



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lisa M. Wight and the Professional Standards (Real Estate) Committee

Date: April 24, 2026

Subject: Professional Standards (Real Estate) Standard 3.18 – Builders' Liens

For: **Approval** **Introduction** **X** **Information**

DATE April 24, 2026	Council	Introduction
	Council	Approval

Recommendation/Motion:

Be it resolved that Council approves the recommendation that Real Estate Standard 3.18 be published for member feedback following the usual procedure.

Executive Summary:

This is the introduction to Council of a revised Standard 3.18 Builders' Liens– by the Professional Standards (Real Estate) Committee. This standard has been sent to the Equity Committee for review and comment in accordance with the Society's Equity Lens Application in Policy Development guideline, their comment to include the impact on federal reserve lands was included. Following introduction to Council, the standard will be circulated to the membership for review and consultation. The RESC will review any comments received by members and any further comments from the Equity Committee, and then present the final form, amended if necessary, to Council for approval. An equity lens was applied while revising this standard.

One of the Committee's mandates is to review and update existing standards as appropriate and necessary so that they align with current practice. After review, the Committee determined that the standard was outdated and required revisions.

Exhibit:

Standard 3.18 Builders' Liens - with rationale for the revisions.

Builders' Lien Standard – RESC Standard 3.18

Existing Standard	Proposed Standard	Rationale
<p>3.18 BUILDERS' LIEN</p> <p>STANDARD</p> <p>A lawyer who acts in a transaction must consider the applicability of the Builders' Lien Act¹ with particular emphasis on the hold back provisions, and advise the client accordingly.</p> <p>A lawyer must check for any undischarged liens and certificates of <i>lis pendens</i> filed relating to the parcel.</p> <p>A lawyer who vacates a lien for which no <i>lis pendens</i> has been filed, but for which a lawyer has determined that the lien has ceased to exist pursuant to legislation or common law, should take the necessary steps to have the lien removed from the parcel register at the appropriate land registration office. A lawyer who vacates a claim for lien for which a certificate of <i>lis pendens</i> has been filed must ensure a court order is obtained and recorded to remove the <i>lis pendens</i> from the parcel register.</p>	<p>3.18 BUILDERS' LIEN</p> <p>STANDARD</p> <p><u>LITIGATION MATTERS</u></p> <p>1. <u>Acting for Parties Who May Be Subject to Lien Claims</u></p> <p>A lawyer who acts in a transaction must consider the applicability of the <i>Builders' Lien Act</i>¹ (“<i>Act</i>”), including the holdback provisions, and advise the client accordingly.</p> <p>When migrating a property or signing a certificate of legal effect, a lawyer must check for any undischarged liens and certificates of <i>lis pendens</i> filed relating to the parcel that is subject to the lien claim.</p> <p>A. <u>No Certificate of <i>Lis Pendens</i> registered</u></p> <p>Where no certificate of <i>lis pendens</i> is registered and the lawyer determines that the right to register a lien has ceased to exist under the <i>Act</i>, the lawyer should take the necessary steps to have the claim for lien removed from the parcel register at the appropriate land registration office. Where possible, the lawyer should contact the lien claimant and request the removal of claim for lien by consent; however, the same is not</p>	<p>The Committee determined that it would be prudent to update the Builders' Lien Standard to better align with current practice, case law and legislation. The Revised Standard is intended to provide guidance and assistance to lawyers.</p>

¹ [Builders' Lien Act](#), R.S.N.S. 1989, c. 277

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FOOTNOTES

1. [Builders' Lien Act](#), R.S.N.S. 1989, c. 277

ADDITIONAL RESOURCES

- [Land Registration Act](#), S.N.S. 2001, c. 6 – “lien” defined: s. 3(1)(i) – interest may be recorded: s. 47(1) – certificate of *lis pendens* expires [“may be removed”] after five years: s. 58(2)(d) – filing lien under [Registry Act](#), R.S.N.S. 1989, c. 392 has no effect on migrated parcel: s. 70
- John Kulik / “[Liening in a New Direction: Recent Amendments and Case Law on Construction Liens](#)” (January 28, 2005).

