

**BRITISH
COLUMBIA**



**LAW
INSTITUTE**

**1822 East Mall
University of British Columbia
Vancouver, British Columbia,
Canada V6T 1Z1
Voice: (604) 822 0142
Fax: (604) 822 0144
E-mail: bcli@bcli.org
Website: <http://www.bcli.org>**

**Prepared as Part of the
Community Law Reform Project
Supported by**

**The Law Foundation of British Columbia
and
The Notary Foundation**

**Consultation Paper
on**

**Builders
Liens
After the
Shimco Case**

September 2003

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org

WWW: <http://www.bcli.org>

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

The members of the Institute are:

Thomas G. Anderson
Gordon Turriff, Q.C.
Craig Goebel (Secretary)
Prof. James MacIntyre, Q.C. (Treasurer)
D. Peter Ramsay, Q.C.
Etel R. Swedahl
Prof. Martha O'Brien

Prof. Keith Farquhar
Arthur L. Close, Q.C. (Executive Director)
Ravi. R. Hira, Q.C.
Ann McLean (Vice-chair)
Gregory Steele, Q.C. (Chair)
Trudi Brown, Q.C.
Kim Thorau

This project is being carried out as part of the Institute's Community Law Reform Project which is made possible with the financial support of the Law Foundation of British Columbia and of the Notary Foundation. The Institute gratefully acknowledges the support of these bodies for its work.

TABLE OF CONTENTS

I.	Introduction.	1
II.	Facts and Background.	1
III.	The Basis for Establishing the Lien Against the Holdback.	3
	(1) Introduction.	3
	(2) Past Decisions.	3
	(3) Interpretation of the <i>Builders Lien Act</i>.	5
	(4) Tentative Conclusion.	8
IV.	The Differences between the Lien Against the Holdback and the Lien Against Land and Improvements.	9
	(1) Introduction.	9
	(2) Scope of the Lien Against the Holdback.	9
	(3) Scope of Claimants.	11
	(4) Notice.	11
	(5) Extinction of the Lien Against the Holdback.	12
	(6) Tentative Conclusion.	12
V.	The Concerns of Owners and Others Required to Maintain a Holdback under the <i>Builders Lien Act</i>.	13
	(1) Introduction.	13
	(2) Payment Out of the Holdback.	13
	(3) Personal Liability.	14
	(4) Tentative Conclusion.	15
VI.	Call for Comment.	15
VII.	Conclusion.	17
	Appendix A—Selected Provisions from the <i>Builders Lien Act</i>.	18

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. 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 court. 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.³

1. 2002 BCSC 238, 99 B.C.L.R. (3d) 59, 13 C.L.R. (3d) 299 [hereinafter *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 [hereinafter *Shimco* (CA) cited to B.C.L.R.].

3. *Shimco* (SC), *supra* note 1 at 61.

Consultation Paper on Builders Liens After the *Shimco* Case

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 section 33 (1) of the *Act* by commencing an action and filing a certificate of pending litigation in the land title office.⁴ 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.⁵

Tysoe J., who gave the judgment of the court, framed the issue for determination with these words:⁶

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 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.⁷

4. 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*.

5. *Shimco* (SC), *supra* note 1 at 61-62.

6. *Ibid.* at 62.

7. *Ibid.* at 65-66 and 68.

III. The Basis for Establishing the Lien Against the Holdback

(1) 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.

(2) 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.*⁸ and *Myles Enterprises Ltd. v. Atlas Painting & Decorating Ltd.*⁹ 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 liens would be discharged and they would lose their right to pursue a claim against the holdback funds, if any.¹⁰

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:¹¹

8. (1979) 18 B.C.L.R. 317 (S.C) [hereinafter *Metropolitan Trust*].

9. (1997) 29 B.C.L.R. (3d) 173, [1997] B.C.J. No. 446 (S.C.), online: QL (BCJ) [hereinafter *Myles Enterprises* cited to B.C.L.R.].

10. *Supra* note 8 at 318-319.

11. *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.

Consultation Paper on Builders Liens After the *Shimco* Case

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.¹² Since the judgement 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 mortgage, 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.¹³

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*.¹⁴

12. See *Shimco* (CA), *supra* note 2 at 202: “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.”

13. *Supra* note 9 at 175.

14. 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. Section 88 (3) and (4) of the *Strata Property Act* are the equivalents of section 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

Consultation Paper on Builders Liens After the *Shimco* Case

- 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 section 75 (3) and “or” in section 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:¹⁵

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 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*.

(3) 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

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.

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

15. *Supra* note 9 at 177.

Consultation Paper on Builders Liens After the *Shimco* Case

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.

Section 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 section 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.

The argument in favour of the existence of a lien against the holdback turns on a close reading of this section. If this section does not create a distinct lien against the holdback, the argument goes, then it is redundant. The court accepted this interpretation of the section.¹⁶

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 whom the holdback is retained.

16. *Supra* note 1 at 65.

Consultation Paper on Builders Liens After the *Shimco* Case

The argument is bolstered by section 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 section. 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 section are redundant. As the court puts it:¹⁷

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.

This interpretation of the *Act* has been criticized as being too focussed on the wording of one or two sections.¹⁸ 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." Section 4 (9) may simply be poorly drafted.¹⁹ Locating a separate lien in the language of this section upsets one of the broad policy goals of the *Act*, which is to create certainty around the maintenance and release of holdbacks.²⁰ Finally, it is difficult to believe that the legislature would create two clearly-drawn and expressly-stated remedies—the lien against

17. *Ibid.* at 66.

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

19. 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>>.

20. See Lundy, *supra* note 18 at 50.

Consultation Paper on Builders Liens After the *Shimco* Case

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).²¹ 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:²²

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.²³

(4) Tentative Conclusion

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.

21. *Supra* note 2 at 204.

22. *Ibid.*

23. *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-besc-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>.

IV. The Differences between the Lien Against the Holdback and the Lien Against Land and Improvements

(1) Introduction

Builders lien legislation in other provinces has established the remedy of a lien against the holdback for limited purposes.²⁴ 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 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.

(2) 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.

-
24. 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 section 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.

Consultation Paper on Builders Liens After the *Shimco* Case

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:²⁵

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 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.²⁶

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. . . .”²⁷ 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 construction project. These “sub-subcontractors” could complicate the distinction the court drew:²⁸

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

25. *Supra* note 1 at 68.

26. 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 [hereinafter *Builders Liens Practice Manual*].

27. *Supra* note 1 at 65.

28. Jenkins, *supra* note 26 at § 7.16 [italics and ellipsis in original].

Consultation Paper on Builders Liens After the *Shimco* Case

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.

(3) 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.²⁹

(4) 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.³⁰ 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.³¹ The uncertainty surrounding this point 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.

29. 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 23 at para. 5.

30. *Supra* note 1 at 62-63. See also “Builders Lien Alert: *Shimco Metal Erectors Ltd.*,” *supra* note 23 at para. 4.

31. See Streu & Hirst, *supra* note 18 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>>.

(5) 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.³² 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.³³ 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.

(6) Tentative Conclusion

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

32. 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*.

33. *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.

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.

V. The Concerns of Owners and Others Required to Maintain a Holdback under the *Builders Lien Act*

(1) Introduction

Owners and others required to maintain a holdback under the *Act*³⁴ 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.

(2) 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.³⁵ 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 come into existence, particularly in the face of a more informal assertion of the lien. This could lead to increased

34. 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.

35. See Stuart, *supra* note 31 at para. 8.

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 advice³⁶ 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.

(3) Personal Liability

The language of section 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. . . .”³⁷ The commentator goes on to explain the importance of this point:³⁸

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. Tysoe J. said that owners and others who maintain a holdback could protect themselves by paying those funds into court, should a dispute arise.³⁹ 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.⁴⁰ Under the close reading of the provisions of the

36. See *Shimco* (SC), *supra* note 1 at 67.

37. James R. White, “The Lienable Interest” in *Builders Liens Practice Manual*, *supra* note 26 at § 3.42.

38. *Ibid.*

39. See *Shimco* (SC), *supra* note 1 at 67.

40. See Streu & Hirst, *supra* note 18 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>.

Consultation Paper on Builders Liens After the *Shimco* Case

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.

(4) Tentative Conclusion

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.

In light of the uncertainties and practical difficulties created by the *Shimco* decisions we are of the opinion that the *Act* should be amended. The proposed amendments would involve the repeal of section 4 (9) and the addition of a new paragraph to section 2 (1), which would integrate the lien against the holdback into the existing procedures established for the lien against land and improvements.

