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Docket: CI 21-01-33651
(Winnipeg Centre)
Indexed as: Sterling Parkway Residences Inc. v. Boretta Construction 2002 Ltd. et al
Cited as: 2024 MBKB 120

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

STERLING PARKWAY RESIDENCES INC., applicant,	Jesse Gietz for the applicant
- and –	
BORETTA CONSTRUCTION 2002 LTD. and TOROMONT INDUSTRIES LTD., respondents.	Mark Borgo for the respondents
	Peter Halamandaris for Silex Fiberglass Windows & Doors Ltd.
	Timothy Fry Kosta Vartsakis for S & J Construction Ltd.
	Tyler Kochanski for Gypsum Drywall Interiors Ltd. and 3-Phase Electrical Ltd.
	Bailey Harris for Transcona Roofing
	Jessica Hersey for Inex Plastering
	JUDGMENT DELIVERED: August 8, 2024

GREENBERG J.

INTRODUCTION

[1] This is a motion by Sterling Parkway Residences Inc. ("Sterling") for payment out of a portion of the money that it paid into court to discharge two builders' liens registered on its property by the respondent, Boretta Construction 2002 Ltd. ("Boretta"). The money Sterling seeks to recover is the holdback that it was required to keep under s. 24 of ***The Builders' Liens Act***, C.C.S.M., c. B91 ("***BLA***") with respect to a construction project on which Boretta was the general contractor. Now that the project is complete, Sterling wishes to pay the subtrades out of the holdback fund. Boretta opposes the motion. It says that the holdback was paid into court as alternate security for its liens and that it cannot be distributed until the action on those liens and the amounts owing to the various parties has been determined.[1]

[2] For the reasons that follow, I am dismissing the motion.

BACKGROUND

[3] Sterling is the owner and developer of an apartment complex in Winnipeg on which construction began in June 2019. Boretta was the general contractor. On August 17, 2021, Sterling terminated the contract with Boretta because of alleged performance and delay issues. Boretta then registered two liens on the property (one for each of the two

[1] Although Boretta has assigned its interests in this matter to Liberty Mutual Insurance Company, the surety under performance bonds issued with respect to the construction contracts, I will refer to the respondent as "Boretta"

phases of construction). Sterling applied to vacate the two liens. In January 2022, Bock J. ordered the liens vacated upon deposit into court of cash security as follows:

> a. In respect of Builder's Lien No. 5334071/1:
>
> i. $377,207.64; and
>
> ii. $1,369,584.04 being the total builders' lien holdback on Phase 1A to August 17, 2022 [sic – the year should be 2021] and as held in trust by Tapper Cuddy LLP; and
>
> b. In respect of Builders' Lien No. 5334070/1:
>
> i. $91,877.75; and
>
> ii. $489,302.71 being the total builders' lien holdback on Phase 1B to August 17, 2022 [sic] and as held in trust by Tapper Cuddy LLP.
>
> [emphasis added]

[4] In accordance with the order, Sterling deposited $2,343,371.01 into court. In vacating the liens, Bock J. noted that, while the amount of alternate security represents the value of the work done at the date of filing the liens, his assessment of that value was based on a summary process and was not a final determination of the amount owing to the contractor.

[5] After terminating the contract with Boretta, Sterling retained another company as construction manager and the project was completed. It now seeks the return of that part of the alternate security which is made up of holdback funds ($1.45 million[2] plus GST) so that it can disperse those funds to some 25 subtrades. (It is not seeking to be

[2] Bock J. relied on Boretta's calculations to determine the holdback amounts. In valuing the holdback for the purpose of this motion, Sterling is relying on the amount that was calculated by Affinity Architecture Inc., the payment certifier on the project.

paid out that portion of the holdback that is attributable to Borretta's self-performed work.)

[6] There is pending litigation over the construction. In July 2022, Sterling commenced an action against Boretta for damages for deficiencies and delays. Boretta filed a defence and counterclaim for damages for breach of contract. Boretta also commenced an action on the liens. Although almost all the work on the project was performed by sub-contractors, Boretta has not to date initiated third party claims against any of the sub-contractors. It says that it has not done so because it does not have particulars of the alleged deficiencies and so does not know which sub-contractors would be responsible.

