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COURT ESTABLISHES SIGNIFICANT COSTS CONSEQUENCES FOR WRONGFULLY FILED BUILDERS LIENS

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A builder's lien is a powerful tool available to contractors to secure payment for work done or materials supplied to an owner's land. However, there are strict pre-conditions in the *Builders Lien Act* (the "BLA") that must be satisfied for a contractor to be entitled to a lien. A recent decision from the Supreme Court of British Columbia has established significant cost implications for lien claimants that fail to satisfy those pre-conditions.

Section 19 of the BLA creates a statutory right of recovery for costs and damages incurred by a landowner in circumstances where a claim of lien is improperly filed:

A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

However, the BLA is silent regarding the extent of, or the method of calculating, the costs and damages that are recoverable. The jurisprudence to date under s.19 similarly provided little guidance to would-be lien claimants and owners.

In *Century Group GP Co. Ltd. v KRS Excavating Ltd.*, 2022 BCSC 357 [*Century Group*], the Court considered the question as a matter of first instance in a summary trial application against a lien claimant who had been found to have registered a lien out of time. The owner had expended significant amounts of money to initially discharge and secure the claim of lien (by way of letter of credit) and on legal fees to establish that the claim of lien did not attach to the land.

In its summary trial application, the landowner advanced a claim for both the expenses incurred to secure the letter of credit and the actual legal fees incurred both to negotiate the security and establish that the lien was invalidly filed. The lien claimant argued that only party-and-party costs were recoverable by the landowner under s.19; a cost award that is assessed under the *Supreme Court Civil Rules* and inevitably significantly less than the actual legal fees paid.

In finding for the landowner, the Court found that legal expenses were clearly included within the term





“costs” in s. 19 of the BLA. The Court interpreted those “costs” as comprising two categories:

1. legal expenses incurred for releasing and replacing the lien, including expenses incurred in the investigation of the lien, the facts and law relevant to it, advising the client contemplating the discharge of the lien, and possibly including negotiating replacement security; and
2. legal expenses incurred in the legal proceedings taken to challenge the lien, which in this case included a court application to have the lien declared invalid and the within application under s.19 of the BLA.

The Court determined the actual reasonable legal expenses incurred under the first category of costs were recoverable on an indemnity basis, but those falling within the second category were to be assessed under the *Supreme Court Civil Rules*. In support of its analysis, the Court drew an analogy to the jurisprudence developed under BC’s environmental legislation where the court had distinguished between “remediation legal costs” and “litigation legal costs”. The Court likened the first category of “lien investigation/removal costs” to “remediation legal costs” which courts had found to be recoverable on an indemnity basis.

The Court also found that under s.19 the owner can recover any out-of-pocket ‘costs’ or other damages arising from the wrongful filing of the lien, which in this case included the costs related to the letter of credit which was initially posted by the owner as security for removing the lien from title to its property.

There are some important takeaways from *Century Group* for contractors and owners to consider when deciding to file or challenge a claim of lien, most notably the following potential cost consequences:

1. an owner who successfully challenges a wrongfully filed lien is entitled to recover its reasonable out-of-pocket legal expenses incurred in investigating and removing the lien before the commencement of litigation;
2. the owner is entitled to recover legal expenses incurred during the legal proceedings taken to challenge a lien, but those costs are to be assessed according to the *Supreme Court Civil Rules*, and will generally be on a party-and-party basis; and
3. the owner is entitled to recover damages for financial losses caused by the wrongful filing of the lien.

For lien claimants, it is important to note that these costs consequences flow from any lien that is found to have been improperly filed, regardless of whether the lien claimant believed at the time of filing the statutory pre-conditions were met. Accordingly, contractors and their legal counsel should take special care to ensure those pre-conditions are satisfied before filing a lien. Conversely, owners and their legal counsel should take time at the earliest possible stage to assess and determine the validity of a lien as most up-front legal expenses incurred will be recoverable if the lien is later found to have been improperly filed.





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Century Group is a reminder of the importance of seeking timely legal advice in the context of any builders lien claim. For further information relating to claims of lien, or any other issues relating to construction projects, please feel free to contact Insurance lawyer, Ryan Shaw.



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