agreed the work is substantially done, being (97% complete). And, if there are no liens placed by that contractor and or their subs, trades or suppliers, at the time of substantial completion, then you as the project owner must pay them “their 10% holdback money,” even if there is still service work to be done! The holdback money is NOT your money to play with! The holdback funds “belong to the contractor or contractors.” The very day the trust account is set up, it is THEIR money, not yours!

## **The Lien holdback is NOT INSURANCE**

No, the lien holdback is not "ransom" - you aren't withholding payment in a lien holdback trust account to make sure the contractor doesn't place a lien your property. Nor is the holdback your insurance that the work will be done right! To make sure that things do get done right requires that they are fully and clearly set out in the main construction contract, NOT dealt with by the lien holdback fund. The contract between owner and contractor should clearly set-out the payment schedule, which should also clearly state the milestone/benchmarks of work performed, for payment to the contractor, and clearly lay out the number of holdback funds at each milestone stage, including when they will be released for possible progress payments. This way once the

contractor reaches a particular stage of completion, you or your lawyer will release more milestone money to them “as long as there are no liens.” If you are not happy with the way the job is progressing, stop paying the general contractor along with a notice in writing that you are temporarily suspending the contract until things get back on track. (*Note: this termination or stop work clause should be set out clearly within the main construction contract to deal with a project that is not going as per the agreement, specification or building plans.*) It doesn't matter what kind of contract/agreement you have with your contractor/builder, whether it is fixed-price, time and materials, cost plus, or a project management contract. For any disagreement you need to be ready to pay any potential lien holdback funds into court as soon as you know you have a lien problem!

## **Lien Protection**

Sometimes your prime contractor will satisfy all the terms and conditions of their contract with you/the-owner, and you as the homeowners are very happy with the finished job, but then the prime contractor “may forget” or is simply not willing to pay the sub-contractors and suppliers, and these subtrades are then left holding the bag. At this point, the sub-contractor's only recourse is to place a lien on your property/land in an attempt to get from you/the-homeowner what they are owed by the main prime contractor. Remember, once you pay the prime contractor, you have no way of knowing whether they have paid their trades or suppliers. A sub-trade or supplier who hasn't been paid has the legal right under the Lien Act to put a lien on your property during the 45 days after the job is substantially completed (97% complete).

As stated earlier, a lien by a subcontractor or supplier means you can't draw down any more funds from your construction lender, and you can't sell your property until that lien has been paid or discarded. It's a legal claim against the value of your home/land. Even if you've already fully paid the entire contract amount to the prime contractor, you are still liable to pay the subcontractor liens out of the lien holdback fund, or out of your own pocket if a lien holdback fund does not exist. Therefore having money held back in a properly structured lien holdback fund of 10% of the Main Contractors contract value (*or for each milestone draw*), then allows you to clear the lien or liens off Title using the “lien hold-back” money set-aside from the original contract.

## **Substantial Completion**

Once you agree with the contractor that the job is substantially done, meaning it is 97% complete, you should ask them to sign a certificate of substantial completion. It's at this point that you have to decide to agree or not if the project is 97% complete. If you're not happy and don't feel the work is 97% complete, don't sign off. Many customers feel intimidated at this point, even if the contractor is entirely professional. It's very reasonable to feel pressure to get everything finished as the job nears its end. However, if you brought up each of your concerns as they came up during the project build or renovation, there shouldn't be any surprises for you or your contractor at the end.



It should be noted that the contractor can still issue a certificate of substantial completion if, in their view, they think they are substantially complete. However, by stating your position “in a written format” before this, and if any lien issues are raised, you can try and argue that the contractor was not 97% complete, and put the responsibility on the contractor to prove in court that they were indeed 97% complete. This is where you should have your evidence lined-up, ie., photos, daily logs, notes, emails, etc., of all items not complete the day the contractor issued their 97% complete certificate. Furthermore, it becomes very useful to have an “arm’s-length” report done by an unrelated third party in case things do end up in court, to prove the real percentage of project complete. This type of report percent complete report can be done by an accredited Appraisal Firm, licensed home inspector, or even your project manager. A report completed by such arm’s-length parties will generally override that of the contractors “word”, or the owners opinion in court related to what part of a project is really complete!

### **Progressive Release of Holdback (CSP)**

Posting a Certificate of Substantial Completion certainly affects lien rights. The statutory purpose of a Certificate of Substantial Performance is to permit a progressive release of holdback. A contractor or subcontractor issues a Certificate of Substantial Performance to obtain payment of a holdback as it pertains to each subcontractor/trade, even though the work for the overall project has not been complete, or may not be completed for some time down the road.

It should be noted that posting a CSP creates two lien funds: a major lien fund and a minor lien fund. (*If there is no CSP posted, then there is only one lien fund.*) The major lien fund consists of the holdback and any additional unpaid amounts up to the date of the CSP. Then if there are no liens registered, the owner may safely release the major lien fund holdback (*to the contracts or subcontracts that are substantially complete*) 46 days after the CSP is posted. The legislation does not require the owner to progressively release holdback, the legislation only permits it. It should be further noted that experienced contractors and subcontractors will want to ensure that their contracts have a progressive release clause requiring the owner to progressively release holdbacks when permitted by the Lien Act legislation. You also need to make sure your lender’s loan agreement somewhat mirrors these requirements or make other arrangements to meet the construction contracts' payment terms and conditions.

### **Reduced Security**

The minor lien fund consists of the holdback and any additional unpaid amounts for work performed after the date of the CSP. If the owner is progressively releasing holdbacks, the minor lien fund is likely to be quite small relative to the overall project value. The minor lien fund

holdback may be released by the owner 46 days after the total completion of the work, assuming no liens are registered.

The key for potential lien claimants is this: the owner's liability for the major lien fund holdback expires 46 days after the CSP is posted if no lien is registered. A lien claimant whose work continues after the CSP is posted may have the right to register a lien long after the CSP is posted (up to 45 days after the work is finally completed); however, the security given by that lien is much reduced 46 days after the CSP is posted. In other words, the lien only "attaches" to the minor lien fund, 46 days after the CSP is posted. The potential lien claimant concerned with payment of the major lien fund holdback must register a lien within 45 days of the CSP to preserve the full security given by the Builders' Lien Act.

### **Posting on the Jobsite**

The Builders Lien Act requires the CSP to be posted in a conspicuous place (*e.g., the entry door to the project or front window at the entry of a project*) within three (3) days of issuance. This requirement is sometimes overlooked. Case law shows that an owner needs not to determine whether a CSP is properly posted before relying on the CSP to release the major lien fund. The Act provides that the person who fails to post the CSP may be liable for legal costs and damages resulting from this non-compliance, although the right to recover costs and damage from the same party who failed to post the CSP in the first place may be a waste of time in the event of a prime contractor/builder that is becoming insolvent.

### **Disputing Substantial Performance**

It is up to the party posting the CSP to determine if the work is substantially complete as defined in the legislation – unless the main construction contract stipulates differently. Once posted, a CSP can usually be relied on by the owner and any potential lien claimants. However, uncertainty can be created as to lien rights if the validity of a CSP is disputed, because of possible evidence that the CSP was incorrectly posted or regarding the value of work remaining to be completed. Many standard form contracts avoid these potential disputes by requiring an arm's length party such as an arms-length project consultant to determine or certify when the work is actually substantially performed.

## Contract Terms

It should be noted that many contractors' contract/agreements require a certificate of substantial performance or “substantial completion” to be issued by a contractor or a consultant as a pre-condition to final payment or release of the holdback. Such a certificate triggers the rights and obligations under the *Act*, provided it also meets the statutory criteria (such as posting the certificate in a conspicuous place on the Jobsite). On the other hand, such a contractual certificate may serve a purely contractual function and have no bearing on statutory lien rights, if it does not meet the statutory criteria. In some cases contractual documents may call for “certificates of substantial performance” that do not meet the proper statutory criteria, and therefore do not affect lien rights, which can become a potential source of risk and confusion that you need to make sure your lawyer is on top of.

## Deficiency Holdback

Separate from the lien holdback fund, your construction contract should also include a clause for Deficiency Holdback. To be clear, this has nothing to do with the lien holdback, but should also be included within the main construction agreement so that all parties fully understand that the lien holdback is a separate fund from the deficiency fund and the holdback fund will NOT be used for deficiency work or repairs. A general rule of thumb is a 3% holdback for deficiencies, held for 30 days after substantial completion. Note, this would be 3% of work not already previously signed-off under previous milestone completions. There is no law/legislation that states you are allowed to holdback a deficiency holdback, this is just good practice to have in-set into the main construction agreement, however many contractors don't like to see this provision in the contract!

## Permissive vs. Mandatory Holdbacks

The Alberta Builders' Lien Act permits the progressive release of a holdback. However, it does not require it. Experienced general contractors and subcontractors may insist on a progressive release of holdback by the owner, yet, to do so, this must be set out in the main construction contract and must detail how the owner is to release the holdback progressively. An example contract clause below:

*When 45 days have expired from the date of issue of the certificate of substantial performance in respect of that Subcontractor's subcontract, as verified by the Consultant, and no builders' liens have been registered for the Work, the Owner shall promptly release that Subcontractor's portion of the major lien fund to the Contractor. If no builders' liens have been registered for the Work, the Contractor shall promptly release that portion of the major lien fund to that Subcontractor.*  
*(Excerpt From: The Canadian Construction Association, CCDC 2 (2008) Supplementary General Conditions for use only in the Province of Alberta)*

Subcontractors might also want to ensure that progressive release of holdback provisions are included in their subcontract and the general contract; an omission of such provisions from either contract could prevent the subcontractor from insisting on the progressive release of holdback

**Side Note:** (many subcontractors will want to ensure that such provisions are included in the general contract and every subcontract in the chain thereafter).

## **Owner Risk related to Progressive Holdback Release**

Proper accounting for multiple progressive releases of holdback can be challenging under any contract. Experienced contract administrators, project managers, and some convincing lawyers are familiar with these challenges. However, I know from experience that the administration of progressive releases is not straightforward, and errors can happen through inadvertence or inexperience. I have seen several circumstances where the concept of the progressive release of holdback is misunderstood, sometimes even set out wrong within the construction contract in a way that does not comply with the statute, resulting in significant financial risk to the owner due to the potential shortfall in the statutory holdback trust account. Having an experienced lawyer handle all of these progressive draw calculations somewhat helps to eliminate this risk for the owner.

## **45-day lien holdback**

Until the time limit for filing a lien has passed, make sure you as the landowner or your lawyer holds back 10% the final payment in a properly set-up lien holdback fund (*ideally with your lawyer in a separate trust account set-up just for your project*) and wait 45 days, no matter how much you like your contractor, no matter how happy you are with the job they did, and no matter how much you believe they will be back to finish the job. On the 46th day, if there are no liens, then you must then pay him/her for the work done, even if there are a few small things that may need attending to!

## **Should you include a lien holdback clause in ALL contracts?**

When you negotiate your contract with ANY contractor that is building or renovating your house, make sure that a 10% lien holdback clause is included “in the contract.” This is your legal right as a land/project owner and is a standard normal protection clause for you/the-homeowner. The lien holdback is standard practice and accepted practice in Alberta and should be part of every construction agreement. You should never feel intimidated by excluding the holdback provision from your contract, even if a contractor demands it be omitted (and if this happens to you, find a new contractor). For larger projects like a full home build you should also include a schedule of milestone payments, and the amounts that will be held back at each milestone, and when each lien holdback will be progressively paid out, this way there is no confusion or argument as to “when”

a contractor will get paid! It should be noted that in Alberta, it is against the law to make a contract to the effect that the Builders' Lien Act does not apply, but there is no problem with a contract that supplements the statutory requirements.

## **Where/how to do a lien search?**

There are a couple of ways you can request a lien search. You can go on-line or by calling toll-free within Canada at 1-866-989-6370. We recommend that you get a lien search before every payment stage or at a minimum every month of construction. A lien (*also known as debtor*) search request searches Alberta's Personal Property Registry Information System's database for liens or encumbrances that have been registered in Alberta against personal property. A lien search only provides information on liens recorded in Alberta. There is a fee usually in the range of \$17.00 or so. It should be noted that most good contractors belong to a membership service that provides them with notification of all registered Lien's Statement of Claims, Judgements, etc. That's why most good contractors know right away that you have a lien registered, in some cases before you do! And that's why when they see the first Lien being recorded, that they all rush in to register their lien position!

<https://www.registriesplus.ca/online-corporate-name-search/>

## **Paying CASH**

A common issue that comes up on many residential projects is the "Old CASH discount" that many contractors may ask for, or may even be offered by the project owner to try and "save money"! However, this is a VERY SCARY proposition if you consider the issue of liens. It should be noted that it is not illegal to pay CASH, but it is also not recommended, as you have no way to prove that you paid CASH, and the prime contractor or his subs can come back and lien your project even though you have already paid them CASH. "IF" you do decide to pay cash, you need FIRST to have the contractor acknowledge in writing that they have received payment in the amount being paid in cash and have them sign for the money. However, this tends to turn off most cash requesting contactors, as the whole idea of the contractor taking cash is because they do NOT plan to declare it, and want NO money trail to follow! There is a whole lot of other reasons for NOT paying cash, such as getting service work done, call-back issues, and warranty issues, but we won't get into that within this book. All this aside, you might want to also read our ebook How to Avoid a Bad Contractor, as asking for CASH is somewhat of a "Red Flashing Light" of possible contractor troubles!

## **Other paying cash related issues!**

When you pay cash to a contractor it raises “some other RED flags!” If you pay a contractor cash they most likely don’t have WCB coverage. Even if they did have an account with WCB (*which they should by law*) they most likely won’t register your project with WCB, as they don’t want to show any link to the cash you paid them. Also, cash paid contractors’ will most likely NOT have any liability insurance coverage, and even if they did have a policy, they most likely won’t register your project with their insure, again because they don’t want to show any link to the cash you paid them! Which means that a worker injured or worse that gets killed on your job is now 100% your liability!

## **Contractor’s wanting CASH payment may be cheaper!!!???**

You might think you are getting a “Real Deal” by paying CASH, but the discount you THOUGHT you were getting compared to a REAL contractor that has proper WCB and liability insurance coverage, might have the cheaper-guy costing you WAY more than it is worth! You could be sued for MILLIONS for wrongful death or disability caused by a worker being injured or killed on your project. Furthermore, your own home insurance might become null & void if the contractor you hired does not have all the proper contractor liability coverage! For example, if your home burnt down due to a fire caused by your “CASH-paid cheap contractor” you might be on the hook for all the fire damage, with NO help from your insurer! (*We get into that in much more detail in our “How to Avoid a BAD Contractor” e-book*)

## SECTION TWO

**T**he following section has been developed based on clients that have come to us in the past and already have a lien mess to clean up! Furthermore, this section is dedicated to those that started their project and did NOT have a proper lien holdback trust account set up. They are now looking at having to pay a bunch of lienholders for money that the client has already paid the prime contractor for, and for whatever reason, the prime contractor has NOT paid their bills and has now abandoned the project leaving the client holding the bag to pay all the same bills TWICE! This section outlines what you need to do in such a case, and details a step by step process and approach to this problem. If you are stuck in this type of situation you do have a REALLY BIG PROBLEM on your hands, but there is light at the end of the tunnel, and it does not have to be a TRAIN coming your way! However, time is very much your enemy here, and knowing what to do is critical. I know I have stated this many times throughout this book, but once again, I am not your lawyer, and the very first thing you need to do is consult with a lawyer ASAP! Then come back and read this section so that you fully understand what is needed, and so that you can properly instruct your lawyer as to what to do about this mess.

### **About Lawyers, related to lien issues**

Lawyers are kind of like Doctors, they specialize in certain types of law, and like Doctors you don't want a GP doing heart surgery - same thing with lawyers, you don't want a divorce lawyer handling a lien mess! You will hear from law firms "Yes we do that!" Being just one of the legal matters they can represent among a half dozen other legal type matters, however, with a lien mess you need the "big-guns!" Meaning, a law firm that specializes in Lien Act matters. Further, you need a lawyer that understands the fine art of lien negotiation! I want to clarify here that I mean no disrespect to any lawyer or Law Firm, as all probably do good work, but when you may lose your home to a lien mess you really do need "the right team" on your side!

You may find a lawyer or firm that specializes in Lien Act law, but may not know a darn thing about how to deal with things from a "negotiation point of view." What I mean by this is there are very few lawyers out there that I have run across that "fully understand" how to create a full work-out plan of attack related to lien issues! By using the word "attack" what I mean is this is effectively war! The lienholders want their money, and at this point they don't really care how they get their money! In a lot of cases the lienholders at this point will think you, the project owner, "are the bad guys" not understanding that the prime contractor is the one that is really "screwing them over!" This is where a really good lawyer will be worth every cent of their fees!

