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BUILDERS' LIENS—2015 UPDATE
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Popular Misconceptions

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POPULAR MISCONCEPTIONS

I. Builders' Liens – Popular Misconceptions

The *Builders Lien Act* (the "Act") sets out a complex regime of legal rules and remedies. Such complexity has led to misunderstandings and misconceptions in the industry and in the legal profession about its application in specific scenarios, and about how the Act interfaces with contract. This paper discusses some of these misconceptions.

II. Misconception: The Holdback Account Is Required to Be A Joint Bank Account in the Names of the Owner and the Contractor

Section 5(1)(c) of the Act requires that an owner must administer the holdback account "together with" the contractor from whom the holdback was retained. This does not mean that the holdback account must be a joint bank account.

Section 5(2)(c) requires that amounts deposited into a holdback account must not be paid out without the agreement of all the persons who administer the account, but obtaining such agreement does not require the holdback account to be a joint bank account.

The owner and the contractor may choose to enter into a simple "holdback account agreement".

III. Misconception: The Owner Is Not Permitted to Hold Back More Than the 10% Holdback Set Out in the Act

Section 4(1) of the Act requires the person primarily liable on each contract (and the person primarily liable on each subcontract) under which a lien may arise under the Act to retain a holdback equal to 10% of the greater of the value of the work or material provided and the amount of any payment made on account of the contract or subcontract price.

Some widely used standard form construction contracts (i.e. CCDC 2 2008 and CCDC 17 2010) recognize a payor's possible statutory holdback obligation by making obligations to pay under the contract subject to retaining such a holdback. This may have contributed to a failure to understand that there are other possible holdbacks in addition to the statutory holdback.

In any event, nothing in the Act prohibits parties from agreeing to additional holdbacks. A deficiency holdback, for example, is commonly found in construction contracts. For example:

> The Owner may retain, out of the amount due and owing to the Contractor upon Substantial Completion, an amount equal to two times the value of the estimated cost to complete or correct the items set out in the [deficiency list required to be provided with the Contractor's application for Substantial Completion]. If the total amount due and owing to the Contractor upon Substantial Completion is less than two times the value of the estimated cost to complete or correct the items set out in the deficiency list, then such difference will be immediately due and owing by the Contractor to the Owner upon receipt of an invoice from the Owner for such difference.

Contracts may also set out additional holdbacks to address claims of lien or certificates of pending litigation. For example:

> If, at any time, the Owner becomes aware that a claim of lien, certificate of pending litigation or lien is threatened or has been registered against title to the Site, the Owner may, in its sole discretion, withhold out of any monies payable to the Contractor, a holdback (in addition to the [statutory holdback]) in the amount

> set out in or associated with the applicable filing plus an additional reasonable amount as security for related costs. The Owner may, on five days written notice to the Contractor, make application to court pursuant to the provisions of the Builders Lien Act (British Columbia) to obtain a court order whereby any holdback monies or other security such as a lien bond or letter of credit can be paid into or deposited with the court and the claim of lien, certificate of pending litigation or lien be discharged. The Contractor will reimburse the Owner for any legal and other costs actually incurred by the Owner relating to such application to court immediately upon receipt of an invoice from the Owner of such costs. If the Contractor fails to so reimburse the Owner, the Owner may, on five days written notice to the Contractor, withhold and set-off such amounts from any payment then or thereafter due to the Contractor. If the claim of lien, certificate of pending litigation or lien is discharged without payment of any holdback into court, then the Owner will pay such holdback to the Contractor, without interest.

Even in the absence of such contract clauses, it is common practice for an owner to hold back for these amounts in any event, relying on common law set-off rights (see below); but having clear and detailed contractual language has the advantage of providing an undisputed legal entitlement, as well as clarity as to the details of the permitted holdbacks, thereby helping to minimize disputes.

IV. Misconception: Upon Expiry of the Holdback Period, Holdback Monies Must Be Paid to the Contractor

After the holdback period expires, if there are no valid lien claims, section 8(4) of the Act provides that payment of the holdback may be made. However, before the release of the funds, the owner is entitled to consider whether it has any set-off claims before releasing the holdback.

