BUILDERS LIENS IN BRITISH COLUMBIA

A Summary of the Law Relating to Builders Liens in British Columbia

1. INTRODUCTION

A *builders lien* is a creature of statute and is governed by the Builders Lien Act. The underlying object of the Act is to prevent owners of property getting the benefit of improvements constructed on their property without paying for them. In legal language, the Act's primary purpose is to prevent the "unjust enrichment" of owners. This type of legislation in B.C. has been in existence since 1879.

In late 1997, a new Builders Lien Act was passed by the Provincial legislature and was proclaimed in force as of February 1, 1998. The new Act seeks to improve the builders lien regime established under the old Act by bringing in measures whose purpose is to make construction monies flow more quickly and smoothly from the owner down through the chain of contractors, subcontractors, material suppliers and workers on a project.

2. THREE CORNERSTONES OF THE ACT

The operation of the Act rests upon three concepts:

a. the right to file a *lien* against property to which labour and materials have been supplied in connection with the construction of an *improvement* on the property;

b. the establishment a *holdback* which limits the liability of an owner to lien claims; and

c. the creation of a *trust* with respect to monies paid on account of the contract price for the improvement.

The *lien*, *trust* and *holdback* concepts are discussed below. References in square brackets are to the relevant portions of the Act.

3. THE LIEN

A builders lien confers a charge against both a money fund created by the Act, the "holdback", and against real property, to secure the payment of a debt arising from a contract to perform work on that property. Who is entitled to file a lien, how it is created, and what rights it confers are all governed by the Act.

a. ***Who is entitled to a lien?***

[s. 1: "contractor", "head contractor', "improvement", "material", "material supplier", "services", "subcontractor", "work", "worker"; s. 2]

The entitlement to a lien is given to *contractors*, *subcontractors* and *workers* who supply work or materials to an improvement to real property. The Act also gives *engineers and architects* lien rights for services provided before or after the construction of an improvement has begun.

A contractor is defined as a person engaged by an owner to do one or more of the following in relation to an improvement:

(a) perform or provide work;
(b) supply material;

but does not include a worker.

A head contractor means a contractor who is engaged to do substantially all of the work respecting an improvement, whether or not others are engaged as subcontractors, material suppliers or workers.

A subcontractor is a person engaged by a contractor or another subcontractor to perform or provide work or to supply material, but it does not include workers or anyone hired by an architect, engineer or material supplier.

A material supplier is defined as a contractor or subcontractor who supplies *only material* in relation to an improvement. The effect of this in practical terms is that the Act now makes clear that a material supplier to a material supplier (what we used to call a submaterialman) is not entitled to lien rights. This was a sticky point under the old Act and gave rise to many contested hearings. The other sticky point for material suppliers under the old Act was the issue of transformation. The Act makes it clear that material includes material which has been transformed. The definition for material reads:

> "movable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed state, or is consumed or used in the making of an improvement, including equipment rented without an operator".

Equipment renters may lien for the supply of equipment without an operator as bare equipment falls under the definition of material. An equipment operator may also file a lien as a worker (see the definitions of "work" and "services"). If the renter sends someone on site to service or do maintenance work on an equipment rental that work is not lienable (unless it is part of the rental price) as the definition of operator reads:

> "Operator means an individual who operates equipment at an improvement site but does not include an individual who temporarily or periodically is present at the improvement site to install, inspect, service, empty or remove equipment".

b. ***How is a lien created?***

[s. 1: "claim of lien", "land title office"; s. 15; s. 19, s. 25, s. 45]

A lien against real property is created by filing, at the appropriate land title office, a claim of lien. Under the old Act, the claim was required to be in the form of a sworn affidavit. This is not so under the current Act. The Act contains a prescribed form for filing a lien. Although this is a simple document, a failure to comply with the Act or frame the lien claim properly may be either fatal to the claim or incapable of remedy after filing.

The Act contains strict penalties for the wrongful filing of liens. Section 19 provides that:

> "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".

Under s.45, a person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence and is liable to a fine not exceeding $2,000 and the amount by which the stated claim exceeds the actual claim. In addition, s. 25 of the Act provides that an owner, contractor, subcontractor or lien claimant can apply to the court without notice for an order cancelling a lien on the basis that it is vexatious, frivolous or an abuse of process.