## **What if you read this book too late?**

### **And you already have liens to deal with! Now what?**

Unfortunately, we see this all too often, especially with clients that came to us in the first place to get a building quote, and then find some “other-guy” that is “way cheaper” than us, and decided to “save money” and go with the other cheaper-guy. Then later when they are partway through their project, find out they now have a HUGE MESS on their hands and then come back to us, asking Landen for HELP to solve this massive problem! At this point, there is still “some light” at the end of the tunnel, but time is now very much an issue, and having the right “game plan” can help you get out of this mess. However, you will most likely end up spending more money in the end than if you had used the more expensive contractor in the first place. The following suggestions are based on the author's personal experience with over 40 years in the construction industry, and should NOT be considered the “best course of action,” just some of the ways you can deal with this type of mess. Furthermore, you should ALWAYS consult with your legal counsel BEFORE you instigate any of the following advice offered here!

### **You have liens to deal with and NO Lien Trust! Who do you call?**

I can tell you this; it's not Ghost-Busters! There are many circumstances as too why there may be a lien or multiple liens' registered on your title. It could be merely a small misunderstanding between your prime contractor and one of his sub-contractors, which could be simply resolved by you issuing a “Formal Demand letter” to have liens removed (*See sample letter at the end of this book*). In this case, the prime contractor needs to deal with the lien mess by one of two methods, by paying the subcontractor directly and then have the subcontractor remove the lien, or where the prime contractor pays into court “their 10% lien holdback” or pays into court the entire disputed amount. Then the Court issues an order to have the lien or liens removed.

Even though this “might be” a small misunderstanding, it is still imperative that you have these liens dealt with IMMEDIATELY! In the Formal Demand Letter to your prime contractor, you need to put a very tight deadline for the prime contractor to deal with this lien mess! I would recommend no more than five (5) business days for the prime contractor to have these liens dealt with!

You also want to copy your construction lending facility with this same letter, and let them know along with your cover letter that you are aware of the lien and that you have issued the “Formal Demand Letter” to your prime contractor. You also want to notify the law firm handling the construction loan conveyancing of the transaction or possibly have them issue the demand letter for you and have them issue the notice to the construction funding facility.



**On a side note:** This is why it is imperative to have a termination clause built into the construction contract with the prime contractor and do so upfront before any construction work has started, this clause needs to very clearly outline the reason for possible contract termination. Also, a provision included that clearly outlines the reasons for default, which should further clearly indicate that ANY lien or liens will be deemed a breach of contract and cause for termination if not rectified within the contracted and specified timeframe/deadline. Furthermore, the construction contract should indicate how much time the main contractor has to “rectify” any default! A further side note, you should review your construction funding agreement/mortgage to see what “rectification time frame” has been set out within the loan agreement to resolve default issues such as liens, and then make sure that the prime construction contract mirrors this rectification time frame.

### **The Prime Contractor has not rectified a Lien Default, now what?**

After the official demand and notice period to rectify the lien default has expired, and the lien default rectification period has expired, and the prime contractor has NOT resolved the lien/default, you then need to immediately issue a formal Termination of the Contract notice to the prime contractor, or at a minimum issue a Halt ALL Construction formal demand letter. This process should also have been clearly defined within the main construction contract, but even if it was not, you need to send out these formal notices, and you should have them sent out by your lawyer. *(See also DRAFT Formal Termination Notice letter’ at the end of this book).*

Then after the formal termination of the contract notice has been issued, then immediately have the 10% lien fund paid into court. Then request the court to remove all liens from the title. I would highly recommend that you have your lawyer do this for you, especially if you have been personally holding the 10% lien holdback yourself!

### **You read this book too late, and you did NOT have a proper lien holdback set up, NOW WHAT?**

So you started your project without setting up a proper lien holdback or did not know you should have one set-up, and now there is a bunch of liens registered on your project title, NOW WHAT do you do?!!!!

With no proper lien holdback set up and you then end up with a bunch of liens, you now have a REALLY, BIG PROBLEM on your hands! However, there is still some light at the end of the tunnel, that is if you make a good workout plan, but let’s first understand the process of what will happen, and the sequence of events that occur after a bunch of liens are registered.

The first thing that happens after just one single lien is registered is that it is likely that most of the other trades and subcontractors will record their lien claims, even if they are not due for payment yet! The reason for this is that word travels FAST after the first lien is registered, many contractors monitor the lien records, and in some cases pay for a monthly service to keep up-to-date on the latest recorded court filings, such as liens, foreclosures, law-suits, claims, bankruptcies, etc. Once word gets out it travels at the speed of light throughout the industry!

The next thing that will happen is that notice of the lien or liens is given to your construction lender being that their mortgage is registered on title, and then ALL construction financing advances will stop dead in their tracks!

You will then get a formal demand from your construction lender to rectify the lien, or liens, (default) usually with a VERY short time-fuse to rectify the default. Communication with your construction lender at this point is critical. You need to inform the lender BEFORE they become aware of the lien situation and further inform them of your PLAN to have the situation resolved. Excellent communication with all involved is essential, as the very last thing anyone wants to see is “Foreclosure Action.” However, it should be noted that the lender’s hands are somewhat tied as to what they need to do and when they need to do it by, as they go throughout the “loan default” process, and early communication can help buy you a bit more time to deal with this lien mess!

The next thing that shows up if the liens are still recorded on the title after the Lenders formal rectification letter’s deadline has lapsed, is the issuance of a “Demand for full payment” of the construction facility. This demand for payment will be for the total amount of whatever has been advanced for any construction draws that have already been issued, plus any default penalties for lost future interest, legal cost, or other damages.

Then, after the formal demand for full payment, and if the total amount owed has not been repaid to the lender within the official demand deadline, the lender will issue a Pre-foreclosure Notice with a new period to rectify the foreclosure default before final foreclosure.

Then the lender proceeds with the foreclosure and the lender then liquidates the asset or assets. With any remaining funds above that is owed to the lender, then paid into court to deal with the liens that were registered before the bank foreclosed, and then if any money is left over after paying out lien claims, would be directed back to the original project owner (in most cases this ends up being zero dollars). It should be noted that if there was no lien holdback account set up, then the entire registered lien amounts are deducted from any remaining proceeds of the asset sale, instead of just the 10% lien holdback funds!

## What is the Foreclosure Process?

In the event you can't get all lien issues resolved in time to satisfy the construction lender, the next step is foreclosure, and the general foreclosure process proceeds as follows:

### Step One: Statement of Claim is Issued

- The lender will file a statement of claim, setting out the facts on which the claim is based

### Step Two: Time to Respond

- Once a statement of claim is filed, the borrower has 20 days in which to file and serve a Statement of Defense or Demand for Notice.
- It should be noted that there are no defenses for non-payment of a mortgage, and in most cases, very limited defense for mortgage defaults, such as liens, etc.
- Then demand notice, a legal declaration indicating that a borrower wishes to be kept up to date about the foreclosure process.
- If no action is taken, the lender can note the borrower in default.

### Step Three: Affidavit of Value and Affidavit of Default Are Filed

- The lender will then file an Affidavit of Value. Which includes an appraisal of the fair market value of the property in the as-is condition. (This is usually well below what the actual cost to build would be if the project is only partially complete). An Affidavit of Default is also filed, which includes the amount that remains owing on the mortgage or in the case of a construction mortgage whatever has been drawn down plus any accrued interest, as well as the amount in default.
- Once this is done, the lender can pursue various remedies, including the sale of the property.

### Step Four: Redemption Order is Granted

- Once the two affidavits are filed by the lender, the court will generally grant a Redemption Order. This order grants the borrower a specified period of time within which the outstanding default and or mortgage payments must be made and further provides that if these payments are not made within this period of time, the property will be offered for sale.
- The redemption period will vary depending on several factors, including equity in the property, and is set at the Judge's determination of the facts presented. Note: The redemption period can often be extended with the help of a good lawyer.

### Step Five: The Property is Listed for Sale

- If you, as the borrower, are unable to rectify the default issues required within the Court ordered time period indicated in the Redemption Order, the property will be listed for sale.

- The costs of listing the property, including the cost of a real estate agent, are deducted from the asset sale effectively paid by you, the borrower.
- If there is a valid offer made, the court must approve and accept the offer, and make an order permitting the property to be sold.
- If there are no valid offers made, the lender can apply to become the legal owner of the property known as BOP Bank-Owned Property.
- The proceeds of the sale are used to pay all debts owing. If any funds are remaining after the Bank debt has been paid in full and any registered liens settled, or any other registered debts are settled, then any remaining funds go to the original owner/borrower. In the case of a “shortfall” meaning there were not enough funds generated by the assets sale to cover off the primary lender or lenders, then the lender or lenders can file a statement of Claim for the shortfall damages, and most likely get a Judgement against you for that amount.
- In some cases, where the court believes there is no way a borrower can fix the default and pay back what is owing or redeem the mortgage, a court will make an Order for Foreclosure, and the lender will become the owner of the property. This circumvents the need for a sale.

### **Step Six: Possession of the Property**

- The new owner (a purchaser, or the bank, if no valid offers were made) will usually be entitled to possession of the property within 30 days.
- All occupants of the property must move out/leave during this time.

## **What can you do when faced with all of this lien mess and possible foreclosure?**

The one thing you can't do is “sit on your hands” hoping it will all go away! Time is very much an issue once there are liens on your project! The very first thing to do is call your lawyer and then notify your lender about the liens. If you do have a proper lien holdback set up, instruct your lawyer to have these holdback funds paid into court, and have your lawyer organize the removal of the liens. Then have the lawyer send notice to your lender that the liens have been resolved! That is the simplest way **IF** there is a proper holdback fund in place “upfront,” if not, God help you! Then read on!

## **So what if you did not have a lien holdback set up? Then what?**

This next section is set out for anyone that has already started construction of their project and did NOT have a proper lien holdback set up and now has a bunch of liens. You first need to implement the above advice of informing your lawyer and lender of the situation, and tell them of your PLAN to deal with this mess!

## **Formulating a Plan of Attack!**

I don't want to sugar coat any of the following advice, as not having a lien holdback in place, upfront, before any construction has started, is a REALLY, BIG PROBLEM. But, you can make a plan of attack to deal with this mess. The following are just "some" of the things you need to do and plan for, as this can have many "forks in the road" in the overall process that can point a good strategy into several directions, therefore, you also need to make a "what-if this or that happens" plan! Start planning strategies for the "what-ifs" and other contingencies that WILL pop up!

### **The first thing to figure out!**

#### **Do you plan to deal with this yourself or engage someone to help you?**

There are two options here. The first one, deal with this whole mess yourself, OR try and find a New Builder/Contractor to take on this entire mess of liens for you! With your project only partly done, and with many items that may be in midstream of installation, and with things missing, or not knowing what works or not, may sound easy to do. However, finding a new builder/contractor to take over when there is a bunch of liens and a bank breathing down your neck, wanting to foreclose on you, is NOT the most enticing thing to talk a new builder or contractor into doing! Furthermore, very few builders or contractors know what to do with such a mess, and would instead rather steer away from this colossal headache! Then, later on, these same builders will be like vultures showing up to the Bank Owned Property (BOP) foreclosure sale looking for a bargain flip property! With you as the original owner being SOL!

What you need is a contractor/builder that is experienced in mediating this type of mess. However, few builders or contractors have such experience. And even if they do, this is NOT the most glorious thing that they want to do! In a lot of cases, these same subcontractors, trades, and suppliers may also do work for the new builder that you want to use to take over your project! However, that builder needs to go to those same guys and tell them "sorry, there is not ENOUGH MONEY to pay you" and "by the way, I would like you to finish the job for ME!" How do you think that goes over!!!?

In other words, you are asking the new builder to come in and deal with trades that they may have a good working relationship with, effectively become the bearer of bad news telling them they have to take a huge discount (hair-cut) on their billing! After that message, these same trades and suppliers want to call the new builder four letter names I can't print here!

I have been asked by many trades and suppliers in this lien mess situation, this question, "*How can you stand there and tell us that we must take a discount or else!*" and then further tell me, "*how dare you!*" Or "*how can you live with yourself or how do you sleep at night knowing you are screwing over all the trades?*" At this point, these trades and suppliers now think that my company Landen or me personally are now the "bad guys!" So I ask you, "*Why would any builder want to take this on?*" In most cases, I don't like to take on these types of jobs, all the way around it is a nightmare! The only reason I will even consider them is that I know that if I don't, two things will happen. First, the owner might lose their home to foreclosure. Second, the lienholders will most likely get paid nothing! However, **IF** I get involved, the lienholder will most likely get **SOME** of their money back out of this mess, and most likely, we can save the home-owner from foreclosure! I can tell you this - **we don't do it for the money!** I would much rather be doing something else!

## **The second option is to find someone to Mediate**

When it comes to negotiating with lienholders and negotiating the completion of a job that has all of these lien problems, it can be very intense. Furthermore, it can be challenging for the homeowner compared to someone that is "more arm's length" from the transaction. From a new builder's point of view and acting as the mediator, they can simply tell the lienholders, "*This is how it's going to be*"!!!! "*Take it or leave it*"!!!! In other words, tell them, "*If you don't like the deal that we/the new builder are presenting, then we/the new builder won't take on this project*"!!! Then wish the lienholder the best in luck in trying to collect on their liens after the bank forecloses! Whereas you, the owner, would have difficulty stating the same thing! The lienholders know you as owner "should be" more committed to getting the job done and feel you should simply buck-up to do so, and they might not be as willing to negotiate a settlement.

Whereas the new builder goes to them with the funds that "could be available" and a work-out plan and the lienholders know that the new builder taking over is **NOT** going to throw in any of their own money (the builders) to get the job done!

The founder of Landen Developments, also known as Landen Design-Build, and the author of this book has dealt with this type of mess many times over, but I want to be very clear here, we are not looking for this type of business, as it is very time-consuming, and requires that "we as the new contractor/mediator" come in and deal with very unhappy trades, subcontractors and suppliers. We would have to come in and hand out "hair-cut" offers to these trades and suppliers, some of

which might also be the same trades and suppliers that we deal with on our own projects! And the very last thing that we want is trades and suppliers that think we/Landen are now the “poop-head” handing out a bunch of grief to them. When in fact, if someone like us doesn’t come in and help out, it will mean they will most likely lose most, if not all, of the invested money into your project. However, these guys don’t usually see it that way!!! We will get into that in much more detail later on in this book. In other words, this is not a happy time, and we get called all kinds of four-letter names that are not very pleasant while going through this restructuring of a project in this type of lien mess.

## **THE WORK OUT PLAN**

The light at the end of the tunnel that we talked about earlier is the “work-out-plan.” What do we mean by this? The work-out-plan is a plan of attack to get all parties involved on-side with a detailed plan to make all parties as “happy as possible.” This will include not only all the lienholders, but also your construction lender. Furthermore the work-out-plan needs to address not only the immediate situation of liens and how to get rid of them, but must also deal with HOW to get your project completed, and further how to get it completed knowing that the prime contractor has most likely run-off with a bunch of money that should have originally been paid to the lienholders! This work-out-plan needs to address the situation of “cash shortfall”, meaning there is not enough money to pay everyone their full lien amount and also get the project done! The work-out-plan **MUST** demonstrate how everyone gets paid, and when everyone gets paid, and how much everyone will get paid! Furthermore, the work-out-plan must demonstrate that everyone will be treated “fairly” and honestly throughout the entire work-out process.

The one major obstacle of a work-out plan is to get everyone all on the same page, all at the same time, and all on the same pro-rata settlement agreement! This is no small task, and is a lot of hard work to achieve! The following ten steps are just some of the ways to achieve this monumental task! I can tell you this, the following is achievable, kind of like eating an elephant, if you take one bite at a time, pretty soon the elephant is gone, however, you still need a plan on how to eat the elephant, otherwise the last bunch of bites might be a bit rotten if you did not plan upfront on any refrigeration! Time is your enemy here so you need to “eat quickly” this elephant!

## The Ten Steps Needed for a Restructure Plan

There are several steps to deal with once you do have a “lien mess” on your hands. The following is a list of some of the most common restructuring items to plan for. It should be noted that you do need a good lawyer for this restructuring plan, preferably one that is very experienced with the following events. You may find this surprising, but very few lawyers know what to do with this type of “lien mess”! They may know lien law, but that is not good enough here! They also need to understand the fine art of lien negotiations! Chester Karass, a famous negotiator, once said, **“You don’t get what you ask for, you get what you negotiate!”** I learned a lot from Chester taking many of his negotiating training courses in my 40 years. And the one thing I can tell you is that negotiating is an ART! The secret to any successful negotiation is when both sides come out with a win/win! This win/win negotiation is tough to do when you need to tell someone they are NOT going to get all of their money and then convince them that getting some of their money is actually going to be a win for them!

### **Step One. Do the math for the funds that “may become available.”**

This calculation is probably the most crucial step. You need to figure out just how much money you will have to complete the project. This calculation includes any of your “own personal” cash on hand that you may want/plan to “invest,” and whatever funds might be left to draw down from your construction lender. (*We will get into how to convince the lender to fund further draws, later on in this book*).

