

DISCUSSION PAPER

1. TITLE

Contractor Liability/Statutory Lien

2. ISSUE

The *Workers Compensation Act* (“*Act*”) provides that when a contractor employs a subcontractor, the contractor could be liable to WorkSafeBC (“WCB”) for insurance premiums owing in connection with the work or service being performed on the contractor’s behalf.¹ The *Act* also provides that a buyer purchasing business assets of a seller could also be liable for insurance premiums in connection with the seller’s business.²

To protect contractors and buyers from potential liability, the WCB has developed a clearance system which enables anyone to request a clearance letter from the Assessment Department prior to hiring subcontractors or purchasing assets. The clearance letter sets out whether a subcontractor is complying with the registration and payment requirements of the *Act*.

Currently, a clearance letter is valid until the clearance date, which is the date of the employer’s last payment. This is also the date to which the WCB will not transfer liability. The Assessment Department is in the process of developing a pre-clearance system to protect against contractor liability which will allow it to provide a clearance date in the future for qualified subcontractors.

In developing the pre-clearance system, the Assessment Department identified that policy should clearly set out the obligations of a contractor to pay any outstanding assessment premiums owed by a subcontractor if the WCB cannot collect from the subcontractor. It was also noted that policy currently does not set out the function of clearance letters and the importance of the clearance date. Accordingly, the Assessment Department has requested that the Policy and Research Division (“PRD”) review the policies in this area.

At issue is a review of the policies to consider whether changes are required to clarify the function of clearance letters and the importance of the clearance date.

¹ Section 51 of the *Act*.

² Section 52 of the *Act*.

3. BACKGROUND

3.1 Law and Policy

(a) Contractor Liability

The *Act* allows the WCB to transfer liability for unpaid assessments to contractors when a subcontractor fails to pay assessments owing to the WCB in connection with the work or service being performed on the contractor's behalf.

The WCB policy on contractor liability³ describes how persons, wishing to protect themselves from liability for subcontractor firms, can obtain a clearance letter from the WCB which sets out the account status of a subcontractor. The policy extends the application of clearance letters to statutory lien liability as well.

The policy also states that a clearance letter advises whether:

- an employer is registered with the WCB;
- there are assessments owing;
- remittances have been paid up to the end of the latest period for which they are required;
- the account is cancelled and there are assessments owing, including the cancellation date; and
- the employer has only recently been registered and is not required to remit.

(b) Statutory Liens

The *Act* provides that, in a situation where an employer does not pay assessment premiums or other accounts as required, the WCB has the authority to place a statutory lien in favour of itself in respect of the unpaid amount. Such a lien may attach to the employer's property, or to proceeds arising from the sale of the employer's property, which was used in, or produced in the industry for which the assessment arose. The lien may attach regardless of whether the property has been sold to a third party buyer.

The WCB policy on statutory liens⁴ does not reference clearances directly but states that the WCB "will not hold third parties responsible if they ... made a reasonable attempt to ascertain the financial obligations of the debtor firm before obtaining their property". In practice, the WCB uses clearances as evidence of a "reasonable attempt to ascertain the financial obligations of the debtor firm".

³ Policy item AP1-51-1 *Contractor Liability* of the *Assessment Manual*.

⁴ Policy item AP1-52-1 *Statutory Lien* of the *Assessment Manual*.

3.2 Overview of Current Clearance System

The Assessment Department operates under a post-paid system with payments being applied to insurance for past periods. Accordingly, clearance letters provide clearance dates for payments up to and including a prior annual or quarterly reporting period. The exceptions to this rule are firms that have prepaid their premiums or pay their premiums by installment.

The Assessment Department issues over 300,000 contractor liability clearances for 500,000 clearance subject requests online each year, mostly to firms in the construction and transportation industries.⁵ Applicants obtain contractor liability clearances either by fax or online by accessing the WCB website and printing a clearance letter for their records.

Clearances to protect against statutory liens are requested less often, generally when a buyer is purchasing the assets of a business. Statutory lien clearances may be requested by phone or fax, separately from contractor liability clearances.

3.3 The Assessment Operating Strategy – Pre-clearance Project

The Assessment Operating Strategy (“AOS”) is an integrated set of projects designed to meet the service goals of the Worker and Employer Services Division. As part of the AOS, the Assessment Department is modifying their current clearance practice by introducing a new pre-clearance system. Under this new system, a contractor will have clearance until the end of the current quarter, providing them with more protection.

