
Builders Lien Holdback Account

1. Builders Lien Act—The Holdback

The *Builders Lien Act* provides a form of security to contractors, subcontractors, workers and suppliers who work on a building that is under construction—the builders lien. A builders lien is a charge on property by a person who has supplied work or material to a building under construction. A builders lien may be claimed by a contractor, subcontractor or worker.¹

The *Builders Lien Act* also creates a pool of money out of which claims may be paid, by requiring an owner to hold back 10% of each payment to the contractor—the builders lien holdback. The builders lien holdback provides two functions:

- It ensures that there is a pool of money out of which builders lien claims can be paid, although it does not guarantee payment of those claims. The requirement for owners to establish a holdback account is clearly intended to give the contractor and the subcontractors comfort that the holdback funds are indeed available. It also aims to assure the contractor and subcontractors that they will not be, for example, at the mercy of a mortgagee or owner who must come up with the holdback funds at the end of the project.
- It limits an owner's liability for lien claims. If an owner complies with the holdback provisions of the *Builders Lien Act*, the owner's maximum liability for lien claims will be limited to the amount of the 10% holdback or the unpaid balance of the contract price, whichever is greater.

The *Builders Lien Act* helps to ensure that money intended to finance construction is used for that purpose by imposing a trust on money received by contractors and subcontractors in connection with the construction project—the statutory

or deemed trust. The holdback account will be treated like a trust account. Contractors and subcontractors are deemed to be trustees of the money received by them. The persons engaged directly by them are the beneficiaries of the particular trust fund.

2. The Holdback Account

The *Builders Lien Act* creates a mandatory obligation to retain a 10% holdback on the “person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act”.² In the case of work being done on behalf of a strata corporation, the persons primarily liable would be the strata corporation in the case of a contract with a contractor and the contractor in the case of each subcontract. It is not sufficient that the owner (the strata corporation, in this case) simply holds back 10% of the payment amount from the contractor; the monies must actually be paid into the holdback account. If the owner acts as the general contractor, a separate holdback account will be required for every contract with the owner.

3. Establishing the Holdback Account

There are no regulations prescribing how the holdback account must be established and managed. The only conditions relating to the operation of the account are that the interest on the account is to be to the credit of the owner to the date it is due and to the contractor after the date the holdback is due. There are no rules setting out, for example, whether the account is to have joint signatories, and whether all payments out of the holdback account are to be directly to the contractor or to a subcontractor when the progressive releases or payments are made.³ The parties are thus left with a wide discretion for what they can agree to con-

cerning the management of the account and these issues are often addressed in the contract executed by the parties.

For every progress payment under the contract, 90% of the price of the work completed in any month is paid by the owner to the contractor or contractors, and 10% is retained as a holdback that must be paid into the holdback account. At the end of the contract, the amount in the account should equal 10% of the contract price.

At the direction of their strata corporation client, a strata manager can establish the account with its usual financial institution, with the account set up in the usual manner, but with a reference to it being a “holdback account for Strata Corporation ____”. If there are to be multiple accounts due to the strata corporation acting as the general contractor, the accounts could be set up as follows: “holdback account for Strata Corporation ____ –Contract A; holdback account for Strata Corporation ____ –Contract B,” and so on.

4. Exemptions from the requirement to establish Holdback Account

There are two major exceptions to the requirement that the 10% lien holdback be paid into an actual account.

The first is where the owner has a construction mortgage with a “savings institution” and authorizes the savings institution to disburse the mortgage money. In that case, the lender may hold back 10% of the mortgage money from each mortgage draw, and the lender will be liable to the owner and any lien holders if it fails to fulfill its obligations in relation to the holdback. Mortgage lenders do not want to supervise holdbacks and will rarely agree to this arrangement. Most lenders will instead advance 100% of each draw, but will contractually require that the owner pay the 10% into the holdback account.

¹ These are all defined terms under the *Builders Lien Act* and may also include architects, engineers and suppliers of materials.

² Section 4 of the *Builders Lien Act*

³ Sections 8 and 9 of the *Builders Lien Act*

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The second is where the total value of work and materials is less than \$100,000 (e.g. renovations and smaller projects).

Clearly, if there is a general contractor and the contract price exceeds \$100,000, the owner must establish the account. However, consider a situation in which a contract at first is less than \$100,000, but as a result of changes, eventually exceeds the amount. It would be difficult to allege the owner was then in default of the *Builders Lien Act* if the owner did not voluntarily set up an account.

The same is true on a cost-plus contract where there is no specific amount for the value of the improvement or the contract. Presumably, there will be budgets or estimates that will show if the anticipated value of the work exceeds \$100,000 and, if it does, then the account must be established.

The *Builders Lien Act* does not indicate if the \$100,000 limit includes HST. Although HST is considered to be a lienable part of the contract price, the appli-

cability of taxes is a separate issue that remains unanswered.⁴ The conservative approach is to assume that if the HST takes the value of the project over the \$100,000 threshold, a strata corporation should establish the account.

Problems arise in the construction management scenario where there is no “head contractor” as defined in the *Builders Lien Act*.⁵ In construction management structures, all of the trade contractors, who normally act as subcontractors, contract directly with the owner. The construction manager only receives payment of his or her own fees and does not receive funds from the owner to be passed on to the trade or subcontractors. Payment is made directly by the owner to the trade contractor. The problems arise in relation to the exemption as to whether the \$100,000 threshold relates to the value of the individual owner/trade contractor contracts or to the aggregate value of the improvements. There is no authority clearly determining whether or not an owner has to establish and maintain the holdback account in such circumstances, but the more conservative position is to establish the holdback if the total value of all contracts exceeds \$100,000.

Note that the holdback is mandatory. The person primarily liable must retain the 10% holdback and there is no option to the owner but to retain at least that amount, even if they do not have to establish the holdback account due to falling within one of the exemptions.

5. Payment of Interest Accruing in the Holdback Account

Interest on monies on deposit in the holdback account accrues to the benefit of the owner until the holdback payment is due to be released, and to the contractor after payment of the holdback is due to be released.⁶

6. Failure to Establish the Holdback Account

The failure of the owner to pay the holdback into a holdback account is an event of default under the construction contract, irrespective of the wording of the contract.⁷ If the owner fails to establish the account or make the payments into the account, the contractor can give a 10-day notice, and if the default is not corrected in that time, the contractor may stop work. Typically, during this period, the holdback funds are paid into the newly established holdback account. ■

⁴ Section 5(8) of the *Builders Lien Act*

⁵ Section 1(1) of the *Builders Lien Act*

⁶ Section 5(6) of the *Builders Lien Act*

⁷ Section 4 of the *Builders Lien Act*