PRACTICE NOTE

The [Builders' Lien Act](#) requires the person primarily liable on the contract to holdback 10% of the value of the contract price or actual value of work, service, and/or materials provided.

When construction or renovation is being carried out, a lawyer has an obligation to advise the client of the holdback provisions under the Act.

required if the lawyer determines on the contested facts that the removal is appropriate in the circumstances.

Certificate of *Lis Pendens* registered

Where a certificate of *lis pendens* is registered, a lawyer seeking to vacate the lien must ensure a court order is obtained and recorded at the appropriate land registration office in order to remove the *lis pendens* from the parcel register.

2. Acting for Lien Claimants

A lawyer who acts for a lien claimant must consider the applicability of the *Act* with particular emphasis on the deadlines for registration and notice requirements relating to claims for lien and certificates of *lis pendens*, and advise the lien claimant accordingly.

TRANSACTIONAL MATTERS

3. Acting for a purchaser of property which may be subject to Lien Claims

A lawyer who acts for a purchaser of property must consider the applicability of the *Act* with particular emphasis on the deadlines for registration and the terms of any agreement of purchase and sale between their client and the vendor.

Subject to the terms of any agreement of purchase and sale², if the property being purchased is newly constructed or has been subject to construction work, a lawyer acting for the purchaser should do the

² While parties cannot contract out of the *Act*, some agreements of purchase and sale provide for the provision of title insurance in lieu of maintaining a lieu holdback.

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<p><u>Agreements of Purchase and Sale</u></p> <p>(i) For the purchase of a new construction home, where the Buyer purchases both the land and home on the closing date from the Seller/Builder, the person primarily liable would be the Seller.</p> <p>Where lawyers are involved in the transaction, the usual practice is for the Seller's lawyer to retain the holdback for the required period. The Buyer is protected when the Seller's lawyer retains the holdback.</p> <p>Where no lawyer is retained by the Seller (which is unusual), the Buyer or the Buyer's lawyer would retain the holdback.</p> <p>Where the work is ongoing or substantial performance of the work occurred less than 60 days before the closing date, the holdback will be required.</p> <p><u>Construction Contracts and Renovations</u></p> <p>(ii) The Builders' Lien Act also extends the liability to a person who has any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished. When a land owner contracts with a Builder to construct or renovate a home on the land, the person primarily liable will be the owner</p>	<p>following: (1) undertake searches for liens filed against the property; (2) take steps to obtain the date of substantial performance of the construction work; (3) insist that a lien holdback be maintained for a period of 61 days from the date of substantial performance; and (4) if the date of substantial performance is exceeded and work remains incomplete, consider whether a "finishing" holdback should be maintained.</p> <p>4. <u>Acting for a vendor of property which may be subject to Lien Claims</u></p> <p>A lawyer who acts for a vendor of property must consider the applicability of the <i>Act</i> with particular emphasis on the deadlines for registration and the terms of any agreement of purchase and sale between their client and the purchaser.</p> <p>Subject to the terms of any agreement of purchase and sale³, if the property being sold is newly constructed or has been subject to construction work, a lawyer acting for the vendor should do the following: (1) take steps to obtain the date of substantial performance of the construction work; (2) undertake to maintain a lien holdback be maintained for a period of 61 days from the date of substantial performance; (3) if the date of substantial performance is exceeded and work remains incomplete, consider whether a "finishing" holdback should be maintained.</p> <p>5. <u>Acting for a mortgagee of property which may be subject to Lien Claims</u></p> <p>A lawyer who acts for a mortgagee of property must</p>	
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³ While parties cannot contract out of the *Act*, some agreements of purchase and sale provide for the provision of title insurance in lieu of maintaining a lien holdback.