[7] Two of the sub-contractors have also filed claims. Toews J. has ordered all actions to be heard together and directed Sterling to provide particulars of deficiency and delay claims to Boretta by July 31, 2024. Boretta is opposed to the release of any amount paid into court as alternate security before these actions and the amounts owing to the parties is determined. Sterling says that these actions will likely take years to be finally resolved and it would be unfair, and contrary to the intention of the legislation, to make the sub-contractors wait for payment particularly where there is no claim for deficiencies attributable to that sub-contractor.

ISSUES AND POSITIONS OF THE PARTIES

[8] There are two issues on this motion: 1) whether the holdback money that was paid into court as alternate security lost its character as holdback money, and 2) if not, can it be distributed to the sub-contractors before litigation between the parties is determined and the questions regarding deficiencies and set-offs is resolved.

[9] Three of the sub-contractors, namely**,** S & J Construction Ltd., Silex Fiberglass Windows & Doors Ltd. and Gypsum Drywall Interiors Ltd., filed briefs and made submissions on this motion in support of Sterling's position. For ease of reference, I will refer to the arguments made by Sterling and these sub-contractors together as Sterling's arguments.

[10] Sterling does not claim any interest in the holdback money. It seeks return of the money in order to distribute it to the sub-contractors. Sterling says that, under s. 25 of the ***BLA***, the holdback money was payable to the sub-contractors on July 25, 2023, 41 days after certificates of substantial performance were issued and that Boretta has no claim or interest in the holdback money.

[11] While I am told that it is common practice in Manitoba for holdback money to be paid into court to vacate liens, Sterling says that practice contravenes the provisions of the ***BLA***. As the money was improperly paid into court, it cannot, by that action, lose its character as holdback. Sterling says that s. 55(2) of the ***BLA*** allows a judge to vacate a lien on payment into court of an amount "equal to the holdback" plus any additional amount payable under the contract. Section 56(2) provides that the security paid into court does not reduce the amount required to be retained as the holdback. Sterling says that the legislation contemplates that the amount of the holdback is used to quantify the amount of alternate security, not that the actual holdback money is used as security. It says that, had the money not been improperly paid into court, it would have distributed that money to the sub-contractors long ago.

[12] Sterling says that s. 27(6) of the ***BLA*** precludes Boretta from claiming set-offs against the holdback amounts. Essentially, they say that the holdback is protected from any claims of deficiencies. Sterling argues that the sub-contractors should be paid for their work even though Sterling has filed a claim alleging that the work is deficient. While this seems counterintuitive, Sterling argues that s. 27(6) evidences a deliberate policy choice by the Legislature to protect 7.5% of the contract price for disbursement to the subtrades, regardless of the quality of the work.

[13] Boretta agrees that the payment of the holdback into court contravened the ***BLA*** but says that, once paid into court, the money lost its character as holdback for the benefit of sub-contractors and now secures only the interests of the lien holder, Boretta. Boretta's position is that, in the absence of the consent of the parties, the money paid into court cannot be paid out until the court determines what amounts are owed under the contracts and whether there are any set-offs between the parties.

THE LEGISLATION

[14] The purpose of the ***BLA*** was described in ***Bird Construction Group v. Trotter and Morton Industrial Contracting Inc.***, 2023 MBCA 64:

> 19 The primary purpose of the Act has been described as ensuring "that a person contributing to the improvement of such land is paid for that contribution in accordance with his contractual entitlement" (*Canotech Consultants Ltd v 5994731 Manitoba Ltd*, 2017 MBCA 48 at para 21). Like all legislation, the Act is deemed to be remedial in nature. As noted by the [Manitoba Law Reform] Commission in the Report [*The Builders' Liens Act of Manitoba: A Modernized Approach*, Final Report #136 (Nov. 2018)] (at p 1):
>
> > . . .
> >
> > . . . Most construction projects give rise to a complex construction contract pyramid composed of many two-party contracts connected to form a series of payment chains that require payment for completed work to flow from owner to contractor to sub-contractor/supplier, and so on.

> There is considerable risk in this model for an innocent party whose contract may be remote from the owner or the contractor in possession of the project funds.