See *Kinetic Construction Ltd v Tuscany Village Holdings Ltd*, 2008 BCCA 417 in which all possible beneficiaries and lien claimants had been fully satisfied from the holdback account, except the contractor, and there were funds remaining in the holdback account. The holdback period had expired, but the owner refused to transfer the remaining funds to the contractor on the basis that the owner had a set-off claim against the contractor for damages owed for breach of the construction contract, in an amount larger than the remaining funds. The Court of Appeal held that the remaining funds were impressed with the statutory trust created under section 5(2) of the Act, and that because all possible beneficiaries except the contractor had been paid out, the only remaining beneficiary was the contractor. However, the Court of Appeal held that the existence of the trust does not bar the advancement of a claim by the owner of set-off to the remaining funds.

See also *PCL Constructors Westcoast Inc v. Norex Civil Contractors Inc*, 2009 BCSC 95 where there were completing claims to the holdback by the contractor (by way of set-off for damages for default under the subcontract), subcontractors (lien claims for unpaid contract amounts) and the CRA (by way of a deemed trust over the subcontractor's property pursuant to the *Income Tax Act* for unremitted payroll deductions). The court held that the CRA's entitlement to the holdback depends on what, if any, amount the subcontractor is entitled to receive from the holdback. Where the holdback is subject to a claim of set-off, and the set-off is larger than the holdback, then the subcontractor (and in turn, CRA) has no entitlement to the holdback.

V. Misconception: A Company Needs to Be Registered in BC in Order to File a Lien

Under section 312 of the repealed *Company Act*, RSBC 1996, c 62, an extraprovincial company that was not registered in British Columbia was not capable of maintaining an action in any court in British Columbia in respect of any contract made in whole or in part in British Columbia, or of acquiring or holding land or an interest in it in British Columbia or registering any title to it (see section 312(1)). This led to some question about whether an unregistered extraprovincial company could register a claim of lien or enforce it, or if successfully enforced, whether an interest in the land acquired by way of a builders lien might be voidable (if not void).

The current *Business Corporations Act*, SBC 2002, c 57 does not contain those restrictions, and so a company is no longer disabled from sustaining claims of lien just because it is an unregistered extraprovincial company.

VI. Misconception: A Consultant Can Lien For Design or Other Pre-Construction Services Performed On a Project—Even If a Project Does Not Proceed

Section 2(1) of the Act provides that a contractor or subcontractor who, in relation to an improvement, performs or provides work has a lien for the price of the work.

The Act defines "work" as work, labour or services, skilled or unskilled, on an improvement, and "services" as including services as an architect or engineer whether provided before or after the construction of an improvement has begun.

The Court of Appeal ruled in *Chaston Construction Corp v Henderson Land Holdings (Canada) Ltd*, 2002 BCCA 357 that architects and engineers are not entitled to claim a lien if construction of the improvement never commenced, because in such a case it cannot be said that they have performed work "on an improvement".

VII. Misconception: You Can't Lien For a Delay Claim

This misconception arises from the principle that "damages are not lienable"; however, that principle must be taken with a grain of salt. Section 2(1) of the Act refers to a "lien for the price of the work and material". If the delay claim is in essence a claim for an increase to the price of the work and material due to delay, it may be lienable.

As Mr. Justice Johnston has stated in *M3 Steel (Kamloops) Ltd v RG Victoria (Construction) Ltd, 2005 BCSC 1375* at para. 57:

> … it is important to look at the nature of the claims made, not the labels, such as "damages", put on the claims. If the claims are for work performed or provided, or material supplied, or are so closely connected to them that it is reasonable and proper that they should be included in the statutory regime under the Builders Lien Act, they are properly the subject of a claim of lien… (Underlining added.)

VIII. Misconception: You Can't Lien Provincial Crown Land, Municipal Land, Federal Crown Land or First Nations Reserve Property, Just As You Can't Lien Highways.

A. Highways

It is true that you can't lien a highway. Section 1.1 of the Act provides that nothing in the Act extends to a highway, continuing highway properties and a forest service road. The definition of highway comprises most roads in a municipality. However, it should be noted that some road construction projects include construction on land that is not a highway.

B. Provincial Crown Land and Municipal Land

This one is not wholly a misconception. In the case of provincial Crown land and municipal land that is not registered in the Land Title Office, it is not possible to file a claim of lien because there is no certificate of title in the Land Title Office against which to register the lien claim.

However, where land is registered in the name of the provincial Crown or of a municipality, a lien can be claimed, although section 31(6) of the Act provides that the court cannot make an order for sale of the provincial Crown's or municipality's interest in the land.

Note that in order to be an "owner" under the Act, the provincial Crown must have actually requested the improvement to which the lien relates, this is because section 3(3) of the Act makes the deemed authorization provisions of the Act inapplicable to the provincial Crown.