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<p>of the land.</p> <p>In the case of a contract with progressive draws to a builder, the holdback is deducted each time a payment is made. The accumulated holdback amounts are held for a period of 60 days after the work has been substantially performed. In most custom built home contracts, the owner's solicitor will retain the holdback, unless the contract specifies otherwise.</p> <p>In the majority of transactions, there will be a lender involved. Lawyers must consider the applicability of the <i>Builders' Lien Act</i> when dealing with lenders and how the holdback provisions of the <i>Builders' Lien Act</i> apply.</p> <p>A lawyer must follow the lender's instructions if they specifically direct that a holdback must be maintained.</p> <p>Amended by Council on July 19, 2013</p>	<p>consider the applicability of the <i>Act</i> with particular emphasis on the deadlines for registration and the terms of any financing\loan arrangements between their client and the property owner and\or builder.</p> <p>Subject to the terms of any construction agreement⁴, if the property being mortgaged is newly constructed or has been subject to substantial construction work, a lawyer acting for the mortgagee should do the following:</p> <ol style="list-style-type: none">(1) determine whether the mortgagee's instruction require the maintenance of a lien holdback;⁵(2) if the mortgagee's instructions require the maintenance of a lien holdback, do the following:<ol style="list-style-type: none">a. take steps to obtain the date of substantial performance of the construction work;b. ensure a lien holdback is maintained for a period of 61 days from the date of substantial performance;c. if the date of substantial performance is exceeded and work remains incomplete, consider whether a "finishing" holdback should be maintained.	
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⁴ Some construction agreements provide for no lien holdbacks as between the owner and general contractor. It is advisable for the risk of subcontractor claims to be brought to the client's attention and for the lawyer to recommend that the client undertake steps to mitigate risk of breaches of the *Act* (i.e. obtaining statutory declarations from general contractor respecting payment of subcontractors, independent review of general contractor billing, etc.)

⁵ In cases where the property's owner is also the "general contractor" for the project, there may be less compelling reasons to maintain a lien holdback. In those instances, some lenders will not require a lien holdback and will focus on ensuring that all sub-trades have been paid prior to the advancement of funds.

PRACTICE NOTE

LITIGATION PROCEEDINGS

Acting for Parties Who May Be Subject to Lien Claims

The *Act* requires the person primarily liable on the contract to holdback ten percent (10%) of the value of the work, service and materials actually done, placed or furnished as mentioned in Section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.⁶

Whenever construction is being carried out on a property and advice is sought, a lawyer should make the client aware of the holdback provisions under the *Act* and the risks of failing to maintain holdbacks under the *Act*.

Substantial performance under the *Act* or substantial completion means:

(a) when the work or improvement is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than two and one-half percent of the contract price.

In practice, for residential property, the date of

⁶ Ibid, Section 13(2).

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	<p>substantial performance is generally determined based on the issuance date of a passed final inspection report; however, for a commercial construction project, a lawyer may consider other resources for determining this threshold.⁷</p> <p>Beyond typical claims by subtrades, parties should be aware that claims can also be made under the <i>Act</i> with respect to a wage earner's 30 days of unpaid wages on a project.⁸</p> <p><u>Turn Key New Home Construction</u></p> <p>For the purchase of a new home construction (including the transfer of land), the person primarily liable under the <i>Act</i> will in most instances be the vendor\builder.</p> <p>Where lawyers are involved in the transaction, the usual practice is to obtain an undertaking from the vendor's lawyer to retain the holdback for the required period. A more recent alternative to maintaining lien holdbacks is title insurance.</p> <p>By proceeding this way, the purchaser is protected from liability for potential lien claims by having the vendor's lawyer retaining the holdback for the required period. If the builder or property owner purchased the land, it is common to deduct the value of land from the contract price prior to calculating the lien holdback amount.</p>	
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⁷ As an example, the Construction Association of Nova Scotia maintains a website (www. Substantialperformance.com"). It is also possible for project managers, architects or project consultants to specify dates of substantial completion for specific subcontract work – see Sections 13A and 13B of the *Act*.

⁸ See Section 16 of the *Act*.

