

# POINT COUNTER POINT

With Norm Streu & Chris Hirst



## Determining the price of the work

**W**hat amounts can you lien for? Like many Builders Lien Act questions, the answer is not as straightforward as it may first appear.

The Act provides that a contractor, subcontractor, or worker who performs, provides, or supplies work and materials in relation to an improvement has a lien for the price of the work and material.

The calculation of the enforceable amount of a claim of lien requires a calculation of the total price to which a claimant is entitled less amounts paid. But, what constitutes the price?

Non controversial components of the price include:

- unpaid invoices, progress claims, and holdback, and the price of any and all work performed but not paid for;
- taxes including PST and GST; and
- legitimate claims for extra work.

More controversial components of the price include overhead charges, administrative costs, and profit.

Courts have allowed all of these where such amounts can be established to be directly connected to the actual work and therefore can be considered to

have contributed to the improvement.

At one time it was thought that damages for breach of contract were not lienable. The argument for excluding damage claims from the lien was that damages did not relate to the price of the work or material and therefore contributed nothing to the value of the improvement.

Courts are taking a more nuanced approach to this issue and where a damage claim can more properly be considered to form part of the work performed or provided or material supplied or are so closely connected to them, the courts have found such claims to be properly lienable.

Of note in this regard is that the courts have found that damages for delay can properly form part of the lien amount.

Components of the price which can not be liened include contractual or court ordered interest, the prospective profit on work taken away from the lien claimant, financing costs, and the prospective profits on other work the claimant could have obtained.

Where there is no contract and therefore no "price", a lien can still be main-

tained on the basis of quantum meruit.

That Latin phrase simply means "as much as one deserves".

This is a legal doctrine which implies a promise to pay a reasonable amount for services, even where a specific contractual entitlement may be absent.

Ultimately, where there is some question as to whether an amount is properly lienable or not, most lien claimants will include the amount in the lien.

However, there are penalties in the Act for exaggerated or frivolous liens.

Accordingly, where there is significant uncertainty as to whether certain amounts intended to be claimed are properly lienable or not, a lien claimant should consult their lawyer as to the amounts intended to be claimed.

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