4. DISCUSSION

4.1 Contractor Liability

Currently, the Contractor Liability policy does not set out the function of the clearance system nor does it explain the importance of the clearance date. The clearance system allows individuals to protect themselves from liability by exercising their due diligence in requesting clearance letters from the WCB. The clearance letter sets out the clearance date, which is the date to which the WCB will not consider transferring an assessment of liability from a registered subcontractor or contractor to the requestor.

The present policy directs that a clearance letter set out the date of the employer’s last remittance payment. Given that the pre-clearance system will result in a separate clearance date, it is important to note that the clearance date will not necessarily be the same date as the date to which the employer has made its last payment. Revising the

⁵ The clearance system allows an applicant to conduct multiple searches of subcontractors at one time, which is why there is a difference between the number of clearance letters and clearance subjects. Many firms obtain quarterly clearances on their subcontractors, which is why the number of clearance subjects is so high.

policy to include the function of the clearance system and the importance of the clearance date will simplify the clearance process for users.

4.2 Statutory Lien Liability

Currently, the Statutory Lien policy does not reference the clearance system. Potential buyers of firm assets have to refer to the Contractor Liability policy for information on the clearance system. This is potentially confusing as clearance letters for contractor liability are distinct from clearance letters for statutory liens and have to be requested separately. Including a provision in the Statutory Lien policy about the clearance system would resolve this issue.

5. OTHER JURISDICTIONS

The other Canadian workers' compensation jurisdictions were surveyed to determine how each deal with clearance requests. Of the twelve jurisdictions, nine operate on a prospective collection system, collecting assessments for future periods. Only Ontario and Nova Scotia operate as British Columbia does, on a retrospective system for collecting assessments, collecting assessments for past periods.

Five of the jurisdictions offer some form of advance or term clearances. Of the five jurisdictions, Saskatchewan, Newfoundland, and Yukon, are prospective collection systems while Ontario and Nova Scotia are retrospective collection systems.

Half of the jurisdictions⁶ clearly set out the function of their clearance systems in policy.

6. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Under this option, no changes would be made to the current clearance policies in the *Assessment Manual*.

Implications

- Policy would not set out the purpose and function of the clearance system.
- Policy would remain silent on the importance of the clearance date.
- The Statutory Lien policy would not reference the clearance system, resulting in potential confusion surrounding the clearance system and requests for clearance letters.

⁶ Alberta, Newfoundland, New Brunswick, Ontario, Prince Edward Island, and Saskatchewan.

Option 2: Amend policy to more accurately represent the clearance system

Under this option both the Contractor Liability and Statutory Lien policies would be revised to set out the function and purpose of the clearance system and the importance of the clearance date.

Implications

- Policy would clarify the purpose and function of the clearance system.
- Policy would clarify the importance of the clearance date and accommodate the pre-clearance system.
- Policy would clarify the distinction between the two types of clearance letters used by the WCB (contractor liability and statutory liens).

7. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **February 14, 2007**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Lori Guiton
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 Vancouver, B.C. V6B 5L5
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WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

Appendix A

Draft Contractor Liability Policy

RE: Contractor Liability

ITEM: AP1-51-1

BACKGROUND

1. Explanatory Notes

Section 51 of the *Act* provides that, if a ~~prime~~ contractor employs a subcontractor to perform work within the scope of the *Act*, both are liable for the assessment in respect of the work. However, in the absence of a term in the contract to the contrary, the subcontractor is primarily liable. This section ensures that the collection of an assessment for work performed is not affected by contracts between contractors, subcontractors and persons engaging their services.

2. The Act

Section 51:

- (1) Where work within the scope of this Part is undertaken for a person by a contractor, both the contractor and the person for whom the work is undertaken are liable for the amount of any assessment in respect of it, and the assessment may be levied on and collected from either of them, or partly from each; but in the absence of a term in the contract to the contrary the contractor is, as between the contractor and the person for whom the work is performed, primarily liable for the amount of the assessment.
- (2) Where work within the scope of this Part is performed under subcontract, both the contractor and the subcontractor are liable for the amount of the assessments in respect of the work; and the assessments may be levied on and collected from either, or partly from each; but in the absence of a term in the subcontract to the contrary the subcontractor is, as between the subcontractor and the contractor, primarily liable for the assessments.
- (3) Where a contractor or subcontractor who is executing work in or for the purposes of an industry within the scope of this Part carried on by another person (in this subsection referred to as the "principal") is not assessed with respect to the work so executed, the workers of the contractor or subcontractor may, in the discretion of the Board, be deemed workers of the principal with respect to the industry so carried on by the principal.

