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THE B.C. BUILDERS LIEN ACT – AN EXECUTIVE SUMMARY

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The *Builders Lien Act* (Bill 38) (the “*Act*”) was brought into force on February 1, 1998 and replaced the former builders lien legislation in force in the Province. The *Act* significantly changed previous existing construction practice and must be understood by anyone working in the construction industry in British Columbia. The following is a summary of certain features of the *Act* and is intended to serve as a basic overview of its operation.

MULTIPLE HOLDBACK SCHEME

The former *Builders Lien Act* (the “*Old Act*”) was based on a “single holdback” scheme. Under this scheme an owner of the land on which a construction project is built is required to retain an amount known as a holdback equal to 10% of progress payments made to the contractors with whom the owner enters into direct contracts for the construction of the project. By contrast, the *Act* creates a “multiple holdback” scheme under which each person (including contractors and subcontractors) who is primarily liable under a contract or subcontract must retain a holdback equal to 10% of the greater of (a) the value of the work or material actually provided under the contract or subcontract, or (b) the amount of any payment made on account of the contract or subcontract price.

The obligation of the person to retain the holdback applies to any contract where the contractor, subcontractor or worker provides labour or services in respect of an improvement, and extends to any clearing, excavating, drilling or grading of the land. An architect or engineer engaged by an owner now will be considered a contractor and therefore entitled to a claim of lien for services rendered, even where no on-site services have been provided. However, no holdback can be retained from architects or engineers.

HOLDBACK ACCOUNT

The *Act* also establishes rules for handling money retained by an owner as a holdback. The holdback amount retained by an owner must be deposited with a savings institution in a separate trust account set up for that purpose. If the owner enters into contracts with several parties, the owner must open a separate holdback trust account for each contract. The purpose of the owner's holdback account is to ensure that funds will be available to the contractor at the conclusion of the contract regardless of the financial solvency of the owner. The failure of an owner to pay the funds into the holdback account constitutes a default under the contract and the contractor may give 10 days' notice of default and then cease operations until the money is paid into the holdback account.



The *Act* also requires that the holdback account must be administered by the owner “together with the contractor from whom the holdback is retained”. The only exceptions to the provisions relating to the holdback account are that a holdback account is not necessary where the aggregate value of work and material supplied to an improvement is less than \$100,000 or where the owner is the government.

TIME LIMITS

Under the *Act*, all lien claimants will have 45 days to file a lien. The commencement of this period depends on whether a “Certificate of Completion” has been issued. The *Act* stipulates that a “payment certifier” (usually an architect, engineer, or other person specified by contract) can certify when a contract or subcontract has been completed. If the payment certifier determines that completion has occurred, then he must issue a Certificate of Completion. A lien claimant must file a claim of lien no later than 45 days after a Certificate of Completion has been issued. If no Certificate has been issued, then a claim of lien may be filed no later than 45 days after the head contract has been completed, abandoned, or terminated, or, if there is no head contract, 45 days after the improvement has been completed or abandoned.

The *Act* defines “completed” with reference to a contract or subcontract as meaning substantially completed or performed, not necessarily totally completed or performed. Under the *Act* a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion at a cost of not more than:

- (a) 3% of the first \$500,000 of the contract price (\$15,000);
- (b) 2% of the next \$500,000 of the contract price (\$10,000); and
- (c) 1% of the balance of the contract price.

In addition, the *Act* defines the completion of an improvement as the time when the improvement, or a substantial part of it, is ready for use or is being used for its intended purpose.

Where a Certificate of Completion has been issued by a payment certifier, time begins to run not only for the filing of lien claims arising under a particular contract or subcontract, as discussed above, but also for the release of the holdback retained from a contractor or subcontractor. The *Act* provides that if a Certificate of Completion has been issued for a contract or subcontract, the holdback period relating to that contract or subcontract expires 55 days later. If no Certificate of Completion has been issued, the holdback period expires 55 days after the head contract is completed, abandoned or terminated or, if there is no head contract, 55 days after the improvement is completed or abandoned. If the holdback period expires and no lien claims have been filed, the holdback must be paid to the person from whom it was retained.



EARLY RELEASE OF HOLDBACKS

The *Act* permits the early release of holdbacks retained in relation to subcontracts which are completed before construction of the project itself is complete. For example, the payment certifier can be asked by an excavating subcontractor to issue a Certificate of Completion in respect of the excavation subcontract. The filing periods in respect of that contract commence running upon the issuance of the certificate. If no liens are filed upon the expiration of the statutory period, the contractor retaining the holdback for the excavation subcontract must pay the holdback amount to the excavation subcontractor. The contractor is then allowed to claim a like amount from the holdback retained from that contractor by the owner.

FILING PROCEDURE

Lien claims are filed in the Land Title Office. Where a single project extends over several parcels of land, a lien claimant is permitted to create a lien against each parcel of the project with a single filing.

CLEARING LIENS

The *Act* allows an owner, contractor, or subcontractor to remove a lien claim from title by paying into court security for the lien pending a determination of its validity and amount. In some instances, an applicant may seek to pay in an amount equal to the holdback retained from the contractor or subcontractor under whom the lien arose and, if the total value of the liens filed is less than the holdback, only the lesser amount.

PROOF OF DELIVERY

The *Act* provides that if a person to whom material is supplied (i.e. a contractor or subcontractor) signs an acknowledgement of receipt of the material stating that it is received for inclusion in an improvement at a named address, the acknowledgement of receipt is proof, in the absence of evidence to the contrary, that the material was delivered to the land described by the address.

NOTICES BY NON-CONTRACTING OWNERS

The Old Act allowed a non-contracting owner to avoid responsibility for an improvement by posting notices on the site. The *Act* replaced notice posting with a procedure whereby the owner files a “notice of interest” in a prescribed form in the Land Title Office to warn other persons 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. Lien claimants will have to check the Land Title Office if they intend to rely on the interest of a non-contracting owner as security for work performed or materials supplied.

RIGHT TO INFORMATION

Interested parties are given a comprehensive right to information about a project so far as it is relevant to their rights under the *Act*.



PENALTIES

The *Act* specifies liability for wrongful filing of a lien and clarifies the right of the owner to seek costs and damages.

DEFICIENCIES

The *Act* clarifies that an owner or contractor may apply amounts retained in excess of the required 10% holdback to remedy a default by the person from whom the holdback was retained.

PRIORITIES

The court may modify priorities between lien claimants and a construction lender so that further advances can be made by the lender to permit the completion of the project.

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