The Act also gives persons who are entitled to lien the right to claim a "lien against the holdback", whereby a person who may be out of time to claim a lien against the improvement, may nevertheless claim a lien against the holdback. This is done not by a filing in the Land Title Office, but by the commencement of legal action, against the holdback. The only practical limitation on the ability to do so is that if the holdback has been distributed in accordance with the Act, there will be no holdback against which to claim a lien. This remedy is a controversial one and will likely be the subject of a statutory amendment.

c. ***When does the entitlement to claim a lien arise and when must it be claimed?***

[s. 1: "improvement", "notice of certification of completion", "owner"; s. 2; s. 7: "certificate of completion"; s. 20; s. 22; s.25; s.45]

The entitlement to a claim of lien arises as soon as the lien claimant has supplied work, labour, services and/or materials under a contract for the construction of an improvement to real property.

There must be an improvement. An improvement includes:

> "anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land".

Under the old Act, the time period for claiming a lien expired 31 days after a date that depended upon the identity of the lien claimant. This is no longer so. Under the current Act, the time period for claiming a lien expires 45 days after the earlier of:

(a) the issuance of a certificate of completion in respect of any contract or subcontract above the claimant in the contractual chain between the claimant and the owner; or

(b) the *completion*, *termination* or *abandonment* of the head contract, if there is a head contract; or

(c) the *completion* or *abandonment* of the improvement, if there is no head contract.

The introduction of the concept of a certificate of completion, and its applicability to a *sub*contract, means that the lien limitation period can begin to run for certain lien claimants when a *portion* of an improvement (for example, framing) has been completed. That is, the limitation period can begin to run much earlier under the Act than under the old. This change, the purpose of which is to permit the holdback to be released earlier, is of particular significance to material suppliers.

A failure to file within these time limits is fatal to a claim of lien.

d. ***What is meant by "completion" and "abandonment"?***

[s. 1: "completed"; subs. 1(2), (3), (4) and (5); Strata Property Act s. 88]

"Completed" means substantial completion or performance, as it did under the old Act. However, with respect to contracts, the Act sets out a 3-2-1 percentage formula for determining substantial performance. A head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than:

3% of the first $500,000 of the contract price,
2% of the next $500,000 of the contract price, and

1% of the balance of the contract price.

With respect to an improvement, the Act says that an improvement is completed if "the improvement or a substantial part of it is ready for use or is being used for the purpose intended".

"Abandonment" is defined in the Act to occur when no work is performed on an improvement or a contract for 30 days except where the work stoppage is due to certain specified causes such as strikes, weather, court order or shortage of material. The old Act did not define abandonment, and whether an improvement had been abandoned was a matter to be determined on a case-by-case basis.

There is no definition of “termination”, and this can be a difficult matter of fact for the court to determine. Certainly you should try and be aware of any written notices of termination issued by an owner or head contractor, as the lien period will run from that date at least, if not earlier.

There are special rules for strata properties. Under the Act the construction of a strata lot is deemed to be completed, or a contract for its construction substantially performed, not later than the date the strata lot is first occupied. For lien filing purposes, s.88 of the *Strata Property Act* provides that if an owner/developer conveys a strata lot to a purchaser, a claim of lien against the lot or against the lot’s share of the common property must be filed before the earlier of the date required by the *Builders Lien Act* and 45 days after the conveyance date. This may drastically shorten the lien filing period if strata units are sold prior to completion.

e. ***How does a subcontractor or material supplier determine when the lien limitation period begins to run?***

[s. 7 (in particular, "payment certifier"); s. 20;]

If there are no certificates of completion issued on an improvement, then subcontractors (in which category the Act includes material suppliers) are in no different a position under the Act than under the old. However, where payment certificates are issued, a subcontractor must know when that occurs in order to know when the lien limitation period begins. This is an area of significant uncertainty under the Act.

Certificates of completion are issued by persons called "payment certifiers". The parties to each contract or subcontract can appoint a payment certifier but, if they do not, the Act provides that the owner is the payment certifier in respect of a head contract, and the owner and the contractor together are the payment certifier in respect of subcontracts. Anyone can be a payment certifier. Thus, there will always be a payment certifier under each contract and subcontract, but they may not necessarily be the same person.