C. Federal Crown Land

As a matter of constitutional law, the federal Crown cannot be bound by the provincial legislature. Therefore, generally, claims of lien cannot be filed against title to federal Crown land or land registered in the name of its agent.

However, the federal Crown can be bound by the federal legislature. For the purposes of debunking this misconception in respect of charging federal Crown land, it may suffice to say that federal statutes can (see the *National Energy Board Act*, RSC 1985, c N-7 as a well-used example) allow for claims of lien to be filed against certain federal Crown lands.

D. First Nations Reserve Property

With respect to First Nations land, section 29 of the *Indian Act*, RSC 1985, c I-5 ("*Indian Act*") expressly provides that reserve lands are not subject to seizure under legal process, and section 89(1) provides that real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band. These sections effectively bar the registration of a claim of lien against reserve land by non-Indians.

Apart from this, generally, provincial enactments do not apply to the transfer of land situate on a reserve because attempts to affect transfer of land would be inconsistent with the provisions of the *Indian Act* (*Dunstan v Dunstan*, 2002 BCSC 335 ("*Dunstan*") at para 23). In the case of liens, the inconsistency arises from the ultimate remedy under section 31 of the *Builders Lien Act* – an order of sale of the land to satisfy a lien.

Notwithstanding this, section 89(1.1) of the *Indian Act* provides that a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution. On this point, see *Dunstan*, where the court concluded that leasehold interests in designated lands (that is, reserve lands in which a band has, for a limited time, released or surrendered its rights and interests) are subject to Provincial laws of general application[1], and therefore are lienable.

E. A Note About Trust Claims

Even if a claim of lien cannot be filed against the land, the Act still requires, under section 10, that a contractor or subcontractor hold monies received by that contractor or subcontractor on account of the price of the contract or subcontract in trust for the benefit of those engaged in connection with the improvement by that contractor or subcontractor (see also *Engineering & Plumbing Supplies Ltd v Seaboard Excavating Ltd* (1988), 29 BCLR (2d) 309 (Co Ct) for the proposition that a trust may lie even if the work is on property in which there is no lienable interest).

It is important to note, however, that because section 1.1 of the Act provides that nothing in the Act extends to highways, continuing highway properties or forest service roads, the trust provisions do not apply in respect of those properties.

IX. Misconception: The Deadline for Filing a Claim of Lien Is 45 Days After Completion of a Contractor's Work on Site

This is a common misconception, possibly based on experience with the prior Act, or lien legislation in another jurisdiction.

For a fulsome discussion of this topic, refer to Karen Martin and Stephen P. Coyle's "Lien Filing Periods – Traps for the Unwary", presented on November 24, 2015 at the CLE BC Builders' Lien Update 2015, but the general rule under the Act is that the deadline is 45 days after any certificate of completion has been issued with respect to the contract or subcontract immediately above that of the lien claimant.

X. Misconception: If You Don't File a Claim of Lien on Time, You Can Always Rely on Your Lien Claim Against the Holdback

Shimco Metal Erectors Ltd v Design Steel Constructors Ltd, 2002 BCSC 238 (aff'd 2003 BCCA 193) and subsequent cases have firmly established that the Act contemplates an independent lien claim against the holdback, and that failing to file a claim of lien against the land does not preclude a holdback lien. However, it is important to remember that the holdback lien claim regime has its own traps for the unwary.

One of these traps is that a holdback lien can only exist if the holdback actually exists. This was confirmed by the Court of Appeal in *Wah Fai Plumbing & Heating Inc v Ma*, 2011 BCCA 26. If

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1 Note, however, that section 89 of the *Indian Act* was not applied for a number of reasons, including that the person seeking the remedy as against the subject property was an Indian.

the owner – contrary to the Act – fails to retain a holdback, no lien claim against the holdback can be made.

A related trap is failing to commence proceedings to enforce the holdback lien before the holdback is paid out. Section 8(4) of the Act specifically permits a holdback to be paid out after expiry of the holdback period unless in the meantime a claim of lien is filed or proceedings are commenced to enforce the holdback lien. If neither of those events occurs, the holdback may well be paid out.

In other words, missing the lien filing deadline means the only way to preserve a holdback lien claim is to commence proceedings to enforce the holdback lien before the holdback is disbursed.

XI. Misconception: The Deadline for Commencing an Action for Breach of a Statutory Trust Is the Same One Year Time Period for Commencing an Action to Enforce a Lien Claim

This is not correct.

