

**Report on
Builders Liens
After the
Shimco Case**

Report on Builders Liens After the Shimco Case

British Columbia Law Institute

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- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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Report on Builders Liens After the Shimco Case

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	THE CONSULTATION PAPER.....	1
III.	FACTS AND BACKGROUND.....	2
IV.	THE BASIS FOR ESTABLISHING THE LIEN AGAINST THE HOLDBACK.....	3
	A. Introduction.....	3
	B. Past Decisions.....	3
	C. Interpretation of the <i>Builders Lien Act</i>	6
	D. Summary.....	9
V.	THE DIFFERENCES BETWEEN THE LIEN AGAINST THE HOLDBACK AND THE LIEN AGAINST LAND AND IMPROVEMENTS.....	9
	A. Introduction.....	9
	B. Scope of the Lien Against the Holdback.....	10
	C. Scope of Claimants.....	11
	D. Notice.....	11
	E. Extinction of the Lien Against the Holdback.....	12
	F. Summary.....	13
VI.	THE CONCERNS OF OWNERS AND OTHERS REQUIRED TO MAINTAIN A HOLDBACK UNDER THE <i>BUILDERS LIEN ACT</i>.....	13
	A. Introduction.....	13
	B. Payment out of the Holdback.....	13
	C. Personal Liability.....	14
	D. Summary.....	15
VII.	RECOMMENDATIONS FOR REFORM.....	15
	A. Responses to the Consultation Paper.....	15
	B. Recommendations for Legislative Amendments.....	15
	1. Subsection 4 (9).....	16
	2. Subsection 8 (4).....	17
	3. Subsection 5 (2).....	18
	4. Section 88 of the <i>Strata Property Act</i>	18
	C. Summary of Recommendations.....	19
APPENDIX A.....		21
	Draft Legislation.....	21
APPENDIX B.....		22
	Selected Provisions from the <i>Builders Lien Act</i>	22

Report on Builders Liens After the Shimco Case

INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Report on Builders Liens After the Shimco Case

This Report addresses a number of concerns that have arisen after the decisions of the British Columbia Supreme Court and British Columbia Court of Appeal in *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.* The *Shimco* case has established a remedy under the *Builders Lien Act* which surprised many practitioners, property owners, and participants in the construction industry. This remedy is an independent lien against the holdbacks that property owners, contractors, and subcontractors are required to maintain under the *Builders Lien Act*.

The recommendations in this Report have the effect of abolishing this lien against the holdback. Abolishing the lien against the holdback will have several benefits. It will clear up a number of procedural uncertainties that may result from the implementation of the new remedy. It will renew the conceptual clarity of the *Builders Lien Act's* remedies that the 1997 revisions were designed to have. Finally, it will restore builders lien practice to the position it was widely understood to take before the *Shimco* case.

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Report on Builders Liens After the Shimco Case

I. INTRODUCTION

A recent decision of the British Columbia Supreme Court changed the understanding that many lawyers, property owners, and participants in the construction industry have of the holdback provisions of the *Builders Lien Act*, S.B.C. 1997, c. 45 (the “*Act*”). In *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*¹ the British Columbia Supreme Court dismissed an application to extinguish the lien rights of a lien claimant that had failed to comply with certain provisions of the *Act*. The court concluded that a separate lien exists with respect to the holdbacks that must be maintained by owners and contractors under the *Act*. This separate lien against the holdback survives the extinction of the lien against the land and improvements. Moreover the lien against the holdback escapes the registration that is required to perfect a lien against other assets related to the improvement. The decision was upheld on appeal.²

The dual lien theory endorsed in the *Shimco* decisions has attracted concern for two broad reasons. First, the interpretation of the *Act* set out in the *Shimco* decisions is controversial. The *Act* does not contain clear language creating a separate lien against the holdback. The existence of a lien against the holdback caught some practitioners by surprise, even though there has been some academic and judicial comment on the subject. Second, both the Supreme Court and the Court of Appeal acknowledged that the new remedy creates some “awkwardness” in builders lien practice. However, neither decision attempted to resolve the practical problems that arise from implementing this new remedy into existing practice. As a result, many practitioners feel that this area of the law has a great deal of uncertainty to it, and that legislative action may be necessary in order to alleviate this uncertainty.

II. THE CONSULTATION PAPER

In September 2003 the Law Institute published a *Consultation Paper on Builders Liens After the Shimco Case*. The Consultation Paper contained a discussion of the issues raised by the *Shimco* decisions and asked for readers to comment on the Law Institute’s tentative proposals for reform. The primary medium of publication for the Consultation Paper was the British Columbia Law Institute website.³ A number of relatively detailed

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1. 2002 BCSC 238, 99 B.C.L.R. (3d) 59, 13 C.L.R. (3d) 299 [*Shimco* (SC) cited to B.C.L.R.].
 2. *Shimco Metal Erectors Ltd. v. North Vancouver (District of)*, 2003 BCCA 193, (sub nom. *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*), 11 B.C.L.R. (4th) 199, 225 D.L.R. (4th) 665, 23 C.L.R. (3d) 163 [*Shimco* (CA) cited to B.C.L.R.].
 3. Our statistics show that the Consultation Paper was accessed 1100 times during 381 user sessions in September 2003 and 276 times during 96 user sessions in October 2003. (A new user session is counted after 15 minutes of inactivity per internet-connected computer; “accessing” the Consultation Paper describes the process of clicking on the link set out on the website and causing the document to open for viewing.)
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Report on Builders Liens After the Shimco Case

responses were received. These responses were fully considered by the Law Institute in formulating the recommendations that appear in this Report. The Law Institute would like to thank all those who took the time to respond to the Consultation Paper.