In order to guarantee being notified that a certificate of completion has been issued, a subcontractor must send a demand for notification to each payment certifier. However, there is no mechanism in the Act whereby a subcontractor can positively identify a payment certifier appointed under a contract or subcontract above him in the contractual chain between him and the owner. A subcontractor is, however entitled to obtain information from an owner (see (f) below), and this appears to be the only avenue available for identifying payment certifiers. Additionally, a payment certifier is required to post notification of a payment certificate on the improvement.

f. ***Is the owner obliged to disclose information about the head contract?***

[s. 41, s.32]

Yes. The Act requires the owner to disclose certain basic information about the head contract. It also obliges the owner to disclose information about any labour and materials payment bonds in respect of the improvement, as well as details concerning the holdback account (see "The Holdback" below).

Section 41(1) of the Act provides that a lien holder or a beneficiary of a trust under the Act may, at any time, deliver a written request for information to an owner, a mortgagee, or an unpaid vendor. This right to information is given to both lien holders and trust beneficiaries. A “lien holder” is defined in Section 1 of the Act as a person entitled to a lien under the Act, as compared to a “lien claimant”, who is a person who files a claim of lien. The right to request information does not require that a lien claim be filed. You may be a trust claimant only, with no lien rights, or you may not have yet filed a lien, but will still be entitled to the information set out in Section 41(1). As there is potentially a lien against the holdback regardless of whether a builders lien claim has been filed, the right to information may be important for that purpose.

The Act does not apply, however, to highways or municipal works (Section 1(1)) and there is no requirement that a holdback account be maintained on any public government projects (Section 5(8)(a)).

Under s.41(1) the lien holder or trust beneficiary can request the following information from the owner:

(a) the terms of the head contract or contract under which the lien holder of beneficiary claims, including the names of the parties to the contract, the contract price and the state of accounts between the owner and the head contractor;

(b) the name and address of the savings institution in which a holdback account has been opened, and the account number;

(c) particulars of credits to and payments from the holdback account, including the dates of credits and payments, and the balance at the time the information is given; and

(d) particulars of any labour and material payment bond posted by the contractor with the owner in respect of the had contract or contract under which the lien holder of beneficiary claims.

The lien holder or trust beneficiary can obtain the following information from a mortgagee or an unpaid vendor:

(a) the terms of the mortgage or agreement for sale;

(b) in the case of a mortgage, particulars of the amount advanced under the mortgage, including the date of advances, and of any arrears in payment; and

(c) in the case of an agreement for sale, particulars of the amount secured under the agreement for sale and any arrears in payment.

As a lien claimant you will want to obtain the terms of the head contract or the contract under which you are claiming so that you can be satisfied that the holdback has been calculated correctly. It is advisable to request a copy of the contract itself if there is any question as to the holdback calculation. In response to those requests, depending on the contract, you will likely receive a copy of the contract together with a list of contract adjustments (change orders and back charges) which the owner or contractor has used to calculate the statutory holdback. The owner will want to minimize its holdback liability and as a lien claimant you may not agree with the backcharges.

The state of accounts is also important is because the actual holdback may be greater than the statutory 10% holdback. It is not very often that there is an actual holdback available to lien claims in excess of the 10% statutory holdback. It is always worthwhile, however, to ask the question and to carefully examine any set-offs claimed against the actual holdback.

Although the owner is obliged to disclose the name and the address of the savings institution in which the holdback account has been opened, and the account number, there is no corresponding obligation on the savings institution to verify that information.

Note that one deficiency of the Act is that s. 41 only permits information to be obtained from the owner; there is no statutory obligation on a subcontractor to produce particulars of a subcontract except to an owner.

The Act is improved in that it requires the owner to disclose the particulars of any labour and material payment bond posted by the contractor. Historically there was no real method of obtaining a copy of the labour and material payment bond if it was not provided on request. The Act now specifies that information regarding the bond must be provided to the lien holder and the trust beneficiary seeking that information.

In terms of mortgagees and unpaid vendors, the provision allowing the lien claimant or trust beneficiary to obtain the terms of the mortgage or agreement for sale is particularly useful. These documents can also be obtained from the Land Title Office, but under the Act the mortgagee is obliged to produce it on request. The Act also provides that in the case of a mortgage, the particulars of the amounts advanced and the date of those advances and any arrears in payment must be provided. This information is useful in examining the issue of priority under s.32 of the Act. Pursuant to s.32, a mortgagee will only have priority over a lien claimant for advances made under the mortgage before the lien is filed.

A sample request for information is included in these materials.

A person who receives a request under ss. 41(1) or 41(2) must provide the requested information within 10 days after the day the request is delivered. The Act also sets out a remedy for failure to comply:

> "a person who fails to comply in writing with a request within the time provided in subsection (3), or who knowingly or negligently misstates the information requested, is liable to the person requesting the information for any resulting loss or damage".