[15] To address this risk, the ***BLA*** creates three types of remedies: 1) liens, 2) holdbacks and 3) trusts. These remedies are distinct and may be explained, very briefly, as follows.

[16] The lien provisions of the Act allow a person who provides labour, services or materials that improve land to create a charge on that land for the value of their work or supplies even if they do not have a contract with the owner. The lien, if registered in the land titles office, would allow the person to force the sale of the land to satisfy amounts owing to them. The lien must be registered within 40 days of substantial performance or abandonment of the contract, or it ceases to exist.

[17] The holdback provisions of the ***BLA*** require each person who is primarily liable for payment under a contract (the owner, contractor and sub-contractors, if there are sub-sub-contractors) to hold back 7.5% of each payment made on the contract until 40 days after the work under the contract has been completed or abandoned, at which time, if no liens have been registered, the holdback is paid out.

[18] The trust provisions of the ***BLA*** impose a trust on all money payable to a contractor or sub-contractor under a construction contract and on money received by an owner to finance a construction project. The trustee (owner, contractor, sub-contractor) cannot appropriate that money or use it for any purpose until persons below them in the construction pyramid are paid. Breach of the trust provisions may result in penalties of fines or imprisonment.

[19] Those who work on construction projects, of course, have a common law right to sue for breach of contract where there is a contractual relationship between them and the defaulting party. The ***BLA*** supplements that right by creating remedies where there is no contractual relationship. As Scott C.J.M. said in ***Winfield Construction Ltd. v. B.A. Robinson Co.***, 1996 CarswellMan 108 (C.A.), at para. 27, "one of the most important, if not the most important objects of the statute [is] to protect persons who are not in a position of privity of contract for the value of the work done by them that results in an improvement to the value of land."

[20] Prior to the enactment of the ***BLA*** in 1981, remedies for contractors and subcontractors in construction projects were found in two statutes – ***The Mechanics' Liens Act***, R.S.M. 1970, c. M80 (the "***MLA***") and ***The Builders and Workers Act***, R.S.M. 1970, c. B90 (the "***BWA")***. The ***MLA*** contained provisions allowing for the registration and enforcement of liens and created holdback requirements. The ***BWA*** imposed trust provisions on amounts owners and contractors received with respect to a construction project. In its first report on mechanics' liens, **Mechanics' Liens Legislation in Manitoba** (Report #32, August 13, 1979), the Manitoba Law Reform Commission ("MLRC") recommended that the two statutes be consolidated and so they were. But, it appears that in consolidating the legislation, little thought was given to addressing how the remedies in the two Acts would work together. As a result, it is difficult to reconcile some of the provisions. As Kroft J.A. explained in ***Provincial Drywall Supply Ltd. v. Gateway Construction Co. (Man. C.A***.), [1993] M.J. No. 164 (C.A.) (QL):

> 19 Throughout North America and other jurisdictions legislatures have for many years attempted to achieve protection, order and fairness by creating a variety of statutory liens, holdbacks and deemed trusts.
>
> …
>
> 22 Unfortunately, but not surprisingly, no panacea has been found in Manitoba or elsewhere. The Builders' Liens Act is not a seamless and symmetric web. It might better be described as a jigsaw puzzle which not only has a few pieces missing, but to complicate matters further includes additional pieces from other puzzles.
>
> 23 Sections 55(2) and 56(1) of the Act [sections in issue in the case at bar] are written in clear and understandable language. Standing alone they admit to little ambiguity. The problem is they do not fit the rest of the picture as perfectly as some might like, and it does not help to force them into place.

[21] The usual rules of statutory interpretation require provisions to be read in the context of the statute as a whole, presuming that the provisions are intended to work together (***Bird Construction Group***, *supra*, at para. 18). However, it is difficult to apply those rules where the statute, as here, is not a "seamless and symmetrical web". That said, the objectives of legislation can usually provide some guidance. Unfortunately, while the overall objective of the ***BLA*** is to ensure those who work on or provide supplies to a construction project are paid, the specific objective of the holdback provisions is difficult to discern. While it is apparent how the lien and trust provisions serve the overall objective of the legislation, it is not clear how holding back 7.5% of the contract payments assists those lower down in the construction contract pyramid.