- (4) For the purposes of this section, a person, contractor, subcontractor or principal includes an employer within the scope of Part 1.

POLICY

(a) General

When the Board finds that a third party may have a section 51 liability, it informs the third party of the possible liability and requests information about the nature of the contract, the gross amount paid to the debtor firm and the disposition of “holdback” funds. If the third party claims to have no liability, and no information to the contrary is known, the Board will confirm to the third party that it does not have a section 51 liability.

If the third party has a liability, the amount of the liability is the lesser of the actual assessment outstanding on the account of the delinquent subcontractor or the assessment based on the labour component of the contract. The labour component is determined by subtracting an appropriate allowance for materials and equipment from the gross contract amount. This allowance depends on the nature of the work performed. The labour component is then multiplied by the assessment rate(s) of the contractor for the year(s) in question to arrive at the liability amount. The third party is advised of this amount.

If the third party has retained holdback funds, the Board requests the third party to remit the lesser of the holdback funds up to the amount of the section 51 liability or the outstanding assessment of the delinquent contractor’s account. The Board may also issue a garnishing order for any holdbacks retained by the third party in excess of the section 51 liability. If the third party has not retained holdback funds, and all collection avenues with regard to the debtor firm have been exhausted, the Board will request payment of the section 51 liability from the third party.

The Board will not normally enforce payment of a section 51 liability if there is no holdback being retained, and

- the ~~prime~~ contractor or owner has a liability which is calculated to be less than a minimum determined by the Board; or
- the ~~prime~~ contractor or owner is a private homeowner who has a liability due to the contracting of work on his or her principal residence and the calculated liability based upon the value of that assessment is less than a minimum determined by the Board.

The Board considers any holdback or third party payment agreements between ~~prime~~ contractors and subcontractors to be private agreements between those two parties, which do not effect either party’s reporting and remitting responsibilities.

(b) Clearances

~~Persons who wish to protect themselves from liability under sections 51 or 52 of the Act can obtain clearances from the Board that set out the account status of an employer. A clearance advises whether:~~

- ~~• an employer is registered with the Board;~~
- ~~• there are assessments owing;~~
- ~~• remittances have been paid up to the end of the latest period for which they were required;~~
- ~~• the account is cancelled and there are assessments owing, including the cancellation date; and~~
- ~~• the employer has only recently been registered and is not yet required to remit.~~

Section 51 of the Act establishes that where a subcontractor or contractor fails to pay assessment premiums as required, the Board has the authority to transfer the liability for these premiums to a contractor and/or the person for whom the work is performed.

In order to reduce the uncertainty resulting from a section 51 liability, the Board has established a system through which it provides clearance letters. A section 51 clearance letter provides the addressee of the letter with the clearance date for a registered subcontractor or contractor. The Board will not transfer any liability owed by a subcontractor or contractor for work done before the clearance date to an addressee who was the contractor or person for whom the work was performed.

PRACTICE

The minimums in effect for the exemptions provided by the policy for prime contractors and homeowners are set out in Appendix "A" to this *Manual*.

For information on how to obtain a clearance, see the Board's Internet site at http://www.worksafebc.com/online_services/clearance_letters/default.asp.

For any other relevant PRACTICE information, readers should consult the Assessment Department's Practice Directives available on the WCB website.

EFFECTIVE DATE:	January 1, 2003
AUTHORITY:	s. 51, <i>Workers Compensation Act</i> .
CROSS REFERENCES:	See also Payroll Categories (AP1-38-2), Collection of Assessments (AP1-45-1) and Statutory Lien (AP1-52-1) in the <i>Assessment Manual</i> .

HISTORY:

Replaces Policies No. 70:20:50 and 70:40:00 of the *Assessment Policy Manual*.