Owners are given an additional remedy. If an owner makes a request of a subcontractor who has filed a lien, it may instruct the contractor or another subcontractor to withhold further payments to the subcontractor who has failed to provide the requested information. If the owner has requested information from its contractor, it may withhold further payments to the contractor. Those payments may be withheld until the contractor or subcontractor has complied with the request for information.

In addition to the potential liability for damages and the risk that payment might be withheld, Section 41(6) allows an application to Court to compel the provision of the requested information. Either before or after an action is commenced to enforce a claim of lien, a person entitled to information can apply for an Order that the owner, mortgagee, vendor, contractor or subcontractor produce for inspection all contracts, subcontracts, documents, books or records relating to the contract or subcontract or to the payment to the contractor or subcontract price. The Court may also order that copies of those documents be delivered and may make an Order as to the costs of such an application.

If requests for information are ignored by a party in contravention of their obligations under the Act it is quite likely that a party compelled to apply to court will seek special or increased costs.

g. ***What amount may be claimed under a builders lien?***

[s. 2; s. 12; s. 17]

A lien claimant is entitled to claim the entire unpaid portion of the contract price for the work, labour, materials or services supplied to the property in respect of which the claim is made, including holdbacks, extras and change orders. Interest on that amount cannot be claimed. A lien claim for less than $200 cannot be filed. A lien claim may not include a claim for damages for breach of contract.

Section 12 of the Act requires that "if a person makes a payment from money in a trust fund constituted in respect of a particular improvement, a person who receives the money must credit it against the debt in respect of the improvement". This means, for a material supplier, for example, that there is now a higher obligation to determine the source of funds received (that is, from which improvement), and then credit the payment to the improvement. This is a problem for many material suppliers who will allocate payments received to the oldest invoice rather than crediting it to any particular improvement. This can ultimately be fatal to a subsequent lien claim.

h. ***What rights does a builders lien confer?***

[s. 2; s. 4(9)]

A valid lien gives the lienholder the right to share in the holdback, and a charge against the real property to which the work, labour, services or materials were supplied, as a means of securing that right. The lien right itself is set out in ss. 2(1) of the Act:

> "Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,
>
> (a) performs or provides work,
>
> (b) supplies material, or
>
> (c) does any combination of those things referred to in paragraphs (a) and (b)
>
> has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
>
> (d) the interest of the owner in the improvement;
>
> (e) the improvement itself;
>
> (f) the land in, on or under which the improvement is located;
>
> (g) the material delivered to or placed on the land."

i. ***How is a lien proven and enforced?***

[s. 26; s. 29; s. 31]

A lien is proven by bringing legal action in the B.C. Supreme Court and proving the basic elements of entitlement, such as proving that work or materials were provided to an improvement, that the lien was filed within time, etc. In connection with proof of delivery, it is worth noting that, although a material supplier was always under an obligation to prove delivery of materials to an improvement, the Act contains a means by which delivery may be easier to prove; namely, by obtaining a signed acknowledgement of receipt by the person to whom the material is supplied. Section 29 deems this to be proof of delivery.

Once the lien is proven, it can be enforced against the lien claimant's share of the holdback or, if there is no holdback defence, by obtaining a court order to sell the property. If there are a number of lien claims against the property then all of the lien claims have to be proved before a pro rata distribution of the holdback can occur.

Unfortunately lien claims cannot be enforced in provincial Small Claims Court, although debt and breach of trust claims can be.

j. ***When must a lien be proved?***

[s. 1: "notice to commence an action"; s. 33]

A lien must be proved by commencement of legal action within one year after it is filed at the land title office. This time period may be shortened by a "21 day notice" which, if delivered to a lien claimant, requires that an action to prove the lien be commenced within 21 days from the date of receipt or service of the notice.