### **Step Two. You need to figure out what the cost to complete will be.**

Figuring out the cost to complete your project is not as simple as it sounds. There are several factors to consider. First off, you need to figure out which parts of the project are 100% complete, and then figure out which sections of the project are at different stages of completion and what percentage of each stage is still outstanding. Then figure out which parts of the project have not yet been started! Furthermore, you then need to figure out what parts of the project have already been paid for 100 % and then figure out how much of each partially done part of the project has been paid for, and what the balance owing is for each portion remaining. Then figure out what has not been done and what it will cost to get the unfinished item completed. Then set up all this data into a detailed spreadsheet for further analysis. This spreadsheet is also the same sheet that will be used to figure out the proposed lien “haircut settlement amount!” (*See example cost to complete spreadsheet at the end of this book*)

Once you have all of this information in hand, you then need to prepare a detailed report known in the industry as a “cost to complete report” to present to your lender for approval and to present it to all lienholders. This cost to complete analysis report will show everyone precisely where they stand in the whole restructure plan process. If you managed to engage a new builder/contractor to take over the project, they should be able to help you with this cost to complete analysis.



Alternatively, you might want to engage an accounting firm to help with this process, preferably an accounting firm that is very familiar with residential construction accounting or look into having a professional Appraisal Firm run a cost to complete analysis report for you - OR have your newly selected builder run the analysis for you “*on their letterhead.*” It should be noted that having these types of reports done by an “outside” arm's length professional reporting firm helps in negotiating with lien holders, and for presenting your work-out plan to your lender. This is compared to you simply running all the numbers yourself!

### **Step Three. Figure out the “Haircut” that will be needed?**

The first thing I know you will ask is, “what is a Haircut”? No, it is not lining up a barber! This term is used in the construction industry to determine just how much the contractor, subcontractor, trades, or suppliers will need to discount their lien amount to get paid something! The simple equation is to take the total number of funds that “might be available” and subtract the cost to complete for the project (*including the new contractor/builder’s management fees*) with the difference in these two numbers being what is left over to negotiate with unpaid contractors and trades! (The HAIR-CUT). Sounds simple, right? No, not so simple, as you will need to negotiate a settlement with ALL contractors, tradesmen, and suppliers ALL at the same time that have “valid liens” - the keyword here is “valid liens,” (*we will get into that in more detail later on*). Furthermore, you will need to negotiate ALL of these lien holders to accept the same pro-rata discounted % settlement. (*We will get into that in more detail later on*)

### **Step Four. Set up an Assignment & direction to pay**

You may ask, “how” do you pay trades and suppliers with the bank's future construction draw advances when the bank is NOT willing to issue ANY more funds with the liens in place? The quick answer, you will need to have all liens removed, and if you have not set up a proper lien holdback to simply pay into court the 10% holdback amount, then the only other quick way is to fully pay into court the total amount of lien funds yourself, and then have as many liens as possible removed using the court held trust funds, then go to court and defend yourself against all these liens and hope to get some of them tossed out of court, and then move on with the construction of your project.

However, most likely, you don't have a Pirates Chest full of spare money to pay into court, so then the only other way is to promise “PAPER” to the lienholders!

What do I mean by the promise of “paper”? This paper process is where you “structure” a deal using your lawyer, preferably the same lawyer who has already been handling the conveyancing of the lender's already advanced funds to date. You ask that lawyer to prepare for you a DRAFT “Assignment of Funds” and a DRAFT “Direction to Pay” that you plan to use to administer ANY POSSIBLE further funds advanced by the lender into the lawyer's trust account. (*Note: the wording on the assignment MUST include the lienholder agreeing to the removal of their lien in*

*exchange for the assignment & direction to pay, see also examples of direction to pay and assignment of funds at the end of this ebook).*

What that means is that any subcontractor, tradesman, or supplier that accepts the assignment of funds and direction to pay must remove their liens to be able to realize on the “future assignment funds.” For clarity, the assignment amount would be the amount of the negotiated “haircut settlement.” And as a further negotiating tactic, you will want to make sure that ALL lien holders agree to the assignment and haircut deal BEFORE signing off on ANY assignments, in other words, you use this as leverage to get ALL lienholders to agree to the settlement amount.

### **Step Five. You need a Letter of Understanding (LOU)**

To help give the lienholders something to sign-off upfront, you want to create a Letter Of Understanding (LOU). Inside that LOU, you address all of the basic terms of your offer to settle, with the added condition that ALL other lienholders must agree to the “hair-cut amount.”

The advantage of the LOU is that it is non-binding, and you can later renegotiate the terms if need be!

Once you have several lienholders signed-off on the LOU and talked into accepting an assignment, you simply tell them at that time that you cannot accept their settlement signature unless ALL other lienholders also agree to the same pro-rata terms and have first signed off on the LOU. Effectively you have them help you negotiate with the “hold-out” lienholder guys. (*We will discuss how to deal with hold-out guys later on in this ebook).*

One tactic that I have used is what I call the “Deceleration Negotiation Tactic.” This is where you start with a higher settlement percentage number in the LOU and get a few lienholders on board when you run into a “roadblock” with some hold-out guys. You then go back to the already signed LOU guys, and tell them “*Sorry guys, but because of the hold-out guys, this is now taking too long, and now the available funds are being sucked up in added legal cost, bank interest and penalties, and they now will have to settle for even less!!!!*”. Yes, this will tick them off, but you blame it on the hold-out guys, and tell all lien holders the longer this takes, the deeper the hand-out haircut discounts. Once they see that available funds are actually “shrinking,” many more will most likely sign on to the settlement deal before there are NO funds to divy-up!

### **Step Six. Talking the lender into advancing more funds**

To convince the subcontractors, tradesmen, and suppliers into accepting your assignment and direction to pay them, you will need to convince them that the lender “will still fund” the balance of the remaining construction draws. This is where having a detailed Restructuring Plan to present to your lender comes in and, once again, where your lawyer helps out. You request a letter from the lender that simply states that “*IF you get all lienholders to agree to a settlement, and agree to complete their work, and if ALL lienholders agree to remove their lines in exchange*

*for an assignment and direction to pay, and sign off by a pre-set date certain, that the lender will then advance the remaining construction funds into the lawyer's trust account, for the lawyer to payout as and when the job gets done, as per the agreed-to assignment and direction terms and conditions.”* NOTE: The bank will only want to advance the final draws at 100% completion of the project and or at pre-agreed to milestone stages completed.

You will note that I mentioned “*agree to complete the work/project,*” inside this requested Bank Letter wording. This is very important, and we will discuss that in much more detail later on. Furthermore, you want to have included within the bank issued letter a “drop-dead date” meaning wording something like “*this funding offer is conditional to the \_\_\_\_\_ project being 100% complete by \_\_\_\_\_ date and all other (such and such) conditions being met by \_\_\_\_\_ Date.*” What this deadline does is expresses a sense of urgency in the lienholders accepting a haircut offer! What I try and do is have the lawyer draft this letter for the lender's legal counsel to review and the Banker to then sign back, as opposed to simply just asking the lender for such a bank letter.

*(See also a Draft Bank Letter at the end of this ebook)*

One obstacle you will run into after the lienholders see just how much money will be advanced by the construction lender, is that if you simply divide the lien amounts into the leftover bank funding so that it may calculate to amounts that “appears to be enough to pay them 100% whole”! However, you have to be firm and tell them that the ONLY way the Lender will fund ANY of the remaining construction draws is **IF** ALL OF THE PROJECT IS BUILT 100% COMPLETE! And the only way “ALL of the project” will get done is to cover off ALL of the REMAINING COST TO COMPLETE! Further, you tell the lienholders that if the project is not completed, then there will be zero dollars advanced by the bank!!!! At this point, they should start to get the big picture!

### **Step Seven. Determine the weak from the strong!**

What do I mean by this? Simply put, there will be liens that you could easily challenge and most likely have tossed out of court, whereas other lienholders may have a more iron-clad lien position. The reason you need to figure this out up-front is two-fold, one, you need to know which lien holders that you don't need to spend much time on at the front end of negotiations and that you will most likely negotiate last. Second, you need to know that if any of the “weak lienholders” decide to be “hold-out” that these will be the ones you may need to pay into court, and then go to court to challenge them, and have them possibly tossed out of court and then possibly sue them! You need to make an example of the lienholders that “change-you!” (*Watch the movie 300; this will give you an idea of what I am talking about*). To verify which liens are “valid or not” would be determined by your lawyer, as there are many reasons why a lien claim might not be valid, and that could take up another book just to explain that, so we will leave that one for your lawyer to deal with!

## **Step Eight. Negotiating everyone to the “middle playground”!**

Once you have the Lender on board with your restructure work-out plan, and you have the assignment and direction to pay documents in hand, along with a complete copy of the cost to complete analysis report, (*ideally backed up by an arms-length party like an accountant*) and a detailed list of available funds to complete the project, (*also backed up by an arms-length party such as an accountant or trustee in bankruptcy*) and the LOU outlined, it's time to negotiate with all of the lienholders! This negotiation can be handled in two ways, one where you rally all lien holders together into a large settlement meeting, or where you meet with each lienholder one on one! This process depends on just how many lienholders there are. If you have many lien holders, then the group process tends to work best, however, if you only have say 10 to 15 lienholders or less, then a one on one approach might be the way to go. The big issue here is TIME. Time is your enemy, and trying to negotiate a large group of lienholders one on one takes a lot of time, which your lender may not be willing to give you!

So what do I mean by “negotiating to the middle playground?” First off you need to clearly lay out the situation, show why there is going to be a shortfall in available cash (*usually because the prime contractor ran off with a bunch of “your” money and did not pay his bills, and where you clearly show that you paid the prime contractor*). You evidence this cash shortfall by showing the lienholder that there is only a VERY LIMITED amount of cash to deal with and that this CASH will ONLY be available IF they agree to the haircut terms! At this point, you whip out the bank's letter, which clearly tells them that NO more funds will be advanced “unless” there is an agreed to settlement by ALL lien holders! Then show them the cost to complete analysis, which then shows them the needed “haircut” number to make everything work!

To further help with this negotiation, you “may” want to put up some of your “own CASH funds” into a separate lawyer's trust account with a “major condition” that these extra funds will ONLY be advanced into the project IF EVERYONE takes the haircut deal! These additional funds are what I call a “sign of good faith funds,” being your willingness to put more of your own personal money where your mouth is! If you are willing to put up “good faith funds,” I suggest you offer no more than 10% of whatever remaining funds will be advanced by the lender. This is also where you need to show that you are just the “poor homeowner.” You need to make the impression that you are NOT the bad guy here, that you are a victim, and that you only have so much of your own “personal cash” to put up (ie. *the extra CASH you put upfront into the trust*). This sends a loud message that IF the lienholders do not take your haircut offer, you WILL simply keep that extra cash offered to them, and walk away from the project!

The message the lienholder gets at this point is that if they don't take the haircut offer, that at best they will only get pennies on the dollar, and most likely may not get ANYTHING if the bank ends up foreclosing, or a bankruptcy trustee moves in, so they should take the haircut offer!

One more added negotiating point: you should set-up a meeting with a Trustee in Bankruptcy before you meet with lienholders. Keep in mind this is ONLY a pre-meeting with the trustee. What I mean by this is that you are ONLY having a simple “meeting” to discuss your situation, not engaging them! Lay out your cards, explaining that if all lienholders do not accept the work-out plan that you MAY want to engage their firm as the Bankruptcy Trustee. Take their business card, and when you get back to your office, draft a letter back to the trustee that states *“thanks for the meeting today, could you please recap what we discussed in our last meeting and send me the bullet points in a letter or e-mail, thank you.”* Once you have this letter in hand, keep it to show any “hard-egg lienholders,” but do not hand out this letter to anyone. Just letting the lienholders know that you have TALKED to a Trustee in Bankruptcy, should let them know, just how serious the situation is. If everything works out, then there will be no need for another meeting with the Trustee!!! *(The reason you don’t want to hand out the Trustee letter is that they will ALL want to call this trustee to ask about their position in thus mess, and the last thing you need is all these calls into the “possible” trustee).*

If, for some reason, you can’t get a letter from the Trustee, simply leave their card, along with a few other bankrupt trustee firms’ cards on your desk in plain sight at the meeting, along with a few internet print-out pages of information about their firm. That should also do the trick! Don’t make it too obvious; just set them on the side somewhere, so that they see you have looked at your options!

### **Step Nine. Hammer out an agreement to finish the project**

The next thing to hammer-out, once you have everyone “verbally” in agreement with the haircut amount, is to decide on a completion amount for any original contract portion that was not originally completed or is only partially complete. For example, the plumber might have all his/her rough-in installed, but still needs to install the balance of plumbing finishes. The lien the plumber has registered is for the work done to date, being the rough-in, but this same lien does not cover off the finishing part of their original contract. In this example you then need the plumber to understand that you will advance 100% dollars for anything going forward, ie. finishing their outstanding portion of the job. This will also be paid for and covered off by a second separate assignment and direction to pay from the lawyer's trust account, that would also need to be signed-off and agreed to at the same time as the first discounted haircut assignment. This means the first discounted assignment is “conditioned” to all lienholders, also agreeing to finish the job with their signature on the second assignment. So to be very clear, you further need to nail down with each lienholder that has any outstanding work to complete, that the first haircut assignment and direction to pay is **CONDITIONED** on them also agreeing to complete the project, with the second assignment and direction to pay! **THIS IS VERY IMPORTANT!**

You may ask WHY? Do you want to have all lienholders with any outstanding work also agree to complete and finish the job? The answer is straightforward. It will be VERY difficult to find another tradesman or subcontractor to finish off the other guy's work/job. There is sort of a code

of ethics thing in the construction industry about taking over another man's job, but also the word will be out on the street to STAY AWAY from your job. So it is a MUST that you also convince all trades to finish up, or at a minimum, know that you do have some other tradesmen that will come in to finish the work after all liens are cleaned up! However, this is also one area where these lienholders may try to "make up" some of the haircut losses and try to build this into their completion number. This is why you need to have all lienholders FIRST verify their original contract that was signed with the original prime general contractor BEFORE you start to discuss settlement numbers. This way, you know precisely what part of the agreement or subcontracts are still required to complete the job! And this way, the lienholder can't play games with you on the calculation of the completion amount!

### **Step Ten. Re-start your project**

Once all the above nine steps have been completed, and assuming that all lienholders agreed to the terms of the LOU, its time to nail down a "hard/firm agreement." This agreement should be prepared by your lawyer for the lienholders lawyers' to review. (*Effectively your lawyer "formalizes the LOU"*) then makes any reasonable changes requested by the lienholders lawyers', then sign off. (*Note: you can have slightly different formal agreements between each lienholder, as long as the "basic-deal-terms" stay the same.*) With all lienholders signed-off, get a stiff drink (*if you drink*) and congratulate yourself! Then get ready to re-start your project, as time is still very much a concern. You will still have the bank breathing down your neck to get the project complete as quickly as possible. Plus, the lienholders want to get the job done as fast as possible so that they can get PAID! This is where you need a good project manager!

## **What is an Assignment of Mortgage Funds / "Direction to Pay?"**

An assignment of funds is effectively "new" security that you can offer lienholders in the form of an "Assignment of Mortgage funds" along with a "Direction to Pay" from funds to be advanced by the lender into the lawyer's trust account. This trust account is specifically set up for this transaction and this security offered up and signed off by you, the owner, and your lawyer, as new security being effective *only after all liens are removed*. To tradespeople or subcontractors, this is the next best thing to cash for a lienholder, especially if you can show them that this is the ONLY way to get paid ANYTHING. With everyone agreeing to work with these assignments, the project can now move forward to complete the remaining project work without having to pay everything out all in cash upfront!

The assignment and directions will then be handled directly by a lawyer, which you as the project owner will no longer have any way to retract or cancel the assignment, nor can the lender maneuver around the assignment, nor can the lawyer maneuver around the assignment (*assuming the lender's funds do show up in the lawyer's trust account*). This security gives the Trades and

Suppliers some level of comfort that they will get paid the assignment amounts, that is, if they complete the work. This type of assignment and direction to pay offer usually gets most Trades and Suppliers off high center in negotiating the “hair-cut” settlement. However, many trades and subcontractors do not understand the assignment process, and may not TRUST you! And it may take a bit of convincing, what I try and do is get the lienholders to take a draft copy of the assignment and direction to pay, along with a copy of the bank’s letter to their lawyer, where their lawyer can explain it all to them, and usually they come away from that meeting agreeing to accept your haircut offer.

You may ask why lienholders would accept a lesser hair-cut amount. The reason is simple. If the bank foreclosed on the land/project, they will most likely be left with what is called in the industry “blown-off-title” through the foreclosure process, as the bank is registered ahead of all liens on Title, this, from a securitized point of view, once the bank forecloses, then afterward there is a very good chance the trade or supplier will get “0” dollars toward payment for their lien. This happens all the time, and they all know this! Furthermore, if the lienholders realize you are “talking” to a Trustee in bankruptcy, they know that if any funds might be leftover from the Bank foreclosure, that any remaining funds will be sucked-up through the Bankruptcy process.