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	<p>Where a vendor is unrepresented and there is evidence of recent construction work, the purchaser's lawyer should recommend to their client that any holdback be maintained by the purchaser's lawyer.</p> <p>Where work remains incomplete at the time of substantial performance of the work, a holdback based on ten percent (10%) of the price of the remaining services or materials as they are actually supplied under the contract, until all liens that may be claimed against the holdback have expired or have been satisfied, discharged or vacated.⁹</p> <p><u>Construction Contracts and Renovations</u></p> <p>The <i>Act</i> also extends the liability to a person who has any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished. When a landowner contracts with a builder to construct or renovate a home on the land, the person primarily liable under the <i>Act</i> will be the property owner. Parties cannot contract out of the <i>Act</i> and, regardless of contractual arrangements, a property owner will remain liable for lien claim.</p> <p>In the case of a mortgage with progressive draws, the practice is to withhold ten percent (10%) each time a draw is made. In calculating the holdback on any draw, it is appropriate to take into account any funds directly paid by the owner to the builder inclusive of the deposit. The accumulated holdback amounts are held for a period of 60 days after the work has been substantially performed.</p>	
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⁹ Ibid, Section 13(3).

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	<p>For most construction contracts or renovation projects, the owner's lawyer will retain the entire holdback until substantial completion is achieved on the project, unless the contract specifies otherwise; however, as noted below, lawyers should ensure that the contractual provisions do not contravene an owner's mortgage terms.</p> <p>In most transactions, there will be a lender involved. Lawyers must consider the applicability of the <i>Act</i> when dealing with lenders. Where the lender's security is registered prior to the registration of a lien claim, the security will have priority up to the amount advanced at the time the lien claim is filed. Subsequent advances may not be afforded the same priority and, for that reason, most lenders will insist on the discharge of lien claims prior to the disbursement of funds.¹⁰</p> <p>A lawyer must follow the lender's instructions if they specifically directed that a holdback is to be maintained. If the lender's instructions are ambiguous concerning the maintenance of a lien holdback, it is prudent for a lawyer to seek clarification.</p> <p><u>Large construction projects</u></p> <p>On large construction projects, it is possible for a lien holdback for specific subcontract work to be released prior to substantial completion of the project if the subcontract work is certified complete in accordance with Sections 13A and 13B of the <i>Act</i>.</p>	
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¹⁰ See Section 15 of the *Act*.

	<p><u>Acting for Lien Claimants and Defendants to Lien Claims</u></p> <p>When acting for a lien claimant or defendant to a lien claim, the lawyer should consider whether the claim for which a lien is sought to be registered constitutes an “improvement” or otherwise is otherwise a claim recognized under the <i>Act</i>. As an example, Nova Scotia’s jurisprudence has held that certain activities (i.e. snow removal, landscaping etc.) do not constitute an “improvement” to a property in accordance with the <i>Act</i>.</p> <p>In order to have a valid lien, a claim for lien must be registered within sixty (60) days of the last day of work. In order to perfect a lien, a <i>lis pendens</i> must be registered within the range of ninety (90) and one hundred of five (105) days of the last day of work.</p> <p>Generally, a lien action must be prosecuted within the time period provided for actions in Supreme Court. Counsel should be cognizant of the risk of losing a valid lien claim if an action is dismissed for want of prosecution¹¹ or removed by operation of statute¹².</p> <p>A lawyer acting for a lien claimant should consider whether the claim can be advanced in light of the</p>	
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¹¹ In *JPA Construction Limited v. Saad*, 2024 NSSC 409, the Court held that an 18 month delay in advancing the litigation constituted inexcusable and justified vacating the lien.

¹² Counsel should be aware that, pursuant to Section 58(2)(d) of the *Land Registration Act*, a certificate of *lis pendens* expires five years after it has been recorded. This occurs without regard to the status of the underlying litigation. The language of the *Land Registration Act* implies that it may be permissible to apply to “continue” a certificate of *lis pendens*.

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	<p>nature and owner of the property. Subject to any statutory exceptions¹³, most jurisprudence has consistently held that federal land (inclusive of aboriginal lands¹⁴) cannot be liened; however, with respect to reserve land, a leasehold interest cannot be liened. Similarly, the <i>Act</i> does not allow a lien claim to attach to provincial crown lands; however, a leasehold interest located thereon cannot be liened. Where Provincial Crown is the owner of the land, a lien holdback charge arises as a matter of law without the requirement for registration.¹⁵ A proceeding against the Provincial Crown also requires compliance with the <i>Proceeding Against the Crown Act</i>.¹⁶ In lieu of lien claims, on many projects on federal and provincial crown land, there will be payment bonds, holdback accounts and other mechanisms to bring claims for unpaid work.</p> <p>A lawyer acting for a lien claimant should consider whether there can be additional claims and additional defendants to the proceeding arising from breaches or non-compliance with the trust provisions of the <i>Act</i>.¹⁷</p> <p>A lawyer acting for a defendant to a lien claim should consider their client's risk of liability, especially personal liability for directors, officers and key employees of corporate entities, arising from breaches or non-compliance with the trust provisions of the <i>Act</i>.¹⁸</p>	
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¹³ See text by Douglas N. Macklenm & David I Bristow, *Construction Builders' and Mechanics' Liens in Canada*, Sixth Edition, Chapter 2- Lienable Interest (Scarborough: Carswell, 1990).

¹⁴ See Sections 89(1) and 89(2) of the *Indian Act*, R.S.C. 1986, C. I-5.

¹⁵ See Section 3 and 13 of the *Act*.

¹⁶ See Section 3(7).

¹⁷ See Sections 44B, 44C and 44G of the *Act*.

¹⁸ See Sections 44B, 44C and 44G of the *Act*.

ADDITIONAL RESOURCES

- [Land Registration Act](#), S.N.S. 2001, c. 6 - “lien” defined: s. 3(1)(i) - interest may be recorded: s. 47(1) - certificate of *lis pendens* expires [“may be removed”] after five years: s. 58(2)(d) - filing lien under [Registry Act](#), R.S.N.S. 1989, c. 392 has no effect on migrated parcel: s. 70
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FOOTNOTES

¹ [Builders' Lien Act](#), R.S.N.S. 1989, c. 277

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⁵ In cases where the property’s owner is also the “general contractor” for the project, there may be less compelling reasons to maintain a lien holdback. In those instances, some lenders will not require a lien holdback and will focus on ensuring that all sub-trades have been paid prior to the advancement of funds.

⁶ *Ibid*, Section 13(2).

⁷ As an example, the Construction Association of Nova Scotia maintains a website ([www. Substantialperformance.com](http://www.Substantialperformance.com)). It is also possible for project managers, architects or project

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	<p>consultants to specify dates of substantial completion for specific subcontract work – see Sections 13A and 13B of the <i>Act</i>.</p> <p>⁸ See Section 16 of the <i>Act</i>.</p> <p>⁹ Ibid, Section 13(3).</p> <p>¹⁰ See Section 15 of the <i>Act</i>.</p> <p>¹¹ In <i>JPA Construction Limited v. Saad</i>, 2024 NSSC 409, the Court held that a 18 month delay in advancing the litigation constituted inexcusable and justified vacating the lien.</p> <p>¹² Counsel should be aware that, pursuant to Section 58(2)(d) of the <i>Land Registration Act</i>, a certificate of <i>lis pendens</i> expires five years after it has been recorded. This occurs without regard to the status of the underlying litigation. The language of the <i>Land Registration Act</i> implies that it may be permissible to apply to “continue” a certificate of <i>lis pendens</i>.</p> <p>¹³ See text by Douglas N. Macklenm & David I Bristow, <i>Construction Builders’ and Mechanics’ Liens in Canada</i>, Sixth Edition, Chapter 2- Lienable Interest (Scarborough: Carswell, 1990).</p> <p>¹⁴ See Sections 89(1) and 89(2) of the <i>Indian Act</i>, R.S.C. 1986, C. I-5.</p> <p>¹⁵ See Section 3 and 13 of the <i>Act</i>.</p> <p>¹⁶ See Section 3(7).</p> <p>¹⁷ See Sections 44B, 44C and 44G of the <i>Act</i>.</p> <p>¹⁸ See Sections 44B, 44C and 44G of the <i>Act</i>.</p>	