[22] The MLRC reviewed Manitoba's builders' lien legislation a second time in 2018. In its second report (***The Builders' Liens Act*** **of Manitoba: A Modernized Approach**, Report #136, November 2018), the Commission identified another purpose of the holdback provisions as being to protect the owner (at p. 13):

> F. The Role for Statutory Holdback
>
> The Legislature has capped an owner's potential liability to lien claimants by creating provisions involving retention of a holdback from contract price amounts payable. In Manitoba, the holdback is equal to 7.5% of each payment made on account of the contract price. If an owner complies with the requirement to deduct and retain holdback according to the Act, it can limit its monetary exposure to lien claims in the event of a payment default by others on the project.

[23] While s. 26 of the ***BLA*** does give sub-contractors a charge on the holdback money, it does not ensure prompt payment since the holdback cannot be paid out where liens have been registered or an action on a lien has been commenced (ss. 25, 27).

[24] Sterling argues that the purpose of the ***BLA*** is to ensure the "proper and timely flow of funds to parties who are entitled to them" (Applicant's Supplementary Motion Brief, para. 40). In fact, in its 2018 report, the MLRC notes that "there is currently no remedy in the Act for the enforcement of *timely* compliance with payment terms in construction contracts and sub-contracts" (p. 20). The MLRC report identifies the failure to ensure prompt payment to sub-contractors as a major flaw in the current legislative scheme and recommends the enactment of legislation to address this. Manitoba accepted that recommendation and, in 2023, passed ***The Builders' Liens Amendment Act (Prompt Payment)***, S.M. 2023, c. 30. However, the legislation has not yet been proclaimed.

DISCUSSION AND ANALYSIS

Did the holdback lose its character as holdback once paid into court?

[25] As I said, Sterling argues that, in paying the holdback into court as alternate security to vacate the lien, it unintentionally contravened the ***BLA***. Although the amount

of the alternate security is based in part on the amount of the holdback (s. 55(2)), Sterling says that the actual holdback is not to be paid in. It relies on this comment of Scott C.J.M. in ***Winfield Construction Ltd. v. B.A. Robinson Co.***, [1996] M.J. No. 121 (C.A.) (QL):

> 50 … It is not disputed that the formal judgment was in error in providing that Winfield pay into court $17,137.53 "being the statutory holdback" since sec. 55(2) calls for payment of the sum "in an amount equal to the holdback required under this Act" and sec. 56(2) makes it clear that money so paid does not reduce the amount required to be retained by the owner by way of holdback…

[26] I note that this statement in ***Winfield*** is not accompanied by any explanation or discussion. And while Boretta agrees that it was an error to pay the holdback into court, I am not sure that I agree. In any event, in my view, whether it was an error to pay the holdback into court, it did not thereby lose its character as holdback.

[27] The comments of Scott C.J.M. in ***Winfield*** pre-date the decision of the Supreme Court in ***Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel***, 2015 SCC 43. Although the court in ***Structal*** was dealing with money that is subject to the trust provisions of the ***BLA***, the rationale of the decision would seem to apply equally to holdback money. In that case, a contractor who had posted a lien bond to discharge a lien registered by a sub-contractor, argued that by posting the bond they had discharged their trust obligations under the Act. The Court disagreed, holding that the trust provisions and the lien provisions provide two distinct remedies even though the funds sought under each may be the same. The filing of a lien bond to discharge the lien does not extinguish the trust claim. Rothstein J. explained that a contractor can avoid the

need for double security by paying trust money into court instead of posting a lien bond and, if that is done, the money remains impressed with a trust:

> [46] There may be circumstances where a contractor will choose to maintain double security where there are lien and trust claims for the same work, services, or materials, by acquiring a lien bond while still holding trust funds. However, a contractor can avoid double security by paying cash into court pursuant to s. 55(2) instead of depositing a lien bond. The BLA provides that any owner, contractor, or subcontractor with trust obligations "shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust" until one of the listed steps has occurred (ss. 4(3), 4(4) and 5(3)). Payment of the trust funds into court to vacate a lien, for the amount of the lien claim implicated by the trust claim, does not constitute an appropriation or conversion of the trust funds. The contractor is doing exactly what the Act requires - ensuring the monies are held in trust for the beneficiary. These funds remain impressed with the trust; should the lien claim fail while the trust claim is outstanding, the cash would continue to be trust funds when returned to the owner, contractor, or subcontractor. So long as the trust funds themselves are deposited with the court, the funds are secure and the trust has not been breached.
>
> [emphasis added]