By using the “Assignment & Direction” formula as part of the haircut and lien settlement, you then don’t need as much “real hard cash” on hand to settle with the trades and suppliers. However, you will most likely end up with a few trades or suppliers that will NOT want to settle with this haircut offer, no matter what! Also known in the industry as “hold-outs” and by law, you need all lienholders on-side to transact the overall settlement. This process is also a legal term known as “preferential treatment,” meaning that you have to treat all lienholders the same and that you can’t simply agree to pay one lienholder a greater percentage of their outstanding bill than some other lienholder. *(There is the issue of the minor lien fund and the major lien fund, but we won't get into that here)*. This legal condition comes in handy when negotiating, as you simply tell the guy “*that wants more money or else*” that you legally CAN’T offer them more money than the other lienholders have already agreed too! Knowing just how secure or valid their lien “might be” becomes useful, walking them through their lien “weakness” might help to get them on board, as “some money” is better than “no money if their lien gets tossed out of court”!

Usually, the “hold-out guys” are trades or suppliers that have never gone through what I call the “Knot-Hole Process” before, and generally have no idea that they can lose ALL of their money invested into the contract on your project if the bank forecloses on you/them. To deal with these hold-out guys, what I do is notify the other trades and suppliers that have already signed off on the settlement deal and let them know that the “hold-out guys” are preventing the settlement from getting done *(as all have to be on board, otherwise no bank draws come forward as also set out in the bank’s letter)*, this then helps to get a few more hold-outs onboard. However, you may still have a few stubborn hold-outs. The only way to deal with these last “stubborn hold-outs” is to pay that last portion into court (in CASH) and then agree with the valid lienholders that have already signed off that you plan to defend yourself in court and try and have the hold-out guys

tossed out of court, and then on a pro-rated basis divvy-up with the signed on guys whatever is released from the Court. You can also agree to sue the stubborn hold-out guys and agree to divvy up any court winnings with the valid lienholders on a pro-rata basis, which gets a bit messy! But, at this point, it's the only way out of dealing with the last hold-outs, other than letting the bank foreclose on you!

**IMPORTANT Note:** If you have already signed off on a “hair-cut” settlement, then you have effectively agreed that the lien claimant does have a valid lien, even if later you find out otherwise, you would then most likely have no recourse to go back and overturn the settlement agreement even if you later prove the lien as being not valid. I only mention this, as it is a good idea to investigate the validity of liens before signing any settlement. However, time is very short when hammering out a settlement with Trades and Suppliers “before” the bank wants to foreclose on you! In some cases, the guys with a “weak-lien” may want to sign off right away, because some money is better than NO MONEY if their lien is invalidated and tossed out of court. You can use these weak-lien guys to your advantage, to help entice other more solid lienholders to accept your haircut offer. (*Note, the solid, more valid lienholders generally have no idea if any of the other lienholders have a weak-lien position*). The weak lienholders want to settle because these guys know their lien position is weak, and their best chance of getting any money is to be “inside the haircut deal”! This way you can go back to the more solid lienholders and state “SEE, these guys have already signed off”! The thought is similar to, “SEE the first guys have jumped off the cliff, now it's your turn”!

**Note:** For more information on the lien's and how to deal with them after the fact see also our Landen booklet on how to avoid a Bad Contractor.

**Now You Are Fully Informed**

**GOOD LUCK!**



## **The most frequently asked questions about builder's liens**

The following are the most asked questions that we come across related to lien issues, some of which we have already outlined some of the details earlier in this book, but have assembled here as somewhat of a re-cap review.

### **What is a Builders Lien?**

A construction lien (as it is called in Alberta) - a Builders Lien is a claim made against a property by an individual or company (like a contractor or supplier) who has supplied labour or other materials for work on that property. The short answer, a builders lien, is what helps to protect a contractor, sub-contractor, or supplier in hopefully getting paid. Still, the Act also protects the owner if there is a properly set up lien holdback of 10%, limiting the total risk of the owner to only 10% of the main contract.

### **How do you Define a Builders Lien?**

The Alberta Builders Lien Act establishes special remedies to protect contractors and sub-contractors from clients/customers for non-payment, with the understanding that contractors, sub-contractors, and suppliers have to meet specific requirements to get these right lien remedies. These lien claimants must file their valid lien on time, and be very thorough about it. If they make a mistake or miss the legal deadline, then their lien can become invalid and in some cases, if the owner of the land has a lien invalidated, can then go after the lien applicant for damages caused by the lender's advance delay, delayed possession dates, delayed moving cost, interest carry cost, and or other damages.

### **What Does the Act Cover?**

Under the Act, a contractor or supplier can file a builder's lien when they have completed any improvement or service added to a property, including labour/work and providing materials, and where there is an unpaid invoice. Liens are registered similar to a mortgage, a builder's lien is recorded on the title of the property and give everyone notice of the same. In some cases, a duplicate copy may be sent to any other lienholders like the banks sitting in first mortgage position and or in second-placed mortgages. The owner is also notified once a Builders' lien is filed, and the lien at this point is now public knowledge for anyone who searches the property title - including people interested in buying it!

### **How do Holdbacks Work Under the Alberta Lien Act?**

The short answer is that the Act provides a valuable measure of security for tradespeople. Unfortunately for everyone, including the client/landowner, the Act is also frustratingly complicated. And since complications can often turn into bad news, this turns into one important

misunderstood aspects of the Act - that being holdback obligation, mainly because they're so often misunderstood and thus improperly handled or filed. Holdback obligations are another form of security, so they have two purposes: to provide protection for contractors and subcontractors who provide materials and labour, and to limit the liability of owners. To be clear, the Act is there for both parties; think of it sort of like the food chain. If you, as an owner, hired a contractor who later employed a subcontractor, and that subcontractor then files a lien against the contractor that you as the owner hired, the lien holdbacks somewhat limit the liability of everyone along the “food chain.”

### **How does the 10% rule work?**

Under the Lien Act in Alberta, everyone in the contractual “food chain” (*beginning with the project owner*) is required to retain a 10% holdback from all payment amounts made for work done on your project. This includes any additional work that “isn't in the original contract (extras and change orders) that the owner of the land signed with the main general Contractor. For clarity, the Lien legislation trumps the contract. Therefore, everyone down the contract “food chain” is required to hold back 10% of any payment made if that payment was made because of the contract. Note that if the value of the work done is greater than the amount in the agreement, then the landowner needs to retain 10% of the value of that work. Also note, this 10% holdback can be based on milestones of the main contract, with each milestone holdback having its particular 45 day holdback period. You need to ask your lawyer handling the holdback account how and when this can be released to the main contractor and still have you as the landowner protected (*see also 45 day holdback period*).

### **How do Lien Holdbacks Work?**

Let's say you, as an owner, are building a \$500,000 home and have a holdback of \$50,000 from the main General Contractor over the course of construction work on your home (*this based on progress milestone draws*). And you just found out that your main General Contractor just hit the rocks, financially speaking, and did not pay all of his subcontractors and suppliers further down the “food chain,” such as the plumber, the electrician, etc. Then, let's say all those individual subcontractors file liens, and assume that all lienholders file correctly. And for arguments sake, let's say that all these liens add up to say \$200,000. As the owner of the land, you may have already paid out almost all of the \$500,000 contract for construction work to the main general Contractor, and the smaller subs and suppliers to that General Contractor had no idea or could see this was coming, and therefore not their fault. Suddenly, you as the landowner are stuck having to pay another \$200K over and above the main contracted amount?!!! - unless you as the landowner had a properly set up a lien holdback in the first place!!!!

Thus, the holdback gives the owner the right to pay the subcontractors (out of the \$50,000 above example) on a pro-rata basis to have all liens removed. And the subcontractors and suppliers then need to pursue the main General Contractor through the courts for the difference, and you, the

owner, then have no further liability. However, if you did NOT have a correctly set up lien holdback, you would indeed now owe the whole amount of the \$200,000 as set-out in the example above. You would then need to fight every lien claim in court to see if you can have any of them removed by other means, such as improperly filed liens, or simply negotiate with all liens to see if they will settle for a lesser amount!.

### **What if the Owner Doesn't Have a General Contractor?**

Effectively you as the owner have cut out the middleman if there is no general contractor involved, then you as the owner/builder are now 100% required to set-up a 10% holdback for each trade and supplier (i.e., each payment made to the cribber, framer, electrician, plumber, HVAC, etc.)

### **What if the Owner Doesn't Retain Holdbacks?**

It's the owner's prerogative, as there is no real legal way to “make you” set-up a holdback fund. However, in the author's opinion, this is a VERY bad idea not to have a holdback set-up. This mess becomes very evident after the fact when you do end up with a lien or several liens, and then you realize just how big a mess you now have on your hands. You effectively become 100% responsible to all lien holders and no longer have the luxury of paying in just 10% to make all the liens go away! It's easy to see where holdbacks get complicated. Smaller, more informal projects can get especially complicated.

### **How Can a Builders Lien Help a Contractor or Supplier?**

Think of it as an insurance policy for subcontractors and suppliers, in a lot of ways, that's what it is - insurance to help make sure the tradesmen contractors and suppliers get paid. Effectively the lien acts are sort of a collection tool. With a lien registered on a property, it cannot be sold or refinanced until the claim has been addressed, which forces the landowner to have to deal with the mess. There is no way around it until either the claim is properly dealt with, or the claim expires or is invalidated in court.

In most cases, filing a builder's lien won't get the lien claimant the full amount they are due. Assuming they file correctly and they win in court, they only get the holdback amount - 10% of the payments due to them on a pro-rata basis with all other valid lienholders. This is why it is so essential for a landowner to correctly set-up a lien holdback trust account with a lawyer that knows what they are doing, and do so upfront before it comes to any lien issues.

### **Who Does a Builder's Lien Help?**

Who can actually file a lien? Any person or corporation that has performed any of the following for a client/customer under a valid contract with their client/customer, which makes them eligible to file a builder lien for the following services provided:

1. A supplier of materials
2. A laborer for a project
3. A general contractor hired by a landowner
4. A subcontractor hired by a general contractor (or other subcontractors)
5. An engineer or architect

These services include any work provided for a construction project, including labor or materials. In other words, a worker who has, in some way, contributed materially to the improvement of a property's value through their provided services.

### **Who can File a Lien?**

Anyone can file a lien, but if not appropriately filed by the contractor or supplier can make the filed lien invalid, even if they did the work and did not get paid for it. This, even if the main contractor or the owner were at fault for not paying the debt registered in the lien. In other words, a lien will do nothing for the person trying to record a lien if the lien isn't filed correctly. Liens come with strict deadlines and rules attached. If the lien applicant fails to file within the allocated timeline, or files improperly, they can lose in court, and effectively lose the right to file a lien, even if they are right and owed money. Further, the landowner can sue them for an improperly filed lien, effectively sue for damages (note: this is also a negotiating tactic that can be used if you as the landowner are sure a lien is improperly filed, by providing evidence from your lawyer that they feel the lien will be struck, whereby you give the lien clamant notice of your plans to file suit for improper registration - *keep in mind, you have to be very careful not to "extort lienholders" with a threat of a lawsuit!*)

### **What are the Deadlines for Builders Liens in Alberta?**

Remember that filing deadlines and rules can vary depending on many factors, such as when the substantial completion certificate is posted on the site where work was done, which then triggers the "start date" for anyone that has lien rights, after that the clock ticks off until 45 days have elapsed, after which anyone that worked on the site is basically "out-of-luck" and can no longer file a lien, there are some instances where this period can be extended, as outlined later on. It is always a good idea to talk to a lawyer early in the process to make sure that as the landowner, you have everything set up correctly, and give all the proper notices at the appropriate times.

One of three events can start the clock for filing a lien:

1. A "certificate of completion" is issued for the project
2. The head contract is completed, abandoned, or terminated
3. The improvement is completed or abandoned

In other words, a lien claimant has 45 days from the day the time the project is stopped. However, it should be noted that simple completion, termination, or abandonment of a subcontract that is not

a head contract will not start the clock on a lien. This timeline depends on where the contract is at with work already done. Generally, the deadline is 45 days, but it also depends on the project.

### **Where does Holdback Money go?**

The Act requires that holdback money be deposited into a separate holdback account. Effectively the holdback account is to be jointly administered by the owner and the contractor.

### **When do holdback obligations come to an end?**

Regular holdback obligations come to an end when:

- a) the period to register new liens has expired and 45 days have passed since the publication of the certificate of substantial performance, and
- b) existing liens have been satisfied (paid, resolved in court, or finally settled), discharged with respect to the owner, which includes the common practice of the contractor paying security into court sufficient to cover the liens (bonding off) or vacated by the owner.

Finishing holdback obligations come to an end under the same conditions as the expiry of the lien period which is 45 days after the total completion of the project. If, at any point, the project is abandoned, the expiry of the lien period is 45 days from the date that the project was abandoned.

Lastly, the holdback obligation can come to an end piecemeal if a subcontract is certified complete at the request of the contractor, the owner is no longer obligated to retain holdback with respect to that subcontract if all liens with respect to that subcontract have expired (45 days have passed), or been satisfied, discharged.

## SECTION THREE

**I**n this section we outline just some of the contract clauses that should be in a standard construction contract. It is normal for your prime contractor to want you sign “their contract,” however, their contract is usually designed to protect them more so than protect you as the project owner! The best contracts in my opinion, are contracts that “cut-both-ways,” meaning that the contract between owner and contractor protects “both parties” equally! The following contract clauses are only “some examples” of what you need to consider, and have been included for reference only so that you know what they should generally look and read like.

This section also includes several sample letters, notices, legal, and other documents that you should be aware of, however, in no way should you simply copy these documents or their content to create your documents. You **NEED** a lawyer to do this for you!

### A FEW STANDARD CONTRACT CLAUSES

#### In Regards to Liens TO CONSIDER

The following clauses are just some of the more standard type of contract clauses that should be in a construction agreement pertaining to liens and lien holdbacks, and have been included in this ebook for a reference **EXAMPLE ONLY**, to give you an indication what some of the clauses you might need to consider having drafted into your construction contract concerning liens and lien holdbacks, however, the author **STRONGLY ADVISES** that you seek independent legal advice before using any of these **SAMPLE** clauses. It should be noted that many of these clauses are used in large commercial type contracts, and may need to be pared down a bit to meet up with your particular project. However, I am a firm believer in more is better, and starting with somewhat “Strong Wording” and then negotiating to a mutually agreeable position, is a better way to go!

**IMPORTANT:** It should be further noted that the following Clauses are not in any particular order, nor are they listed in any particular order of importance, nor should they be deemed a complete construction agreement, nor should you sue them without consulting a lawyer **FIRST!**

## 1. Contractor's Right to Stop Work or Terminate Contract

1.1. The Main Contractor may stop work or terminate this Contract three (3) business days after written notice of its intention has been received by the Owner of the Project/Land or by the Owners Solicitor and or Project Manager, if:

(a). Work-related to this Contract is stopped under an order of a court having actual or apparent competent jurisdiction or by the actual or apparent authority of a federal, provincial or municipal government, and such order or exercise of authority is not related to an act or omission of the Contractor; or

(b). The Owner of the Project fails to pay the Main Contractor any sum as approved by the Owners Project Manager as being due under this Contract within thirty (30) days of the date set out in the Owners or Project Manager's progress certificate as being due, or thirty (30) days after The Owner received the progress certificate, whichever is the later date.

1.2. Upon the Contract being terminated pursuant to article \_\_\_\_\_, subject to the provisions of the Builders' Lien Act (Alberta) The Owner will pay the Main Contractor all amounts then due to the Main Contractor under the terms of this Contract, as well as any amount which the Main Contractor is able to establish that it is legally entitled to receive for loss of anticipated profit and the cost of any additional damage which the Main Contractor may have suffered by reason of termination of this Contract that was caused by the Owner.

1.3. Notwithstanding as also set out in article \_\_\_\_\_, The Owner will not be obliged to make any payment earlier than would be required under this Agreement. The retention of any amount due to the Main Contractor, which is required to be retained pursuant to the Builders' Lien Act (Alberta), the Contract, or any other Act or Regulation, will not create a right for the Main Contractor to suspend work or to terminate this Contract.

## 2. Sub-Contracts and or Sub-Trades

2.1. The Owner of the Project reserves the right to disapprove any proposed Sub-Contractor and or Sub-Trade that the Main Contractor wishes to use on the Owner's Project. Once the names of the proposed Sub-Contractors have been submitted to the Owner and or to the Owners Project Manager, the Main Contractor must not engage a different Sub-Contractor and or Sub-Trade without the prior written consent of the Owner and or the Owners Project Manager.

2.2. The Main Contractor shall be fully responsible to The Owner of the Project for the acts and omissions of its Sub-Contractors and Sub-Trades, and all of its employees, agents, and suppliers.

2.3. Nothing contained in this Contract or attached Documents cerate's any contractual relation between any Sub-Contractor/Sub-Trade and The Owner of the Project.