Under the old Act, only an owner could issue such a notice; under the Act, the owner and any lien claimant who has already commenced an action to prove a lien may give a notice. Failure to commence an action within these time limits results in the lien ceasing to exist and all rights under it being lost. It does not matter if the 21-day notice does not come to the attention of the lien claimant. It may be served at the address set out on the lien claim and once it is served, the time runs. Many a lien claimant has sought extensions or relief from this provision on the basis that the notice sat on an assistant's desk for 22 days, but the 21 days is an absolute time limit.

k. ***Is a builders lien the only remedy available to contractors, material men and workers?***

No. The Act does not eliminate any other remedy available to claimants, such as claims against other contracting parties for debt or breach of contract. The builders lien should always be used in conjunction with ordinary claims for debt, and if

appropriate, the breach of trust remedy. There may also be a labour and material payment bond available against which a claim may be made.

l. ***Can a non-contracting owner avoid liability for liens?***

[s. 1: "notice of interest"; s. 3]

Like the old Act, the Act permits a non-contracting owner to avoid liability for liens by posting a notice. Under the old Act, the notice was posted at the construction site. Under the Act, the notice, called a "notice of interest", is filed in the Land Title Office.

Usually the owner of the land is part of the construction matrix in that the owner is also the person owing the money, or the owner has hired the contractor who in turn has hired the lien claimant. Sometimes, though, the owner is not part of the construction pyramid, but is even further removed, such as an owner of leased premises where the tenant has made improvements, and a purchaser who buys property from a vendor who has had work done before the sale. Section 1 of the Act contains the following:

> "owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and
>
> (a) on whose credit,
>
> (b) on whose behalf,
>
> (c) with whose knowledge or consent, or
>
> (d) for whose direct benefit
>
> work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land."

Where the lien claimant has not contracted with the owner, but, for example, with a general contractor, s 3 of the Act deems the owner to have requested the work unless the owner has filed a notice of interest in the land title office (unless the owner is the government and then there is no deemed knowledge).

The effect of this is that an owner who has knowledge of work being done on its property will be subject to the claim of lien (assuming, of course, that the lien is filed in time and is otherwise valid, and subject to the limitation of the owner's liability to the prescribed holdback). For the owner not to be liable it must file a Notice of Interest against the title to the land in the Land Title Office. The Notice of Interest form is set out in a schedule to the Act. The Notice of Interest provides notice that the owner's interest in the land is not bound by a lien unless the improvement is undertaken at the express request of the owner.

The Notice will not be effective where the lien claimant can show that there was an express request by the owner. The Notice of Interest is, however, a

powerful tool in protecting non-contracting owners, particularly landlords. The effect of filing the Notice is that the lien claimant must show that the work was performed at the owner's request.

Although not explicitly stated, the owner must file the Notice of Interest before the work commences. As a practical matter, a prospective contractor or material supplier must conduct a land title search of the property before they commence the work to learn whether it has any lien rights against the property or not. It is doubtful that this is happening in practice except on larger projects. It would make an interesting legal case if an owner were to file a Notice of Interest part way through the work. If this was held to be effective as against any work performed by the lien claimant after the date of filing, the prospective lien claimant would have to search the Land Title Office daily to check whether any Notice of Interest had been filed.

The Notice of Interest is very different from the notice mechanism set out in the old Act, which required the owner to actually post a notice that it will not be responsible for the improvements in at least two conspicuous places on the land, or to deliver actual notice in writing to the lien claimant. As a practical matter, under the old Act relatively diligent contractors came to recognize what were referred to as Section 13 Notices posted at the work site and would know that their lien rights were affected. Now the lien claimant must conduct a Land Title Office search to obtain that information.

From the landlord's perspective a Land Title Office filing mechanism is much simpler. First of all, the landlord can file the Notice of Interest at any time against all of its properties and it will remain in effect indefinitely. Second, once it is filed at the Land Title Office, the landlord does not have the headache of making sure notices remain conspicuously posted on the job site, which was often a difficult task under the old Act.

If the owner is not liable for the lien, the lien may still attach to the tenant's leasehold interest. In other words, to enforce the lien, the lien claimant can obtain a declaration of lien against the leasehold interest and apply to sell that leasehold interest to satisfy the lien. This requires that the lease be registered against the land at the Land Title Office.

Under the old Act, it was not entirely clear whether non-contracting owners had the benefit of restricting their liability to the 10% holdback set out in the Act and it has now been clarified that the non-contracting owner has the benefit of the holdback.

For purchasers of property it is clear under the Act that they are never liable for more than 10% of the purchase price of the improvement. If the improvement is a strata property the holdback is 7%.

m. ***What is the priority between mortgages and liens?***

[s. 32; s. 41]

The Act and the old Act are substantially similar in that they give a mortgage priority over a lien to the extent of mortgage monies advanced before the lien is filed. Monies advanced after a lien is filed rank after the lien unless (and this is a change in the Act) a mortgagee obtains a court order in circumstances that a court is satisfied that the advances will be applied to complete the improvement and will result in an increase in value at least equal to the amount of the advances.

