

BUILDER'S LIEN HOLDBACK FOR STRATA CORPORATIONS

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Strata corporations are subject to not only the provisions of the *Strata Property Act* ("*SPA*"), but other legislation, including the *Builders Lien Act* ("*BLA*"). Strata complexes undergoing repair projects have an obligation, in certain circumstances, to establish a holdback account under the *BLA*. This article provides some general information regarding the *BLA* and the obligation of strata corporations to establish and administer holdback accounts.

What is a Builder's Lien and who can File One?

The *BLA* gives contractors, subcontractors, and workers involved in making an "improvement" to a property the ability to file a lien on the title to the property. The lien is filed in the land title office as security for payment. An "improvement" as defined in the *BLA*, and 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, filing, grading or ditching of, in on or under land.

For instance, when an owner of a single family dwelling hires a contractor to replace the roof on a house, the contractor, subcontractor and workers are each able to file a lien in the land title office against title to the land as security for the amount that each of them are owed. Liens can also be filed by those contractors and sub-contractors who supplied materials for the project.

Does the *Builders Lien Act* Apply to Strata Corporations?

Except as otherwise provided for under sections 87 to 90 of *SPA*, the *BLA* applies to strata corporations. For instance, when a strata corporation retains a contractor to make repairs to common property, or a common asset, and the repairs are substantially completed and payment is not made, the contractor may file a lien at the land title office against the title of one or more of the strata lots. In fact, even if only one balcony was repaired, the contractor may choose to place a lien against the title of each strata lot in the complex. A builder's lien even takes priority over those amounts owing to a strata corporation under a *SPA* lien placed on the title of a strata lot.

If an owner of a strata lot retains a contractor to do work on a strata lot, a builder's lien may be placed on the title of that strata lot. If the lien on a strata lot is placed because of work done to the strata lot, then the matter is between the individual owner and those that worked on his or her strata lot.

How Can I get a Builders Lien Removed from the Title of my Strata Lot?

If a builder's lien is filed against the title to a strata lot, it may be difficult for an owner to renew his or her mortgage or re-finance. Most financial institutions will require that the builder's lien be removed prior to granting a renewal of the mortgage or agreeing to participate in re-financing. A builder's lien on title to a strata lot may also stop the sale of the strata lot from

completing, because the lien is a financial charge and “clear title” is not being provided to the purchaser.

If the lien is placed on a strata lot because of work done to the common property, the amount shown on the title to the strata lot will be the entire amount of the lien. However, section 90 of the *SPA* provides as follows:

Removal of liens and other charges

90 (1) An owner may apply to the Supreme Court to remove a claim of lien under the Builders Lien Act or other registered charge that charges more than one strata lot from the title to the owner's strata lot.

(2) The court may order the claim of lien or other charge removed from the title to the owner's strata lot on payment into the court of the strata lot's share of the amount secured by the claim of lien or other charge.

(3) Payment into the court releases the owner from liability to the lien claimant or other charge holder for the amount secured by the claim of lien or other charge.

(4) The strata lot's share of the amount secured by the claim of lien or other charge is calculated as set out in section 166 as if the amount of the claim of lien or other charge were a judgment.

(5) The money paid into the court is security for the lien or other charge in place of the strata lot.

As a result, the Court may order that the lien be removed from the title to a single strata lot in exchange for the owner paying his or her unit entitlement share of the lien amount into the Supreme Court of British Columbia. Given the cost of going to Court on this issue, the lien claimant and the strata lot owner, through their respective lawyers, often work out a solution whereby the owner's unit entitlement share of the lien amount is held in a lawyer's trust account on conditions until the matter is resolved between the Strata Corporation and the lien claimant or until the matter is decided by the Supreme Court of British Columbia.

Also, sometimes the strata corporation, acting on behalf of all owners, bring on a court application in the Supreme Court of British Columbia to have the lien removed from the titles of all the strata lots in exchange for monies being paid into Court or in a lawyer's trust account until the matter is resolved by the parties or by Court Order. There are a variety of other methods that a strata corporation can use to obtain removal of a builder's lien from the titles of strata lots and these methods should be discussed with a lawyer to determine the best course of action in the circumstances.

What is the Deadline for Filing a Claim of Lien?

If a certificate of completion has been issued with respect to a contract or subcontract, then the claims of the contractor or subcontractor or any persons engaged by the contractor or subcontractor may be filed no later than 45 days after the date on which the certificate of completion was issued.

If no certificate of completion is issued the lien may be filed no later than 45 days after:

- (a) the head contract is completed abandoned or terminated, if the strata corporation engaged a head contractor, or
- (b) the improvement is completed or abandoned.