### 3. Relations of Contractor and it's Sub-Contractor's and or Sub-Trades

3.1. The Main Contractor agrees to bind all of their Sub-Contractors and Sub-Trades by the same terms of this Contract, which apply to the Sub-Contractors and or Sub-Trades work. Upon the request of The Owner of the Project or a Sub-Contractor or a Sub-Trade, the Contractor will provide the Sub-Contractor and or Sub-Trade with a copy of this Contract's terms and conditions, with an allowance for redacted portions of this contract that may pertain to the contract amounts and or amounts owed to the Main Contractor, plus any Contract Documents such as building plans and or building specifications that directly apply to that Sub-Contractor's and or Sub-Trades work and or materials supplied.

### 4. Claiming of Damages by another Contractor

4.1. Should the Main Contractor suffer damage by an act or omission of any Other Contractor employed/engaged by The Owner of the Project upon the work, the Main Contractor should make its claim in writing against the Other Contractor and at the same time advise The Owner of the Project in writing of the claim and furnish a copy of the claim made against the Other Contractor. The Main Contractor shall advise the Owner and or the Owners Project Manager in writing within forty-eight (48) hours after the happening of the event, which caused such damage to the Main Contractor. The Owners Project Manager will consider such claims and the responsibility for the damage and advise the Main Contractor thereof in writing.

4.2. Where the Main Contractor suffers loss or damage by reason of an act or omission by any Other Contractor engaged by the Owner where the Contract between the Other Contractor and The Owner of the Project (hereinafter referred to as the "other contract") provides that the Main Contractor is or may be added as a party to the other contract for the purpose of obtaining relief at law or in equity for the loss or damage suffered by the Main Contractor, the Main Contractor may, unless the Other Contractor has agreed to settle such claim, sue the Other Contractor to obtain relief for such loss or damage, upon the Owners Project Manager certifying to The Owner of the Project that the Main Contractor has so suffered loss or damage by reason of the Other Contractor, and the Main Contractor may do so whether the Main Contractor is designated by name or added to the other contract by implication only. The Main Contractor shall not name The Owner of the Project as a party to such action unless and until The Owner of the Project so agrees in writing and if, The Owner



of the Project does so agree, the Main Contractor shall indemnify and save harmless The Owner of the Project against any loss, court costs, expense, damage or judgment arising out of such action.

4.3. Should the Main Contractor cause damage to the Other Contractor on the work, the Main Contractor shall upon notice by The Owner of the Project settle with the Other Contractor by an agreement if it agrees to so settle. If the Other Contractor sues The Owner of the Project on account of any damage alleged to have been so sustained, The Owner of the Project shall notify the Main Contractor, who shall defend such proceedings at its own expense, and if any judgment against The Owner of the Project arises therefrom, the Main Contractor shall be responsible and pay the amount of such judgment and all costs incurred by The Owner of the Project.

4.4. If another contract, with the Other Contractor that has suffered damage by reason of any act or omission of the Main Contractor in the performance of this Contract, contains provisions the same as or substantially similar to the provisions of this clause then, unless the Main Contractor has been able to settle the claim of the Other Contractor, and if the Owners project Manager has certified that the Other Contractor has suffered damage which, if it were a party to the Contract would give the Other Contractor a right of action under the Contract, then the Other Contractor, whether specifically named in the Contract or not, will be deemed to be a party to the Contract. Any of the obligations of the Main Contractor to complete the work, or any portion of it, in a particular manner or to a designated standard or within a specified time will be deemed to be obligations owed by the Main Contractor to both The Owner of the Project and the Other Contractor so as to allow the Other Contractor to sue the Main Contractor without naming or joining The Owner of the Project in any action. If the other Contractor does name or join The Owner of the Project in any action arising out of performance, non-performance or inadequate, insufficient or negligent performance, then the Main Contractor shall defend the action on behalf of The Owner of the Project and shall indemnify and save harmless The Owner of the Project against any and all loss, cost, expense

## 5. Payments by the Main Contractor

5.1. Unless otherwise stipulated in this agreement, the Main Contractor shall provide all materials, supplies, labour, tools, equipment, light, power and other utilities necessary for the execution of the Project/work outlined herein, and as outlined within the building plans and as further outline within the building specifications, all of which form part of this Agreement.

5.2. The Main Contractor shall pay all amounts promptly due to any Subcontractor and or Sub-Trades, suppliers, others, engaged by the Main Contractor.

5.3. The Main Contractor shall pay promptly for all tools, equipment, supplies, materials, light, power, and other utilities including, but not limited to, any sum due for labour and services of any foreman, workman, labourer or other people under the employ of the Main Contractor.

5.4. The Main Contractor shall pay promptly for the use, rent, or hire of any motor vehicles, equipment, machinery, temporary buildings, or structures erected by or for the Main Contractor.

5.5. The Main Contractor shall upon request by The Owner of the Project furnish evidence satisfactory to the Owner's Project manager and Owner's Solicitor, whether any, some or all of the payments required above have been made.

5.6. The Main Contractor shall indemnify and save harmless The Owner of the Project from and against any charges or claims in any way connected with the foregoing provisions of \_\_\_\_\_.

## 6. Deductions for Uncorrected Work

6.1. If in the opinion of the Owner and or the Owner's Project Manager it is not expedient to correct defective work or work not done in accordance with this Contract, and or in accordance with the building plans, and or in accordance with building specifications which also form part of this agreement, The Owner of the Project may deduct from the Contract the price the difference in value between the work done and the work as called for by this Contract. The difference in value will be determined in the first instance by the Owner's Project Manager.

## 7. Correction of Work after Final Payment

7.1. Neither the issuance of a Construction Completion Certificate nor payment thereunder, nor any provision in these Contract Documents, will relieve the Main Contractor from responsibility for faulty materials or workmanship which appear within the period set out in article \_\_\_\_\_,

7.2. The Owner of the Project shall promptly give notice of observed defects, and the Main Contractor shall promptly rectify such defects within a reasonable time frame, not to exceed 30 days, if for any reason the Contractor has not rectified the defects within the 30 days stated deadline, the Owner may at its sole discretion hire another party to rectify the defect and then back charge the Main Contactor for such additional cost.

## 8. Application for Payment

8.1. Payment will be made based on the valuation of work done during at each milestone stage as set out in the milestone schedule \_\_\_\_ attached hereto. Materials will not be paid for by the Owner until incorporated into the Project/work and installed in their final locations in accordance with the building plans and building specifications unless modified by the Special Conditions herein or through Change Orders agreed to and signed off by the Owner of the Project.

8.2. Application for payment for work done as each milestone has been completed should be submitted to the Owner of the Project within the five (5) working days after the verified completion of each milestone, unless otherwise agreed to in writing by the parties hereto. The Main Contractor should also provide a completed statutory declaration that all Subcontractors, and Sub-trades, and suppliers have been paid and include a valid clearance letter from the Workers' Compensation Board (The WCB) that the Main Contractor's account is in good standing with WCB.

8.3. Subject to the provisions set out in Article \_\_\_\_\_ of this agreement, the application for payment will be processed, and payment will be made to the main Contractor within \_\_\_\_\_ (\_0) days from the date that application for payment was approved by the Owner of the Project. To expedite payment of invoices, the main Contractors should submit invoices in a format pre-approved by the Owner of the project.

8.4. Notwithstanding any other provision of the Standard General Conditions, when the Construction Completion Certificate is issued The Owner of the Project may withhold the lesser of ONE THOUSAND DOLLARS (\$1,000.00) or one percent (1%) of the Milestone payment amount that would otherwise be due to the Main Contractor and retain such amount as a Deficiency Holdback until the Final Maintenance Certificate has been issued. The Deficiency Holdback is not to be part of the Lien Holdback fund.

## 9. Certificate and Payments

9.1. If no certificate is issued, then no payment will be made to the Main Contractor, nor partial or entire use or occupancy of the work by The Owner of the Project is to be construed as an acceptance of any work or material, not in accordance with this Contract and or the building plans, and or the building specifications.

9.2. The acceptance by the Main Contractor of final payment (not including payment made under article \_\_\_\_\_ for amounts withheld by The Owner of The Project under article \_\_\_\_\_ after the issuance of the Construction Completion Certificate will constitute a waiver and release by the Main Contractor of all claims against The Owner of the Project, except any previously made and still unsettled claim. No amount named in a certificate issued by the

Owners project manager may be due before the expiry of the time provided for payment in Article \_\_\_\_\_ of this Agreement and no payment will be due or payable if any Builders' Lien arising under this Contract is registered against the Title of the Owners Project/property.

## 10. Liens and Holdbacks

10.1. In order to comply with the provisions of the Builders' Lien Act, The Owner of the Project must withhold ten percent (10%) of all progress payments set out in this Contract. The Owner of the Project is also prevented by law from making any further payments whatsoever to the Main Contractor under this Contract after a lien has been registered against the property by reason of work done under this Contract, either by the Main Contractor or a Subcontractor or a Sub-Trade, engaged by the Main Contractor or by reason of material supplied for work under this Contract.

10.2. No portion of any payment may become due or payable until all liens arising out of this Contract (other than the Main Contractor's own) which have been registered against the Owner of the Project property Title have been released or removed from The Owner of the Project's Title as also provided in this agreement.

10.3. Additionally, the Main Contractor must promptly remove all liens (other than its own), which have arisen by reason of work done or materials supplied under this Contract.

10.4. The Owner of the Project will accept an irrevocable letter of credit from a financial institution acceptable to the Owners Solicitor and Owner's Lender ("Letter of Credit"), or a bond ("Holdback Bond") issued by a surety company satisfactory to The Owner's Solicitor and licensed to issue such bonds in the Province of Alberta, in lieu of withholding the ten percent (10%) hold back on progress payments. The Letter of Credit or Holdback Bond, is to be in an amount of ten percent (10%) of the maximum amount of this Contract, including any contingencies (including G.S.T, if applicable). Failure to extend or increase the Letter of Credit or Holdback Bond may result in The Owner of the Project realizing upon the Letter of Credit or Holdback Bond or taking other action under this Contract, including termination of this Contract. The Letter of Credit or Holdback Bond must be valid for sixty (60) days beyond the Contract Completion date. If the Contract is extended in duration or value or both, or if in the opinion of the Owner's Project Manager, the completion will be delayed, the Letter of Credit or Holdback Bond must be extended or increased accordingly. The Letter of Credit or Holdback Bond and any additions thereto must be forwarded to the Owner's Project Manager within seven (7) days of acceptance of this Contract. Any reduction of the amount of the Letter of Credit or Holdback Bond must, before any such reduction, be authorized by the Owner's Project Manager. If the Main Contractor decides to have the ten percent (10%) lien holdback deducted from the progress payments, no interest will be paid by The Owner of the Project to the Main Contractor on the holdback amount.

## **11. Standard General Conditions**

11.1. Following the issue of the Construction Completion Certificate if requested in writing by the Main Contractor or financial institution, in accordance with the provisions of Article \_\_\_\_ of this Agreement, wherein the opinion of the Owner of the Project or it's Solicitor the Builders' Lien Act(Alberta) allows the reduction or release of all or parts of the lien fund by reason of the completion of a Contract or sub-contract

11.2 The Owner of the project may, subject to all other provisions relating to Liens and Holdbacks, release to the Main Contractor the appropriate amounts except those required to be retained pursuant to the said Act.

11.3. The Owner of the Project will not release any such amounts retained as a lien fund unless and until the Main Contractor has at its own expense complied with all of the applicable provisions of the Builders' Lien Act and furnished such evidence as the Owner's Solicitor may require indicating that no lien has been or could be registered in connection with the portion of the work which has been completed or if any such lien has been registered it has been duly discharged. Any deviations in the release of holdback from the procedure described in this Agreement will be noted in the Special Conditions herein.

11.4. Where The Owner of the Project is not required to retain on the Contract any lien fund pursuant to the Builders' Lien Act of (Alberta) The Owner may nevertheless retain the equivalent amount of monies which would constitute such a lien fund from each payment made under this Contract until the Construction Completion Certificate is issued for the entire Contract.

11.5. The Main Contractor must also furnish in addition to the evidence required under this contract a clearance letter from the Workers' Compensation Board (WCB) that the Contractor's WCB account is in good standing, and a statutory declaration issued by the Contractor indicating that all payments made by the Contractor in respect of sub-contracts, wages and materials have been made. If in the opinion of the Owner's Project Manager any portion of the work so completed might require adjustment, rectification, repair or replacement during the maintenance period set out in \_\_\_\_\_ and a portion of the amount which might otherwise be released from the holdback should be retained, The Owner of the Project may refuse to release all or any portion of the said amount. If The Owner releases all or any portion of the amount to be retained as holdback, The Owner may require as the condition of such release a bond or bonds, deeds, undertakings or other securities as it considers necessary or desirable to protect The Owner against liability, loss, claims or damage by reason of such payment, or to assure the continued acceptability of the work.

11.6. Payments of the statutory holdback to the Contractor will be made at the following Milestone Stages provided that the conditions attached to each stage have been completed.

- (a) List the Milestone Stages
  - (I) Foundation Complete
  - (II) Framing to lock-up complete
  - (III) Mechanical complete
  - (IV) & so forth

## 12. Substantial Performance

12.1. A Contract or a subcontract is deemed substantially performed as 97% complete:

- (a) when the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purposes intended, and
- (b) w when the work to be done under the Contract or subcontract is capable of completion or correction at a cost of not more than:
  - (i) three percent (3%) of the first \$500,000.00 of the Contract or subcontract price,
  - (ii) two percent (2%) of the next \$500,000.00 of the Contract or subcontract price, and
  - (iii) one percent (1%) of the balance of the contract or subcontract price.

12.2. The value of work actually done, and materials actually furnished will be calculated on the basis of:

- (a) the Contract price, or
- (b) the actual value of the work done and materials furnished, if there is not a specific Contract price.

12.3. If conditions set out above have been satisfied, then the Substantial Performance Certificate ("S.P.C.") can be issued by the Main Contractor or a Subcontractor. After the expiry of forty-five (45) days from the date of the S.P.C. and the Main Contractor having furnished to The Owner of the Project a certificate of Title showing that no liens have been registered against the property connected to this Contract or in the vicinity of this Contract, and this has been verified by the Owner's Project Manager, a separate Payment Certificate suitably endorsed will be issued for the release of the major lien fund, or portion thereof, which will be paid by The Owner of the Project by the later of thirty (30) days after the expiry of the lien

## 13. Standard General Conditions

13.1. Period or thirty (30) days after receipt of an invoice from the Main Contractor for the release of the holdback.

13.2. In the event of the work being carried out on Owner's lands, where no certificate of title has been issued, the requirement of furnishing a certificate of title as set out in article \_\_\_\_\_ will not apply, and instead, the Main Contractor must provide a clearance letter from the Workers' Compensation Board that the Main Contractor's account is in good standing and a statutory declaration that no liens, charges or other encumbrances are registered or contemplated in respect of the property (including lands) connected to this Contract or in the vicinity of this Contract.

13.2. The issuance of a Substantial Performance Certificate will be by the Main Contractor or Subcontractor and not by the Owner or the Owner's Project Manager. (Refer to Section 19 of the Builders' Lien Act.)

## 14. Construction Completion

14.1. A Construction Completion Certificate can be issued when all work (including deficiencies and all seasonal work) has been totally completed.

14.2. The Owner of the Project at its sole discretion may also consider issuing a conditional Construction Completion Certificate that identifies deficiencies and or seasonal holdbacks mutually agreeable to the parties hereto if, in the opinion of The Owner of the Project, such deficiencies or seasonal issues are deemed by the Owner as relatively minor. If no liens have been registered and if all the requirements of this Agreement have been met, in accordance to the building plans and building specifications then The Owner of the Project within forty-six (46) days after the Construction Completion Certificate issue date will pay to the Contractor the monies held in the minor lien fund, or major lien fund or lien fund in a case where a Substantial Performance Certificate is not issued within sixty (60) days after the Owner of the Project deems the project Substantially complete.

### **Notice to the reader:**

**This booklet/paper/ebook is a general overview of the subject matter and is provided as GENERAL INFORMATION ONLY. As lien rights and the lien process can be very complicated, which can have varying outcomes, this document and or the content within this document should not and cannot be regarded as any legal advice whatsoever; the reader is strongly advised and cautioned to seek information or advice from legal counsel. The author and Landen Development assume NO LIABILITY what so ever for the use of the information contained herein.**

## **Examples of documents related to lien subject matter**

**Declaration of Substantial Completion**

**Declaration of Substantial Performance**

**Statutory Declaration of Full Payment**

**Caviet Forbidding Registration**

**Certificate of Lis Pendens**

**Sample of Liened Title**

**Affidavit of No Lien**

**Irrevocable Assignment**

**Affidavit of No Creditors**

**Irrevocable Assignment for Work Already Done**

**Irrevocable Assignment to Complete Unfinished Work**

**Termination of Contract Letter**

**Demand Removal of Lien Letter**

**Letter of Understanding MOU**

**Letter to Lender**

**Sample of Cost to Complete Work-out Plan**



## LANDEN DEVELOPMENTS INC

### CERTIFICATE OF SUBSTIAL COMPLETEION & PERFORMNCE OF (97% COMPLETION) of THE CONTRACT

RE Substantial completion of:

Legally described as

and

With a Civic Address of

**BETWEEN:**

LANDEN DEVELOPMENTS INC (MAIN CONTRACTOR)

and

\_\_\_\_\_ (PURCHASER)

Has been sustainably completed on \_\_\_\_\_, 2018 and which certificate expires  
(45 days later) as of \_\_\_\_\_, 2018

DATED and issued this \_\_\_\_\_ day of \_\_\_\_\_ June, 2018

LANDEN DEVELOPMENTS INC

\_\_\_\_\_

PER:

## Certificate of Substantial Completion

---

Project: \_\_\_\_\_

Location: \_\_\_\_\_

Owner: \_\_\_\_\_

Contractor: \_\_\_\_\_

Owner's Representative: \_\_\_\_\_

**Definition of Substantial Completion**

Substantial completion is defined as the date at which the owner or owner's representatives certifies that the project is suitable for the owner's beneficial occupancy and intended use according to the contract documents.