APPLICATION:

This Item results from the 2002 “editorial” consolidation of all assessment policies into the *Assessment Manual*. The POLICY in this Item continues the substantive requirements of the policies and items referred to in the HISTORY as they existed prior to the Effective Date, with any wording changes necessary to reflect legislative and other changes since the policies and items referred to in the history were issued.

Appendix B
Draft Statutory Lien Policy

RE: Statutory Lien

ITEM: AP1-52-1

BACKGROUND

1. Explanatory Notes

Section 52 of the *Act* creates a statutory lien in favour of the Board that attaches to property or the proceeds arising from the sale of property.

2. The Act

Section 52:

- (1) Notwithstanding anything contained in any other *Act*, the amount due by an employer to the Board, or where an assignment has been made under subsection (4), its assignee, on an assessment made under this *Act*, or in respect of an amount which the employer is required to pay to the Board under this *Act*, or on a judgment for it, constitutes a lien in favour of the Board or its assignee payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workers by their employer, and the lien for the amount due the Board or its assignee continues to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.
 - (1.1) The exception in subsection (1) does not apply in respect of a lien for wages that is, by section 87 (5) of the *Employment Standards Act*, postponed to a mortgage or debenture.
- (2) Where the employer is a corporation, the word “property” in subsection (1) includes the property of any director, manager or other principal of the corporation where the property is used in, or in connection with, the industry with respect to which the employer was assessed or the amount became payable, or was so used within the period in respect of which assessments are unpaid.

- (3) Without limiting subsection (1), the Board may enforce its lien by proceedings under the *Court Order Enforcement Act*.
- (4) The Board may assign its lien rights to a person, contractor or subcontractor who has fully discharged his or her liability for the amount of an assessment under section 51 by payment of it.

POLICY

(a) General

If the Board determines that a third party may have a section 52 liability, the Board notifies the third party of the priority of the Board's lien on property or proceeds of property used in or produced by the industry of the debtor firm.

When other methods of collecting an outstanding balance from the debtor firm have been unsuccessful, the Board will consider collection from a third party under section 52. If the third party has admitted liability or is holding funds belonging to the debtor firm, the Board will request the third party to remit the lesser of the outstanding balance of the debtor firm's account or the amount of the section 52 liability. The Board does not hold third parties responsible if they are not holding funds of the debtor firm and made a reasonable attempt to ascertain the financial obligations of the debtor firm before obtaining their property.

If the third party has not made the required payment in response to a demand, and funds are owing to the debtor by the third party, a garnishing order may be issued for the lesser of the outstanding balance of the debtor's account or the amount of the third party's section 52 liability.

(b) Clearances

Section 52 of the Act provides that where an employer does not pay assessments as required, the Board has the authority to place a statutory lien in favour of the Board in respect of the unpaid assessments. Such a lien may attach:

- a) **to the employer's property, or to proceeds arising from the sale of the employer's property, used in, or produced in the industry for which the assessment arose, or**
- b) **if the employer is a corporation, to the property of any director, manager, or other principal of the corporation where the property was used in, or in connection with the employer's operations.**

In order to reduce the uncertainty resulting from a section 52 liability, the Board has established a system through which it provides clearance letters. A section 52 clearance letter informs the person requesting the letter of the clearance date

in respect of a registered employer. The clearance date is the date to which the Board will waive its right to place a lien in respect of any unpaid assessments owed to the Board where there has been a transfer of assets. A section 52 clearance letter does not provide information concerning outstanding prevention matters under Part 3 of the Act.

PRACTICE

For any relevant PRACTICE information, readers should consult the Assessment Department's Practice Directives available on the WCB website.

EFFECTIVE DATE:	January 1, 2003
AUTHORITY:	s. 52, <i>Workers Compensation Act</i> .
CROSS REFERENCES:	See also Collection of Assessments (AP1-45-1) in the <i>Assessment Manual</i> .
HISTORY:	Replaces Policy No. 70:20:60 of the <i>Assessment Policy Manual</i> .
APPLICATION:	This Item results from the 2002 "editorial" consolidation of all assessment policies into the <i>Assessment Manual</i> . The POLICY in this Item continues the substantive requirements of the policies and items referred to in the HISTORY as they existed prior to the Effective Date, with any wording changes necessary to reflect legislative and other changes since the policies and items referred to in the history were issued.