

Builders' Liens: Some Points for Insolvency Counsel

The "new" *Builders Lien Act*, SBC 1997 c.45 gives three categories of rights: (1) liens on land; (2) liens on holdbacks; and (3) trust rights.

Liens on land:

- *In rem* rights against real property which has been improved by work or materials provided by the lien claimant.
- Preserved by filing a claim of lien (CBL) in the Land Title Office and then commencing a lawsuit against the property owner and filing a certificate of pending litigation (CPL) against title to the land.
- Time limit to file a CBL:

A. If there is a "head contractor" (a contractor engaged to do substantially all the work on the improvement)

45 days after the earliest of:

1. Actual completion of the head contract (determined by 3%/2%/1% formula).
2. Termination of the head contract.
3. Abandonment of the head contract (no work is done for 30 days and the reason is not one of the reasons referred to in section 1(5)).
4. A Certificate of Completion is issued for the head contract or for any subcontract under which the lien claimant is claiming.
5. In the case of a strata lot, the strata lot is sold by the owner-developer or is occupied.

B. If there is no "head contractor":

45 days after the earliest of:

1. Completion of the improvement (a substantial part of it is in use or ready for use).
2. Abandonment of the improvement (no work is done for 30 days and the reason is not one of the reasons referred to in section 1(5)).
3. A Certificate of Completion is issued for any contract or subcontract under which the lien claimant is claiming.
4. In the case of a strata lot, the strata lot is sold by the owner-developer or is occupied.



- Time limit to commence a lawsuit and file a CPL: 1 year after the CBL was filed, or 21 days after delivery / deemed delivery of a "21 day notice".
- Holdback defence: Combined recovery by all lien claimants claiming under a single contractor or subcontractor is limited to the greatest of:
 1. 10% of the total payments made to that contractor / subcontractor under its contract / subcontract.
 2. 10% of the total value of work and material provided under the said contract / subcontract.
 3. The amount still owing to the said contractor / subcontractor under the said contract / subcontract

Liens on holdbacks:

- BC now has a "multiple holdback" system: a 10% holdback is to be retained from all payments to contractors or subcontractors (but not payments to material suppliers, workers, architects, engineers).
- In most cases, the holdback is to be retained until 10 days after expiry of lien rights for the contract or subcontract in question.
- The holdback "required to be retained" is "subject to a lien" and charged with payment of all persons engaged by or under the person from whom the holdback is retained (s.4).
- Section 5 requires owners to pay the holdback on contracts of \$100,000 or more into a holdback account, where it is "charged with payment of all liens arising under the contractor ..."
- *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238 and 2003 BCCA 193: Persons who had lost their lien rights against the land still shared equally in the 10% statutory holdback amount.
- Enforced by commencing an action in BC Supreme Court before the holdback is released.
- Similar rights under section 88 of the *Strata Property Act* with regard to the 7% holdback to be retained on sales of a strata lot by a developer.
- *Myles Enterprises Ltd. v. Atlas Painting & Decorating Ltd.*, 1997 CanLII 4206 (BCSC): Persons who had lost their lien rights against the strata lots in question still had rights against the 7% holdback

Trust rights:

- Arise upon receipt *or deemed receipt* of contract / subcontract funds by a contractor / subcontractor (but not in the hands of an owner).
- The beneficiaries are those persons engaged by the contractor / subcontractor.
- Material suppliers, workers, architects, engineers have no trust obligations.
- Not defeated by an assignment.
- Potential personal liability for directors etc. involved in a corporation's breach of trust.



- Potential liability for third parties receiving trust funds (e.g., banks).
- Trust funds can be traced (e.g., into land).
- Limitation to sue: 1 year from completion of the head contract (or the improvement, if no head contract).

Priorities - basic rules:

- A CBL filed before an advance is made under a mortgage has priority over the advance (s.32).
- A CBL has priority over a judgment obtained after the time the first work or material covered by the CBL was provided, regardless of the order of registration (s.21).
- CBL's share without regard to order of registration, but in case of a shortfall: generally speaking, workers not engaged by the owner are paid for 6 weeks wages, then other persons not engaged by the owner, then persons engaged by the owner. Note that this is an oversimplification. The calculation can be very complicated (ss.36-38) and the holdback provisions can also limit liability.
- A CBL attaches to the interest of all "owners" with knowledge of the improvement, unless a Notice of Interest was filed in the LTO (ss.3, 1(1)). A mortgagee is not an "owner" unless in possession of the land (s1(1)).

Effect of bankruptcy:

- A person with a builders lien on land is a secured creditor of the land's owner for purposes of the *B&IA*. (See Holden and Morawetz, section G44.)
- Two Saskatchewan Q.B. decisions have held that *BLA* trust provisions do not apply in a bankruptcy, but the prevailing view is that they were wrongly decided. (See Holden and Morawetz, section F8.)
- It has also been held that liens on holdbacks under the *BLA* are secured claims in a bankruptcy. (See Holden and Morawetz, section G44.)
- A breach of trust claim (e.g., against a company director) survives the defendant's personal bankruptcy, even if no dishonesty is involved: *Smith v. Henderson* (1992), 10 C.B.R.(3d) 153 (BCCA).

Effect of receivership / CCAA:

- Typical order provides for a stay and for priority of subsequent borrowings, but allows the filing of CBL's and commencement of proceedings to enforce them as required to avoid loss of lien rights due to expiry of a limitation period.
- Some similarity to ss. 32(5), (6) of the *BLA*, which allow court orders giving priority to subsequent mortgage advances whenever the advances will increase the property value by more than the amount of the advances.



Requirements to Pay under *Income Tax Act* s.224(1.2) or *Excise Tax Act* s.317(3):

- "Super garnishing orders" with "super-priority".
- Not defeated by any assignment or other "security interest" in favour of a secured creditor.
- Rights under the *BLA* are "security interests".
- A RTP clearly has priority over trust claims under the *BLA*.
- A RTP clearly has priority over all other claims against a *BLA* holdback *to the extent that the holdback is owing to the tax debtor*.
- CRA used to have a policy of allowing lien claimants to recover the 10% holdback amount notwithstanding a RTP, but not any more.
- In fact, CRA has recently been taking the position that it is entitled to the 10% *BLA* holdback amount even if nothing is owing to the tax debtor as a result of the tax debtor's breaches of contract. Arnold-Bailey J. ruled on February 2, 2009 that this position is wrong: *PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc.*, 2009 BCSC 95.

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