Section 14 of the Act sets out the relevant deadline:

> An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after
>
> (a) the head contract is completed, abandoned or terminated, or
>
> (b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available.

Note that if the lien claim is filed within the 45 day time period after the head contract is completed, the one year time limit for commencing the action to enforce that lien expires after the one year time limit for suing for breach of the trust under the Act. Therefore, careful attention to those time limits must be given when setting "bring forward" dates for commencing actions under the Act.

XII. Misconception: Even If You Miss All of the *Builders Lien Act* Deadlines, You Can Still Claim for Unjust Enrichment

This is not correct in most cases.

In order to make out a claim of unjust enrichment, a claimant must establish three things:

(a) enrichment to the defendant;

(b) a corresponding deprivation of the claimant; and

(c) the absence of a juristic reason for the enrichment.

The courts have found that the availability of contractual remedies and the remedies in the Act are juristic reasons for the enrichment. See *Park v KS Mechanical Ltd*, 2012 BCSC 1751 ("*Park*") at paras. 39 and 40:

> Courts rarely find unjust enrichment in circumstances like the present. A subcontractor on a construction project has remedies in contract against the person with whom he or she contracts. The legislature has recognized these remedies to be inadequate and has enacted the Builders Lien Act. Thus, the subcontractor has remedies against the property as long as the subcontractor acts within the time limits imposed by the Act.

Except in unusual circumstances, that is the extent of a subcontractor's remedies.

See also *Sabihi v Dr Mansur Roy Inc*, 2013 BCSC 157 relying on *Park* as standing for the proposition that (at para. 31) "where there has been enrichment and a corresponding deprivation in the circumstances of a non-contracting owner, a juristic reason for the enrichment of the non-contracting owner exists where there is a contract between the non-contracting owner and the party the plaintiff contracted with."

XIII. Misconception: If You Sue to Enforce a Claim of Lien in the Wrong Registry, the Lien Claim Will Be Lost

This used to be the case under the prior Act.

Section 27 of the current Act provides that section 21 of the *Law and Equity Act* applies to a proceeding in respect of a claim of lien or other proceeding under the Act.

The effect of Section 21 of the *Law and Equity Act* is that unless the court otherwise orders, every proceeding to enforce a lien must be commenced, in most cases, in a registry of the Supreme Court within the same municipality in which the land is located.

Because these provisions make clear that the court has the discretion to "otherwise order", the question is whether or not in a particular case, it is appropriate for the court to exercise its discretion to transfer an action that was improperly commenced in the wrong registry in order to bring it into compliance with the Act.

Although the particular facts of each case will ultimately determine this issue, see, as an example where a transfer was permitted, *Proform Management Systems Ltd v Tuscan Villas Ltd*, 2010 BCSC 381.

XIV. Misconception: It's Easy to Get Rid of A Frivolous/Fraudulent/Outrageous/Inflated Claim of Lien

This is a common misconception in the industry.

The Act contains remedies for these kinds of lien claims, but the challenge is to prove that they are in fact frivolous, fraudulent or knowingly inflated, and to do so within a time frame that allows quick removal of the lien from title.

Section 45 of the Act makes knowingly filing or causing an agent to file a claim of lien containing a false statement an offence, that attracts liability to a fine of up to the greater of $2,000 and the amount by which the stated claim exceeds the actual claim. This provision provides no compensation for the costs or damages caused by the filing of an inflated lien.

Section 19 of the Act provides that a person who files a claim of lien against land to which the lien does not attach is liable for costs and damages incurred by an owner of the land as a result of the wrongful filing. In order to benefit from the protection available under this section, the owner must first establish that the lien is invalid, which usually means an application under section 25(2) of the Act. Section 25(2) provides that the court may cancel a claim of lien if satisfied that it does not relate to the land against which it is filed, or if the claim is vexatious, frivolous or an abuse of process. Applications under that section are, as one would expect, often hotly contested and can be both protracted and costly for both sides.

Note that even after an owner has proved on an application under section 25(2) of the Act that a claim of lien was wrongfully filed and should be cancelled, it is not necessarily the case that costs or damages will be available under section 19 of the Act. In order to justify an order for special costs in such a case, for example, there must be a finding that the filing of the claim of lien, or the conduct of the claimant in commencing an action to enforce the claim, if any, is deserving of the court's rebuke or reproach (see *Tuscany Village Holdings Ltd v Conquest Development Corporation*, 2005 BCSC 1392 at para. 35).