

The *Shimco* Decision

The law regarding the pay out of builders lien holdbacks by owners of construction projects has been complicated by the trial and Court of Appeal decisions in the British Columbia case of [*Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*](#)

The [*Builders Lien Act*](#) creates a lien in favour of contractors (including material suppliers), subcontractors, and workers against land and improvements for the cost of improvements to the land. The Act also requires the owner to maintain a holdback of 10% of the cost of the improvement and creates a lien on this holdback. Before *Shimco*, it was assumed that if a builders lien is extinguished for any reason, any claim a contractor, subcontractor, worker or other person might have against the holdback is also extinguished. On a very close and technical reading of the Act, the courts have determined that this common understanding is incorrect. The courts have determined that there are two liens under the Act; one against the land and improvements and one against the holdback. The rules in respect of these liens are not the same. The lien against the land and improvements expires after 45 days from completion or abandonment of the subject improvement; there is no provision in the Act for automatically extinguishing the lien against the holdback. Therefore, even if a claimant has not filed a lien in the Land Title Office by the time of expiry of the holdback period, the holdback itself may not be released if proceedings have been commenced to enforce the lien against it. This raises a number of thorny problems for the owner, the most important of which is how to determine when it is safe to pay out the holdback.

Before paying out the holdback, the owner or the owner's lawyer should conduct the usual search in the Land Title Office and obtain the customary statutory declaration from the contractor confirming that all lienable claims have been paid or will be paid from the holdback. It is not sufficient to assume that simply because a claim for lien has not been filed in the Land Title Office, there are no proceedings to enforce a claim for the lien against the holdback. The owner should also conduct a search in the pertinent Supreme Court registry in order to ensure that no action claiming a lien has been filed. As the court registries may not be completely current, such a search should be undertaken several business days after the expiry of the 55 day period when the lien against the land has expired. This could delay pay out of the holdback by several days, thereby increasing the likelihood that a frustrated contractor, subcontractor or material supplier will file a claim for lien in the Land Title Office.

The *Shimco* case creates unnecessary complications for owners and arguably also creates windfalls for contractors, material suppliers and others associated with construction projects in B.C. who do not properly file claims for lien in the Land Title Office on a timely basis. For this reason, the British Columbia Law Institute has circulated a paper outlining in detail the problems raised by *Shimco* and requesting input on the legislative solution which the Institute concludes is necessary. For direct access to the Institute's questionnaire, go to:

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

In the mean time, prudent owners should change their practice regarding pay outs of lien holdbacks in order to ensure that when lien holdbacks are paid out, they are not subsequently faced with a claim to the effect that the pay out was improper.