4. LIENS AND SUBCONSULTANTS' RIGHTS [§2.25]

In what situations will a subconsultant hired by an architect or engineer have, or not have, statutory lien rights? Section 2(2) of the *BLA* provides that no lien shall arise in favour of "a person who performs or provides work … to an architect, engineer or material supplier". Therefore, a consultant who has been engaged by another architect or engineer to provide services in relation to a construction is not entitled to the statutory lien.

Section 4(6) provides that "[d]espite subsection 1(a), a holdback must not be retained from a worker, material supplier, architect or engineer". The accounts of architects and engineers are not subject to holdback.

Section 10(4) provides that the trust obligations under the *BLA* (discussed in chapter 8 (The Builders Lien Trust)) do not apply to money received by an architect, engineer, or material supplier. Thus, architects and engineers are exempt from trust obligations to those they engage on an improvement.

Accordingly, if a project requires a series of consulting services to be provided by different individual specialists, each consultant would want to ensure that they are engaged directly by the owner or a general contractor, and not by a prime consultant, in order to preserve their right to a lien as "contractor" or "subcontractor". The trade-off for the loss of the subconsultants' lien rights is the benefit that flows from an absence of statutory holdbacks.

B. THE CONSULTANT AS PAYMENT CERTIFIER [§2.26]

To complement the scheme providing for the progressive release of multiple holdbacks, the *BLA* creates the role of "payment certifier".

Section 7(1) defines the "payment certifier" as follows:

> **7** (1) In this section, "**payment certifier**" means
>
> (a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or
>
> (b) if there is no person as described in paragraph (a),
>
> (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.

In addition to the traditional role of the prime consultant provided for in standard form construction contract documents (for example, CCDC 2 – 2020 – Stipulated Price Contract; see www.ccdc.org/document/ccdc-2-2020/), the *BLA* impresses the "payment certifier" with a duty to determine whether a contract or subcontract is "completed" within the meaning of the *BLA*. Issuance of a certificate of completion following the payment certifier's decision will trigger the start of the time limitation for holdback retention and the filing of claims of lien.

It is important to note that s. 6 of the *CPPA* (not yet in force) voids any provision in a contract that makes the giving of a proper invoice conditional on the certification of a payment certifier or the approval of the owner. "Payment certifier" under the *CPPA* has the same meaning as in s. 7 of the *BLA*.

1. THE PAYMENT CERTIFIER SCHEME IN SECTION 7 [§2.27]

The s. 7 scheme may be summarized as follows:

(1) Within 10 days after the date of a request of a contractor or subcontractor, the payment certifier must determine whether the contract or subcontract in question has been completed. If the payment certifier determines that there has been completion, it must issue a certificate of completion (s. 7(3)).

(2) Within seven days of the issuance of a certificate of completion, the payment certifier must:

   (a) deliver a copy of the certificate to the owner, to the head contractor (if any), and to the person at whose request the certificate was issued;

   (b) deliver a notice of certification of completion to all persons who submitted a request in relation to the particular contract or subcontract; and

   (c) post a notice of certification of completion in a prominent place on the improvement (s. 7(4)).

While there is no particular form required for the request for certification, the Regulations to the *Builders Lien Act* provide a form of certificate of completion (Form 3). Form 3 requires that the following information be set out:

(1) the name and address of the payment certifier;

(2) the date the contract or subcontract was completed;

(3) the location of the improvement (street address);

(4) a brief description of the improvement; and

(5) a brief description of the contract or subcontract involved, including the date upon which it was made and the names of the parties to it.

The certificate of completion must be signed and dated by the payment certifier. Unless special circumstances exist, it is desirable that the date the contract or subcontract was completed be identified as the date the certificate is signed. This practice avoids creating confusion as to the running of the lien period. A certificate of completion may only be issued with confidence as to its effectiveness when there is a request for such a certificate under s. 7(3) of the *BLA* (*Quigg Homes WV345 Ltd. v. Bosma*, 2004 BCSC 1582).

