

**THE ESSENTIALS:  
Builders Liens in BC**

Webinar – October 28, 2021

**CLARK WILSON**

Satinder Sidhu, Partner  
Scott Lamb, Partner  
Rosalie Clark, Associate

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**INTRODUCTION**

1. **Time Limits to File a Lien:** certification, completion, abandonment and termination explained
2. **Lienable Lands:** What does in relation to an improvement mean?
3. **Quantum of Liens:** What constitutes the price of the work?
4. **Discharge of Liens:** How to prepare for timely discharge?
5. **The Holdback and Liens Against the Holdback:** What will come of the Shimco Lien?
6. **Priorities Between Lien Claimants and other Creditors:** Considerations upon insolvency
7. **Reforms:** Prompt payment and interim adjudication

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**THE ESSENTIALS: BUILDERS LIENS IN BC**

**Time Limits to File a Lien  
Lienable Lands**



Satinder Sidhu  
Partner - Moderator  
604 643 3119  
ssidhu@cwilson.com

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### Core Features of the Builders Lien Act

- **Lien against land**
  - A claimant can file a lien for work performed and materials supplied in connection with an improvement to land, even if the claimant has no contract with the owner
  - Lien can be satisfied from court-ordered sale of lands but rare as payment disputes usually resolved
  - Must file claim of lien in prescribed form in the land title office within strict time limit
  - To enforce lien must commence an action in Supreme Court and file a certificate of pending litigation in one year
- **Holdback**
- **Statutory trust**

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### CONTRACTUAL RELATIONSHIPS IN CONSTRUCTION PROJECTS



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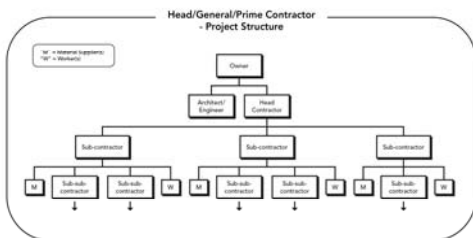
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### Head/General/Prime Contractor Project Structure



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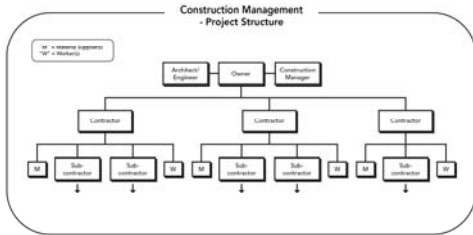
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### Construction Management Project Structure



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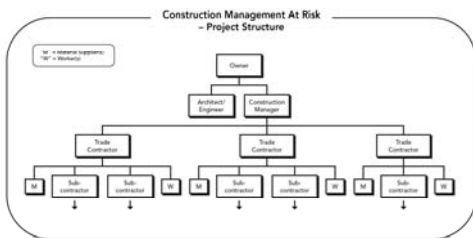
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### Construction Management At Risk Project Structure



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### TIME LIMITS TO FILE A LIEN



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**POLL QUESTION:**

Which one of the following events does not trigger the time limit to file a lien:

- Issuance of a certificate of completion
- Completion of the head contract
- Issuance of an occupancy permit
- Abandonment of the improvement

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**Time Limit to File Lien**

- 45 days after earliest triggering event
- Most issues surrounding liens relate to the 45-day period
- **Triggering Events:**
  - Issuance of a certificate of completion for a contract or subcontract
  - Completion, abandonment or termination of the head contract
  - If no head contract, completion or abandonment of the improvement
  - Transfer of strata lot title from owner-developer to purchaser

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**Time Limits: Certificate of Completion**

- **Often misinterpreted**
- **Issued by the payment certifier**
- **Who is the payment certifier:**
  - An architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification
  - If no payment certifier is identified then the owner acting alone in respect of amounts due to the contractor or the owner and contractor acting together in respect of amounts due to any subcontractor

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### Time Limits: Certificate of Completion

- At the request of a contractor or subcontractor, the payment certifier must, within 10 days, determine whether the contract or subcontract has been completed
- If the payment certifier determines that the contract or subcontract has been completed, the payment certifier must issue a certificate of completion:
  - If a certificate of completion is issued, the payment certifier must, within 7 days: deliver a copy of the certificate to the owner, the head contractor (if any) and the person that requested the certificate
  - Deliver a notice of certification of completion to all persons that requested the certificate
  - Post the notice of certification of completion in a prominent place on the improvement
- Payment certifier could be liable for damages
- Does not restart the 45 day clock if already started by another triggering event

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### Certification of Completion: prescribed form

#### Form 3, Builders Lien Act (Section 7 (10)) Certification of Completion

I ..... [name of payment certifier], of ..... [address], British Columbia, certify that, for the purposes of the *Builders Lien Act*, the following contract or subcontract was completed on ..... [month, day, year]:

Street address or other description of the land affected by the improvement:

Brief description of the improvement:

Brief description of the contract or subcontract, including the date of the contract and the names of the parties to it:

Signed: ..... [signature of payment certifier]

Dated ..... [month, day, year]

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### Notice of Certification of Completion: prescribed form

#### Form 2, Builders Lien Act, (Section 7 (4)) Notice of Certification of Completion

NOTICE: Re ..... [Name or popular description of project]

Take notice that on ..... [date] a certificate of completion, or court order to that effect, was issued with respect to a contract (or subcontract) between

..... [owner, contractor or subcontractor]

and

..... [contractor or subcontractor]

in connection with an improvement on land described as follows:

for the provision of [brief, general description of work done under contract or subcontract]:

All persons entitled to claim a lien under the *Builders Lien Act* and who performed work or supplied material in connection with or under the contract are warned that the time to file a claim of lien may be abridged and section 20 of the Act should be consulted.

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### Completion of Head Contract

- Where no certificate of completion
- Completion of the head contract occurs when it is “substantially performed” according to the 3-2-1 formula:
  - (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
    - (a) 3% of the first \$500 000 of the contract price,
    - (b) 2% of the next \$500 000 of the contract price, and
    - (c) 1% of the balance of the contract price.

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### Abandonment of the Head Contract

- Abandonment is deemed to have occurred if no work takes place in connection with a contract or improvement for 30 days, except for specified reasons:
  - (5) For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.
- Head contractor’s abandonment at issue
- Deemed abandonment is a presumption that can be rebutted if it can be shown that the owner and contractor had a real intention to complete

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### Termination of the Head Contract

- Termination is not defined
- Could be in writing or inferred from the course of dealings between the parties
- Terms of the contract may be relevant to determine if a contract has been terminated
- Only termination of a head contract triggers the 45-day period

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### Completion or Abandonment of an Improvement

- Where no certificate of completion or head contract
- Improvement is completed when it is, or a substantial part of it, is in use or ready for use
- See definition of abandonment above
- Abandonment of the owner at issue

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### Time Limit: Strata Lots

- **When an owner developer conveys a strata lot to a purchaser, under the *Strata Property Act* section 88(1), a claim of lien under the *Builders Lien Act* must be filed before the earlier of:**
  - the date on which the time for filing a claim of lien under the *Builders Lien Act* expires
  - the date which is 45 days after the date the strata lot is conveyed to the purchaser

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### Proposed Reforms

- Simpler process to determine when the 45 day period begins
- Reducing the number of separate triggers
- No need to have different triggers depending on whether there is a head contract
- Issuance of an occupancy permit to signify completion discussed and rejected as not all building structures involve occupation
- In the event of abandonment or cessation of work, the act should provide for a "certificate of cessation of work" to be issued by the payment certifier
- Strengthening the certification process
- Require substantial compliance with the prescribed forms
- Abolish the Notice of Certification of Completion

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**LIENABLE LANDS**



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**What lands are lienable**

Lienable Lands	Non-lienable Lands
<ul style="list-style-type: none"> <li>Lands registered in the land title office or gold commissioners office</li> <li>Provincial crown lands</li> <li>Municipal lands</li> <li>Schools and other public facilities</li> </ul>	<ul style="list-style-type: none"> <li>Lands that are NOT registered in the land title office or gold commissioners office</li> <li>Federal lands (including Indian reserve lands)</li> <li>Highways/ certain ferry properties</li> <li>Improvements by the Minister of Forests and forest service roads</li> </ul>

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**Special Categories of Lands and Lienable Interests**

- Can file lien against registered leasehold interests and easements
- In a phased strata plan, can only file against the strata lots in the phase in which the material was supplied or the work was done
- Where an improvement spans several properties, entitled to file a lien on each of those properties for the full amount of the lien
- Can lien for offsite work when it was an integral and necessary part of the actual physical construction of the improvement:  
*JVD Installations Inc. v. Skookum Creek Power Partnership et al., 2020 BCSC 374.*
- Can lien mining properties held under the *Mineral Tenure Act* but many minerals excluded (coal, petroleum, natural gas)
- Mineral Titles Branch maintains a registry of petroleum and natural gas interests and will accept liens but on an information basis only

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Reforms: liens on unregistered lands and interests

- 94% of land in BC is provincial Crown lands and most of this land is unregistered
- A claim of lien cannot be filed unless the land title office has issued a title for the land – gap in enforceability of lien rights against unregistered lands
- Filing mechanism should be available to file liens against unregistered lands
- Alberta land title offices maintain a record of lien filings against unregistered lands
- Several existing provincial registries may be capable of serving as repositories for liens against unregistered lands

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THE ESSENTIALS: BUILDERS LIENS IN BC

Quantum of Liens  
Discharge of Liens



Scott Lamb  
Partner  
604 643 3103  
slamb@cwilson.com

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POLL QUESTION: What can you claim in a Lien?

- a. Cost of work performed and unpaid.
- b. Taxes.
- c. Freight costs.
- d. All of the above.

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### QUANTUM OF LIENS

- Price
- Interest
- Damages
- Improper Liens



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#### Price

- A contractor, subcontractor or worker is entitled to a lien for the price of the work and material that is unpaid.
- Cannot claim for the price of the work not yet commenced or materials not yet supplied.
- Can only claim for work actually performed and unpaid.

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#### Price

- Unpaid invoices, progress claims and holdback and all work performed and unpaid for.
- Any applicable taxes and any other levy claimable from the customer as part of the price.
- Bond premiums which the customer is responsible.
- Legitimate claims for extra work calculated pursuant to the contract terms or on a *quantum meruit* basis.

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Price

- Extra work that contributes nothing to the improvement may be disallowed even if the Contract says payment must be made.
- Extra work claim in *quantum meruit* may be allowed even if the Contract did not provide for payment.
- Freight costs for materials that are lienable are properly added to the lien claim.

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Price

- Project management services, interior design services, development manager services may all be found to be lienable services but construction must have commenced at the site.
- However, if the work is done offsite it will only be lienable if the work physically contributes in a direct and essential way to the construction of an improvement on the site.

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Price

- Claims in liens for profit, overhead and administrative costs are most often seen in claims for extras on a cost-plus or *quantum meruit* basis.
- Profit, overhead and administrative costs have been found to be a valid part of the lien claim.
- However, overhead and administrative costs must be directly connected to the actual work.

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### Interest

- Interest payable under a contract or pursuant to court order interest cannot be claimed in a lien.
- The reason is that a lien claim is a claim *in rem*.
- However, interest can be claimed in a trust claim as it is a right *in personam*.

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### Damages

- Often stated that there is no lien claim for damages for breach of contract.
- Because these costs do not relate to the "price of the work or materials" and do not contribute to the value of the improvement.
- However, it is a bit more complicated.



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### Damages

- If the damage claim concerns the price and profits on work taken away from the claimant, these cannot be claimed in a lien.
- However, if the damage claim relates to work actually performed and not paid for, then it may be possible to argue that these claims may be included in a lien. However, this will depend whether the charges are an integral part of the price of the work.
- Delay claims may be claimed in a lien if it can be characterized as failure to fulfill the obligation to pay the value of additional work caused by the delay.

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**Improper Liens**

**Section 19**

- If a wrongful lien is filed, then the person who files the lien is liable for costs and damages.
- Applies to wholly invalid liens and not inflated quantum of liens.

**Section 45**

- A person who knowingly files an inflated lien is liable to a fine in the amount by which the lien stated claim exceeds the actual claim.
- Must show damages suffered.

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**Improper Liens**

**Abuse of Process.**

- A claim for damages for an inflated lien may be pursued against a lien claim if it amounts to an abuse of process.
- Need to show “wholly unsupported claim” and an “improper ulterior motive”.

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**DISCHARGE OF LIENS**

- Section 24 – Disputed Lien Claims
- Section 23 – Undisputed Lien Claims
- Section 25 – Clearly Invalid Lien
- Strata Lots
- Section 33 – Notice to Commence Action

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### Section 24 – Disputed Lien Claim

- Applicant can clear lien by paying into court “sufficient security” for the lien claim.
- Usually “sufficient security” is the full amount of the lien claim but it can be less.
- Security is paid into court or lawyers trust account and stands in place of the land.
- In order to get the money out of court or the lawyer’s trust account, the lien claimant must prove its claim.
- The applicant under section 24 can still dispute the lien claimants’ entitlement to lien and payment.

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### Section 24 – Disputed Lien Claim

- Security can be posted in form of:
  - cash
  - lien bond
  - Letter of Credit.
- Best practice is to pay security into court.

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### Section 23 – Undisputed Lien Claim

- Applicant can discharge a lien by paying into court the lesser of:
  - a) the total amount of the lien claims, or
  - b) the amount owing from the applicant to the person engaged by the applicant, provided that amount is at least equal to the statutory builders lien holdback applicable to the contract or subcontract between them – usually 10% of payments made.
- On payment, the lien is discharged from title and liability for the quantum of the lien is also discharged.

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### Section 25 – Clearly Invalid Liens

- Applicant can apply to the court to remove the lien on the basis that :
  - the lien was filed out of time; or
  - the lien is vexatious, frivolous or an abuse of process (filed against wrong land, for amounts not lienable, etc.)

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### Strata Lots

- A purchaser of a strata lot can apply to the court to discharge a lien on title and release the purchaser from liability in return for payment into court or the lesser of:
  - total amount of the liens; and
  - the full amount of the lien holdback retained from the purchase price of 7% of the purchase price.
- A strata lot owner may utilize an alternative procedure to discharge a lien by payment of the strata lot's share of the amount secured by the lien.

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### Section 33 - Notice to Commence Action

- A lien claimant must commence an action in the BC Supreme Court within 1 year of filing of the lien against title and register on title a Certificate of Pending Litigation.
- An owner may deliver to a lien claimant a Notice to Commence an Action to enforce its lien. The lien claimant must do so within 21 days or its lien claim will be discharged from title.



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THE ESSENTIALS: BUILDERS LIENS IN BC

**The Holdback and Liens against the Holdback  
Priorities Between Lien Claimants and other Creditors  
Reforms**



Rosalie Clark  
Associate  
604 643 3190  
rclark@cwilson.com

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THE HOLDBACK AND  
LIENS AGAINST THE HOLDBACK



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What is the Holdback?

- **Section 4 Builders Lien Act:**  
10% of the greater of the value of the work or material as they are actually provided under the contract or subcontract, and the amount of any payment made on account of the contract or subcontract price.
- Funds in holdback account charged with payment of liens and held in trust for the contractor

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### Who Maintains the Holdback?

- **Section 4 Builders Lien Act:**  
Person primarily liable on each contract, and the person primarily liable on each subcontract under which a lien may arise
- Obligation to retain a holdback applies whether or not the contractor or subcontract provides for periodic payments or payment on completion.

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### How is the Holdback Held?

- **Section 5 of the Builders Lien Act:** requires an owner to establish a holdback account at a savings institution.
- Different account required for each contract.
- All holdback maintained from payments to be paid into the account.
- Account to be administered with contractor.
- Limited exceptions to maintain Holdback Account. See BC Reg. 265/98 Builders Lien Public Bodies Holdback Account Exemption Regulation

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### What if no Holdback Account?

- Act of default under the contract, contractor may suspend operations on 10 days' notice



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**POLL QUESTION: What is a Shimco Lien?**

- Which of the following are true:
  - A Shimco Lien is separate from a lien against land.
  - A Shimco Lien must be filed within 45 days of substantial completion of the project.
  - A Shimco Lien must be registered in the land title registry.

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*Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd., 2002 BCSC 238, aff'd 2003 BCCA 193*

- **Shimco Lien:** lien against the holdback
- Separate and distinct from the lien against the lands – exists only against the holdback funds



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**Pros and Cons of Shimco Lien**

- **Pros:**
  - Holdback funds may exist after the 45 day lien limitation period has expired.
  - If time is missed for filing a claim of lien against the lands, lien may be filed against the holdback funds.
- **Cons:**
  - If there is no holdback maintained, or if the holdback is paid out before the Shimco Lien is alleged, no lien against the holdback can arise.
  - *Wah Fai Plumbing & Heating Inc. v. Ma, 2011 BCCA 26*

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### What will become of Shimco Lien?

- Courts have resisted expanding Shimco Lien (following decision in *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26).
- Prompt Payment Legislation may lead to less circumstances of Shimco Liens arising.

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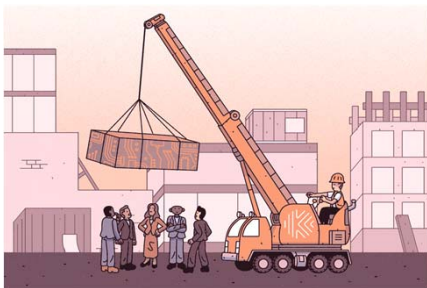
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### PRIORITIES BETWEEN LIEN CLAIMANTS AND OTHER CREDITORS



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### Priorities Between Lien Claimants and other Creditors: Considerations upon Insolvency

#### Insolvency:

- Creditors:
  - Unpaid vendors
  - Banks or financial institutions
  - Subcontractors or suppliers
- Canada Revenue Agency (CRA)

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Priorities Between Lien Claimants and other Creditors:  
Considerations upon Insolvency (cont'd)

- **What funds are available?**
  - **Holdback Funds:** a statutory trust applies to funds deposited into a holdback account for the contractor (and ultimate payment to all subcontractors and suppliers).
  - **Contract Funds:** funds designated for payment of the contract (funds received by a contractor from the owner in respect of a project) are imbued with a trust for payment of the subcontractors and suppliers.

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Priorities Between Lien Claimants and other Creditors:  
Considerations upon Insolvency (cont'd)

- **Who has priority?**
  - Lien claimants will have priority to funds that can be identified as being held in trust for their benefit.
  - Property that is subject to a trust is exempt from bankruptcy proceedings.
  - *British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 SCR24* confirmed that a “deemed trust” created by provincial statute is not a “trust” for the purposes of the *Bankruptcy Act*.

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Priorities Between Lien Claimants and other Creditors:  
Considerations upon Insolvency (cont'd)

- **When does a trust arise under the *Builders Lien Act*?**
  - Common law trust requires:
    - certainty of intention
    - certainty of subject matter
    - certainty of objects

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### Priorities Between Lien Claimants and other Creditors: Considerations upon Insolvency

- **When does a trust arise under the Builders Lien Act?** (cont'd)
  - *Re 0409725 B.C. Ltd. (Bankruptcy of)*, 2014 BCSC 1196, 2015 BCSC 561, 2015 BCSC 1221
    - Trustee in bankruptcy of a contractor proposed single procedure to assess, process adjudicate and pay out claims of the bankrupt. The Court was required to determine which of the cash funds held in connection with construction projects met the requirements of a trust.

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### Reforms: Prompt Payment and Interim Adjudication



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### Reforms: Prompt Payment and Interim Adjudication

- **Lien legislation across Canada is undergoing amendments and reformation.**
- **Ontario: Construction Act, R.S.O. 1990 c. C.30**
  - **July 2018:** amendments to construction lien and holdback rules.
  - **July 2018:** introduction of prompt payment framework and fast-track dispute resolution process for payment.
  - **October 2019:** introduction of adjudication procedures.

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Reforms: Prompt Payment and Interim Adjudication

- **Alberta: Builders' Lien (Prompt Payment) Amendment Act, 2020**
  - Received Royal Assent December 9, 2020 – not yet in effect.
  - Introduces timelines and rules for payments made by owners to contractors and by contractors to subcontractors.
  - Extends timelines for registering liens (45 to 90 days).
  - Increases amount that can be subject to a lien (\$300 to \$700).
  - Introduces adjudication process.
  - Introduces phased holdback release for multi-year project.

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Reforms: Prompt Payment and Interim Adjudication

- **Saskatchewan: Builders' Lien (Prompt Payment) Amendment Act, 2019 and The Builders' Lien Amendment Regulations, 2020 SR 92/2020**
  - Amendment Act received Royal Assent May 15, 2019 - not yet in effect.
  - Amendment Regulations filed August 20, 2020 will come in effect on same day as Amendment Act.
  - Introduces prompt payment provisions and adjudication procedures.
  - Prompt payment and adjudication will not apply to architects, engineers, land surveyors, persons providing services or materials to mine or mineral resources (including exploration, development, production, decommissioning or reclamation), or improvement related to infrastructure in connection with generation, transmission or distribution of electrical energy.

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Reforms: Prompt Payment and Interim Adjudication

- **Nova Scotia: Builders Lien Act, Bill 119**
  - Received Royal Assent April 12, 2019 - not yet in effect.
  - Introduces prompt payment framework (similar to Ontario).
  - Introduces adjudication procedures only for disputes that are "the subject of a notice of non-payment".

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### Reforms: Prompt Payment and Interim Adjudication

- **Federal: Federal Prompt Payment for Construction Work Act**
  - Passed as part of budget bill in June 2019 - not yet in effect.
  - Introduces prompt payment framework for federal construction projects.
  - Introduces adjudication procedures.
  - Governor General has discretion to exempt specific projects.

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### Reforms: Prompt Payment and Interim Adjudication

- The CCDC 2 - 2020 has also introduced the term of "Payment Legislation":  
*"Payment Legislation means such legislation in effect at the Place of the Work which governs payment under construction contracts."*
- There is nothing in the CCDC 2 – 2020 that provides what will occur if there is no prompt payment legislation that applies.
- Reference to "Payment Legislation" will need to be considered and addressed by supplementary conditions.

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## Questions?



**Satinder Sidhu**  
Partner - Moderator  
604 643 3119  
ssidhu@cwilson.com



**Scott Lamb**  
Partner  
604 643 3103  
slamb@cwilson.com



**Rosalie Clark**  
Associate  
604 643 3190  
rdclark@cwilson.com

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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