Note that a lien holder is entitled to obtain particulars of a construction mortgage from the mortgagee. Specifically, within ten days of a written request being delivered, the mortgagee must provide the terms of the mortgage, the amounts and dates of advances and whether mortgage payments are in arrears.

It appears that the drafters of the Act deliberately chose to tighten up the priority provisions in s. 32 of the Act while conversely requiring the mortgagee to provide information requested by the lien claimant. Under the old Act, lien claims would take priority from the date the work was performed or the materials supplied. They could thereby take priority over a mortgage advance after the work was provided but before the lien claim was actually filed. That priority for lien claimants is now gone. The determination of priority is a straightforward analysis of whether the mortgage advances were made prior to the lien being registered.

n. ***Can an owner get rid of a lien?***

[s. 1: "class of lien claimants", "required holdback"; s. 23; s. 24]

An owner can get a lien cancelled by paying into court an amount of money accepted by the court as being sufficient security for the lien (s. 24). Under the Act, *anyone else* who is liable on a contract may similarly post security to cancel a lien.

Additionally, the Act contains a mechanism (s.23) for an owner to obtain a discharge of an entire class of liens by paying into court an amount determined by the court to be the owner's maximum liability to the lien claimants whose liens are discharged. Under the old Act, the law was that an owner could not simply apply to post the holdback into court but, generally speaking, had to post the total amount of the lien or liens to be cancelled. This new provision effectively remedies that aspect of the old Act, but its effect is to reduce the leverage available to lien claimants to get their claims settled in a timely fashion.

The challenge under a s.23 application, however, can be establishing the amount of the holdback.

4. THE HOLDBACK

Giving contractors, workers and material suppliers the right to lien property meant that, if the owner paid the contractor the contract price but the contractor did not

pay subtrades, workers and material suppliers, the owner could conceivably be liable for more than the contract price to the extent of the registered liens. The concept of a holdback was developed to allow an owner to limit its liability to a fixed percentage of the contract price. The holdback attempts to balance the risks between two parties, the owner and the lien claimant, who have no contractual link.

The Act significantly alters the timing of the payment of holdbacks by permitting them to be progressively released over the course of construction.

a. ***What is the holdback?***

[s. 1: "required holdback"; s. 4, s. 23]

There are two types of holdback: the *statutory* holdback and the *actual* holdback. The *statutory* holdback is an amount equal to 10% of the greater of:

a. the value of the work or material as they are actually provided under the contract or subcontract, and

b. the amount of any payment made on account of the contract or subcontract price.

The *actual* holdback is the amount actually unpaid under a contract or subcontract. The greater of the two amounts determines the holdback fund in which lien claimants are entitled to share.

b. ***Who is required to retain a holdback?***

[s. 4]

Under the old Act, only the owner was required to hold back 10% of monies payable under a contract for an improvement. Under the Act, contractors and subcontractors also have an obligation to hold back, except that no amount is to be held back from material suppliers, workers, architects or engineers.

c. ***Must holdback monies actually be held in an account?***

[s. 5]

Under the old Act, the holdback was "notional" in that no actual funds were required to be set aside. Under the Act, no holdback is required in respect of a contract if the aggregate value of the work and material supplied is less than $100,000. If it is greater that $100,000.00, however, the owner is required to actually set up an account into which the holdback must be deposited. A holdback account is required only for the holdback retained by the owner. Contractors do not have to create holdback accounts for holdback amounts due to subcontractors.

The funds in the holdback account are trust funds, held for the benefit of the contractor from whom the holdback was retained.

The holdback provisions do not apply to the government if the government is an owner.

d. ***How does the holdback work?***

[s. 4; s. 23; s. 36; s. 37; s 38]

Each person primarily liable on a contract or subcontract under which a lien can arise must hold back 10% of the value of the work or material actually provided to an improvement or 10% of the amount of any payment made in respect of the contract or subcontract, whichever is greater. The person holding back is thereby able to limit their liability to anyone below them in the contractual chain in the event that someone goes unpaid by reason, for example, of a bankruptcy.

e. ***When does the "actual holdback" come into play?***

[s. 23; s. 37]

The owner cannot avoid liability for the entire contract price, however, by distributing the statutory 10% holdback if in fact the owner owes the contractor more than that amount. If the owner does not pay the other 90% of the contract price, the holdback to which lien claimants are entitled is the amount still owing, and the liens against the owner's property remain undischarged to the extent of the value of the work, materials and services which remains unpaid. This ensures that the owner cannot reap a windfall if, for example, a head contractor goes bankrupt before the owner has paid the full contract price owing.

f. ***When can the holdback be paid?***

[s. 1: "holdback period"; s. 8]

Under the old Act, a holdback could be paid out by an owner 40 days after completion (the lien filing period was 31 days). Under the Act, the holdback is to be paid out 55 days after completion (the lien filing period being 45 days).

