

CAN YOU REGISTER A BUILDERS LIEN FOR PRE-CONSTRUCTION SERVICES ON A CANCELLED PROJECT? – CASE COMMENT: SHELLY MORRIS BUSINESS SERVICES LTD V SYNCOR SOLUTIONS LIMITED

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In the recent decision of *Shelly Morris Business Services Ltd v Syncor Solutions Limited*, [1] the Supreme Court of British Columbia assessed whether a contractor has a valid builders lien for pre-construction services in relation to a project where construction ultimately never commenced due to the COVID-19 pandemic. The Court provides a helpful analysis of what constitutes an “improvement” under the *B.C. Builders Lien Act* (“*BLA*”). [2] This bulletin summarizes the decision and the key takeaways for industry participants.

Background

In May 2019, Shelly Morris Business Services Ltd. (“**SMBS**”), a tenant of two office premises located in Vancouver and Richmond, B.C., contracted with Syncor Solutions Limited (“**Contractor**”) to provide interior design and construction management services for the renovation of the leased office space (the “**Project**”). [3] The Contractor started performing pre-construction activities such as site visits, design work, and ordering of materials from sub-trades. [4] The materials ordered by the Contractor included plumbing components and kitchen and boardroom millwork. The sub-trades held the materials pending commencement of the Project so as to avoid disruption of the on-going business. As a result, the materials were never delivered to the Project.

The Project was paused in mid-March 2020, because of the COVID-19 pandemic. At the time, no physical alterations to the Project had been made. [5] By July 2020, SMBS decided not to proceed with the Project due to a loss of revenue and ongoing economic uncertainties in its business. The parties could not agree on payment of the Contractor’s remaining invoices. [6] On August 27, 2020, the Contractor registered two builders liens under the *BLA* against the two properties. [7]

SMBS brought an application seeking that the Contractor’s liens be cancelled on grounds that the builders liens were frivolous or that it was plain and obvious that the builders liens were defective. [8] SMBS argued that there was no “improvement” because the physical construction had not commenced, and therefore the

Contractor's builders liens were invalid.

Relevant Builders Lien Act Provisions

The *BLA* defines an "improvement" as including,

anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.^[9]

A contractor who performs or provides work, or supplies material, or some combination of the two, (and is unpaid) may register a builders lien within the applicable time limit.^[10]

The *BLA* defines "work" as "work, labour or services, skilled or unskilled, on an improvement".^[11]

In this context, "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 state, or is consumed or used in the making of the improvement, including equipment rented without an operator".^[12]

Analysis

In reviewing the relevant authorities, the Court observed the following important points:

- The *BLA* definition of "improvement" can include additional meanings beyond the statute, as long as "they do not subtract from what is already prescribed"^[13]
- The *BLA*'s definition of "improvement" does not include "intended construction"^[14] and an "intended improvement"^[15]
- "A lien claimant must have contributed physically to the improvement of the site"^[16]
- "The harm that the *BLA* addresses is that an owner should not get the benefit of an improvement to their land without paying for it" ^[17]

The question before the Court was "whether the definition [of improvement] can, and should, be expanded to include an intended renovation that has not yet started." ^[18] The Court answered this question in the negative, and determined that the definition of "improvement" should not be expanded to include work performed in the absence of physical alteration to the premises.

Although the parties intended for there to be an improvement in the form of renovations to the leased premises, the renovations never commenced, and accordingly, construction of the improvement never commenced. There had been no physical benefit to the property. There was no "work" performed on an improvement, as required under the *BLA*. Expanding the definition of "improvement" to pre-construction

services would be too far of a stretch, considering that the *BLA* addresses the harm that flows from an owner benefitting from an improvement without paying for it.

As a result, the Contractor's builders liens against the properties were cancelled. The Contractor still had its contractual claims against SMBS.

The Court did not decide the issue of whether materials delivered to a project that has not commenced construction would entitle the material supplier to register a valid builders lien. In this case, the sub-trade suppliers never delivered their materials to the project site, and the Court did not need to answer this question.

Takeaways

This case offers the following useful guidance for the construction industry in British Columbia, particularly in light of project interruptions and cancellations caused by COVID-19:

- Contractors and subcontractors are unable to register valid builders liens for pre-construction services if construction does not ultimately commence, including for tasks such as design work and ordering off-site materials. Given the uncertainty of what COVID-19 related restrictions will be imposed and when, parties should seek that pre-construction work is paid for promptly.
- Parties should consider whether a contractual claim is sufficient in the event that construction does not commence and the opposite contracting party fails to pay. A contractual claim is typically unsecured, unlike a builders lien which provides a security interest in the project and project lands.
- Suppliers should be cautious when preparing customized materials for a project that has not commenced. The supplier may not be able to register a builders lien for such customized materials, and may face difficulty in reselling the materials.
- Parties should examine each project on a case-by-case basis, and consider the following:
 - Is there pre-construction or offsite work that needs to be completed prior to the commencement of construction?
 - How soon will payment be made for pre-construction work?
 - Is there a scheduled start date for construction?
 - Is it possible to commence at least some portion of the work on the premises concurrently with the pre-construction work?
 - What is the likelihood that the owner may be significantly impacted by COVID-19 restrictions?
 - Have the parties considered whether construction will commence in light of new COVID-19 restrictions?
 - If feasible, can the parties delay new work until there is greater certainty with respect to COVID-19 restrictions and impact?

McMillan's National Construction Group is well equipped to assist industry members with builders liens issues and the implications of COVID-19 on construction projects.

[1] Shelly Morris Business Services Ltd v Syncor Solutions Limited, 2020 BCSC 2038 [Shelly Morris].

[2] Builders Lien Act, SBC 1997, c 45 [BLA].

[3] Shelly Morris, supra note 1 at para 2.

[4] Shelly Morris, supra note 1 at para 3.

[5] Shelly Morris, supra note 1 at paras 3, 26.

[6] Shelly Morris, supra note 1 at paras 5–6.

[7] Shelly Morris, supra note 1 at para 7.

[8] Shelly Morris, supra note 1 at para 17.

[9] BLA, supra note 2, s [1\(1\)](#).

[10] BLA, supra note 2, ss [20](#)–[22](#).

[11] BLA, supra note 2, s [1\(1\)](#) [emphasis added].

[12] [Ibid](#) [emphasis added].

[13] Shelly Morris, supra note 1 at para 24, citing [Boomars Plumbing & Heating Ltd v Marogna Bros Ent Ltd](#), 1988 CanLII 2870 (BC CA), 51 DLR (4th) 13 (this accords with the BLA definition being enlarging – “including...”, instead of restricting – “means...”).

[14] Shelly Morris, supra note 1 at para 31, citing [John Perkins/Peter Wardle Partnership v Domus Design Company Ltd](#), 1984 CanLII 747 (BC CA) at para 28, 7 DLR (4th) 615.

[15] Shelly Morris, supra note 1 at para 32, citing [Chaston Construction Corp v Henderson Land Holdings \(Canada\) Ltd](#), 2002 BCCA 357 at paras 52–53.

[16] Shelly Morris, supra note 1 at para 30, citing [Kettle Valley Contr Ltd v Cariboo Paving Ltd](#), 1986 CanLII 1009 (BC CA) at para 46, 26 DLR (4th) 422, McLachlin JA.

[17] Shelly Morris, supra note 1 at para 34.

[18] Shelly Morris, supra note 1 at para 24.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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