VI. Call for Comment

The Law Institute is anxious to receive your comments on the issues raised. To facilitate this we have established an online questionnaire that can be completed interactively. To complete this questionnaire simply direct your browser such as Internet Explorer or Netscape to the following internet address:

<http://fs6.formsite.com/ppsa/shimco/index.html>

or click on [this link](#).

The questionnaire seeks comment on the questions posed below.

1. *Do you agree with the Law Institute's tentative conclusion that amendments to the Builders Lien Act are required to address the issues arising out of the Shimco decisions.*

cba.org/CBA/Sections/Construction/pdf/shimco.pdf>.

Consultation Paper on Builders Liens After the *Shimco* Case

Yes No

2. *If amendments are to be made, which approach should they take:*

(a) *Abolish the lien against the holdback, or*

(b) *Retain the lien against the holdback but assimilate it to the lien against the improvement created by section 2 (1) so it is subject to the same registration requirements and exists for the benefit of the same group of claimants*

3. *If option (a) is preferred, would the simple repeal of section 4 (9) achieve this?*

Yes No

If not, what other drafting approach would you suggest:

Reply: _____

4. *If option (b) is preferred would it be achieved by the repeal of section 4 (9) and the addition to section 2 (1) of an additional clause (h) extending the basic lien to the holdback? The section would then read:*

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,

(h) *a holdback retained under section 4 in relation to the improvement.*

Do you have an alternative drafting approach to suggest?

Consultation Paper on Builders Liens After the *Shimco* Case

Reply: _____

VII. Conclusion

The issue raised in this Consultation Paper requires legislative action. Readers are encouraged to send in their comments on the issues raised. The responses will be fully considered when the Institute forms its final recommendations.

The Institute asks that comments be submitted by 21 November 2003 either by completing the online questionnaire at:

<http://fs6.formsite.com/ppsa/shimco/index.html>

or by mail or email to:

Mail: British Columbia Law Institute
1822 East Mall, University of British Columbia
Vancouver, BC V6T 1Z1

Fax: (604) 822-0144

Email: bcli@bcli.org

Appendix A

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.

Consultation Paper 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 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

Consultation Paper on Builders Liens After the *Shimco* Case

- (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.

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

Consultation Paper on Builders Liens After the *Shimco* Case

- (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.
- (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.

Consultation Paper on Builders Liens After the *Shimco* Case

- (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.
- (2) Despite subsection (1),
- (a) an owner, or
 - (b) a lien claimant who has commenced an action
- may 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.

Our Supporters

The British Columbia Law Institute wishes to thank all those individuals and firms who provided financial support in the past year.

Partner

The Advocate

Canadian Bar Association, B.C. Branch

Benefactor

James M. MacIntyre, Q.C.
Blake, Cassels & Graydon
Steele Urquhart Payne

Hon. Mr. Justice Grant D. Burnyeat
Borden Ladner Gervais
Stikeman Elliott

Associate

Hon. Bryan Williams, Q.C.
Hon. Martin Taylor, Q.C.
Hon. Mdm. Justice Risa Levine

Hon. Chief Justice Donald C.J. Brenner
Hon. Mdm. Justice M. Anne Rowles

Supporter

Hon. Chief Justice Lance G. Finch
Kerry-Lynne D. Findlay Chapman, Q.C.

Hon. Mr. Justice Randall S.K. Wong

Friend

Hon. Mdm. Justice Carol Huddart
Hon. Mr. Justice Duncan Shaw
Hon. Mr. Justice Kenneth Smith
Hon. Mr. Justice Frank Maczko
Hon. Mdm. Justice Marion Allan
Hon. Mdm. Justice Heather Holmes
Hon. Judge David R. Pendleton
Hon. Associate Chief Judge Anthony J. Spence

Master Ronald Barber
Margaret Ostrowski, Q.C.
Taylor Jordan Chafetz
Ian Donaldson, Q.C.
J. Parker MacCarthy, Q.C.
Arthur Close, Q.C.
Donald J. Sorochan, Q.C.

Anonymous Donations

Support in Kind

Faculty of Law, University of British Columbia
Bull Housser & Tupper