[28] The reasoning in ***Structal*** should apply equally to holdback money. Sterling could have sought to vacate the lien by posting a bond instead of the holdback money. But paying the money into court should not remove the protection that money is meant to provide.

[29] Rothstein J. rejected the argument (similar to an argument made by Sterling in this case) that, if the posting of a bond does not extinguish the trust, the owner or contractor who posted the bond will be required to pay the funds twice:

> 45 Dominion's argument blurs the distinction between payment and security. Should an owner or contractor pay funds into or post security with the court in order to vacate registered liens, such funds or security do not constitute payment to the lien claimants.

[30] Sterling refers to s. 56(2) of the ***BLA*** as prohibiting use of the holdback to vacate a lien. That section reads:

> 56(2) Money paid into court or security given under subsection 55(2) does not reduce the amount required to be retained by the owner under section 24.

[31] I do not read this section as prohibiting holdback from being paid into court to vacate a lien. Rather, I think it ensures that the value of the holdback is maintained even if it is paid into court. As I said, paying the holdback into court to vacate a lien is common practice in Manitoba and it is not clear that the legislation prohibits it.

[32] If I am wrong in this regard and it was an error to pay the holdback into court, then it should not be released to Sterling unless Sterling substitutes another form of security as a substitute for Boretta's lien. Sterling disputes that it should be required to post another form of security because it says that Boretta has no interest in the holdback money. They say that the holdback is for the exclusive benefit of the subtrades. This is not correct. Boretta has a direct interest in the holdback as the payee under the contract pursuant to which the holdback arises. And Boretta has an interest in the holdback as a lienholder (s. 26). In fact, Sterling acknowledges that part of the holdback is payable to Boretta for self-performed work.

[33] Sterling also argues that, if the holdback is distributed to the sub-contractors, there would be a corresponding reduction in the amount of money owed by Sterling to Boretta and, therefore, in the value of the security needed as a substitute for Boretta's lien. That is to say, Boretta would only have a claim against Sterling for self-performed work and the amount of the alternate security should be reduced accordingly. But that argument does not take into account the fact that Sterling has claimed damages against Boretta for

deficiencies in work performed by the subcontractors, for which deficiencies they say Boretta is liable. In my view, the alternate security ordered by Bock J. should be maintained until entitlement to the money is determined. As I said earlier, Toews J. has ordered this action to be heard together with the other actions related to the construction project. And Boretta indicates that, once it has particulars of the alleged deficiencies, it intends to third party those sub-contractors responsible for the deficiencies.

[34] The ***BLA*** requires the judge, in an action on a lien, to resolve all issues related to the construction project. Section 65(1) provides:

> **Trial of action**
>
> 65(1) Subject to subsection (3), on the trial of an action the judge shall try all questions that arise therein or that are necessary to be tried in order to dispose of the action finally and completely and to adjust the rights and liabilities of, and to give all necessary relief to, the persons appearing before him or upon whom a notice of trial has been served, including all questions of set-off and counterclaim arising under the contract or out of the work done, services provided or materials supplied in respect of the land against which the claim of lien is registered.
>
> **Disposal of questions and judgment**
>
> 65(2) On the trial of an action the judge shall take all accounts, make all inquiries, give all directions, and do all things, necessary to try and to dispose finally and completely of the action and of all matters, questions and accounts arising therein or at the trial as provided in subsection (1) and he shall embody all the results in the judgment.

[35] In my view, the amount of alternate security paid into court should be maintained until "all accounts" are taken of the issues in dispute. Sterling is not prepared to post substitute security and concedes that, if I am not prepared to reduce the amount of the alternate security, the holdback should remain in court.

[36] As Sterling is not prepared to offer substitute security, its application to have the holdback money paid out to it should be dismissed.