A notice of certification of completion must be in the prescribed form (Form 2). Form 2 requires that the following information be set out:

(1) the name or popular description of the project;

(2) the date the certificate of completion was issued;

(3) the identity of the parties to the contract certified;

(4) a brief description of the work done under the contract or subcontract; and

(5) the location of the improvement (street address).

What is "completion"? For the purposes of the *BLA*, "completed", when used in relation to a "contract" or "subcontract", has a defined meaning:

> **"completed"**, if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed;

The phrase "substantially completed or performed" is further defined in s. 1(2) of the *BLA*, with reference to financial criteria:

> (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
>
> (a) 3% of the first $500 000 of the contract price,
>
> (b) 2% of the next $500 000 of the contract price, and

(c) 1% of the balance of the contract price.

Once a certificate of completion is issued, time starts to run with respect to the holdback retention from the contractor or subcontractor whose contract is certified as complete. Upon 55 days elapsing from the date of the issuance of the certificate of completion, and if no liens have been filed, the holdback may then be released to the contractor or subcontractor from whom it was retained. Note: When it comes into force, s. 56 of the *CPPA* will amend that time period from 55 days to 46 days.

If the certificate fails to comply with the relevant provisions of the *BLA* respecting certificates of completion, the time for filing a lien will not begin to run and valid lien claims may still be filed until 45 days after a proper certificate of completion is issued or the other statutory requirements for completion in the *BLA* have been met (*W Redevelopment Group, Inc. v. Allan Window Technologies Inc.*, 2010 BCSC 1601). Consequently, it is important to ensure strict compliance with the provisions. See also *Clough Pacific Joint Venture v. AECOM Canada Ltd.*, 2025 BCSC 164, a case dealing the issue of whether the certificate of completion and notice of certificate of completion complied with the requirements of s. 7 of the *BLA*. The court held the certificate and notice were invalid, and therefore, the lien was filed in time and was not extinguished.

What are the legal risks to the consultant acting as a "payment certifier"? The *BLA* creates a statutory cause of action against a payment certifier who fails to comply with its statutory duties. A payment certifier who fails or refuses:

(1) without reasonable excuse to issue a certificate of completion within 10 days after the date of a request; or

(2) to deliver and post the required notices of certification of completion

is "liable to anyone who suffers loss or damage as a result" (s. 7(8) and (9)).

The *BLA* also provides for recourse to the court for an order declaring that a contract or subcontract has been completed, when the payment certifier fails or refuses to issue a certificate of completion (s. 7(5) and (6)). When a court makes an order to the "same effect as a certificate of completion issued by a payment certifier", the payment certifier must thereafter comply with the notice requirements under the *BLA* (s. 7(7)).

A consultant wishing to take advantage of the protections under the *BLA*, should become familiar with the corresponding duties and obligations imposed upon it as a "payment certifier". If a consultant wishes to retain statutory lien rights, the consultant must carefully consider its mode of contracting.

See the Forms and Precedent section for:

- Notice of Certification of Completion—Builders Lien Forms Regulation, Form 2
- Certification of Completion—Builders Lien Forms Regulation, Form 3

2. THE CONSULTANT'S RISK [§2.28]

Statutory liability now exists under the *BLA* vis-à-vis parties to whom the consultant traditionally owed no contractual or other legal duties. This exposure, which is statutory in nature, cannot be limited by the traditional contractual vehicle.

VI. LIENS AND THE MEANING OF MATERIAL SUPPLIER [§2.29]

The definition of "material supplier" in the *BLA* is different from that in the former Act. Under s. 1(1) of the current Act:

> **"material supplier"** means a contractor or subcontractor who supplies only material in relation to an improvement;

This definition eliminates the confusion that often arose under the former Act in determining whether a claimant is a material supplier or subcontractor. However, the distinction may still be relevant for holdback and trust claims because no lien or trust rights are created by the *BLA* for a person engaged by or under a material supplier, and no holdback is retained from a payment to a material supplier.

In addition, the definition of "material" has changed in the current Act:

> **"material"** means movable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed