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*SENT BY EMAIL*

Bruce Reynolds and Sharon Vogel
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King Street West, 44th Floor
Toronto, ON M5H 3Y4

Dear Mr. Reynolds and Ms. Vogel:

**RE: Toronto Transit Commission's Supplementary Submissions on the Expert's Review of the *Construction Lien Act* regarding joint holdback accounts**

Part 6 of the Information Package considered the issue of a mandatory holdback trust account or mandatory project bank account, however it was not clear to TTC a *joint* holdback account similar to that set out in B.C. Builder's Lien Act ("BLA")[1] was being considered.

TTC thanks the panel for the opportunity to provide these supplementary submissions in respect of this issue.

Section 5 of the B.C. BLA requires all holdback monies required under the BLA to be paid into an account opened solely for that holdback and that no payments may be made out of that account without the permission of both the owner and the contractor.

TTC would like to emphasize that the B.C. BLA exempts an owner who is "the government, a government corporation … or any other public body designated, by name or by class, by regulation" from the requirement for a joint holdback account.[2] By Regulation, a municipality and specifically the Greater Vancouver Transportation Authority are expressly exempt.[3]

The exemption for pubic owners also makes sense in light of the purpose of segregated holdback accounts. The need to segregate funds to ensure a certainty of subject matter is maintained in the face of an insolvency is only required if the party retaining the holdback is at risk of an insolvency.[4] It is not necessary that at party in the chain *above* the bankrupt maintain

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[1] SBC 1997, c. 45
[2] B.C.BLA Section 5(8)(a).
[3] B.C. Reg. 265/98, s.1(v).
[4] *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 3062 (CanLII)

segregated funds. Since bankruptcy is not an issue for a municipality or its agencies, including the City of Toronto and TTC, there is in turn no need to ensure such an owner's holdback maintains the certainties of a trust.

Furthermore, the use of a joint holdback account would administratively burdensome and effectively eliminate an owner's right of set-off.

From a practical perspective, the requirement for a joint holdback account may reduce the flow of funds on a project. If a joint holdback account were required by the Act, additional holdback retention for deficiencies[5] may be created by contract. The B.C. BLA acknowledges this in statue and the British Columbia Law Institute explains:

> The Act clarifies the right of an owner or contractor with respect to *amounts retained in excess of the required 10% holdback*. They may be applied to remedy a default by the person from whom the holdback was retained (section 6(3).[6] [emphasis added]

The effect of a required joint holdback account may be to retain *more* funds from contractors and the subcontractors below them.

TTC submits that because:

1. bankruptcy is not an issue for a municipality or its agencies, including the City of Toronto and TTC;
2. it would be administratively burdensome and the right of set-off ought to be maintained; and
3. the practical effect may be to retain more funds on TTC construction contracts,

TTC ought to be exempt from any requirement for a joint holdback account if such a concept is being considered.

Sincerely,

LEGAL DEPARTMENT

Samantha Ambrozy
Solicitor
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[5] or other amounts owing to the owner by the Contractor

[6] British Columbia Law Institute, "Introducing British Columbia's New Builder's Lien Act", available http://www.bcli.org/law-reform-resources/builders-lien-act/about#security-holdbacks