Can Boretta claim set-offs against the holdback?

[37] Sterling says that Boretta is not entitled to claim set-offs against the holdback. As a result, there is no reason not to distribute it to sub-contractors now. In view of my conclusion on the first issue, this issue is moot. But, as much of the argument on the motion focused on this issue, I make the following comments about it.

[38] Before addressing Sterling's arguments, I note that the position that Sterling takes is a curious one. It says that the holdback provisions of the ***BLA*** require the holdback to be paid out 41 days after substantial performance of the contract regardless of the quality of the work. It says that the holdback is meant to protect the sub-contractors and ensure their payment in a timely way. As I explained earlier, I am not sure that is the purpose of the holdback. To be sure, if there are no disputes with the quality of the work, the holdback would be paid out as directed by s. 27 of the Act. However, the logical extension of Sterling's argument, as vividly put by Boretta's counsel, is that a sub-contractor can finish their work on a building, then burn the building down, and still get their share of the 7.5% holdback.

[39] While Sterling does not have any direct contractual claim against the sub-contractors, its claim of deficiencies is inconsistent with the position that the sub-contractors should be paid regardless of their entitlement. Eighty percent of the work on the construction project was performed by sub-contractors. I note that Boretta does not take issue with paying a pro rata share of the holdback to those sub-contractors whose work is not impugned but Sterling has not yet provided particulars of its deficiencies

claim. Sterling says its position is not inconsistent because they are just following the mandate of the legislation, which it says requires the holdback to be paid out and prohibits the use of the holdback to set-off amounts owed for defaults or deficiencies.

[40] Moreover, Sterling says that when it terminated its contract with Boretta, Boretta's rights under the sub-contracts were assigned to it. As a result, Boretta lost all its rights under those contracts and the right to any set-offs against the sub-contractors. I have no evidence that Boretta assigned its rights under the sub-contracts to Sterling. Sterling seems to be saying that it "assigned" Boretta's rights to itself. The cases relied upon by Sterling refer to the right of a party to a contract to assign its own rights under the contract, not the right of a person to assign the rights of another person under a contract to which it is not a party.

[41] When Sterling terminated the contract with Boretta, it had the right under its contract with Boretta to take possession of the work and products at the place of work and to finish the work (CCDC2, GC 7.1.5). It could enter into new contracts with the sub-contractors to compete the work. But its contract with Boretta did not give it the right to determine the rights and obligations arising from the contracts between Boretta and the sub-contractors. Sterling's argument would mean that Boretta would have no right, in the action that Sterling brought against Boretta for deficiencies, to third party the sub-contractors who performed the work that give rise to the allegations of deficiencies. In fact, this argument conflicts with Sterling's argument that if Boretta wants to claim set-offs, it should have third partied the sub-contractors. In any event, in a decision in a related action between Sterling and one of the sub-contractors, the Manitoba Court of

Appeal found that the consequences of the contractual relationship between Sterling and the sub-contractors should be left for trial (***Sterling Parkway Residences Inc. v. Gypsum Drywall Interiors Ltd.***, 2024 MBCA 46, at para. 68).

[42] Sterling's main argument that the holdback is not subject to set-offs is based on s. 27(6) of the ***BLA***, which provides:

> **Where holdback not to be applied**
>
> 27(6) Where the contractor or sub-contractor defaults in performing his contract or sub-contract, the holdback shall not, as against the lien claimant who by virtue of section 26 has a charge thereon, be applied by the owner or contractor
>
> (a) to complete the contract or sub-contract; or
>
> (b) in payment of damages for non completion of the contract or sub-contract by the contractor or sub-contractor; or
>
> (c) in payment or satisfaction of any claim against the contractor or sub-contractor; or
>
> (d) for any other purpose to remedy the default.

[43] Section 27(6) has not been subject to judicial comment, but I do not think it has application here. Section 27(6) prohibits the payer under the contract from using the holdback money to remedy default by the payee. That is not what is happening here. Sterling is not seeking to use or reduce the holdback; it is seeking to pay it out. In any event, while s. 27(6) prohibits the owner, in determining the amount they are required to hold back, from setting-off amounts to remedy defaults, in my view, it does not prohibit the ultimate use of that money in an accounting between the parties at the trial of an action as contemplated by s. 65.

[44] Sterling's interpretation of s. 27(6) – that the section requires payout without regard to deficiencies – appears inconsistent with other provisions of the ***BLA*** which prohibit payout of the holdback where liens are registered or an action on a lien has been commenced (ss. 25, 27). Section 25(1) reads:

> **When holdback may be reduced**
>
> 25(1) Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 24(1) and 40 days have expired after
>
> (a) a certificate of substantial performance of the contract has been given under section 46; or
>
> . . .
>
> whichever first occurs, the holdback under subsection 24(1) shall be reduced
>
> (d) by 7.5% of the contract price for the contract less the amount of the holdback required under subsection 24(2) and less the aggregate of payments made under subsection (2); or
>
> (e) if there is no specific contract price for the contract, by 7.5% of the value of the work done, the services provided and the materials supplied under the contract, less the amount of the holdback required under subsection 24(2) and less the amount of the aggregate of payments made under subsection (2);
>
> plus the pro rata share of any accrued interest in the holdback account applicable to the amount by which the holdback is reduced <u>but this subsection does not apply while the registration of a lien arising under the contract continues in effect under section 49.</u>
>
> [emphasis added]

[45] Section 27(3) and (4) provide:

> **Payment of holdback where no liens**
>
> 27(3) Payment of the holdback retained under this Act in respect of a contract <u>may</u> be validly made after the expiration of 40 days mentioned in subsection 24(1) or (2), as the case may be <u>if, at the time the holdback is paid, there are no liens registered against the land to which the contract relates.</u>
>
> **Payment of holdback where liens are registered**

> 27(4) Where, on the expiration of the 40 days mentioned in subsection 24(1) or (2), as the case may be, there are liens registered against the land to which a contract relates, the holdback retained under this Act in respect of the contract may be validly paid for the purpose of obtaining discharges of all those registered liens unless before the payment of the holdback an action has been commenced under this Act to enforce one or more of those liens.
>
> [emphasis added]

[46] Arguably, these sections preclude payout of the holdback in this case. While Boretta's lien is no longer registered against the land, s. 51 of the ***BLA*** provides that the lien continues to exist, albeit as a charge against the money paid into court. Even if s. 27(3) or s. 27(4) do not apply here, those sections preclude an interpretation of s. 27(6) that mandates payout of the holdback even where there is a dispute under the contract.

[47] Sterling argues that caselaw from other jurisdictions supports its interpretation of s. 27(6). One must be cautious about looking to the case law of other jurisdictions since there are differences in the statutory schemes. In any event, the cases relied upon do not support Sterling's position. For example, in ***Alexander Insulations Ltd. v. Norwood Construction Ltd. and Lansdowne Investment Corporation***, 1985 CarswellBC 364 (B.C. Co. Ct.), several subcontractors brought an application for summary determination of the minimum amount of the holdback to which they would be entitled. There was a pending action by the owner against the general contractor and two of the principal sub-contractors with respect to deficiencies. There were also a number of pending lien actions. The sub-contractors who brought the application were not party to those actions. The British Columbia ***Builders Lien Act*** has a section comparable to s. 27(6) of the ***BLA***. The owner argued that it would be improper to require him to pay

the statutory holdback before the litigation was completed. The court disagreed. Macdonald J. said that because the owner had not brought any claim against the applicant sub-contractors, they did not have to wait to be paid out their portion of the holdback. However, he did not order payment of the holdback to the sub-contractors against whom the owner claimed damages, saying:

> 13 With respect to the lien claims of Sigma Steel and Inland Glass, I agree that the potential right of the owner to recover, out of their respective shares of the holdback, any damages awarded to it against those subcontractors in the Supreme Court actions must be preserved. Thus, a proportion of the minimum statutory holdback representing the proportion which the claims of Sigma Steel and Inland Glass bear to the total subtrade and material lien claims (approximately 40 per cent) may be reserved by [the owner] for that purpose. There will be liberty to apply if the parties are unable to agree on that amount.

