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PRACTICE NOTE 09: BUILDERS LIEN ACT - NEW LEGISLATION & IMPLICATIONS

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The new Builders Lien Act, which passed its requisite third reading and received Royal Assent on 30 July 1997 under Bill 38 in the Provincial legislature, was officially proclaimed (save its provisions regarding real estate holdbacks) on 08 January 98 and takes effect on 01 February 98. While many basic principles and aspects of practice which relate to builders liens remain familiar, the new legislation also reflects considerable change in both attitude and application to practice in British Columbia.

Until the effective date for the new legislation, and to the extent that current projects may be unaffected by it, architects; clients; builders; consulting engineers and other industry participants remain governed by the existing Builders Lien Act (last amended on 01 September 1984; see AIBC Directors Chair 002) and prevailing agreements/contracts.

Please note that the new statute is indeed a newly written and formatted document. It is not an amended edition of the existing statute. It is available from the provincial government through either their Internet website at www.ei.gov.bc.ca/directory/Ec_Dev/construc/index.htm under the auspices of the Ministry of Employment and Investment, or from the Queen's Printer. The provincial government also has available educational and technical guides and forms, including explanatory tables as well as an extensive set of questions and answers, through its Construction Secretariat (contact: Jim Sproul, manager at (250) 952-0676) and linked to the aforementioned website. The AIBC will not be publishing or distributing copies of the statute or other government documents.

Architects are encouraged to share this practice note and its contents with their clients and other industry colleagues. Equally, the companion video from the AIBC professional development program's 14 October 1997 teleconference, involving an architect/contractor/lawyer panel well-versed in the new legislation's development and featuring question-and-answer periods, is recommended and available at cost from the AIBC office.

BACKGROUND SUMMARY

This new statute has been sought for many years and represents one of the few industry-driven pieces of legislation to materialize under any government. The primary force seeking change has been the construction industry, largely through the BC Construction Association's efforts (the BCCA website address is www.bccassn.com and contains links to the provincial government's site). The AIBC has received input from architects over time and a decade ago conducted an extensive survey of both its members' attitudes and of the parallel lien legislation in other provinces. Suffice it to say that while the

new legislation contains many aspects which are without precedent in BC, those aspects by and large are (i) supported by the survey results and by current committee review; and (ii) familiar to architects and other industry participants in every other province. There will be an inevitable learning curve but, if the reported experience elsewhere is a good indicator, the objective benefits will outweigh the consequential increase in initial awkwardness as well as ongoing effort and costs.

The three types of principal benefits sought had to do with: cash flow amongst all components of the industry; security with respect to available holdback monies; and administration. Those objectives appear broadly to have been achieved but, candidly, the resultant statute is complex in some areas and occasionally somewhat ambiguous. While there is likely no such thing as a perfect piece of legislation (and without detracting from the government's significant efforts and positive results), some of the new Act's specific wordings and provisions could have benefitted from further industry consultation and practical "fine-tuning" prior to their adoption.

Whereas the AIBC's participation in the statute's development allows us to state confidently what the intent was of the aspects of direct concern to the architectural profession, there will undoubtedly be differences which arise in interpretation because of the statute's actual wordings; because of a particular situation's context; and because the legislation is new and has not been tested under the judicial system in our province. The Act itself takes precedence and should be carefully read in full.

The key may well lie, as it often does, in clear agreements between parties; their equitable administration to effect an appropriate balance of interests; and an understanding of the statute's requirements and opportunities.

SCOPE, IMPLICATIONS AND PRACTICAL RECOMMENDATIONS

Much has already been compiled by others (as noted above) and by various legal firms, comparing in fine detail the wordings of the new and the existing statutes. Much of that is of more interest and value to those parties who may file; handle; process or litigate builders liens accounts or claims. This practice note's scope is reserved for those aspects likely to be of direct and ongoing interest and value to architects and their clients as well as to builders whose construction contracts are administered by architects. It is extremely helpful for all parties to have a reasonable expectation of how architects are approaching the new statute's provisions in practical ways. Its focus is on providing both "hard" information as well as advice with respect to practical and professional issues. Here are the highlights:

A. AMBIT:
The new statute applies to all contracts to perform or to provide work or to supply material in relation to an improvement.* It is our understanding that there is no inherently exempt owner-type save the Federal Crown, including Native Lands.