III. FACTS AND BACKGROUND

A brief review the facts and background of the *Shimco* decisions is a useful introduction to the issues that arise from the case. *Shimco* involved a contract between the District of North Vancouver (as owner of the land) and Design Steel Constructors Ltd. (as general contractor). The contract governed the construction of a tennis facility. Design Steel Constructors Ltd. hired numerous subcontractors to assist it in the performance of this contract. However, it was unable to pay all the subcontractors upon completion of the project.⁴

Seven subcontractors filed eight claims of builders liens against the land in the land title office. Throughout this time the District of North Vancouver had maintained a holdback of 10% of the contract price, as required by the *Act*. In the end, only three of the lien claimants perfected their liens in accordance with subsection 33 (1) of the *Act* by commencing an action and filing a certificate of pending litigation in the land title office.⁵ The claims of these three lien claimants amounted to less than the holdback fund. The District of North Vancouver wished to use the remainder of the holdback fund to set off certain deficiencies in the construction of the tennis court. It applied to the Supreme Court for a declaration of its maximum liability under the *Act*, a declaration that the lien rights of the four “unperfected” lien claimants had been extinguished, and a dismissal of the action.⁶

Tysoe J., who gave the judgment of the court, framed the issue for determination with these words:⁷

The law is clear that subcontractors have at least two separate and distinct remedies under the *Act*. They can pursue their lien against the land and they may pursue any monies impressed with a trust by s. 10 of the *Act*. The Plaintiff says that there is a third separate and distinct remedy; namely, the right to pursue a lien against the holdback funds. It maintains that it is entitled to pursue the lien against the holdback funds even if its lien against the land has been extinguished. The Owner takes the position that there is only one lien under the *Act* and that it

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4. *Shimco* (SC), *supra* note 1 at paras. 2–3.
 5. *Shimco Metal Erectors Ltd.*, the plaintiff, obviously had commenced an action. However, it had failed to file a certificate of pending litigation in the land title office before the expiry of the limitation period in section 33 of the *Act*.
 6. *Shimco* (SC), *supra* note 1 at paras. 4–6 and para. 1.
 7. *Ibid.* at para. 8.
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Report on Builders Liens After the Shimco Case

is entitled to utilize the remainder of the holdback monies towards the deficiencies after it has paid the amount of the liens which have not been extinguished.

The court dismissed the District's application. The court's key ruling, which was affirmed on appeal, accepted the plaintiff's argument that the four lien claimants that had failed to file certificates of pending litigation continued to be entitled to an independent lien against the holdback fund. This "separate and distinct" lien survived the extinction of their lien against the District's land and improvements.⁸

IV. THE BASIS FOR ESTABLISHING THE LIEN AGAINST THE HOLDBACK

A. Introduction

The court rested its decision in *Shimco* (SC) on two bases: the authority of previous decisions of the Supreme Court and the conclusions it drew from a close interpretation of the relevant sections of the *Act*. The court appears to have broadened the scope of the two decisions cited as being authoritative. As well, the court's method of interpreting the *Act* has attracted criticism.

B. Past Decisions

The court highlighted two past Supreme Court decisions as authority for his conclusions in *Shimco* (SC). The two decisions are: *Metropolitan Trust Co. v. Abacus Cities Ltd.*⁹ and *Myles Enterprises Ltd. v. Atlas Painting & Decorating Ltd.*¹⁰ Both cases addressed the question of the existence of a separate lien against the holdback. However, both cases were also decided in different circumstances and under different legislation.

Metropolitan Trust concerned an application by a first mortgagee for an order approving a sale of the mortgaged property. A group of lien claimants, among others, opposed the order. At the time of *Metropolitan Trust* the legislation governing builders liens was the *Mechanics' Lien Act*, R.S.B.C. 1960, c. 238. The lien claimants had commenced an action in County Court, which advanced a claim against any holdback funds in existence (it was unclear on the facts whether the required holdback had actually been maintained). No one had been served with the Writ of Summons for the County Court action at the time of this application. The lien claimants argued that, if the property were sold, their

8. *Ibid.* at paras. 18–20 and paras. 23–24.

9. (1979) 18 B.C.L.R. 317 (S.C.) [*Metropolitan Trust*].

10. (1997) 29 B.C.L.R. (3d) 173, [1997] B.C.J. No. 446 (S.C.), online: QL (BCJ) [*Myles Enterprises* cited to B.C.L.R.].

Report on Builders Liens After the Shimco Case

liens would be discharged and they would lose their right to pursue a claim against the holdback funds, if any.¹¹

In a very brief judgment, Wallace J., who gave the judgment of the court, concluded that the discharge of the liens from title to the property would not affect the lien claimants' entitlement to the holdback funds, if any. In coming to this conclusion the court inaugurated the idea that the *Act* creates two distinct liens:¹²

I am of the opinion s. 21 creates an express charge upon the holdback moneys, and the lien claimant can pursue his claim against such fund as he could against trust moneys established pursuant to s. 3 [now s. 2 of the Builders Lien Act], even though his lien against the lands in question has been discharged by the sale. In other words, s. 21(2) creates a separate and distinct lien to that created by s. 5 [now s. 4 of the Builders Lien Act] and extinguishment of the one does not affect the existence of the other.

Although *Metropolitan Trust* attracted some academic interest, it apparently did not affect practice in this area of the law.¹³ Since the judgment said nothing else on this point, this decision appears to have been taken as being strictly confined to the circumstances of this case. *Metropolitan Trust* could be interpreted narrowly, as being merely concerned with the effect of a sale of property in foreclosure on the rights of lien claimants. However, in *Shimco* (SC) it was cited as authority for the broader proposition that a distinct lien against the holdback exists for all purposes under the *Act*.

Similar to *Metropolitan Trust*, *Myles Enterprises* involved an application to court in the context of a mortgage foreclosure proceeding. The mortgaged property was a condominium development. As the condominium units were sold, the purchasers paid a mandated holdback from the purchase price into court, in order to discharge all builders liens from their titles. The second, third, and fourth mortgagees determined that the sale of the remaining condominium units would only raise enough funds to pay out the first mortgage. They also learned that most of the builders liens that had been registered against the titles to the various condominium units had in fact been filed after the statutory deadline. Hoping to obtain an order authorizing the application of the holdback funds to the first mort-

11. *Supra* note 9 at 318–319.

12. *Ibid.* at 319. The bracketed comments are in the original. The references contained in them are to the *Builders Lien Act*, R.S.B.C. 1979, c. 40.

13. *See Shimco* (CA), *supra* note 2 at para. 7: “It appears that the view [expressed by Wallace J. in *Metropolitan Trust*] that there was a separate and distinct lien on the holdback was not generally accepted by practitioners in the field.”

Report on Builders Liens After the Shimco Case

gage, the second, third, and fourth mortgagees applied for a determination, as between the lien claimants and the first mortgagee, of entitlement to the holdback funds in court.¹⁴

Myles Enterprises turned on the interpretation of section 75 of the *Condominium Act*, R.S.B.C. 1979, c. 61. Subsections (3) and (4) of section 75 of the *Condominium Act* are similar—but not identical—to the operative provisions in the *Act*.¹⁵

- 75 (3) The holdback is subject to a lien under the *Builders Lien Act* and the holdback is charged with the payment of those persons employed under the person from whom the holdback is retained.
- (4) Payment of a holdback required to be maintained under subsection (2) shall be made after 40 days expires unless in the meantime a claim of lien has been filed, or proceedings have been commenced to enforce a claim of lien against the holdback.