What is a Holdback Account and when is it Necessary to have one?

A holdback account is kept as a form of security to help ensure that contractors, sub-contractors and workers are paid for their work and materials. It creates a fund out of which lien claimants can be paid. Also, the owner of the property, for the purposes of this article being a strata corporation, who properly keeps a holdback account will have limited liability for the lien claims. The liability of the strata corporation for the lien claims will be limited to the amount of 10% of the holdback or the unpaid balance of the contract price, whichever is greater.

A holdback account must be established by each legal entity primarily liable on each contract and sub-contract. As a result, a holdback account will need to be kept by the strata corporation regarding each contract it enters into. If the strata corporation acts as its own general contractor and enters into several contracts, which are not exempted from the requirement for a holdback account, it will need to establish several holdback accounts. Also, a general contractor will also have a similar obligation to establish holdback accounts for the sub-contracts it enters into.

When a contract in respect of an improvement to common property or common assets has an aggregate value of work and materials of \$100,000.00 or more, the strata corporation is legally obligated to establish a holdback account. Under section 4 of the *BLA*, the holdback must be 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.

Pursuant to section 4, the obligation to retain a holdback applies whether or not payments are made periodically or upon completion. The value of the work and materials is based on the contract price. If there is no contract price, it is based on the actual value of the work and materials. If payments are made periodically, 10% of each payment must be placed in the holdback account.

Pursuant to section 5 of the *BLA*, holdback accounts are not required if the aggregate value of the work and material provided is less than \$100,000.00. Some improvements to common property or common assets clearly will be less than \$100,000.00 and in those cases, a holdback account is not required. However, sometimes it is not clear whether the amount of the work and materials will meet the \$100,000.00 threshold. For instance, certain contracts allow for charges based on time and materials and it may be difficult to know whether the \$100,000.00 mark will be reached. Perhaps multiple related contracts have been signed that will cost over \$100,000.00. In cases where it is unclear whether a holdback account is required, it is prudent to seek legal advice about whether a holdback account should be maintained.

Also, certain owners are exempted from having to have holdback accounts, namely the government, a government corporation defined in the *Financial Administration Act*, or any other public body designated by name or class by regulation to the *BLA*.

What are the Obligations Regarding the Holdback Account?

Under section 5 of the *BLA*, an entity obligated to retain a holdback account must:

- (a) establish at a savings institution a holdback account for each contract under which a lien may arise,
- (b) pay into the holdback account the amount the owner is required to retain under section 4, and
- (c) administer the holdback account together with the contractor from whom the holdback was retained.

The holdback funds are charged with payment of all liens arising under the contractor from which the holdback is retained. They are held in trust for the contractor and may not be paid out without agreement of the strata corporation and the contractor, or a court order. Unless the strata corporation and the contractor otherwise agree, interest on the monies in the holdback account accrues to the strata corporation during the holdback period and to the credit of the contractor involved after the holdback period.

If a contractor defaults on a project, the strata corporation cannot use the holdback monies to complete the contract until the possibility of any lien being registered is exhausted.

Failure of a strata corporation to maintain a holdback account when required to do so constitutes a default under the contract and the contractor, on 10 days' notice, may suspend operations for as long as the default continues.

How long is the Holdback Period?

For contracts where a certificate of completion is issued, the holdback period expires 55 days after the certificate of completion is issued. For contracts that are not governed by a certificate of completion, the holdback period expires at the end of 55 days after:

- (a) the head contract is completed abandoned or terminated, if the strata corporation engaged a head contractor, or
- (b) the improvement is completed or abandoned, if paragraph (a) does not apply.

When the holdback period expires, the strata corporation pays the contractor the amount owing to the contractor unless liens have been filed or proceedings commenced to enforce a lien against the holdback. It is important for the strata corporation to check for liens after the time for filing a claim of lien has expired, by obtaining a new title search for each strata lot. It is also important to have a court search completed to see if a legal action has been commenced to enforce a builder's lien.

Phased Strata Plans and Builders Liens

Pursuant to section 87 of the *SPA* in a phased strata plan “...a claim of lien under the *Builders Lien Act* may be filed against only the strata lots in the phase in which the materials were supplied or the work was done.”

Holdbacks and Purchasing a Strata Lot from the Owner Developer

The obligation of a purchaser of a strata lot from the owner developer to retain a 7% holdback is beyond the scope of this article.

Legal Advice

This article has been written for the purposes of general education only. A strata corporation or an owner dealing with a builder's lien or a holdback account should seek legal advice about their particular factual situation