**(note: under the new statute, 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.)*

B. PROFESSIONALS' LIEN RIGHTS:
Architects and engineers are now specifically contemplated and referenced under the statute. Architects and engineers who have a "prime" consulting contract (i.e. with an owner) have lien rights for all of their

services* (rendered either before or after construction has begun) unless they are engaged one by the other. In short, an architect is entitled to lien rights at such time as the architect has rendered service in relation to an improvement with regard to a property unless the architect's client happens to be an engineer (and vice versa).

**(note: under the new statute, "services" includes services as an architect or engineer whether provided before or after the construction of an improvement has begun).*

Under the statute and for its purposes, payments made by their clients to architects or engineers are not deemed to be in trust and those payments are not subject to any holdback. Accordingly, no one (including an employee and/or a sub-consultant) who provides work or supplies material to an architect or an engineer has a corresponding lien right. The provisions of this legislation have no effect with respect to an architectural commission undertaken with respect to an owner* who does not have some legally defined interest in land.

**(note: under the new statute, an "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, © 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.)*

C. PERCENTAGE:

The holdback percentage (where applicable) remains at 10% of the amount earned under contract* or subcontract*. This is the legal minimum requirement to satisfy builders liens exposure and is not to be confused with so-called "deficiency" holdbacks, which are separately aggregated amounts of money not certified or otherwise with-held for purposes of correcting or completing the Work.

**(note: under the new statute, a "contractor" means a person (excluding a worker) engaged by an owner; a "subcontractor" means a person (excluding a worker or a person engaged by an architect, engineer or a material supplier) engaged by a contractor or another subcontractor...in relation to an improvement...to perform or to provide work or to supply material.)*

D. MULTIPLE HOLDBACKS:

The extent of holdback monies available to satisfy builders liens under any given subcontract, is limited to 10% of the value of that subcontract...not 10% of the full value of its "parent" contract (the latter being the case under the existing legislation). In turn, the extent of a builders lien claim by a sub-subcontractor is limited to 10% of the value of that sub-subcontract, only. The holdback provisions do not extend to suppliers and workers (or architects and engineers). It is worth remembering that the real purpose of a holdback is not so much to guarantee a lien holder's payment as it is to limit an owner's financial liability or exposure.

E. LIEN PERIOD DURATION:

The lien period duration under the new statute is 45 days, with holdback payment thereunder due ten days later, i.e within 55 days (this compares to the existing 31- and 41-day time frames, respectively). The

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"triggering" event for initiating these time periods with respect to contractors or subcontractors (including architects and engineers) is either:

a) issuance of the first certificate of completion for the contract or subcontract; or

b) completion/abandonment/termination of the "head" contract* (if there is one); or

c) completion/abandonment of the improvement (if there is no "head" contract); or

d) if a strata lot is involved, conveyance from the original owner/developer to the first purchaser.

**(note: under the new statute, 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.)*

Should a project be delayed or deferred and the work (or services rendered) thereunder not yet be substantially complete, then the lien period remains effectively open.

F. HOLDBACK TRUST ACCOUNT:

Holdback monies must be placed by the owner into a trust account (one per contract) in the names of both the owner and the contractor. This, broadly, is to ensure that some monies are made available to satisfy liens, in the event of an owner's insolvency or diversion of funds. Interest on the holdback monies accrues to the benefit of the owner until expiry of the holdback period; thereafter, to the contractor. The holdback trust account provisions do not apply:

a) when the provincial government itself is an owner; or

b) to a contract with respect to an improvement with aggregate value below $100,000; or

c) to subcontracts or sub-subcontracts.

Municipal governments; other forms of regional and local government; and such entities as school boards or hospital boards...when acting as the owner on a project and notwithstanding that funding and/or authority may be provided by the provincial government...are not exempt from the Act's holdback trust account provisions.

In any event, administration of such trust accounts is the joint responsibility of the owner and contractor (not the architect).

G. TRANSITION:

The new statute will generally apply within its ambit (but not its holdback trust account provisions) to each and every project in progress at the date of proclamation unless all contracting (and subcontracting) parties on the project agree that the new statute, in its totality, shall not apply. This general application is contrary to industry intent and presents a highly problematic situation. At the risk of stating the obvious, a change order is not required in order to have the new statute apply to an existing contract.

Existing contracts typically do not contemplate the new legislation's applicability. Their financial terms and conditions account for neither the time nor the costs of both builders' and consultants' additional efforts in complying with or realizing opportunities afforded by the new statute. Equally, existing construction contracts and subcontracts (in particular) do not contemplate early release of some holdback monies; on the contrary, the carrying costs of such holdbacks were built into the contract prices.
For existing contracts which come under the ambit of the new statute, it may be appropriate to seek reasonable credits (by change orders) should a subcontractor apply for early release of holdback monies.

The AIBC's preferred approach and recommendation is for the parties to those existing contracts to clearly "opt out" of the new legislation (as is permitted thereunder). Certainly, legal advice should be sought, but the gist of our advice is to have all parties agree that (e.g.) the former Builders Lien Act shall continue to apply to this contract and all subcontracts throughout the duration of the contract. Whether or not this strategy will ultimately succeed with respect to every subcontractor (some of whom may not yet be on board) is not readily determinable, but under industry standard construction contracts, one fundamental provision (cf CCDC-2/94 GC 3.8) calls for the contractor to incorporate the terms and conditions of the "parent" contract into all contracts with subcontractors and suppliers.

If the construction contract is not under the new Builders Lien Act's provisions, then the client/architect agreement need not contemplate how to deliver and pay for related consulting services. Furthermore, nothing done in accordance with the "old" statute is invalidated by the new Act.

H. PAYMENT CERTIFIER:

The new statute introduces this term to represent whomever (under contract or subcontract) is either designated or subsequently appointed to undertake the responsibility for certifying completion* status. Consistent with standard/endorsed forms of client/architect agreement, construction contract and industry practice, this is generally an ongoing, familiar role for architects and one which we expect architects generally to continue to embrace, particularly as it relates to the administration of a contract.

**(note: under the new statute, "completed" means substantially completed or performed, not necessarily totally completed or performed.)*

There are, however, a set of newly introduced provisions which can have serious impact on the scope of duties and responsibilities of the payment certifier, chiefly those having to do with: multiple holdbacks; formula for determination of completion; progressive release of subcontracts' holdback components (necessitating certification of subcontracts' completion); time lines for certification; and communicating completion. Good record-keeping and observance of required response deadlines are always recommended practices, but especially so with regard to statutory obligations (and consequences for failure to comply) relative to a number of third parties.

The payment certifier* for a contract need not necessarily be the payment certifier for any subcontract thereunder. Architects are cautioned that the payment certifier's roles and responsibilities may present an onerous administrative chore and added liability exposure, not contemplated in standard client/architect agreements as part of "basic services" or in the AIBC's corresponding Tariff of Fees for Architectural Services. The role of payment certifier is not to be acquired by default but, rather, by specific agreement and in return for appropriate, additional compensation.

**(note: under the new statute, "payment certifier" means an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or (absent such a person) (i) the owner acting alone in respect of amounts due to the contractor, or (ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.)*

I. FORMULA FOR DETERMINATION OF COMPLETION:

The new statute sets out a simple formula for determining whether or not a "head" contract, contract (or subcontract) is substantially performed. In order to qualify, the extent of work remaining must be evaluated as being capable of completion or correction at a cost of not more than 3% of the first $500,000 of the contract plus 2% of its second $500,000 plus 1% of the balance. As well, for purposes of the statute, an improvement is completed if it or a substantial part of it is ready for use or is being used for the purpose intended.

The introduction of a "threshold formula" should prevent premature or frivolous applications for completion and make it easier to anticipate and calculate a valid application. Equally, however, architects are cautioned that missing or defective items, even if by themselves small or apparently inexpensive, may well (if not properly supplied, installed, reviewed and tested) jeopardize the performance of an improvement or a substantial part of it, especially with regard to matters of public safety, health or welfare. An architect needs to rely on both the prescribed formula and, thereunder, the architect's professional judgement with respect to evaluation when certifying completion.

J. PROGRESSIVE HOLDBACK RELEASE FOR SUBCONTRACTS:

The payment certifier, as agreed for a subcontract, upon application from that subcontractor, is required to review and certify completion of that subcontract's work, thereby triggering (at the appropriate later date) the release (by the contractor) of that subcontract's holdback (10% of its value). The statute provides the payment certifier with a right to information to assist determination of subcontract performance.
This new aspect of what could be part of an architect's services has attracted the most concerns, stemming from several apprehensions, as follows (along with our advice in their regards):

1. In order to certify completion of a subcontract, one would have to know what that subcontract's terms are, and the statute does require that a subcontract's terms must be made known. As a practical matter, however, on some projects...wherein the contractual chain is not characterized by integrated, standard, consistent and equitable conditions...one might discover that there were terms that are (say) unusual; contradictory with its "parent" contract; or (in the event of unwritten or at best informal agreements) difficult if not impossible to determine. In such cases, it is likely wise not to be the payment certifier, given that there is no reasonable way to fairly judge such an arrangement's performance, let alone in a timely fashion, and certainly not without exposing oneself and one's firm to high and unnecessary risk. Furthermore, it is highly recommended that the standard General Condition 3.8 of CCDC-2/94 be used and relied upon, so that any review and certification with respect to any subcontract is based upon that subcontract's terms being those of its "parent" contract, and so stated and agreed.

