

# BUILDERS LIENS

## POSTING SECURITY FOR A LOWER AMOUNT THAN THE AMOUNT CLAIMED



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On September 22, 2008, the British Columbia Court of Appeal in the decision of *Q West Van Homes Inc. v Fran-Car Aluminum Inc.* dealt with the discretion granted to the Court under s.24 of the *Builders Lien Act* to order cancellation of a lien upon posting security for an amount less than the amount claimed.

Once a claim of lien has been filed on a construction project it has the effect of interrupting the flow of money from the lender to the owner, from the owner to the contractor, the contractor to the subcontractor and the subcontractor to the supplier. In order to get the money flowing again, an application to post security is brought by the owner or the contractor under s. 24 of the *Builders Lien Act*. The usual practice which developed before the Courts involved payment of the face amount of lien plus 10% to 15% as security for legal costs into Court and the lien is cancelled from title. The money would then be held as security pending resolution of the dispute years. Recently, there have been a series of cases where another application is made shortly afterwards to reduce the amount of the security which was initially paid into Court. This second application requires the Court to scrutinize the evidentiary basis for the lien

The Court of Appeal reviewed a number of the authorities and crafted a framework under which applications under s. 24 of the *Builders Lien Act* should be considered. The Court of Appeal held there is a two prong test. The first was to determine what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate.

In summary, the Court must:

- (a) look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a prima facie case will suffice;
- (b) any claims that are not sustainable will not be considered in fixing the appropriate amount of security;
- (c) looking at the evidence as a whole, the judge has a discretion in fixing the amount that is appropriate security;
- (d) that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced; and
- (e) the amount of security may be less than the amount claimed under the lien.

The implication of this decision is twofold. Firstly, if you are able to post security for a lower amount than the amount claimed you are able to effectively eliminate a portion of a lien without incurring the expense of a Supreme Court trial. Secondly, as a lien claimant it is imperative that you document your underlying evidence to ensure that when your claim is scrutinized that it can be classified for one for the “price of work and material”.

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