However, it is important to note that, unlike the old Act, the Act permits the *progressive* release of holdbacks. That is, a subcontractor who completes its work early in the construction of an improvement and whose subcontract is certified complete by the issuance of a certificate of completion will be entitled to be paid money held back from it much earlier than under the old Act, because the lien limitation period and the holdback period commence to run upon the issuance of the certificate. This is a key feature of the Act.

Payment of the holdback may be prevented if, between the time the holdback becomes payable and is actually paid, a proceeding is commenced which asserts a claim of lien against the holdback. If that occurs, the person claiming the lien against the holdback, assuming that claim is proven, becomes entitled to share in the holdback with all the other lien claimants.

g. ***How is a lien claimant's share of monies to which lien claimants are entitled as a group determined?***

[s. 1: "class of lien claimants"; s. 36; s. 37; s. 38]

Generally speaking, the Act attempts to achieve fairness in the sharing of monies available for distribution to lien claimants by providing that a lien claimant shares monies proportionally with other claimants in an amount determined by the size of the individual's lien relative to the total of all liens. However, the calculation can become complex if there are multiple lien claimants in multiple "classes"; a "class" being defined as a group of lien claimants all of whom contract with the same person.

5. THE TRUST

By section 10 of the Act, all sums received by a contractor or subcontractor on account of the contract/subcontract price are impressed with a trust for the benefit of persons contracting with the contractor or subcontractor. In contrast, under the old Act, such sums were impressed with a trust for the owner and the Workers Compensation Board and *all* contractors, subcontractors, material suppliers and workers. Thus, the pool of trust funds available to any lien claimant is substantially smaller under the Act.

The Act also contains a further trust provision in section 5. Among other things, that section provides that, where a holdback account is required to be established, the holdback monies deposited in that account are in trust for the benefit of the contractor from whom the holdback was retained.

a. ***What purpose is served by the s. 10 trust?***

The trust provisions provide an additional remedy for unpaid subcontractors and material suppliers. The remedy for breach of trust arises when monies designated as trust monies by the Act are paid to persons other than those designated by the Act as being entitled to trust funds. It is a particularly important remedy because, if it is employed successfully, it will result in a judgment which survives bankruptcy. Another important aspect of the remedy is that it may allow a director to be sued personally on a corporate debt if the director has participated in the breach of trust.

b. ***How does the s. 10 trust operate?***

[s. 10; s. 11]

The Act prohibits a contractor or subcontractor from paying itself (or anyone else not entitled to trust monies), out of monies received in respect of an improvement, before all persons claiming through it who are entitled to share in such trust monies have been paid.

c. ***Does access to the s. 10 trust fund depend upon the existence of a lien?***

[s. 10]

No. A worker, subcontractor or material man can look to the trust for payment of its contract/subcontract even if it has not filed a lien. The lien remedy and the trust remedy are entirely independent.

d. ***Are there limitation periods for commencing a breach of trust action?***

[s. 14]

Yes. The old Act did not specify a limitation period for the commencement of breach of trust actions so the general law relating to limitations had to be relied upon. The Act requires an action for breach of the s. 10 trust to be commenced within one year after completion, abandonment or termination of the head contract, if there is one, or completion or abandonment of the improvement if there is not.

There is no similar limitation applicable to an action in respect of a breach of the s. 5 trust.

6. LABOUR AND MATERIAL PAYMENT BONDS

There are several important issues for labour and material payment bond claimants, some of which can result in the barring of a claim. They include the adequacy of the claim notice, the timing of the notice, and qualifying as a claimant.