2. Similarly, one would have to know the actual price (and scope) of the subcontract, as opposed to the "schedule of values" normally provided today under the "parent" contract against a breakdown of the Work. Those values don't necessarily represent subcontracts and commonly include apportioned amounts attributable to the "parent" contractor's general conditions, profit

and overhead. In a positive vein, the new statute may generate more accurate disclosure of cost information... but could attract increased liability for the architect should amounts be certified which are not those actually under subcontract. It is strongly recommended that schedules of values be required to be prepared by the "parent" contractor which accurately represent the subcontracts' prices, upon which the architect is entitled to and will rely. Under the Act, the contractor is obligated to reveal actual subcontract prices to the payment certifier.

3. Regarding subcontracts which encompass work that is largely or wholly of an engineering nature (e.g. structural steel; mechanical system; emergency generator supply), there are several reasonable approaches. The architect could, simply, not undertake to be the payment certifier for those subcontracts; the likely candidate(s) would then be the project's professional engineer(s) of the appropriate discipline(s), under agreement with the owner. On the other hand, under a general contract wherein the architect is the payment certifier, he or she does so today while relying significantly upon the pertinent professional engineer...and that could continue to be the case.

4. Finally, there is a prospect of being flooded with applications for certification of completion by every subcontractor which, frankly, would generate considerable additional costs and an administrative nightmare with tight, coincidental deadlines. In practical terms (and based on experience in other provinces) this is neither intended nor realistic and, by potentially overloading the payment certifier(s), would be counter-productive. The subcontracts which can reasonably expect to obtain separate certification of completion (and progressive release of their holdback) are relatively few, encompassing (typically) those clearly in and done quite early (e.g. excavation); large structural systems around a project's middle (e.g. structural steel; framing); and the occasional stand-alone item. For the most part, the mechanical and electrical works are intimately connected with each other and require testing and commissioning at the end of the project. The finishing trades tend to come together, similarly, and the project's overall completion is effectively dependent upon and simultaneous with such determination.

In any event, it is important for one's contract documents to make it clear that the certification of completion for any subcontract is a function of (amongst other things) its work's being properly interfaced with that of other subcontracts; acceptable to those other subcontractors; and upon proper advance submission, review and approval of such items as statutory declarations; warrantees; manuals; WCB clearances; and commissioning. These contractual requirements for completion also will carry with them associated values with regard to the formula for determining completion. It is in every one's best interest not to abuse the new legislation.

K. TIMELINES FOR CERTIFICATION:

There are specific requirements regarding the allowable lapse of time (10 days) within which a payment certifier is obliged to respond to an application (from a contractor or subcontractor) for certification of completion. As well, the new statute is quite elaborate in setting out a payment certifier's obligations (and corresponding timelines) as to responses to request from lien holders* for any of the payment certifier's completion certificates' particulars...along with a payment certifier's associated liability exposure with respect to loss or damage arising out of failure to exercise properly the administrative duties relating to certification.

*(note: under the new statute, a "lien holder" means a person entitled to a lien; i.e. not necessarily a "lien claimant", which means a person who files a claim of lien.)

L. COMMUNICATING COMPLETION:

The payment certifier for a contract or subcontract is required to deliver copies to relevant parties and to post conspicuous notice regarding that contract's or subcontract's being certified complete, within 7 days of having certified completion (or be exposed to liability, similarly). This is an other additional service and reimbursable expense item for consultants. As is the case under the "old" statute, these obligations do not extend to the actual advertising of completion. (As a sidebar note, the Journal of Commerce (per editor Brian Martin) is exploring ways of doing that economically).

