

Builders' Lien system changes
Questions and answers
May 2nd, 2017

Q. What are the key changes?

A. There are three major amendments:

- The first was to change the way that a finishing holdback is calculated. As mentioned, the finishing holdback is the amount that an owner continues to holdback following substantial performance and payout of the main holdback. The Act had required that the finishing holdback be 2.5% of the contract price, which could be out of all proportion to the actual work remaining to be done to fully complete the project. The new way of calculating the finishing holdback is 10% of the price of remaining services or materials to be supplied.
- The second amendment was to allow for early release of holdbacks to sub-contractors who complete their work at an early stage in the construction project. This is called "progressive release of holdback". Subcontractors who finishing their work on a project at an early stage – for example the company pouring the foundation – can get their subcontract certified complete and the owner can pay out a proportionate amount of the holdback amount at that point, instead of waiting for the whole project to be completed.
- The third amendment was to create authority to make regulations to require notice be given to parties when a contract is substantially performed and when a sub-contract is certified as complete. While the legislative changes provided the authority to require proactive notice, the actual requirement and the details about the manner for giving notice were left to regulation.
- There were also a number of other minor amendments made to bring more clarity and consistency to the Act, but those three are the major ones.

Q. Why did it take so long to proclaim these agreements?

A. Although these amendments were passed in 2013 and 2014, they were not proclaimed because follow-up regulations about notice were being developed. These have now been completed.

Q. Are the changes to the Builders Lien Act effective immediately?

A. They will be effective June 30, 2017.

Q. Will the new changes affect existing contracts?

A. Yes. The changes could affect how things work in relation to contracts made before June 30, 2017.

Finishing holdback

- The new provision regarding finishing holdback says this: “Where, sixty days after the date on which a contract is deemed to be substantially performed, services or materials remain to be supplied to complete the contract, the person primarily liable upon the contract shall retain a separate holdback equal to ten per cent of the price of the remaining services or materials as they are actually supplied under the contract, until all liens that may be claimed against the holdback have expired or have been satisfied or discharged in accordance with this Act.” So it does not matter if the contract was made before or after the date that the amendments come into force – the key will be what law is in place at the key time of sixty days after substantial performance. If that key date falls on or after June 30, 2017, the finishing holdback is going to be calculated in this new manner.

Progressive release of holdback

- In regard to progressive release of holdback, the ability to have a subcontract “certified complete” and then have holdbacks released in respect of the completed subcontract would apply in relation to any subcontract. It isn’t specific to subcontracts that are put in place before or after June 30, 2017. The certification of the subcontract would have to take place on or after June 30, 2017, but the subcontract could have been in place before that date.

Notice

- The requirements to give notice under the regulation will also apply in relation to substantial performance of contract and completion of subcontracts, regardless of when the contracts or subcontract was made. The key will be when substantial performance or certification of the subcontract happens – if it is after the effective date, the notice requirements will kick in.

Q. If progressive release of holdback is requested by subcontractor, who is required to certify that the subcontractors work is complete?

A. A subcontract may be certified complete by the architect, engineer or other person upon whose certificate payments are to be made. If there is no architect, engineer or other person upon whose certificate payments are to be made, the subcontract may be certified complete by the owner and the contractor acting jointly.

Q. How do these changes help the contractor or subcontractor if an owner maintains that contract is not substantially complete and continues to retain the 10% holdback for long periods of time?

A. These amendments don't change how substantial performance of a contract will be determined. The Law Reform Commission considered whether a certificate or declaration of substantial performance should be required, but concluded that the Nova Scotia Act's deemed trigger for substantial performance should be retained. [See page 13 of the Report]

The amendments to the Act do address a similar issue with regard to delay in the certification of completion of a subcontract. Where there is a failure or refusal to certify, within a reasonable time, that a subcontract is complete, an application may be made to Court. The Court may issue an order certifying the subcontract to be complete.

Q. If I am a subcontractor on a project and I have reached completion of my work, and another subcontractor of the same project files a lien, will the progressive release of holdback for the holdback related to my contract be effected?

A. Where a subcontract has been certified complete, the owner may, without jeopardy in respect of any other lien, make payment reducing the holdback to the extent of the amount of holdback the payer has retained in respect of the completed subcontract if all liens that may be claimed against the holdback have expired or have been satisfied, discharged or vacated in accordance with the Act. For further information about how this applies in your particular situation, you should consult a lawyer.

Q. Under the amended Act, an owner will be releasing the majority of the holdback 60 days after substantial performance of the contract. If I am a subcontractor that has not been paid for work that I do after the date of substantial performance, this leaves very little money available if I need to file a lien. How is this change better for contractors?

Under the amended Act, the amount of holdback that will be retained after substantial performance (the finishing holdback) is based on the value of the work that is to be completed between substantial completion and total completion. The Law Reform Commission observed that the actual work remaining to be done in this period may be very slight, out of all proportion to the 2.5% of the total contract price that was previously required to be retained in this period. The change to the way that the finishing holdback is calculated is intended to make

the amount that is retained more proportionate and to allow holdback money to flow out to contractors and subcontractor sooner, rather than having an unduly large amount held by owners until total completion of the contract.

Q. What is the purpose of the Builders’ Lien Act?

A. The Builders’ Lien Act has a long history, originating as the Mechanics’ Lien Act in 1899. The Act is intended to protect subcontractors and suppliers who perform work or supply materials at a construction project if the person with whom they directly contracted defaults on the contract.

The subcontractor or supplier automatically gets a legal right – a lien – in the property that lasts until the services or materials are paid for. Registering a lien is a way for a subcontractor or supplier to try and collect the money that is owed to them.

Once the lien is registered in the Land Registry, it affects the property owner’s interest in the property and can interfere with the sale or mortgaging of the property.

The Act also features a holdback system on payments made under construction contracts. The owner is required to maintain a “holdback” from the payment to the general contractor.

In turn, the general contractor is supposed to holdback a portion of payments to subcontractors, and this goes on down the line in what is called the “construction pyramid”.

Q. What are holdbacks?

A. Holdbacks serve a dual role. They create a pool of money that will be available to help pay participants in a construction project. If there is a problem with the project and liens are filed, subcontractors and suppliers who have not been paid by the general contractor would proportionately share that pool of money created by the holdback amount.

Holdbacks also protect owners because they can limit the extent to which an owner can be held liable to the subcontractors and suppliers.

If a certain amount of time has passed after the construction contract is substantially performed and no liens have been claimed, the owner is required to pay the holdback out to the general contractor, and the general contractor pays out the subcontractor and suppliers and the payments again flow down the line of the “construction pyramid.”

If there is still work to be done on the contract when the main holdback is release, a smaller holdback – called the “finishing holdback” – is retained until the work is fully completed.