**Date of Substantial Completion**

The Work performed under this contract has been reviewed and has been found to be substantially complete. The date of Substantial Completion is hereby documented as \_\_\_/\_\_\_/20\_\_\_. This date also establishes the commencement of the warranty and guarantee period in accordance with the Contract Documents.

**Items to be Corrected or Completed**

A list of items to be completed, corrected or modified has been compiled by the Owner's representative and is attached to this document. Failure to list items does not release the contractor of his responsibility to complete ALL WORK according to the Contract Documents.

\_\_\_\_\_  
Owner's Representative Date

The Contractor agrees to complete the list of items to be corrected or completed within \_\_\_\_\_ calendar days of the Date of Substantial Completion.

\_\_\_\_\_  
Contractor Date

The owner accepts the Work as substantially complete and will take full possession at \_\_\_\_\_ am/pm, \_\_\_/\_\_\_/20\_\_.

\_\_\_\_\_  
Owner Date

## STATUTORY DECLARATION

---

This Statutory Declaration (the "Agreement") is effective \_\_\_\_\_, 2020

**Company Name:** \_\_\_\_\_ (the "Corporation"), a company organized and existing under the laws of Alberta, with its head office located at:

DO SOLEMNLY DECLARE THAT:

I, \_\_\_\_\_, of the City of \_\_\_\_\_ Alberta, do solemnly declare that:

1. I am the owner of and or have full authority to sign for the Corporation in the position of \_\_\_\_\_, and as such, have knowledge of the matters herein declared to.
2. I declare that all bills for materials and labor, including any sub contract's as they pertain to the contracted amount of \$ \_\_\_\_\_ for the services of \_\_\_\_\_ work, (the "Work") performed by the Corporation have been fully paid, I have further conducted such examinations of the books and records of the Corporation and have made such inquiries and investigations as are necessary to enable me to make this declaration.
3. I have satisfied myself that:
  - (a) there are reasonable grounds for believing that:
    - (i) all bills and invoice related to the Work done by the Corporation on or to the project lands described below, are paid and that no future bills or invoices will be forthcoming concerning the Work performed by the Corporation, and if for any reason there is an outstanding bill or invoice related to the Work of the Corporation that corporation will be able to pay its liabilities as they become due, and
    - (ii) to my knowledge no lien or encumbrance exists on the Title where the Work was preformed at the address of \_\_\_\_\_ Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan \_\_\_\_\_ (the "Property").
  - (b) there are reasonable grounds for believing that no creditor of the Corporation will be in the future be registering a lien and or encumbrance on the above-mentioned Property.

And I make this solemn declaration conscientiously believing the same to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

THE CORPORATION

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Print Name and Title

DECLARED BEFORE me at the City of \_\_\_\_\_ Alberta this \_\_\_\_\_ 2020.

Commissioner for Oaths for the Judicial

District of Alberta

\_\_\_\_\_

SEAL

Authorized Signature

Print Name \_\_\_\_\_

## STATUTORY DECLARATION

I (Trade/Contractors name) DO SOLEMNLY AND SINCERELY DECLARE

My full name is \_\_\_\_\_

I (complete full Name) as owner/member of (Name of company) do declare that for the work performed and or materials that I and or my company have supplied to perform the contracted work for (name of Owner) ("The Owner") and fully preformed all such work on/in the Owners home/project at the address of: \_\_\_\_\_, with the legal description of Lot \_\_\_ Block \_\_\_ Plan # \_\_\_\_\_ ("The Project") and have fully paid for all labor and materials as they relate to my contract with the Owner, and further state that myself and or my company have paid all bills/invoices as they relate to the Owners Project.

**AND I MAKE** this Solemn Declaration that I am signing and conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, Alberta Canada.

Declared Before me,

(Signature)

Name of Lawyer: \_\_\_\_\_

At (Place) this day, \_\_\_\_\_ of, \_\_\_\_\_ 2018

(signature of Contractor/Trade)  
(Name of Contractor/Trade)

Lawyer's Stamp

(Include name, firm, and address)

Print Name and Title

**CAVEAT FORBIDDING REGISTRATION**  
**Form 26**  
**Land Titles Act, Section 130**

TAKE NOTICE that I (we), \_\_\_\_\_  
[insert name(s) of caveator], the caveator, claim(s) an interest as unpaid Vendor, pursuant to unpaid monies under and by virtue of an [Offer to Purchase OR Agreement of Purchase and Sale] made between [NAME(S) OF VENDOR(S)] as Vendor and [NAME(S) OF PURCHASER(S)] as Purchaser dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ and accepted the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, in the lands described as follows:

standing in the register in the name(s) of

and I (we) forbid the registration of any person as transferee or owner of, or of any instrument affecting that estate or interest, unless the certificate of title is expressed to be subject to my (our) claim.

I (We) designate the following address as the place at which notices and proceedings relating hereto may be served:

In witness whereof, I have hereunto subscribed my name this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
*Signature of Caveator or Agent for Caveator*

\_\_\_\_\_  
*Signature of Caveator or Agent for Caveator*

SAMPLE DOCUMENT ONLY

COURT FILE NUMBER

COURT

Court of Queen's Bench of Alberta

JUDICIAL CENTRE

PLAINTIFF

DEFENDANT

DOCUMENT

**Certificate of Lis Pendens**

ADDRESS FOR SERVICE  
AND CONTACT  
INFORMATION OF PARTY  
FILING THIS DOCUMENT

*Builders' Lien Act*

Clerk's Stamp



**To: Registrar of Land Titles (or the Minister of Energy)**

THIS IS TO CERTIFY that proceedings have been taken in court to enforce a certain lien registered by \_\_\_\_\_ against the following lands: *(describe lands by indicating the legal land description)*

which lien was registered pursuant to the *Builders' Lien Act* in the Land Titles Office (or with the Minister of Energy) on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as No. \_\_\_\_\_.

DATED at \_\_\_\_\_ Alberta,  
*City / Town / Municipality*

on \_\_\_\_\_, 20\_\_\_\_.  
*Date*

\_\_\_\_\_  
Clerk of the Court

**NOTES:**

SAMPLE DOCUMENT ONLY

SAMPLE OF TITLE SHOWING LIENS (redacted for privacy)

S  
 LINC                      SHORT LEGAL                      TITLE NUMBER  
 003 [REDACTED]                      0 [REDACTED]; [REDACTED]                      1 [REDACTED]

LEGAL DESCRIPTION  
 PLAN 0 [REDACTED]  
 BLOCK [REDACTED]  
 LOT [REDACTED]  
 EXCEPTING THEREOUT ALL MINES AND MINERALS  
 AREA: 0.81 HECTARES (2 ACRES) MORE OR LESS

ESTATE: FEE SIMPLE  
 ATS REFERENCE: [REDACTED]; [REDACTED]; [REDACTED]; NE

MUNICIPALITY: ROCKY VIEW COUNTY

REFERENCE NUMBER: 1 [REDACTED]

REGISTERED OWNER(S)				
REGISTRATION	DATE (DMY)	DOCUMENT TYPE	VALUE	CONSIDERATION
1 [REDACTED]	02/05/2014	TRANSFER OF LAND	\$500,000	NOMINAL

OWNERS  
 [REDACTED]  
 OF [REDACTED] AVENUE  
 [REDACTED]  
 ALBERTA [REDACTED]

ENCUMBRANCES, LIENS & INTERESTS		
REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
091 [REDACTED]	29/10/2009	UTILITY RIGHT OF WAY GRANTEE - FORTISALBERTA INC.
091 [REDACTED]	30/10/2009	UTILITY RIGHT OF WAY GRANTEE - FORTISALBERTA INC. GRANTEE - TELUS COMMUNICATIONS INC. GRANTEE - ATCO GAS AND PIPELINES LTD. GRANTEE - SHAW COMMUNICATIONS INC.

( CONTINUED )

SAMPLE DOCUMENT ONLY



REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
		GRANTEE - ROCKY VIEW COUNTY. AS TO PORTION OR PLAN: [REDACTED]
091 [REDACTED]	30/10/2009	EASEMENT AS TO PORTION OR PLAN: [REDACTED] OVER AND FOR BENEFIT SEE INSTRUMENT
091 [REDACTED]	30/10/2009	CAVEAT RE : EASEMENT AND RESTRICTIVE COVENANT
091 [REDACTED]	30/10/2009	CAVEAT RE : DEVELOPMENT AGREEMENT PURSUANT TO MUNICIPAL GOVERNMENT ACT CAVEATOR - ROCKY VIEW COUNTY. 911 - 32ND AVENUE NE CALGARY ALBERTA T2E6X6
091 [REDACTED]	30/10/2009	CAVEAT RE : DEFERRED SERVICES AGREEMENT CAVEATOR - ROCKY VIEW COUNTY. 911 - 32ND AVENUE NE CALGARY ALBERTA T2E6X6
091 [REDACTED]	30/10/2009	CAVEAT RE : EASEMENT
091 [REDACTED]	30/10/2009	ENCUMBRANCE ENCUMBRANCEE - [REDACTED] (SPRINGBANK) HOMEOWNERS ASSOCIATION. [REDACTED] [REDACTED] AVENUE [REDACTED] ALBERTA [REDACTED]
091 [REDACTED]	30/10/2009	AGREEMENT SEE INSTRUMENT
111 [REDACTED]	22/11/2011	UTILITY RIGHT OF WAY GRANTEE - FORTISALBERTA INC. GRANTEE - TELUS COMMUNICATIONS INC. GRANTEE - SHAW COMMUNICATIONS INC. AS TO PORTION OR PLAN:1113386
141 [REDACTED]	02/05/2014	MORTGAGE MORTGAGEE - [REDACTED] MORTGAGE INVESTMENT CORP. [REDACTED] PO BOX [REDACTED] [REDACTED]

( CONTINUED )

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
		BRITISH COLUMBIA [REDACTED] ORIGINAL PRINCIPAL AMOUNT: \$1, [REDACTED]
141 [REDACTED]	02/05/2014	CAVEAT RE : ASSIGNMENT OF RENTS AND LEASES CAVEATOR - [REDACTED] CORP. [REDACTED] STREET PO BOX [REDACTED] [REDACTED] BRITISH COLUMBIA [REDACTED] AGENT - [REDACTED]
141 [REDACTED]	02/05/2014	CAVEAT RE : BENEFICIAL OWNER CAVEATOR - [REDACTED] LTD. C/O [REDACTED] LAW [REDACTED] STREET [REDACTED] [REDACTED] ALBERTA [REDACTED] AGENT - [REDACTED]
141 [REDACTED]	02/12/2014	CAVEAT RE : AGREEMENT CHARGING LAND CAVEATOR - [REDACTED] LTD. [REDACTED] CLOSE [REDACTED] [REDACTED] ALBERTA [REDACTED] AGENT - [REDACTED]
161 [REDACTED]	11/05/2016	BUILDER'S LIEN LIENOR - [REDACTED] & DOORS INC. C/O [REDACTED] [REDACTED] [REDACTED] AVE [REDACTED] ALBERTA [REDACTED] AMOUNT: \$ [REDACTED]
161 [REDACTED]	22/06/2016	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: [REDACTED]
161 [REDACTED]	25/07/2016	BUILDER'S LIEN LIENOR - [REDACTED] INC. [REDACTED] [REDACTED] ALBERTA [REDACTED] AGENT - [REDACTED] AMOUNT: \$ [REDACTED]
161 [REDACTED]	29/09/2016	CAVEAT

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 4

# [REDACTED]

REGISTRATION

NUMBER DATE (D/M/Y) PARTICULARS

RE : AGREEMENT CHARGING LAND  
 CAVEATOR - [REDACTED] (ALBERTA) LTD.  
 C/O [REDACTED]  
 ATT: [REDACTED]  
 [REDACTED] AVENUE SW  
 [REDACTED]  
 ALBERTA [REDACTED]  
 AGENT - [REDACTED]

171 [REDACTED] 12/04/2017 TAX NOTIFICATION  
 BY - ROCKY VIEW COUNTY.  
 911-32 AVENUE NE  
 CALGARY, ALBERTA  
 T2E6X6

TOTAL INSTRUMENTS: 019

THE REGISTRAR OF TITLES CERTIFIES THIS TO BE AN  
 ACCURATE REPRODUCTION OF THE CERTIFICATE OF  
 TITLE REPRESENTED HEREIN THIS 23 DAY OF [REDACTED]  
 [REDACTED] AT 08:43 A.M.

ORDER NUMBER: [REDACTED]

CUSTOMER FILE NUMBER:



\*END OF CERTIFICATE\*

THIS ELECTRONICALLY TRANSMITTED LAND TITLES PRODUCT IS INTENDED  
 FOR THE SOLE USE OF THE ORIGINAL PURCHASER, AND NONE OTHER,  
 SUBJECT TO WHAT IS SET OUT IN THE PARAGRAPH BELOW.

THE ABOVE PROVISIONS DO NOT PROHIBIT THE ORIGINAL PURCHASER FROM  
 INCLUDING THIS UNMODIFIED PRODUCT IN ANY REPORT, OPINION,  
 APPRAISAL OR OTHER ADVICE PREPARED BY THE ORIGINAL PURCHASER AS  
 PART OF THE ORIGINAL PURCHASER APPLYING PROFESSIONAL, CONSULTING  
 OR TECHNICAL EXPERTISE FOR THE BENEFIT OF CLIENT(S).

## AFFIDAVIT OF NO LIEN

This Affidavit of No Lien (the "Agreement") is made and effective [DATE],

**BETWEEN:** **LANDEN DEVELOPMENT INC** (the "Company"), a corporation organized and existing under the laws of the Province of Alberta, with its office located at: 274044 10<sup>th</sup> Street East Okotoks (Mailing address RR2 Site 10 Box 2 Okotoks AB T1S-1A2)

**AND:** \_\_\_\_\_ (the "Affiant"), a person and or corporation organized and existing under the laws of the Province of Alberta, with its head office located at:

\_\_\_\_\_  
COMPLETE ADDRESS

In consideration of the terms and covenants of this agreement, and other valuable consideration, the parties agree as follows:

### RECITALS

1. That Affiant is the \_\_\_\_\_ of \_\_\_\_\_
2. That the Company is the owner of the property or is managing for the owner under a separate Project Management contract/agreement for the improved property known and legally described as follows:

Lot: \_\_\_\_\_ Block: \_\_\_\_\_ Plan #: \_\_\_\_\_

Street Address of: \_\_\_\_\_

3. That Affiant hereby declares they are not subject to any bankruptcy, creditor's reorganization or insolvency proceeding, and none are pending, contemplated or threatened
4. That Affiant declares there are no unrecorded labour, mechanic's, or material liens against the property, or about to be against the property, and no material has been furnished or labour performed on the property which has not been paid in full.
5. That the Affiant declares there are no claims whatsoever of any kind or description against any fixtures or equipment located on the said premises as they pertain to the Affiants contract for services and or materials.
6. That this affidavit is made for the purpose of: [DESCRIBE].

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

LANDEN DEVELOPMENT INC.

AFFIANT

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Print Name and Title

## ACKNOWLEDGMENT

In the Province of Alberta

On Date of: \_\_\_\_\_ before me, \_\_\_\_\_, notary, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within the instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

Signature \_\_\_\_\_  
Notary

(Seal)

**IRREVOCABLE ASSIGNMENT OF CONSTRUCTION MORTGAGE PROCEEDS FROM  
FINAL DRAWS OF THE \_\_\_\_\_MORTGAGE INC.  
CONSTRUCTION MORTGAGE**

**REGISTERED AS INSTRUMENT NO. \_\_\_\_\_ (THE "MORTGAGE")**

TO: \_\_\_\_\_ (the "Lien Holder")

**IN CONSIDERATION** of the sum of \$1.00, the receipt and sufficiency of which is hereby Acknowledged, WE, \_\_\_\_\_, being the registered owners of the property legally described as follows:

Address: \_\_\_\_\_

Lot \_\_\_\_\_, Block \_\_\_\_\_, Plan \_\_\_\_\_ (the "Property"), which Property is encumbered by a Construction Mortgage, registered in \_\_\_\_\_ place security position on the Title of the Property, to \_\_\_\_\_ (the "Construction Mortgage") do hereby irrevocably assign the sum of \$ \_\_\_\_\_ ( \_\_\_\_\_ DOLLARS) and irrevocably direct our solicitor Mr./Mrs. \_\_\_\_\_, at

the Law Firm of : \_\_\_\_\_, to whom all construction mortgage proceeds from the Construction Mortgage are to be forwarded to and held in trust, to pay the sum directly to the Lien Holder out of the Construction Mortgages advance from the Construction Lender named as: \_\_\_\_\_

SIGNED AND DATED at the City of Calgary, in the Province of Alberta, \_\_\_\_\_, 2020.