RELATED CONSIDERATIONS

Provincial legislation prevails over, and cannot legally be overridden by, an agreement or contract between parties. It is important to use forms of agreement or contract that are either specifically consistent with or which do not contradict the statute...or that are silent (or benign) as regards that statute, which will govern and apply in any case. In these regards, a review of some of the more familiar, industry-standard documents indicates as follows :

CCAC-6/1997:

This national standard client/architect form of agreement (as well as its abbreviated counterpart, document 7) is silent as to builders lien particulars between the architect and client. There is no provision for, or contemplation of, any holdback against an architect's earnings. In that regard, it may be used "as is" under the new lien legislation. Note, however, that the scope of the architect's basic services thereunder in the administration of construction refers to and contemplates review and certification of the Work, i.e. one general (head) contract for the total construction and related services required by the contract documents .

OTHER AIBC-ENDORSED CLIENT/ARCHITECT AGREEMENTS:

The foregoing considerations also apply to the provincial standard Ministry of Health and Ministry of Education forms of agreement.

CCDC-2/1994:

This national standard owner/contractor form of contract (the terms of reference of which are consistent with those of the standard/endorsed client/architect agreements) specifically acknowledges the fact that there is relevant, differing legislation in each province and makes provisions for stipulating the extent of builders lien holdback (cf agreement article A.5.1 wherein the builders lien holdback percentage must be inserted). Again, as with the above-noted client/architect agreements, the consultant's responsibilities contemplate a single general (head) contractor and review/certification of the Work, identically defined as the total construction and related services required by the contract documents. Under General Condition 5.5, payment of the builders lien holdback for the contract is done once, triggered by Substantial Performance of the Work.

This form of construction contract does acknowledge (General Condition 5.6) that the lien legislation may permit "progressive release" of builders lien holdback(s) for subcontracts and so the standard form need not be supplemented in order to enable its use with the new legislation.

The foregoing observations generally apply to CCDC's cost-plus and design/build forms of agreement (documents 3 and 14, respectively) as well.

BC GOVERNMENT STANDARD FORM OF CONSTRUCTION CONTRACT:

The above-noted comments (for the CCDC family of contracts) are generally applicable for this document, also, save that it does not contain a General Condition which enables "progressive release" of builders lien holdback(s) to subcontractors. This form of contract will have to be either supplemented or directly modified in order to be compatible with the new legislation.

MULTIPLE SEPARATE CONTRACTS

Commonly delivered in a construction management format or in an owner-builder context, each separate contract must be handled on its own merits (as is the case under the existing legislation) and now each attracts its own holdback trust account, unless so exempted by its characteristics under the Act.

DESIGN/BUILD CONTRACTS

If the design/builder (under contract with an owner) is the project's architect (or one of its engineers), the new statute's holdback provisions do not apply. Should the architect (or the engineers) be subcontracted to the design/builder, however, while there is no holdback respecting their earnings under such subcontract(s) from the design/builder, the builders lien holdback provisions apply to the "parent" design/build contract with the owner, in full.

PROFESSIONAL ETHICS AND LEGAL OBLIGATIONS

Notwithstanding the facts that (i) an architect who is a prime consultant (i.e. engaged by a client and who in turn hires subconsultants to fulfill part(s) of the primary obligation) is not subject to builders lien holdback; and (ii) those subconsultants are not entitled to lien the client's property; it remains so that:

(a) an architect nonetheless has a legal obligation to pay a subconsultant monies due under the agreement between them; and

(b) an architect with such a legal obligation and who has been paid by the architect's client on account of the subconsultant's earnings, nonetheless has also an ethical duty to pay the corresponding monies to the subconsultant (cf AIBC Code of Ethics under Bylaw 34.15).

Architects are reminded that their decisions when reviewing construction for conformance must be rendered impartially; they must keep apprised of laws applicable to the practice of their profession; and must take such laws into account (cf. AIBC Code of Ethics under Bylaws 31.4, 33.1 and 33.4, respectively). In doing so, architects may rely on the advice of other knowledgeable professionals and

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qualified persons. Architects are encouraged to obtain legal advice and to consult with their professional liability insurers.

COMMUNICATION

The AIBC is monitoring the new Builders Lien Act's implementation. Feedback as to actual experience, interpretation, extent of professional services and impact on the "Tariff of Fees for Architectural Services" is welcome and should be directed to Michael A. Ernest, MAIBC, Director of Professional Services.

(note: The AIBC and other sources' referenced publications are intended to inform and assist but do not represent any legal opinion or guarantee with regard to meaning and interpretation of the Builders Lien Act, which may ultimately be decided in the courts. The AIBC expressly disclaims responsibility for any errors or omissions contained herein. Members are advised to consult their own legal representatives in order to confirm any advice set out herein.)

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