The lien claimants argued that these sections require a very close interpretation. In their written argument (which was quoted in the judgment) they asked the court to pay particular attention to the words “and” in subsection 75 (3) and “or” in subsection 75 (4). The former is conjunctive, the lien claimants’ argument asserted, and the latter is disjunctive. On this reading, if these words do not point to the existence of a separate lien against the holdback funds, then the clauses they introduce are redundant.

Lowery J., who gave the judgment of the court, accepted the lien claimants’ reasoning and dealt with the mortgagees’ arguments as follows:¹⁶

The mortgagees insist that, if the legislative intent was as the claimants contend, it would be much more clearly stated. They say that the wording employed is to be given a fair, large, and liberal interpretation and that “those persons” must be read as pertaining to only those persons

14. *Supra* note 10 at paras. 1–4.

15. Since the decision in *Myles Enterprises* the *Condominium Act* has been repealed and replaced by the *Strata Property Act*, S.B.C. 1998, c. 43. Subsections 88 (3) and (4) of the *Strata Property Act* are the equivalents of subsections 75 (3) and (4) of the *Condominium Act*; but the new provisions are worded differently:

- 88 (3) The holdback is subject to a lien under the *Builders Lien Act*.
- (4) The purchaser must release the holdback to the owner developer at the end of the holdback period provided for in subsection (2) unless in the meantime a claim of lien has been filed, or proceedings have been commenced, to enforce a lien against the holdback.

Subsections 88 (3) and (4), then, may not support the conclusions reached in *Myles Enterprises*.

16. *Supra* note 10 at para. 10.

Report on Builders Liens After the Shimco Case

who have complied with ss. 1 [*sic*] in filing a claim of lien not later than 31 days after the conveyance. But that is not what the section says.

This conflict between a tightly-focussed, almost technical, reading of the relevant provisions and a broad reading of the statute as a whole is replayed in the *Shimco* decisions. Although Tysoe J. does not expressly say so in *Shimco* (SC), his interpretation of the relevant sections of the *Act* is clearly influenced by this focussed reading of section 75 of the *Condominium Act*.

C. Interpretation of the *Builders Lien Act*

In *Shimco* (SC) the court approached the issue of the existence of a separate lien against the holdback as being first and foremost a question of statutory interpretation. Much of the decision in *Shimco* (SC) is taken up with a discussion of various sections of the *Act*. The court pointed to three provisions as being particularly important. The first is section 2:

Lien for work and material

- 2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,
- (a) performs or provides work,
 - (b) supplies material, or
 - (c) does any combination of those things referred to in paragraphs (a) and (b)
- has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
- (d) the interest of the owner in the improvement;
 - (e) the improvement itself;
 - (f) the land in, on or under which the improvement is located;
 - (g) the material delivered to or placed on the land.

Subsection 2 (1) expressly establishes the familiar lien against land and improvements under the *Act*. It is important to this discussion primarily for background and contrast.

The second important provision is subsection 4 (9):

Holdback

- 4 (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

Report on Builders Liens After the Shimco Case

The argument in favour of the existence of a lien against the holdback turns on a close reading of this subsection. If this subsection does not create a distinct lien against the holdback, the argument goes, then it is redundant. The court accepted this interpretation of the subsection:¹⁷

On a plain and literal reading of s. 4(9), the holdback is made subject to a lien which is independent of the lien created by s. 2. The language refers to “a lien under this Act” (not “the lien under this Act”), which suggests that it is a different lien than the one created by s. 2. In addition, the second phrase of s. 4(9) describes the benefactors of the lien. The lien does not benefit the persons who have a subsisting lien under s. 2. It benefits the persons for whose benefit the holdback is retained.

The argument is bolstered by subsection 8 (4), the third significant provision of the *Act*:

Holdback period

8 (4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

Redundancy also provides the key to this subsection. The court’s interpretation of it focussed on the word “or,” which introduces the closing words about proceedings being commenced. This “or” must be disjunctive. It must point to two different ways of enforcing a lien. Otherwise, the closing words of the subsection are redundant. As the court put it:¹⁸

In my opinion, the wording of s. 8(4) reinforces the existence of a separate lien. It provides that a holdback may be released upon expiry of the holdback period unless (i) a claim of lien is filed or (ii) proceedings are commenced to enforce a lien against the holdback. The first of these events corresponds to the s. 2 lien and the second corresponds to the s. 4(9) lien. Even if a claimant has not filed a lien in the land title office by the time of the expiry of the holdback period, the holdback may not be released if proceedings have been commenced to enforce a lien against the holdback. . . . This acknowledges that there is a separate lien against the holdback which has not been affected by the extinguishment of the lien against the land.

17. *Supra* note 1 at para. 18.

18. *Ibid.* at para. 20.

Report on Builders Liens After the Shimco Case

This interpretation of the *Act* has been criticized as being too focussed on the wording of one or two sections.¹⁹ The existence of a separate lien against the holdback is not in harmony with the *Act* as a whole. (Some aspects of this disharmony are discussed below.) Further, the court overstates the importance of a few simple words, such as “and,” “or,” and even “a.” Subsection 4 (9) may simply be poorly drafted.²⁰ Locating a separate lien in the language of this subsection upsets one of the broad policy goals of the *Act*, which is to create certainty around the maintenance and release of holdbacks.²¹ Finally, it is difficult to believe that the legislature would create two clearly-drawn and expressly-stated remedies—the lien against land and improvements and the trust—and leave a third remedy implicit in the wording of various sections of the *Act*.

The District of North Vancouver raised these criticisms in *Shimco (CA)*.²² Unfortunately, the Court of Appeal did not address them in a systematic way. Instead, Esson J.A., who gave the reasons for judgment of the court, simply stated:²³

All of those matters were considered by the chambers judge in some detail. . . . In the end, he concluded that those matters do not overcome the clear and unambiguous wording of s. 4(9) and s. 8(4). I agree with his conclusions and with his reasons.

The repeated claims that this interpretation of the *Act* is “clear and unambiguous” may actually have had the opposite effect. These claims, combined with limited review of many of the issues involved in implementing the lien against the holdback, have led to concerns that the *Shimco* decisions have radically changed the law in this area and have produced much uncertainty.²⁴

19. See Derek Lundy, “Residential Real Estate (Ontario, British Columbia)” *Canadian Lawyer* 26:9 (September 2002) 48 at 50.

