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March 6, 2020

Gregory G. Blue, Q.C.
C/O British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC V6T 1Z1

Dear Mr. Blue:

Re: BCLI Consultation Paper on the Builders Lien Act

The Urban Development Institute (UDI) thanks the British Columbia Law Institute (BCLI) for its extensive work and consultation on the reforms to the *Builders Lien Act (BLA)*, and we apologize for our belated response. UDI is the association of the development/building industry and its related professions in British Columbia. UDI Pacific represents thousands of individuals involved in all facets of land development and planning, including: developers, property managers, financial lenders, lawyers, engineers, planners, architects, appraisers, real estate professionals, local governments, government agencies and construction companies. Our members have had the chance to review the *BCLI Consultation Paper*, and for the most part are supportive of the Committees recommendations, including:

- Increasing the minimum amount for claiming a lien from \$200 to \$3,000 - although we believe it could be raised even further than this;
- The use of the proposed *New Form of Claim of Lien*, which would eliminate “... *superfluous information and common sources of errors ...;*”
- Ensuring that owners are automatically notified when a claim of lien is filed;
- Amending the *BLA* “... *to provide that a lien does not arise against land that is subject to a statutory right of entry with respect to any operations that are carried out under the statutory right of entry;*”
- Allowing for demolition to “... *be lienable whether or not it is a preliminary step in the redevelopment of the site;*”
- Creating more certainty regarding the 45-day countdown to the end of the lien filing period, including:
 - Removing the head contract triggers;
 - Removing the subjective phrase “*a substantial part*” from the test under the *BLA* for defining when the completion of an improvement has occurred; and
 - Establishing a new “... *certificate of cessation of work, to create certainty about the relevant lien filing period when work ceases under an individual contract or subcontract before its completion and will not resume under the same contract or subcontract;*”

- The need for certificates of completion/cessation to comply substantially with prescribed forms;
- Amending the definition of “payment certifier” to allow them “... *to issue certificates of completion, regardless of whether the contract also calls for certification of progress payments;*”
- Allowing the use of a project website where various forms/information could be posted such as certificates, performance/labour bonds, permits, and other documents;¹
- Allowing agreements between owners and contractors regarding what will be considered separate improvements for the purposes of the *BLA* in a project involving multiple phases;
- UDI strongly concurs with eliminating the dual-lien model, which has been allowed because of the *Shimco* decisions, and we agree that it is a “*bad fit*” for the *BLA* that creates uncertainty;
- Removing the ten-day gap between the end of the lien filing period and the end of the holdback period;
- Amending the *BLA*, so that if a claim of lien is filed after the holdback period, only the portion needed to cover the claims of lien can be held back;
- Allowing for the proposed “... *optional scheme for gradual periodic release of the holdback after the first year,*” to prevent large holdbacks for projects with lengthy construction schedules;
- Amending the *BLA* so “... *applications for orders securing and removing claims of lien from the title could be made without notice if security for the full amount of a claim of lien is offered,*” through standard prescribed forms in regulation;²
- Removing the requirement for owners “... *to maintain a holdback account segregating holdback funds if the value of the contract is \$100,000 or more...*”;
- Lowering the bar for removing an abusive claim of lien from title through the proposed “*Context-specific grounds*” that are in line with other provinces;
- Using the “compensatory principle” for monetary sanctions when the *BLA* is misused;
- Making “... *any term in a contract that directly or indirectly imposes a liability or penalty for exercising a right under the Act unenforceable,*” to protect against circumstances when the bargaining power between parties is one-sided;
- Reducing the required holdback by the amount of any holdback funds that have to be paid to the Canada Revenue Agency in cases when they have issued a “requirement to pay” order “... *to an owner or another payor in the construction contract chain to collect unpaid tax liabilities owed by another party in the chain ...;*”
- Entitling “... *anyone who has provided security for a claim of lien ... to serve a notice on a lien claimant requiring the lien claimant to start an action to enforce the claim of lien within 21 days;*”
- Reducing the deemed service by mail rule period from 8 days to 7 days, so the *BLA* is harmonized with Supreme Court Civil Rules;

¹ However, “project website” might be too specific a term. BCLI may wish to consider a broader definition such as “digitally available format”, as an FTP site may be used instead of traditional URL access to a website. In some cases a portal could be used that is specific to a trade/user but includes information pertaining to multiple projects if the trade is doing work on more than one project. We also agree that if “project websites” or “digitally available formats” were mandated in the *BLA*, it should only apply to larger projects.

² We also support the alternative approach offered in the *Discussion Paper* of officially designating financial institutions and bonding companies, so that the Land Title Office could then “... *be empowered to cancel a claim of lien endorsed on the owner’s title without the need for a court order, upon being notified by an approved issuer or a lawyer that security for the full amount of the claim of lien has been provided...*”.

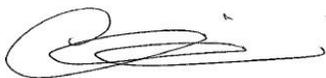
- Ensuring that all lien claimants receive notice of trial or an application for judgment when they could be affected by the outcome of a lien enforcement action;
- Allowing the Courts to conduct lien enforcement actions expeditiously and address dormant lien enforcement actions by empowering them “... *to make case management orders and to dismiss a claim to enforce a lien for delay alone, even if other claims in the action are allowed to proceed;*”
- For improving lien actions involving common property in a strata plan, including:
 - Empowering the Land Title Office to use “single property identifiers” for the common property in strata plans;
 - Naming “... *the strata corporation as the defendant to represent the owners in a certificate of pending litigation;*” and
 - Ensuring that “*A judgment in favour of the lien claimant would not result in an order for sale,*” but instead having the courts give judgments nominally against strata corporations, so that individual owners, as required under the *Strata Property Act*, “... *would become liable to satisfy the judgment according to their proportionate shares in the common property.*”

UDI has only a few concerns with the recommendations in the *Discussion Paper*, as noted below.

- We are not in favour of moving away from requiring that there be “... *strict compliance with the requirements for completing a claim of lien ...;*” and the practice of invalidating claims when misnomers occur.
- UDI prefers that the date on which an abandonment of an improvement would be deemed to have occurred remains at the current 30 days – not the proposed 60 days.
- With regard to extending the one-year limitation period to two years, UDI supports the position taken by the minority that the one-year limitation period under the *BLA* for trust claims remain in place.
- We are not in favour of repealing the “... *rule that a lien enforcement action must be started at the British Columbia Supreme Court registry nearest the land on which the improvement is located ...;*”.

In conclusion, we commend the detailed and extensive work completed by your Committee, and we are supportive of the vast majority of your recommendations. If you have any questions regarding our comments, please do not hesitate to contact us.

Yours sincerely,



Anne McMullin
President and CEO, Urban Development Institute