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
Print Name: Print Name

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
Print Name: Print Name

**ACKNOWLEDGMENT**

This \_\_\_\_\_ day of \_\_\_\_\_, 2020

We hereby acknowledge service and receipt of a true copy of this Assignment and agree to honor such Assignment out of the final \_\_\_\_\_ Investments Inc. Construction Mortgage draws in respect of the above referenced Property to the extent we continue to act and receive such funds and are in a position to payout same.

SIGNED at the City of Calgary, in the Province of Alberta, this \_\_\_ day of \_\_\_\_\_, 2020

The Law Firm of: \_\_\_\_\_, Per: \_\_\_\_\_

## AFFIDAVIT OF NO CREDITORS

This Affidavit of No Creditors (the "Agreement") is made and effective \_\_\_\_\_ 2020,

**BETWEEN:** **Landen Development Inc.** (the "Company"), a corporation organized and existing under the laws of Alberta, with its head office located at:

**AND:** **[AFFIANT NAME]** (the "Affiant"), a corporation organized and existing under the laws of Alberta, with its head office located at:

In consideration of the terms and covenants of this agreement, and other valuable consideration, the parties agree as follows:

### RECITALS

- A. Affiant is the contractor that performed work and or services that may have including building materials or supplies included with the work performed (the "Work") located at the address of

\_\_\_\_\_  
LOT \_\_\_\_\_ BLOCK \_\_\_\_\_ PLAN \_\_\_\_\_ (THE "PROJECT")

- B. The Work and or materials are not encumbered in any way.
- C. Affiant has no creditors due any payment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

COMPANY

AFFIANT

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Print Name and Title

## ACKNOWLEDGMENT

\_\_\_\_\_ of Alberta

On \_\_\_\_\_ 2020 before me, \_\_\_\_\_, notary, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

Signature \_\_\_\_\_  
Notary

(Seal)



**IRREVOCABLE DIRECTION AND ASSIGNMENT TO PAY MORTGAGE PROCEEDS  
FOR WORK ALREADY COMPLETED**

(the "IRREVOCABLE ASSIGNMENT")

**TO:**

**AND TO:**

Attention: The law Firm of: \_\_\_\_\_  
At the address of: \_\_\_\_\_

WHEREAS \_\_\_\_\_ (collectively the "Owners") are the registered owners of the property legally described as follows:

Address of : \_\_\_\_\_  
Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan \_\_\_\_\_ (the "Property");

AND WHEREAS the Owners are constructing a new home (the "Project") on the Property;

AND WHEREAS \_\_\_\_\_ Inc. (the " Construction Lender") has a registered a First Mortgage against the Property as registration no. \_\_\_\_\_ (the "Mortgage");

AND WHEREAS the Lender’s Mortgage is a construction draw mortgage which has not been fully drawn down, and is further is expected to advance further construction draw funds sufficient enough to satisfy this Assignment at the final completion of the project on the property;

AND WHEREAS \_\_\_\_\_ Ltd. (the "Contractor") filed a Builders' Lien against the Property as registration no. \_\_\_\_\_ (the " Contractor’s Lien");

AND WHEREAS the Owners project has been delayed as a result of issues caused by the original, General Contractor (the “GC”) including the registration of several liens against the Property;

AND WHEREAS the Owners have terminated the original GC due to these issues;

AND WHEREAS the Owners have negotiated that the Contractor will discharge the Contractors Lien based on promises to pay the Contractor certain funds secured by Irrevocable assignments and direction to pay;

AND WHEREAS there are \_\_\_\_\_ other liens registered against the Property, being the following registration no’s of \_\_\_\_\_.  
In the total face amount of \$ \_\_\_\_\_

AND WHEREAS the Owners have negotiated or will negotiate the discharge of all others liens as a condition of this assignment and a condition of the Contractor agreeing to discharge its lien;

AND WHEREAS the Owners are further prepared to pay pro-rated proportionately the mutually agreed to settlement balance owing on all Liens;

NOW THEREFORE in consideration of One (\$1.00) Dollar and other good and valuable consideration, the Owner's and the Contractor agree as follows:

1. The Owners hereby irrevocably assign on a pro-rata basis to the following:

- Lienholder :
- Lienholder :
- Lienholder :
- Lienholder :

after payment of all legal fees and disbursements, and to a maximum of \_\_\_\_\_% of the face amount of each of the above mentioned Liens. For greater certainty, the maximum payable under this Irrevocable Assignment to the following Lienholder's

- Lienholder :
- Lienholder :
- Lienholder :
- Lienholder :

For a total of \$\_\_\_\_\_. It is further acknowledged and agreed that if there are not sufficient funds to pay these amounts in full, then the parties shall be paid the balances on a pro-rata basis of their liens to the total amount of all paid out lien's. The Owners will immediately direct their solicitor, of the Law Firm of \_\_\_\_\_ to follow this Assignment and Direction to pay.

SIGNED at the City of Calgary, in the Province of Alberta, this \_\_\_ day of \_\_\_\_\_,2016

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
 Print Name: \_\_\_\_\_ Print Name

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
 Print Name: \_\_\_\_\_ Print Name

**ACKNOWLEDGMENT**

The law Firm of \_\_\_\_\_ hereby acknowledge service and receipt of a true copy of this Irrevocable Assignment and agree to honor same and follow such direction to pay and make payment to the Contractor pursuant to such Irrevocable Assignment, provided that the Law Firm of \_\_\_\_\_ ends up being in receipt of funds remaining out of construction draws forthcoming from the Construction lender after payment of all reasonable legal fees and disbursements.

SIGNED at the City of Calgary, in the Province of Alberta, this \_\_\_ day of \_\_\_\_\_,2016.

Per: \_\_\_\_\_  
 The Law Firm of:

**IRREVOCABLE DIRECTION AND ASSIGNMENT TO PAY MORTGAGE PROCEEDS  
TO COMPLETE UNFINISHED WORK**

**(the "IRREVOCABLE ASSIGNMENT")**

**TO:**

**AND TO:**

Attention: The law Firm of: \_\_\_\_\_  
At the address of: \_\_\_\_\_

WHEREAS \_\_\_\_\_ (collectively the "Owners") are the registered owners of the property legally described as follows:

Address of : \_\_\_\_\_  
Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan \_\_\_\_\_ (the "Property");

AND WHEREAS the Owners are constructing a new home (the "Project") on the Property;

AND WHEREAS \_\_\_\_\_ Inc. (the " Construction Lender") has a registered a First Mortgage against the Property as registration no. \_\_\_\_\_ (the "Mortgage");

AND WHEREAS the Lender’s Mortgage is a construction draw mortgage which has not been fully drawn down, and is further expected to advance further construction draw funds sufficient enough to satisfy this Assignment at the final completion of the project on the property;

AND WHEREAS \_\_\_\_\_ Ltd. (the "Contractor") filed a Builders' Lien against the Property as registration no. \_\_\_\_\_ (the " Contractor’s Lien");

AND WHEREAS the Owners project has been delayed as a result of issues caused by the original, General Contractor (the “GC”) including the registration of several liens against the Property;

AND WHEREAS the Owners have terminated the original GC due to these issues;

AND WHEREAS the Owners have negotiated that the Contractor will discharge the Contractor’s Lien based on promises to pay the Contractor certain funds secured by irrevocable assignments and direction to pay;

AND WHEREAS there are \_\_\_\_\_ other liens registered against the Property, being the following registration no’s of \_\_\_\_\_.  
In the total face amount of \$ \_\_\_\_\_

AND WHEREAS the Owners Owner have negotiated or will negotiate the discharge of all others liens as a condition of this assignment and a condition of the Contractor agreeing to discharge its lien as also set out in a separate assignment and direction to pay;

AND WHEREAS the Owners are further prepared to pay pro-rated proportionately the agreed to settlement balance owing on all Liens;

AND WHEREAS the Owner requires additional work and services to be performed on their Project by

The Contractor and the Contractor is willing to continue to work on the Property provided they are paid in full for such “completion work” out of the final draw of the Construction Mortgage being advanced into trust with the Law Firm of \_\_\_\_\_;

NOW THEREFORE in consideration of One (\$1.00) Dollar and other good and valuable consideration, the Owner and the Contractor in addition to the other separate assignment and direction further agree as follows:

1. CONTRACTOR will continue to complete work and services on the Owner' Property based upon the work specifications and fixed costs summarized in the attached scope of work and cost estimate as also outlined in the original quote to the original GC and or as per the original contract between the Contractor and the GC.

2. The Owner agrees to pay the CONTRACTOR in full for such finish works and in accordance with the attached and mutually agreed to cost estimate from the final draw on the Construction Mortgage being advanced into trust with the Law Firm of \_\_\_\_\_.

3. The Owner hereby irrevocable assign sufficient funds from the final draw of the Construction Mortgage being advanced into trust with the Law Firm of \_\_\_\_\_ to the CONTRACTOR and irrevocably direct their solicitors to pay such funds to the CONTRACTOR through its solicitors, \_\_\_\_\_, from the final draw from the Construction Mortgage being advanced into trust.

4. This Irrevocable Assignment may be executed in counterpart with the same effect as if the parties all signed the same and all of the executed counterparts together form this Irrevocable Assignment. Any such executed counterpart may be delivered by facsimile transmission or by email in PDF and will be deemed to be an original document.

SIGNED at the City of Calgary, in the Province of Alberta, this \_\_\_ day of \_\_\_\_\_, 2020.

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
Print Name: Print Name

Witness: \_\_\_\_\_ Owner: \_\_\_\_\_  
Print Name: Print Name

**ACKNOWLEDGMENT**

This \_\_\_ day of \_\_\_\_\_, 2020

We hereby acknowledge service and receipt of a true copy of this Assignment and agree to honor such Assignment out of the final \_\_\_\_\_ Investments Inc. Construction Mortgage draws in respect of the above-referenced Property to the extent we continue to act and receive such funds and are in a position to pay out same.

SIGNED at the City of Calgary, in the Province of Alberta, this \_\_\_ day of \_\_\_\_\_, 2020

The Law Firm of: \_\_\_\_\_, Per: \_\_\_\_\_  
\_\_\_\_\_, 2020

Contact Name  
Address  
Address2  
City, State/Province  
Postal Code

**Without Prejudice****OBJECT: TERMINATION OF CONTRACT**

---

**Attention:** [CONTACT NAME],

If follow up to our recent formal Demand Letter of \_\_\_\_\_ 2020 and due to a major default of the agreement between us, caused by a lien and or lien's being registered on the title of the project that you where contracted to build, and further due to the fact that said lien and or lien's are still registered on the title after giving you a formal notification letter of said default, which included a specific rectification period of \_\_\_\_ days to have said lien's removed from the title, and as that rectification period has now expired, as also set out in the agreement between us, this letter is a formal notice of termination letter to you which shall acknowledge said termination as also set out in the construction agreement between us, and therefore, the signed construction agreement dated \_\_\_\_\_ 2020 is now formally cancelled and terminated; without further recourse by you. Furthermore, we reserve the right to seek further damages as a court may allow at trial, as also set out in the original agreement between us.

As of this day please cease and desist all activities on the project moving forward, and further, we hereby give you formal notice not to trespass onto the project site/lands, nor allow any party/associate related to your original contract or your subcontracts to trespass onto the lands of the project as also described in the original agreement between us.

Furthermore you are hereby given notice that you cannot remove any/NO materials, items, fixtures, building supplies, products or other parts of the project from the building site/project as also set out in the Alberta Lien Act, and you are further given notice that if ANY of the above mentioned items are removed that we shall look to press charges with the local Police and seek whatever legal remedy available to us.

Please govern yourself accordingly

[YOUR NAME]  
[YOUR TITLE]  
[YOUR PHONE NUMBER]  
[YOUREMAIL@YOURCOMPANY.COM]

\_\_\_\_\_, 2020

Contact Name  
Address  
Address2  
City, Province  
Postal Code

**Without Prejudice****OBJECT: DEMAND LETTER TO REMOVE LIEN**

---

**Attention:** [CONTACT NAME],

It has come to our attention that a lien claim or lien's have been registered/recorded on our title, as per the agreement between us this is deemed a major default of that agreement, and due to this a major default, caused by a lien and or lien's being registered on the title of the project that you where contracted to build, you are hereby by given this formal demand to have all such liens removed within \_\_\_\_\_ days, being the rectification period for such default as also set out in the agreement between us. You are further being notified that if such default still exist and said lien and or lien's are still registered on the title after giving you this formal notification letter of default, and if this default is not rectified with in the rectification period of \_\_\_\_\_ days, meaning all lien's removed from the title, as also set out in the agreement between us, then a formal letter of termination will be issued to you, which letter shall then acknowledge said termination as also set out in the construction agreement between us, and at that time the signed construction agreement dated \_\_\_\_\_ 2020 will then be formally canceled and terminated; without further recourse by you. Furthermore, we reserve the right to seek further damages as a court may allow at trial, as also set out in the original agreement between us.

**Please govern yourself according**

[YOUR NAME]  
[YOUR TITLE]  
[YOUR PHONE NUMBER]  
[YOUREMAIL@YOURCOMPANY.COM]

\_\_\_\_\_, 2020

**LETTER OF UNDERSTANDING REGARDING SETTLEMENT OF LIEN  
(THE "LOU")**

---

**Between**

The Owner of the land's described as Lot \_\_\_\_\_, Block \_\_\_\_\_ Plan \_\_\_\_\_, (The "**Owner**")

Contact Name  
Address  
City, Province  
Postal Code

**And**

The Lienholder of instrument # \_\_\_\_\_ (The "**Lienholder**")

Contact Name  
Address  
Address2  
City, Province  
Postal Code

Dear [CONTACT NAME],

This letter of understanding (The "LOU") will confirm that the parties hereto fully understand each others financial and legal positions as they relate to the lien and or lien's recorded on the above mention land, and the parties confirm that we have discussed a settlement offer (The "Offer") and have verbally agreed to the following terms and conditions as set out in this LOU for a discounted settlement amount of: \$ \_\_\_\_\_, \_\_\_\_\_ Dollars being \_\_\_\_\_% settlement of the registered Lien amount for the work and or materials directly related to the recorded lien amount of: \$ \_\_\_\_\_, with a further understanding that if there are any unfinished portions of the original contract between the lienholder and the original prime contractor, that this Offer is conditioned on the lienholder also completing the original contract as originally specified for a fixed amount of \$ \_\_\_\_\_, \_\_\_\_\_ Dollars, representing 100% of cost going forward to cover off the Lienholders cost of finishing the balance of project going forward.

Both parties hereto fully understand that the only available funds will be coming from the construction lending facility of: \_\_\_\_\_ (The "Bank"), and the parties further understand that said Bank financing draws will ONLY be advanced if the entire project has been completed to a minimum of 97% complete as per the Bank's formal letter, copy of which was provide to the Lienholder, furthermore the Bank financing will not be advanced unless ALL liens have been removed/discharged from the project title, by the date of \_\_\_\_\_ 2020 (The "Rectification Period"),

The parties hereto have agreed to an alternate security in exchange of the lienholder's lien removal, being an Assignment of advanced Bank funds, along with a Direction to Pay the Lienholder from said advanced Bank funds, that are to be transferred directly from the Banks solicitors Truss into the designated Trust of: \_\_\_\_\_ Law Firm (The "Law Firm Trust") at the address and contact information of: \_\_\_\_\_ with said Law Firm Trust funds then to be directly advanced to the Lienholder holding the Assignment and Direction upon 97% project completion being approved by the Bank. It is further understood by the parties hereto that the format and structure of the Assignment and Direction to pay shall meet with the approval of the Lienholders solicitors review with any reasonable requested changes.

This LOU is NON Binding until and or unless ALL other lienholders have also agreed to the same terms and conditions set out herein, on a pro rata basis and as also outlined under the Alberta Lien Act. This LOU is further conditioned that all other Lienholders that may have any outstanding work or service to be completed also agree to complete their work/services in accordance with the terms as outline herein.

If for any reason all Lienholders can't come to an agreement then this LOU will become null and void, and the Owner will have no choice but to concede the property to the Bank, after which there may or may not be any funds available after the Bank forecloses on their mortgage security and liquidates the asset, which will then be outside of the Owner's control.

As time is very much an issue in resolving this situation as also set out in the Banks letter provide to lienholders and if this meets with your understanding of our conversation, please sign a copy of this LOU as soon as possible and return it to the Trust lawyer's address listed above. Upon our receipt of this verified LOU, and same from ALL other Lienholders we will then forward all LOU's to our attorneys for final contract drafting and revisions based on your attorneys reasonable requested changes.

It was a pleasure speaking with you and I hope all Lienholders can come to the same understanding that that we have and finish this job to realize the best possible outcome for all concerned. Thank you once again for your understanding of this very difficult situation.

Sincerely,

[YOUR NAME]

[YOUR TITLE]

[YOUR PHONE NUMBER]

[YOUREMAIL@YOURCOMPANY.COM]



**Draft Letter To Bank**

\_\_\_\_\_ 2020

Name of Lender

Contact Name

Address

City, Province

Postal Code

**REQUEST CONFIRMATION OF FUNDING LETTER**

Dear [CONTACT NAME],

As per our previous meetings and conversations would it be possible to confirm the key points and understanding as discussed in our meeting, in particular your confirmation that you lending facility would still agree to advance the balance of the originally agreed to construction funding facility. We understand that you would require that all liens would first need to be removed, as caused by the now terminated prime contractor not paying their bills. We are in the process of negotiating a settlement with all lienholders for their discharge of all liens, however this settlement would only be doable assuming your construction facility would still be available after all liens have been discharged. Please confirm that if we have all liens removed that we would still have access to the remaining facility that has not yet been drawn down.

If you could also make reference to the amount of time available to us to resolve these liens being the rectification period, this would also help us instill upon the lienholders the sense of urgency in resolving this situation.

As a Work-out Plan we plan to use an Assignment of funds and Direction to pay as alternate security for all lienholders, with said assignments and Directions to be managed through the Law Firm of \_\_\_\_\_ Trust Account, please also confirm that this would be acceptable to you and your funding facility. If you could also make reference to the completion of the project, in particular the issue of advancing funds based on the project completion. Our plan is to settle with all lienholders using a discounted settlement formula for work and services already done to date. Then pay a 100% formula (less lien Holdback of 10%) going forward for all new work and services not already completed. This discounted settlement formula is based on the cost to complete attached hereto, and as reviewed by the Firm of:

\_\_\_\_\_

Based on the attached cost to complete, and based on the discounted settlement formula, and using the balance of your funding facility there should be sufficient funds to complete the project, however as further assurance we are prepared to provide additional funds into a separate lawyers trust in the amount of: \$\_\_\_\_\_ as a contingency fund to be held in trust until project completion, if for any reason there is a short fall, these funds could then be used to remedy the short fall.

On a further note, we plan to make the settlement of all liens conditioned to ALL lienholders not only agreeing to the discounted settlement amount, but also further agreeing to complete the project as originally specified as a condition of receiving Assignment funds (See draft LOU to lienholders attached)

Please also make reference to any additional fees or cost that you may foresee in helping us through this transition process.

If the above meets with your approval we have arranged for a new construction Project manager to take-over construction and completion of the project, the name of the proposed project manager is: \_\_\_\_\_ and their contact information is: \_\_\_\_\_, please feel free to contact then directly to ask any questions you may have.

We look forward to working with you through this difficult time with a plan that should resolve this mess in the best interest of all parties involved. Please contact me, or have your solicitor contact our solicitor if you have any questions, I look forward to your letter response to the above points, thank you in advance for working with us in this difficult time.

Sincerely,

[YOUR NAME]

[YOUR TITLE]

[YOUR PHONE NUMBER]

[YOUREMAIL@YOURCOMPANY.COM]

**Cost to complete & Work-out Plan**

	unit type	quant	unit cost	totals	
<b>Exterior work</b>					
Final Grading	per job	1	\$ 5,000.00	\$ 5,000.00	
Finish road way (gravel)	per job	1	\$ 3,000.00	\$ 7,000.00	
Stucco finish coat	per job	1	\$ 13,000.00	\$ 13,000.00	
Exterior entry steps (Treaded wood)	per job	1	\$ 1,200.00	\$ 1,200.00	
Exterior landing trex boards install	per job	1	\$ 180.00	\$ 180.00	
See also septic work				<b>\$ 26,380.00</b>	\$ 26,380.00
<b>Deck / entry landing alum rail</b>					
Post	Per Post	9	\$ 60.00	\$ 540.00	
rail sections 6'	Per unit	9	\$ 49.00	\$ 441.00	
rail sections 8'	Per unit	3	\$ 55.00	\$ 165.00	
Spindle kit 8' section	Per unit	3	\$ 85.00	\$ 255.00	
Spindle kit 6' section	Per unit	9	\$ 65.00	\$ 585.00	
Wall anchor point	Per unit	8	\$ 30.00	\$ 240.00	
Labor to install	Per lin. ft.	95	\$ 15.00	\$ 1,425.00	
				<b>\$ 3,651.00</b>	\$ 3,651.00
See also plumbing septic				<b>Total Exterior work</b>	\$ 30,031.00
<b>Drywall Repairs</b>					
Drywall touch up walls	per board ft.	19000	\$ 0.15	\$ 2,850.00	
Level 5 Paint coating 2 coats	per sq. ft.	3900	\$ 0.40	\$ 1,560.00	
Re-texture knock down	per sq. ft.	3900	\$ 0.40	\$ 1,560.00	
Mud/Tape Garage	per board ft.	2340	\$ 0.60	\$ 1,404.00	
Note: price based on carpet removed	Price if carpet in place		\$ 9,655.00	\$ 7,374.00	\$ 7,374.00
Remove light figures and trim for re-text	per job	1	\$ 250.00	\$ 250.00	\$ 250.00
Note: see also electrical for re-install					
Insulate windows & tuck tape	per window	41	\$ 15.00	\$ 615.00	\$ 615.00
				<b>Total Drywall Repair</b>	\$ 8,239.00
<b>Interior millwork materials</b>					
Big dog quote	per job	1	\$ 7,952.68	\$ 7,952.68	\$ 7,952.68
<b>Interior Railing Materials</b>					
cap rail	lin ft.	30	\$ 4.15	\$ 124.50	
shoe rail	lin ft.	14	\$ 3.25	\$ 45.50	
Post	per post	4	\$ 115.00	\$ 460.00	
				\$ 630.00	\$ 630.00
<b>Railing labor</b>					
Rail post labor	per post	4	\$ 95	\$ 380.00	
Railing Labor floor rail	per lin. Ft.	14	\$ 85	\$ 1,190.00	
Railing Labor stair rail rail	per lin. Ft.	16	\$ 97	\$ 1,552.00	
				\$ 3,122.00	\$ 3,122.00
<b>Build rail for Garage &amp; dog room stair</b>					
2x4 railing	per job	1	\$ 350.00	\$ 350.00	\$ 350.00
<b>Interior Millwork Labor</b>					
Passage doors	per door	31	\$ 100.00	\$ 3,100.00	
Closet doors bi-fold		0	\$ -	\$ -	
Pocket doors		1	\$ 155.00	\$ 155.00	
Windows cased	Per window	41	\$ 25.00	\$ 1,025.00	
Exterior doors / patio doors cased	per door	7	\$ 30.00	\$ 210.00	
Base board	Per sq. ft.	3840	\$ 0.35	\$ 1,344.00	
Attic assess	Per unit	2	\$ 65.00	\$ 130.00	
Closet self's Gables MDF	Per shelf	30	\$ 25.00	\$ 750.00	
Pantry self's Gables Mel	Per shelf	8	\$ 25.00	\$ 200.00	
Fire place mantel MDF (allowance)	Per mantel	2	\$ 350.00	\$ 700.00	
Hardware install	Per unit	45	\$ 5.00	\$ 225.00	
				<b>\$ 7,839.00</b>	\$ 7,839.00
<b>Passage dr / bath Hardware</b>					
Big dog quote	per job	1	\$ 1,655.80	\$ 1,655.80	\$ 1,655.80
				<b>Total Mill Work Trim / Finishing</b>	\$ 21,549.48
<b>CABINETS</b>					
<b>Kitchen Cabinets ONLY</b>					
Lower Kit boxes	Per box	12	\$ 112.00	\$ 1,344.00	
Upper kit boxes	Per box	4	\$ 95.00	\$ 380.00	
Kit wall oven box	Per box	1	\$ 225.00	\$ 225.00	
Kit Labor base rate	Per lin. Ft.	42	\$ 55.00	\$ 2,310.00	
Labor to install Kit cabinet boxes	Per box	17	\$ 35.00	\$ 595.00	
Kit drawers (average cost incl glides)	Per drawer	16	\$ 45.00	\$ 720.00	
Labor to install Kit darawers	Per drawer	16	\$ 25.00	\$ 400.00	
Kit Cab drawer doors / gable panels	per sq ft	155	\$ 9.00	\$ 1,395.00	
labor to install Kit drw / cab doors	Per unit	40	\$ 12.00	\$ 480.00	
Kit hardware allowance	per unit	39	\$ 3.00	\$ 117.00	
				<b>\$ 7,966.00</b>	\$ 7,966.00
<b>Note: Granit counter tops not include in Kit price (see below)</b>					
<b>Laundry Cabinets</b>					
Lower Laundry boxes	Per box	1	\$ 112.00	\$ 112.00	over w/d
Upper Laundry boxes optional	Per box	2	\$ 95.00	\$ 190.00	optinal 190
Laminate counter top	Per lin ft	9	\$ 32.00	\$ 288.00	
Labor base rate	Per lin. Ft.	3	\$ 32.00	\$ 96.00	
Labor to install Laundry cabinet boxes	Per box	1	\$ 35.00	\$ 35.00	70
Laundry Cab drawer doors / gable panels	per sq ft	6	\$ 13.00	\$ 78.00	195
labor to install Laundry drw / cab doors	Per unit	3	\$ 12.00	\$ 36.00	48
Laundry hardware allowance	per unit	3	\$ 3.00	\$ 9.00	12
				<b>\$ 654.00</b>	\$ 654.00
<b>Vanity / art rm / Cabinets</b>					
Lower vanity boxes	Per box	12	\$ 95.00	\$ 1,140.00	
countertops	lin ft.	22	\$ 32.00	\$ 704.00	
Labor base rate	Per lin. Ft.	22	\$ 32.00	\$ 704.00	
Labor to install cabinet boxes	Per box	17	\$ 45.00	\$ 765.00	
drawers (average cost incl glides)	Per drawer	16	\$ 45.00	\$ 720.00	
Labor to install Kit drawers	Per drawer	16	\$ 35.00	\$ 560.00	
Cab drawer doors / gable panels	per sq ft	55.25	\$ 15.00	\$ 828.75	
labor to install Kit drw / cab doors	Per unit	33	\$ 15.00	\$ 495.00	
hardware allowance	per unit	33	\$ 3.00	\$ 99.00	
				<b>\$ 6,015.75</b>	\$ 6,015.75
<b>Note: includes laminate tops for Laundry, vanity, dog &amp; art room</b>				<b>Total cabinets</b>	\$ 14,635.75
<b>Kit Counter Top &amp; Back splash</b>					
Kit Counter tops Granite (allowance)	per sq. ft.	89	\$ 50	\$ 4,450.00	
Kit tile back splash materials (allowance)	per sq. ft.	54	\$ 2	\$ 108.00	
Kit tile back splash labor	per sq. ft.	54	\$ 9	\$ 486.00	
				<b>\$ 5,044.00</b>	\$ 5,044.00

	unit type	quant	unit cost	totals	
<b>Kitchen Pantry (melamine sheffs)</b>					
Materials sheets		4	\$ 38.50	\$	154.00
labor to install per shelf (see labor)		10	\$ 25.00		
				\$	<b>154.00</b>
<b>Kitchen Appliances</b>					
Main Oven	per unit	1	\$ 1,450.00	\$	1,450.00
Convection Micro	per unit	1	\$ 1,230.00	\$	1,230.00
Warming oven	per unit	1	\$ 890.00	\$	1,140.00
Fridge 36"	per unit	1	\$ 2,130.00	\$	2,130.00
Dishwasher	per unit	1	\$ 980.00	\$	1,200.00
wahser dryer				\$	1,200.00
bar fridge				\$	350.00
Cook top	per unit	1	\$ 1,245.00	\$	1,245.00
				\$	<b>9,945.00</b>
<b>Painting (see also drywall repairs)</b>					
Base rate per sq. ft.	per sq. ft.	3840	2.5	\$	9,600.00
Closet self's	per shelf	40	50	\$	2,000.00
Fire place mantel's	per unit	2	275	\$	550.00
Railing (See int railing)	per lin. Ft.	30	25	\$	750.00
<b>Note: Price based on flooring removed</b>	Price if carpet in place		\$ 18,860.00	\$	<b>12,900.00</b>
<b>Carpet work</b>					
Remove already installed Carpet	per hr.	\$ 20.00	\$ 35.00	\$	700.00
Re-install existing Carpet	per hr.	\$ 40.00	\$ 35.00	\$	1,400.00
				\$	<b>2,100.00</b>
<b>Tile work (see also Kitchen)</b>					
Sub floor prep	per sq. ft.	342	\$ 0.50	\$	0.30
Laundry floor	per sq. ft.	84	\$ 2.00	\$	8.00
Laundry back splash	per sq. ft.	22	\$ 2.00	\$	8.00
Mud room floor	per sq. ft.	156	\$ 2.00	\$	8.00
mud room back splash	per sq. ft.	6	\$ 2.00	\$	8.00
Master bath floor	per sq. ft.	102	\$ 2.00	\$	8.00
Master shower base EPDM /concrete	per job	1	\$ 150.00	\$	160.00
Master shower base tile	per sq. ft.	12	\$ 4.00	\$	10.00
Master shower walls (see also glass)	per sq. ft.	70	\$ 2.00	\$	8.00
fix bench area master shower	per job	1	\$ -	\$	150.00
Main lower bath floor	per sq. ft.	40	\$ 2.00	\$	8.00
Main lower bath walls	per sq. ft.	90	\$ 2.00	\$	8.00
<b>Note: does not include heated tile fl add \$4.00 per sq. ft. + Therm control</b>				<b>Total Tile</b>	<b>\$ 6,601.60</b>
<b>MECANICAL FIANALS</b>					
<b>Electrical final</b>					
counter plugs + (move plugs)	per job	1	\$ 420.00	\$	420.00
Light fixture install	per job	1	\$ 450.00	\$	450.00
Appliance hook up	per job	1	\$ 650.00	\$	650.00
Re-install l-fixtures & Trim (see drywall)	per job	1	\$ 250.00	\$	250.00
Water system hook-up	per job	1	\$ 450.00	\$	450.00
Septic system hook-up	per job	1	\$ 1,250.00	\$	1,250.00
Final the panel	per job	1	\$ 275.00	\$	275.00
Temp water heater hook-up	per job	1	\$ 250.00	\$	250.00
				\$	<b>3,995.00</b>
<b>Plumbing &amp; Heating</b>					
Plumbing final	per job	1	\$ 9,534.25	\$	9,534.25
Hot water heating final	per job	1	\$ 13,084.00	\$	13,084.00
Well & pressure system final	per job	1	\$ 7,045.00	\$	7,045.00
Forced air heating final	per job	1	\$ 682.24	\$	682.24
				\$	<b>30,345.49</b>
<b>Septic Tank &amp; Field final</b>					
Vacuum Final			\$ 14,905.24	\$	<b>14,905.24</b>
Out lets	per unit	6	\$ 25.00	\$	150.00
Vac Machine	per unit	1	\$ 480.00	\$	480.00
				\$	<b>630.00</b>
<b>Fire Place final</b>					
				\$	<b>350.00</b>
<b>Mirrors / glass</b>					
Vanity mirrors	per vanity	3	\$ 225.00	\$	675.00
Shower enclosure	per unit	1	\$ 700.00	\$	700.00
				\$	<b>1,375.00</b>
<b>Construction clean</b>					
Other /contingency 10%				\$	450.00
				\$	<b>13,000</b>
<b>Total Hard cost to complete</b>					
					<b>5%</b>

Builder / contractor normal mark-up 12% \$ - the above is a cost to complete budget only and not a quote

Billing out-standing / owed		Totals not incl G:	
Plumbing / Heating excavation		\$	38,678.99
Electrical		\$	4,600.00
gutter		\$	3,300.00
Garbage Bin's		\$	2,500.00
		\$	<b>49,078.99</b>
		\$	2,453.95
		\$	<b>51,532.94</b>

Funds available towards cost to complete				total of	
Existing Trust fi	Final Draw	Hold back	final & h-back		
\$ 60,000.00	\$ 112,500.00	\$ 55,000.00	\$ 167,500.00		
\$ (45,000.00)	\$ (174,621.00)	\$ (123,654.00)		Cost to complete	
\$ (9,000.00)	\$ (51,533.00)			outstanding bills	
\$ (10,000.00)	\$ (10,000.00)				
\$ (4,000.00)	\$ (123,654.00)	\$ (68,654.00)		Short fall	
		\$ 25,766.47	50%	Discount liens	
net		\$ (42,887.53)			
		\$ -		Do later cost	
net		\$ (42,887.53)			
		\$ -		Pay later cost postponed	
		\$ (42,887.53)		Total Net amount	