In terms of the mechanics of bringing a labour and material payment bond claim, this bond is different from other types of construction bonds in that the claimant is not a party to the bond. The owner is the obligee. The effect of the bond is that the surety must pay labour and material suppliers on a project (up to the penal limit of the bond) if the principal (the contractor) does not make those payments. Normally someone who is not a party to a contract cannot sue to enforce it, but the labour and material payment bond refers to the obligee as a trustee and the bond has been construed by the courts as a trust. The claimants are the beneficiaries, and they can claim and sue on the bond directly. In British Columbia, this is also addressed explicitly by s. 45 of the *Law and Equity Act*, which provides that:

> A claimant under a labour and material payment bond has a cause of action against the surety named in the bond in the event that a principal named in the bond defaults in his obligation under it and may commence an action against the surety on his own behalf and on behalf of other claimants to recover the amount of the claim.

The first step in bringing a labour and material payment bond claim is to obtain a copy of the bond itself. Because the claimant is not a party to the bond it may not know whether there is a labour and material payment bond in place. The claimant will not usually have a copy of the bond itself and will have to request it from the owner or the contractor. The Act provides in s. 41(1)(a)(iv) that a lien holder or trust beneficiary may deliver a written request to the owner for:

> the particulars of any labour and material payment bond posted by the contractor with the owner in respect of the head contract or contract under which the lien holder or beneficiary claims.

It can still take some prodding to obtain it, but the Act requires that the owner respond within 10 days and s. 41(4) provides that:

> A person who fails to comply in writing with a request within the time provided in subsection (3), or who knowingly or negligently misstates the information requested, is liable to the person requesting the information for any resulting loss or damage.

There is a corresponding right for the owner to demand from a contractor or subcontractor particulars of any bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

For labour and material payment bond claims the mechanics of bringing a claim are set out in the bond itself. Notice must be served on the principal (the contractor), the obligee (the owner), and the surety, either by registered mail to the place where they regularly carry on business or by serving the notice under the rules for serving legal action. In British Columbia that usually means service on the registered and records office of a company or personal service on an individual, on behalf of themselves or a company.

a. ***When must notice of a claim be given?***

The notice should be as detailed as possible. It is normally in letter form. It should identify the bond number, the parties (including the surety, obligee, principal and claimant), the amount of the claim, a brief description of the services or materials supplied and the last date of supply. Of note is the bond wording requiring that the notice state “with substantial accuracy the amount claimed”. You may wish to include copies of the contract or the invoices at this point as those documents are likely to be requested later on by the surety in any event.

b. ***What time limits apply to giving notice?***

It is a condition of the labour and material payment bond that the claimant provide written notice of its claim within specified time periods. Failure to provide notice within the time limit will invariably result in this defence being raised by the surety. There may be relief from forfeiture, but the bond sets out that for holdback payments, the claim must be made:

> "within 120 days after such Claimant should have been paid in full under the Claimant's contract with the Principal"

and for all other payments:

> "within 120 days after the date upon which the Claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with the Principal".

c. ***When must an action be started?***

The bond also contains an absolute limitation for bringing an action. The Claimant must sue within one year from:

> "the date on which the Principal ceased work on the Contract, including work performed under the guarantees provided in the Contract".

Of note is that the limitation period for commencing an action runs from a different date than the 120 day notice period. To diarize the limitation period for suing on its bond claim the Claimant must look beyond its own contractual and supply relationship with the contractor and determine when the contractor ceased work on its contract with the owner.

Interestingly, the labour and payment bond limitation period may coincide with the new limitation period for suing for breach of trust under the *Builders Lien Act*. Section 14 of the *Builders Lien Act* requires that breach of trust actions must not be commenced more than one year after the head contract is completed, abandoned or determined, or, if there is no head contractor, the completion or abandonment of the improvement.

Labour and material payment bonds are rarely paid out quickly. If there is a large failure early on in a contract the claims may approach or exceed the penal sum of the bond. There may also be an ancillary performance bond claim and negotiations underway for labour and material payment bond claimants to continue to supply the project, with complicated accounting to differentiate bonded amounts from subsequent accounts. In all labour and material payment bond claims there is a certain amount of

investigation required by the surety to ensure that the claimant qualifies under the bond and to confirm that the amount claimed is correct. All of this is to say that claimants must pay attention to the one-year limitation period.

7. CONCLUSION

The Act has introduced significant new complications relative to the old Act. Experience with the old Act tells us that we cannot be certain how the Courts will interpret the provisions of the Act. Although case law concerning the Act is now emerging, this summary should be read with this caveat in mind.

For specific questions regarding the application and provisions of the Builders Lien Act, the Act itself should be referred to. Do not rely upon this summary.

For further information concerning the Builders Lien Act, we invite you to call us at McKechnie & Company.

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