20. See Norm Streu & Christopher Hirst, “Shimco Lien Lives On” *Journal of Commerce Online* (7 April 2003) at para. 2, online: Journal of Commerce Online <<http://www.joconl.com/archives/Apr2003/Apr07.html#story4>>.

21. See Lundy, *supra* note 19 at 50.

22. *Supra* note 2 at paras. 10–12.

23. *Ibid.* at para. 11.

24. See e.g. “Dual Lien Decision Shakes the Foundations of Builders Liens Law in BC” (2002) CLE Stay Current, online: The Continuing Legal Education Society of British Columbia <<http://www.cle.bc.ca/CLE/Stay+Current/Collection/2002/5/02-bcsc-shimco?practiceAreaMessage=true&practiceArea=Real%20Estate>> and “Builders Lien Alert: *Shimco Metal Erectors Ltd.*” (2002) Alert!, online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/library/alert/body_alert_02-02.html>.

Report on Builders Liens After the Shimco Case

D. Summary

Both Tysoe J.'s reading of past decisions and his interpretation of the *Act* is rather literal and technical. There is little focus in *Shimco* (SC) on the operation of the *Act* as a whole, or on the practical problems that may be created by the dual lien theory. *Shimco* (CA) does not remedy this technical approach to the issues. As a result of the *Shimco* decisions, there now exist two liens under the *Act* that are at odds in several important ways.

V. THE DIFFERENCES BETWEEN THE LIEN AGAINST THE HOLDBACK AND THE LIEN AGAINST LAND AND IMPROVEMENTS

A. Introduction

Builders lien legislation in other provinces has established the remedy of a lien against the holdback for limited purposes.²⁵ Further, a person claiming a lien against the holdback in other jurisdictions is usually required to follow the same procedural steps as a person claiming a lien against land and improvements, with the exception of registration in the land title office. As a result of the *Shimco* decisions, neither of these two points is true with respect to the lien against the holdback in British Columbia law. The lien against the holdback in British Columbia appears to apply to all types of construction

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25. Where the lien against the holdback exists in other Canadian provinces, it is usually restricted to projects involving land owned by the government or interests in land that, for policy reasons, are not subject to a lien against land and improvements. Section 16 of the Ontario *Construction Lien Act*, R.S.O. 1990, c. C.30 is an example of this type of provision:

Interest of Crown

16. (1) A lien does not attach to the interest of the Crown in a premises.

...

Where lien does not attach to premises

- (3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is,
- (a) a public street or highway owned by a municipality; or
 - (b) a railway right-of-way,

the lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.

Section 21 of the *Construction Lien Act* is the equivalent of subsection 4 (9) of the *Act*.

See also the Saskatchewan *Builders' Lien Act*, S.S. 1984–85, c. B-7.1, s. 26 and the Manitoba *Builders' Liens Act*, R.S.M. 1987, C.C.S.M. c. B91, s. 16. Earlier Saskatchewan legislation covering this topic was considered in *Westeel-Rosco Ltd. v. South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238, 69 D.L.R. (3d) 334.

Report on Builders Liens After the Shimco Case

projects and all types of owners, and to involve both a set of claimants and a procedure that are not identical to those established under the *Act* for the lien against land and improvements.

B. Scope of the Lien Against the Holdback

Neither *Shimco* (SC) nor *Shimco* (CA) established any restrictions of the type contained in the legislation of other provinces on when a lien against the holdback may be asserted. Therefore, it appears that the lien against the holdback may come into existence in any situation where a person has been engaged in connection with an improvement.

The *Shimco* decisions are clear on what happens whenever the holdback fund exceeds the amount claimed by claimants who have perfected their liens against land and improvements and claimants who have lost their liens against land and improvements and are only claiming a lien against the holdback. The *Act* does not give priority to the claimants who have followed the necessary procedural steps to perfect their liens against land and improvements. As Tysoe J. concluded in *Shimco* (SC), both classes of lien claimants will share the holdback fund *pro rata*, despite any unfairness.²⁶

It does seem a bit unfair at first blush that the lien claimants which “perfected” their claims of lien against the land will not receive payment of their claims in full and will have to share the holdback *pro rata* with the Plaintiff, which did not “perfect” its claim of lien against the land. However, the Plaintiff did “perfect” its lien against the holdback by commencing this action (in which a lien against the holdback is asserted) before the holdback monies were released.

However, it would appear that only claimants with liens against land and materials would be entitled to share in amounts retained in excess of the 10% holdback level.²⁷

Finally, the *Act* provides for multiple holdbacks, which apply to the general contract and all subcontracts in place for a project. In *Shimco* (SC) the court remarked that “[a]ll of the subcontractors will have a lien against the land . . .” but “. . . only the subcontractors engaged by a particular contractor will have a lien against the holdback retained from that contractor. . . .”²⁸ This point was made in the context of a discussion of projects that do not have a head contract. However, one commentator has observed that the court did not appear to turn its mind to the existence of “sub-subcontractors” with respect to a con-

26. *Supra* note 1 at para. 22.

27. See Robert W. Jenkins, “The Holdback” in Derek A. Brindle, Robert W. Jenkins, and J. Marc MacEwing, eds. *British Columbia Builders Liens Practice Manual*, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 1999) at § 7.16 [*Builders Liens Practice Manual*].

28. *Supra* note 1 at para. 19.

Report on Builders Liens After the Shimco Case

struction project. These “sub-subcontractors” could complicate the distinction the court drew:²⁹

Since the *Builders Lien Act* provides for multiple tiers of 10% holdbacks, and since s. 4(9) provides that *each* of them is charged with the payment of “all persons engaged . . . by or under the person from whom the holdback is retained”, a claimant at the bottom of the contract chain may be entitled to claim the same lien against multiple holdbacks. This could become significant in circumstances in which s. 23 of the Act has been used to clear title using a holdback other than the owner’s. It is apparent from the language of s. 23 that the only liens that can be cleared using its process are those that have been filed in the land title office. Liens against the owner’s holdback would be left untouched.

C. Scope of Claimants

Section 2 of the *Act* provides that “a contractor, subcontractor, or worker” may be entitled to a lien against land and improvements. These words are defined in section 1 of the *Act*. Neither *Shimco* (SC) nor *Shimco* (CA) says anything about restricting the class of people who may claim a lien against the holdback to “contractors, subcontractors, and workers.” As a result the class of people who may claim a lien against the holdback appears to be broader than the class who may claim a lien against land and improvements. Claimants who are expressly denied the ability to claim a lien against land and improvements under the *Act* may be able to claim a lien against the holdback.³⁰

D. Notice

The *Shimco* decisions do not say what form of notice needs to be provided in order to claim a lien against the holdback. Actual notice appears not to be necessary: the court cited *Metropolitan Trust* with approval, and the lien claimants in that case had filed, but not served, a Writ of Summons.³¹ Most practitioners have presumed that an filed Writ would be sufficient to assert the lien, regardless of service. Some have speculated that a letter or telephone call may also be sufficient.³² The uncertainty surrounding this point

29. Jenkins, *supra* note 27 at § 7.16 [italics and ellipsis in original].

30. One commentator has speculated that potential claimants could even include ordinary creditors: “[f]urther, the practitioner in any collections matter in which construction is involved should consider whether the client might be entitled to the security of a holdback lien, even if the client fails to meet the traditional criteria for lien claimants.” See “Dual Lien Decision Shakes the Foundations of Builders Lien Law in BC,” *supra* note 24 at para. 5.

31. *Supra* note 1 at para. 9. See also “Builders Lien Alert: *Shimco Metal Erectors Ltd.*,” *supra* note 24 at para. 4.

32. See Streu & Hirst, *supra* note 20 at para. 3. But see Kathryn Stuart, “Builders Lien Act: The ‘Shimco Lien’ ” (2003) Client Bulletin at para. 6, online: Staples McDannold Stewart, Barristers and Solicitors <<http://www.sms.bc.ca/client/2003/may2003-1.html>>.

Report on Builders Liens After the Shimco Case

may generate disputes whenever a contract calls for the release of the holdback after a certain time has passed and a lien against that holdback has been asserted using one of the more informal means of notice.

E. Extinction of the Lien Against the Holdback

The *Act* sets out a number of procedural steps that must be taken before certain deadlines pass in order to assert and avoid the extinction of a lien against land and improvements.³³ Neither *Shimco* (SC) nor *Shimco* (CA) attempts to apply such a structure to a claim of lien against the holdback. As a result, lien claimants who assert a lien against the holdback have several procedural advantages against those who only claim a lien against land and improvements.

First, the *Act* provides that a lien against land and improvements must be asserted within 45 days of completion or substantial completion of a project. If no claim of lien has been filed in the land title office during this time, then the holdback may be paid out after 55 days from completion or substantial completion have elapsed. Claimants who wish to assert a lien against the holdback will apparently have the benefit of these additional 10 days in which to assert their lien.

Second, so long as one lien—whether against the land and improvements or against the holdback—is claimed before the holdback is paid out, other potential claimants may have no time restriction on when they may claim a lien against the holdback. This conclusion follows from two facts: if a lien has been claimed, then the person maintaining the holdback will be potentially liable if it is paid out; and the *Shimco* decisions do not address the question of when the right to claim a lien against the holdback may expire. This conclusion is also in accord with the decision in *Myles Enterprises*, which the court cited with approval in *Shimco* (SC).

Third, the *Shimco* decisions do not say what other steps need to be taken once a lien has been claimed against the holdback in order to avoid its extinction. An earlier case, decided under the old *Builders Lien Act*, R.S.B.C. 1979, c. 40, speculated that a lien claimed against the holdback will expire within one year if no further steps are taken to enforce it.³⁴ It is not certain whether this position will be accepted under the new *Act*, or if this issue is one that will have to be decided by an application to dismiss for want of prosecution.

33. See section 20 (time for filing claim of lien), section 22 (lien extinguished if not filed as required by Act), and section 33 (limitation and notice to commence an action) of the *Act*.

34. *Wall Brothers Construction Co. v. Canson Enterprises Ltd.*, (1987) 17 B.C.L.R. (2d) 101 at 112, 26 C.L.R. 177 (Co. Ct.). See also David A. Coulson, *Guide to Builders Liens in British Columbia*, looseleaf (Toronto: Carswell, 2002) at para. 5.30.

F. Summary

The failure of the *Shimco* decisions to address these concerns about the implementation of what is, for practical purposes, a new remedy under the *Act* has created the potential for further disputes and litigation. In some respects, as the law stands now, lien claimants who do not follow the procedural steps in the *Act* for the perfection of liens against land and improvements will have an advantage over those who do. In addition, non-traditional claimants will now be encouraged to use the *Act* to secure their claims. These developments have caused property owners and contractors—the two groups who were supposed to benefit from the recent revision of the *Act*—to have considerable reservations about the *Shimco* decisions.

VI. THE CONCERNS OF OWNERS AND OTHERS REQUIRED TO MAINTAIN A HOLDBACK UNDER THE *BUILDERS LIEN ACT*

A. Introduction

Owners and others required to maintain a holdback under the *Act*³⁵ have expressed concerns about the procedural discrepancies between the two types of liens that are described above. They also have concerns that are specific to their role of maintaining a holdback under the *Act*. These concerns relate both to possible disputes with lien claimants, as well as disputes between owners and contractors, and contractors and subcontractors.

B. Payment out of the Holdback

The apparent lack of an actual notice requirement for the assertion of a lien against the holdback could lead to some uncertainty about when the holdback fund may be paid out. The local venue rule for commencing proceedings set out in section 21 of the *Act* should apply to actions commenced in connection with a lien against the holdback. However, court registry searches do not provide the same degree of certainty that a land title office search will provide. Delays of a day or more in adding filed actions to the records covered by the search are not uncommon. Further, a court registry search (or searches) will add to the costs of dealing with the holdback.

Some commentators have speculated that the requirement to perform additional searches will eventually be borne by contractors and subcontractors.³⁶ A simple change in the terms of any future contract could require contractors and subcontractors to certify that no liens have been filed before the holdback fund is released. Further, holdbacks could be effectively tied up due to the uncertainty over whether a lien against the holdback has

35. This group would largely be made up of contractors. However, depending on how a project is structured, it could also include subcontractors and even sub-subcontractors.

36. See Stuart, *supra* note 32 at para. 8.

Report on Builders Liens After the Shimco Case

come into existence, particularly in the face of a more informal assertion of the lien. This could lead to increased disputes over the holdback, which would defeat one of the main policy goals of the new *Act*. To the extent that the disputants follow the court's advice³⁷ to pay holdback funds into court when in doubt, these disputes could result in a significant increase in litigation over payment out of the holdback funds.

C. Personal Liability

The language of subsection 4 (9) of the *Act* appears to create an *in rem* right: a charge against the holdback. At least one commentator has interpreted the *Shimco* (SC) decision as “. . . mak[ing] the owner personally liable for the holdback. . . .”³⁸ The commentator goes on to explain the importance of this point:³⁹

There is a significant difference between a right *in rem* against a holdback account and a right *in personam* against an owner for the holdback obligation. The distinction will be important where no holdback account has been established, and where non-contracting owners are sued. If there is no holdback account, then perhaps this lien is a charge against the contractor's right to be paid the holdback. This would be equivalent to a money judgment against the contracting owner who failed to maintain a holdback account.

The uncertainty on this point seems to match the uncertainty on scope of people entitled to claim a lien against the holdback. In addition to a larger group of potential claimants, then, a larger group of owners could be joined in actions to claim and enforce a lien against the holdback.

The question of the personal liability of owners and others raises a further concern in connection with a another complication produced by the *Shimco* decisions. Tysse J. said that owners and others who maintain a holdback could protect themselves by paying those funds into court, should a dispute arise.⁴⁰ However, several commentators have noticed that this protection may be compromised by the reasoning used in the *Shimco* decisions. Sections 23 and 24 of the *Act*—the provisions governing removal of claims of liens—clearly only refer to liens against land and improvements.⁴¹ Under the close read-

37. See *Shimco* (SC), *supra* note 1 at para. 22.

38. James R. White, “The Lienable Interest” in *Builders Liens Practice Manual*, *supra* note 27 at § 3.42.

39. *Ibid.*

40. See *Shimco* (SC), *supra* note 1 at para. 22.

41. See Streu & Hirst, *supra* note 20 at para. 4 and William S. McLean, “*Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd. and District of North Vancouver*, 2002 BCSC 238” *National Construction Law Section: Case Summaries*, online: The Canadian Bar Association <<http://www.cba.org/CBA/Sections/Construction/pdf/shimco.pdf>>.

Report on Builders Liens After the Shimco Case

ing of the provisions of the *Act* used in the *Shimco* decisions, then, it may be possible to argue that the lien against the holdback survives payment of the holdback into court. Further, if the owner or other person required to maintain a holdback is personally liable to persons claiming liens against the holdback, then, those lien claimants may be able to continue to pursue their remedy even after the holdback fund has been dealt with by the court. This result would clearly not be desirable for owners and others required to maintain holdbacks.

D. Summary

The concerns of owners required to maintain a holdback about facing more disputes with a larger class of lien claimants has the potential to increase litigation over the release of holdbacks. These concerns may also affect the negotiation of contracts, as owners and others required to maintain a holdback attempt to obtain more onerous provisions governing the maintenance and release of holdbacks.

VII. RECOMMENDATIONS FOR REFORM

A. Responses to the Consultation Paper

Respondents to the Consultation Paper were asked to give their opinion on a number of matters raised by the *Shimco* decisions. First, respondents were asked to comment on whether legislative amendments were required in response to the creation of a lien against the holdback. Respondents to the Consultation Paper were unanimous in agreeing with the Law Institute's tentative conclusion that amendments to the *Act* were necessary to address the issues arising from the *Shimco* decisions. In fact, the amendments posed for discussion in the Consultation Paper proved to be the minimum level of change to the *Act* favoured by the respondents.

There was a nearly equal division of opinion, however, on the fundamental question of whether the legislative amendments should abolish the lien against the holdback or assimilate it to lien against land and improvements by making the lien against the holdback subject to the same registration requirements and restricted to the same group of claimants. A bare majority of the respondents favoured abolishing the lien against the holdback. Although assimilation of the lien against the holdback to the registration and procedural requirements of the lien against land and materials would go a long way toward resolving many of the concerns generated by the *Shimco* decisions, the Law Institute agrees with the position taken by the majority of the respondents to the Consultation Paper. The reasons for its support of this position are set out in the next section of this Report.

B. Recommendations for Legislative Amendments

The *Act* employs three distinct strategies for enhancing the financial security of the transactions involved in a construction project: the lien against land and improvements; the

Report on Builders Liens After the Shimco Case

statutory trust attaching to funds for the payment of contractors and subcontractors;⁴² and the holdback. The concept of a separate lien attaching to the holdback obscures the distinctions between these three strategies. Obscuring these distinctions does more than diluting the purpose of the holdback as a device to limit the liability of payors under the *Act*. Under the system of multiple holdbacks instituted in the 1997 revision of the *Act*, the existence of a separate lien against the holdback has the potential to become a lien against multiple holdbacks. This development could cause considerable interference with the flow of money in a construction project. This concern may not be adequately addressed by legislative amendments that only address procedural issues arising from the lien against the holdback.

The recommended legislative changes set out in this Report are more extensive than those referred to in the questions at the end of the Consultation Paper. Abolishing the lien against the holdback requires more changes to existing legislation than would assimilating the lien against the holdback to the lien against land and improvements. Abolishing the lien against the holdback, however, would not be a radical change in the law. Instead, it would substantially restore the law to the position that most practitioners and participants in the construction industry understood it took before the *Shimco* decisions.

The following sections of this Report set out the changes to the *Act* that the Law Institute recommends in order to abolish the lien against the holdback.

1. SUBSECTION 4 (9)

The court in *Shimco* (SC) pointed to subsection 4 (9) of the *Act* as being the key provision in the creation of an independent lien against the holdback. The court speaks of subsection 4 (9) as “creating” the lien against the holdback.⁴³ On occasion, it refers to the lien against the holdback as the “subsection 4 (9) lien.”⁴⁴ This identification of subsection 4 (9) with the lien against the holdback means that any amendments designed to abolish the lien against the holdback must address this subsection.

The important role subsection 4 (9) plays in the establishment of the lien against the holdback also provides an obvious option for legislative reform designed to eliminate the lien against the holdback. This option is the simple repeal of subsection 4 (9). Any amendment that would stop short of a repeal of the subsection runs the risk of either rendering the subsection meaningless or leaving the door open for a future assertion of a lien against the holdback.

42. See section 10 of the *Act*.

43. *Supra* note 1 at para. 19 and para. 22.

44. *Ibid.* at para. 20.

Report on Builders Liens After the Shimco Case

The option of repealing subsection 4 (9) was raised in the questions to the Consultation Paper. None of the respondents to the Consultation Paper supported retaining the subsection.

The Law Institute recommends that:

Subsection 4 (9) of the Act be repealed.

2. SUBSECTION 8 (4)

The court in *Shimco* (SC) relied on subsection 8 (4) to reinforce its conclusion that subsection 4 (9) creates an independent lien against the holdback.⁴⁵ A number of respondents to the Consultation Paper pointed out this reference and suggested that any legislative amendments designed to abolish the lien against the holdback also address subsection 8 (4). Unlike subsection 4 (9), subsection 8 (4) deals with a number of issues. Its primary purpose is to deal with payment of a holdback at the end of the statutory holdback period. The bulk of the subsection has no connection with the lien against the holdback. It should not be repealed in its entirety.

The key part of the subsection for the court in *Shimco* (SC) was contained in its closing words, which describe when release of a holdback at the end of the holdback period will not discharge the person responsible for maintaining a holdback from liability under the *Act*. In particular, the court pointed to the words “or proceedings are commenced to enforce a lien against the holdback.” The simplest way, then, to ensure that subsection 8 (4) no longer provides support for an independent lien against the holdback is to remove these words from the subsection. Striking out these words will not affect the remaining clauses of the subsection. Since this clause appears to contemplate asserting a lien by means other than filing a claim of lien in the land title office, revising the wording of this clause to restate this point would continue to leave open the possibility of asserting a lien against the holdback.

The Law Institute recommends that:

Subsection 8 (4) of the Act be amended by striking out its closing words, “or proceedings are commenced to enforce a lien against the holdback.”

45. *Ibid.* at para. 20.

Report on Builders Liens After the Shimco Case

3. SUBSECTION 5 (2)

The court in *Shimco* (SC) referred briefly to subsection 5 (2) as another provision in the *Act* that supports the existence of a separate lien against the holdback.⁴⁶ One respondent to the Consultation Paper also stressed the importance of dealing with subsection 5 (2) as part of any legislative amendments to the *Act* designed to abolish the lien against the holdback.

Section 5 addresses a number of issues that arise in connection with maintaining a holdback account. Paragraph 5 (2) (a) describes the holdback account as being “charged with payment of all liens.” On its face, this language underscores subsection 4 (9), which says that the holdback is “subject to a lien.” In order to ensure that a legislative repeal of the lien against the holdback is effective this paragraph should be deleted. As was the case with subsection 8 (4), attempting to redraft paragraph 5 (2) (a) would result in retaining a concept that could only lend support to the existence of an independent lien against the holdback.

Paragraph 5 (2) (b) contains references to paragraph 5 (2) (a). These references will also have to be addressed. The first reference may simply be deleted. The second may be dealt with by making explicit the reference that the holdback account is held in trust for the contractor from whom the holdback was retained. The remainder of the subsection deals with matters that do not touch on the existence of a lien against the holdback, and therefore should not be amended.

The Law Institute recommends that:

Subsection 5 (2) of the Act be amended by repealing it and substituting the following text:

(2) *Subject to sections 9 and 34, all amounts deposited into a holdback account*

(a) *are held in trust for the contractor from whom the holdback was retained, and*

(b) *must not be paid out of the account without the agreement of all the persons who administer the account.*

4. SECTION 88 OF THE STRATA PROPERTY ACT

The predecessor to section 88 of the *Strata Property Act*—section 75 of the *Condominium Act*—was considered in *Myles Enterprises*, a case that the court in *Shimco* (SC) dis-

46. *Ibid.* at para. 12.

Report on Builders Liens After the Shimco Case

cussed and relied on as a precedent. Although changes to the *Strata Property Act* were not posed in the questions at the end of the Consultation Paper, a number of respondents suggested that section 88 be amended. We agree with these suggestions. If section 88 is left unamended, then it would appear that holdback accounts retained by the owner developer of strata property are subject to a lien under the *Act*, despite the fact that holdback accounts retained in connection with all other types of developments are not. This situation would be an unacceptable anomaly.

Subsection 88 (3) appears to be a simpler version of subsection 4 (9) of the *Act*. Subsection 88 (3) may be dealt with in the same manner as subsection 4 (9). The subsection should be repealed.

Subsection 88 (4), like subsection 8 (4) of the *Act*, contains a reference to commencing proceedings in court as a means to enforce a lien against the holdback. For the same reasons set out in connection with subsection 8 (4) of the *Act*, this reference should be eliminated from the *Strata Property Act*.

The remaining provisions of section 88 deal with matters that do not touch on the concept of a lien against the holdback. They should not be amended.

The Law Institute recommends that:

Section 88 of the Strata Property Act be amended by

- (a) repealing subsection (3), and*
- (b) striking out the words “, or proceedings have been commenced, to enforce a lien against the holdback,” in subsection (4) and substituting “against that strata lot.”*

C. Summary of Recommendations

The Law Institute’s recommendations are as follows:

- 1. Subsection 4 (9) of the Act be repealed.*
- 2. Subsection 8 (4) of the Act be amended by striking out its closing words, “or proceedings are commenced to enforce a lien against the holdback.”*
- 3. Subsection 5 (2) of the Act be amended by repealing it and substituting the following text:*
 - (2) Subject to sections 9 and 34, all amounts deposited into a holdback account*

Report on Builders Liens After the Shimco Case

- (a) are held in trust for the contractor from whom the holdback was retained, and*
 - (b) must not be paid out of the account without the agreement of all the persons who administer the account.*
- 4. *Section 88 of the Strata Property Act be amended by*
 - (a) repealing subsection (3), and*
 - (b) striking out the words “, or proceedings have been commenced, to enforce a lien against the holdback,” in subsection (4) and substituting “against that strata lot.”*

Draft legislation to implement these recommendations is set out in Appendix A to this Report.

APPENDIX A

Draft Legislation

BUILDERS LIEN (AMENDMENT) ACT, 2004

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Builders Lien Act

1. *Section 4 (9) of the Builders Lien Act, S.B.C. 1997, c. 45 is repealed.*
2. *Section 5 (2) is repealed and the following substituted:*
 - (2) Subject to sections 9 and 34, all amounts deposited into a holdback account
 - (a) are held in trust for the contractor from whom the holdback was retained, and
 - (b) must not be paid out of the account without the agreement of all the persons who administer the account.
3. *Section 8 (4) is amended by striking out “or proceedings are commenced to enforce a lien against the holdback.”*

Strata Property Act

4. *Section 88 (3) of the Strata Property Act, S.B.C. 1998, c. 43 is repealed.*
5. *Section 88 (4) is amended by striking out “, or proceedings have been commenced, to enforce a lien against the holdback,” and substituting “against that strata lot.”*
6. *This Act comes into force by regulation of the Lieutenant Governor in Council.*

APPENDIX B

Selected Provisions from the *Builders Lien Act*, S.B.C. 1997, c. 45

Definitions and interpretation

1 (1) In this Act:

...

“**contractor**” means a person engaged by an owner to do one or more of the following in relation to an improvement:

- (a) perform or provide work;
 - (b) supply material;
- but does not include a worker;

...

“**subcontractor**” means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

- (a) perform or provide work;
- (b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

...

“**worker**” means an individual engaged by an owner, contractor or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

Lien for work and material

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

- (a) performs or provides work,
- (b) supplies material, or
- (c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

- (d) the interest of the owner in the improvement;
- (e) the improvement itself;
- (f) the land in, on or under which the improvement is located;
- (g) the material delivered to or placed on the land.

(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

Report on Builders Liens After the Shimco Case

Holdback

- 4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of
- (a) the value of the work or material as they are actually provided under the contract or subcontract, and
 - (b) the amount of any payment made on account of the contract or subcontract price.
- (2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.
- (3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.
- (4) Subject to section 5 (4), if a mortgagee is a savings institution and is authorized by the owner to disburse the money secured by a mortgage, the mortgagee may retain as a holdback the amount required to be retained by the owner as the payor on the contract and the retention by the mortgagee of that amount is deemed to be compliance with this section by the owner.
- (5) Subject to section 5 (4), a mortgagee who retains or agrees to retain a holdback under subsection (4) of this section
- (a) has the same rights and obligations in relation to the holdback as if it had been retained by the owner, and
 - (b) is liable to the owner or any lien holder who suffers loss or damage as a result of the failure of the mortgagee
 - (i) to retain the holdback as agreed, or
 - (ii) to fulfill the mortgagee's obligations in relation to the holdback.
- (6) Despite subsection (1) (a), a holdback must not be retained from a worker, material supplier, architect or engineer.
- (7) and (8) [Not in force.]
- (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

Holdback account

- 5 (1) Subject to subsection (8), an owner must
- (a) establish at a savings institution a holdback account for each contract under which a lien may arise,
 - (b) pay into the holdback account the amount the owner is required to retain under section 4, and
 - (c) administer the holdback account together with the contractor from whom the holdback was retained.
- (2) Subject to sections 9 and 34, all amounts deposited into a holdback account

Report on Builders Liens After the Shimco Case

- (a) are charged with payment of all liens arising under the contractor from whom the holdback was retained,
 - (b) subject to paragraph (a), are held in trust for the contractor referred to in paragraph (a), and
 - (c) must not be paid out of the account without the agreement of all the persons who administer the account.
- (3) An administrator of a holdback account may apply to the court for directions respecting administration of the account, and the court may make any order it considers appropriate, including one or more of the following orders:
- (a) that the owner establish and maintain a holdback account as sole administrator;
 - (b) that some or all of the money in the holdback account be paid into court under section 23 for the removal of claims of lien;
 - (c) that an administrator be removed or replaced;
 - (d) that a lien holder be paid.
- ...
- (8) This section does not apply to
- (a) if it is an owner, the government, a government corporation as defined in the *Financial Administration Act* or any other public body designated, by name or by class, by regulation, or
 - (b) a contract in respect of an improvement, if the aggregate value of work and material provided is less than \$100 000.

Holdback period

- 8 (1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to
- (a) the contract or subcontract, and
 - (b) any subcontract under the contract or subcontract
- expires at the end of 55 days after the certificate of completion is issued.
- (2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after
- (a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) the improvement is completed or abandoned, if paragraph (a) does not apply.
- (3) [Not in force.]
- (4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

Report on Builders Liens After the Shimco Case

Time for filing claim of lien

- 20** (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of
- (a) the contractor or subcontractor, and
 - (b) any persons engaged by or under the contractor or subcontractor
- may be filed no later than 45 days after the date on which the certificate of completion was issued.
- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
- (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
- (3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
- (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
 - (b) time had started to run under subsection (2).
- (4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

Lien extinguished if not filed as required by Act

- 22** A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

Removal of claims of lien by payment of total amount recoverable

- 23** (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of
- (a) the total amount of the claim or claims filed, and
 - (b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed provided the amount is at least equal to the required holdback in relation to the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.
- (2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and
- (a) the money paid into court stands in place of the improvement and the land or mineral title, and
 - (b) the order must provide that the claims of lien be removed from the title to the land or mineral title.

Report on Builders Liens After the Shimco Case

- (3) If an application has been made under subsection (1) and the claims of lien have been removed under subsection (2), and if additional claims of lien are filed by persons claiming through the same person engaged by the payor with respect to the lien claimants whose claims of lien were removed under subsection (2), application may be made under subsection (1) to have the additional claims of lien removed under subsection (2) on payment into court of whatever additional sum is necessary to bring the amount in court up to the amount that would have been paid into court if the additional claims of lien had been filed at the time of the prior application.
- (4) An application under subsection (1) or (3) may be brought by interlocutory application in proceedings that have been commenced to enforce a claims of lien, or by an originating application, and the court may
 - (a) hear and receive evidence, by affidavit or orally or otherwise, that it considers necessary in order to determine the proper amount to be paid into court,
 - (b) direct the trial of an issue to determine the amount to be paid into court, and
 - (c) refuse the application if it is of the opinion that the determination of the total amount that may be recovered by lien claimants should be made at the trial of the action.
- (5) If the amount held back by the payor from the person engaged by the payor through whom the liens are claimed exceeds the required holdback in relation to the contract or subcontract between the payor and that person, and that person has defaulted in completing or carrying out the contract or subcontract with the payor, for the purposes of subsections (1) and (3) the amount owing by the payor to that person does not include any amount that the payor is entitled to apply to remedy the default or complete the contract or subcontract.

Cancellation of claim of lien by giving security

- 24** (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.
- (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
 - (3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.
 - (4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.
 - (5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

Limitation and notice to commence an action

- 33** (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.

Report on Builders Liens After the Shimco Case

- (2) Despite subsection (1),
 - (a) an owner, or
 - (b) a lien claimant who has commenced an actionmay serve on a lien claimant, or other lien claimants, as the case may be, a notice to commence an action to enforce the claim of lien and to register in the land title office or in the gold commissioner's office, as the case may be, a certificate of pending litigation within 21 days after service of the notice.
- (3) The notice served under subsection (2) must be in the prescribed form, and service is validly effected if the notice is
 - (a) served personally on the lien claimant, or
 - (b) mailed or delivered to the address for service given in the claim of lien.
- (4) If service is by mail the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada.
- (5) Unless an action to enforce a claim of lien is commenced and a certificate of pending litigation is registered within the time provided in this section, the lien is extinguished.

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