[48] I note that, in contrast to this case, the owner in ***Alexander Insulations*** was opposed to paying out the holdback. Moreover, the case was essentially a summary judgment application, not an application to pay out as here. In the absence of consent, applications under s. 56(3) of the ***BLA*** for payment out of money that has been paid into court can only be determined after a trial or summary judgment motion where the court determines what amount is owing to the lien claimant.

[49] In ***Boretta Construction Ltd. v. Independent Heating & Air Conditioning Ltd.***, 1992 CarswellMan 168 (QB), the court had vacated a lien on payment into court of money that included the statutory holdback. The sub-contractors who had served a Notice of Claim for Lien sought payment out of their pro rata share of the holdback amount. The parties whose liens had been vacated challenged the court's jurisdiction to do so without an action being initiated and pursued. There was no suggestion that the

holdback money lost its characteristic as holdback once paid into court. However, Monnin J. (as he then was) dismissed the motion, saying:

> 9 All things being equal, I can find that only lienholders who have given a proper notice of claim for lien to M.P.I.C. are entitled to share in the fund created for the purpose of those liens, but that does not eliminate the requirement of proving their liens as to amounts, goods supplied, and timely and valid service. It may be that in the circumstances of this case, the trial process can be abbreviated either by means of an application for summary judgment or application for an expedited trial process, but an action must be commenced and proof of the validity of the liens must be made.

See also ***Gateway Construction Co. Ltd. v. Provincial Drywall Supply Limited***, 1988 CarswellMan 120 (C.A.).

[50] Sterling refers to the 2018 report of the MLRC as authority for the proposition that "section 27(6) of the Act expressly prohibits set-offs against holdback charged with a lien" (at p. 99). Sterling has taken that statement in the report out of context. The MLRC made the statement in commenting on whether set-offs should be considered in determining the value of the security required to vacate a lien under s. 55(2). The report references s. 27(6) simply to point out that, unlike the case with holdbacks, there is no reference in the ***BLA*** to set-offs against lien claim amounts.

[51] Boretta refers to Ontario case law which they say supports their argument that the holdback may be used for set-offs. In the recent decision in ***Homes by DeSantis (Lake) Inc. v. Sutton Forming Inc.***, 2023 ONSC 2628 (Div. Ct.), a sub-contractor and sub-subcontractor requested payment out of their share of the holdback. The court ordered the money to be paid out because there was no deficiency claim with respect to their work. But Corbett J. commented:

> 22 I appreciate that deficiency claims - and consequent set-off claims - may be asserted at each rung of the construction ladder. To the extent that such claims are asserted at each rung of the ladder, this may impact on the availability for an early order for payment from holdback. That is not this case. A deficiency claim by owner against contractor does not impede payments from basic holdback to subcontractors and their suppliers in the absence of parallel deficiency claims at each applicable rung of the construction ladder.
>
> [emphasis added]

[52] As I said, Boretta concedes that those sub-contractors whose work is not impugned by Sterling should be paid their share of the holdback. Hopefully, there can be agreement on this once Sterling has provided particulars of their deficiencies claim. Until then, the holdback should not be distributed to the sub-contractors.

[53] As I said, Sterling argued that s. 27 of the ***BLA*** evidences a policy choice by the Legislature to require the sub-contractors be paid 7.5% of the contract price regardless of disputes as to the quality of the work. They say that sub-contractors need only prove entitlement to 92.5% of the contract price. But, as the MLRC explained in its 2018 report (at p.10), the ***BLA*** creates remedies; it does not determine entitlement to payment:

> Underpinning the statutory remedies contained in the act for claimants seeking to be paid for work, services or materials provided to improve the value of an owner's land, is each claimant's specific contract or sub-contract. Each contract or sub-contract sets out terms for the claimant's proper performance and establishes the legal basis for its entitlement to ultimately be paid an agreed sum. … The Act does not alter performance requirements, the contract price, sub-contract prices or the total amount the owner must pay for construction of the project.

[54] Nor does the prompt payment legislation that was passed last year (***The Builders' Liens Amendment Act (Prompt Payment)***) eliminate the need to prove entitlement. It simply creates a speedier process for resolving disputes.

[55] The motion to pay out is dismissed. Costs may be spoken to if they cannot be agreed upon.

_____J.