

HOLDBACKS IN THE TIME OF COVID-19: POTENTIAL IMPACTS OF EMERGENCY MEASURES ON BC

Posted on April 2, 2020

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Novel legal issues arise daily as the world navigates the COVID-19 pandemic. One such issue relates to limitation periods and their implications for Canadian construction. A review of British Columbia's emergency measures reveals a potential gap when it comes to builders' lien holdbacks in the province.

Suspended Limitation Periods

In an [earlier bulletin](#), we discussed the retroactive suspension of Ontario's limitation periods and civil deadlines, and how this suspension affects construction projects.

On March 26, 2020, British Columbia followed suit in issuing similar (but not identical) legislation suspending certain limitation periods in the province. Specifically, the Minister of Public Safety and Solicitor General made an order under the *Emergency Program Act* to suspend limitation periods relating to court proceedings.[1] Statutory decision-makers are also empowered to waive, suspend, or extend certain mandatory time periods.[2] The Limitation Periods (COVID-19) Order took effect on March 26, 2020 (the "**Suspension Order**") and will remain in effect for the duration of British Columbia's declared state of emergency.[3] The Suspension Order preserves legal rights in circumstances where the COVID-19 pandemic prevents parties from taking timely steps in court.

Builders' Lien Holdback

The builders' lien holdback is a portion of funds held back by the person primarily liable on each construction contract or subcontract. The purpose of the holdback is to provide security for parties in the construction pyramid and to limit liability when funds do not flow down the construction pyramid as required. *The Builders Lien Act [BLA]* provides that parties have 45 days following completion of the construction project (or the occurrence of one of the other triggering events) to file a lien.[4] The payor may then release the holdback after 10 additional days pass, assuming the conditions of section 8 of the BLA have been met.[5] The payor exposes itself to financial risk if it prematurely pays out the holdback before this 55-day period expires.

It is the conditions of section 8 of the *BLA* that create uncertainty in light of the Suspension Order. In particular,

pursuant to subsection 8(4) of the *BLA*, holdback can be paid after the expiry of the holdback period unless a lien is filed or proceedings are commenced to enforce a lien against the holdback. The question is whether this provision fits within the meaning of Section 2 of the Suspension Order, which states,

Every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended.

Specifically, is the limited time specified within Section 8 and particularly subsection 8(4) of the *BLA* to make a claim against holdback a "...mandatory time period that is establish in an enactment or law of British Columbia within which a civil...proceeding...must be commenced"? If it is, then what does it mean for it to be suspended? Is it safe for a payor of holdback to release holdback relying upon the expiry of the "holdback period"?

Arguably, the safe release of holdback depends on two conditions further to subsection 8(4):

a) Passage of the 55 day time period after the issuance of the certificate of completion or completion, abandonment or termination of the head contract or improvement;

AND

b) the absence of a lien or an action commenced to enforce a lien against the holdback.

If the time period for the second condition has been suspended by the Suspension Order, can a payor assert that both conditions have been fulfilled and it is safe to release holdback?

Unlike other parts of Canada, BC's construction law landscape contains an additional and notable quirk: the Shimco lien.[6] The Shimco lien originated with *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2003 BCCA 193, a case in which the Court of Appeal affirmed that in addition to the *BLA* claim of lien, subcontractors, workers, and material suppliers may assert a "Shimco" lien against an unreleased holdback. The Shimco lien is independent from builders' liens against the land, enforced through a different process, and subject to a different limitation period. The genesis of the Shimco lien is found, in part, within the wording of section 8(4) of the *BLA*.

To assert a Shimco lien, a claimant must commence a civil claim and plead an entitlement to a claim against the holdback. The claim is only available where a holdback actually exists and is in possession of the person charged with holding it.[7] The payor is then restricted from releasing holdback unless certain conditions are met.[8]

While the peculiarities associated with Shimco liens and BC's "dual lien theory"[9] is beyond the scope of this article, the point remains that is unclear whether it is safe to pay out holdback in the face of the Suspension

Order.

Takeaways

The preamble of the Suspension Order specifically states that because of the COVID-19 pandemic, and other necessary public health measures taken in response to it, it may not be possible for a person involved in legal proceedings to take steps required by legislation. It is easy to foresee circumstances where an aggrieved party could allege that they were unable commence a court proceeding because of the pandemic, and thus should be entitled to claim against holdback that was paid out during the period when the Suspension Order was in force.

The flow of funds - particularly during these challenging times - is of vital importance to the feasibility of construction projects in the province. So, it would seem an odd result to penalize payors of the holdback because of "flaws" with the *BLA*.^[10] Nevertheless, as others have observed, BC's "dual lien theory is not in harmony with the [BLA] when read as a whole," and we are unlikely to know whether it is safe to payout holdback while the Suspension Order is in effect or until the Court addresses the question.

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[1] Province of British Columbia, [Ministerial Order 86/2020](#); Province of British Columbia, [Province suspends legal time limitations due to COVID-19](#), 27 March 2020.

[2] Limitation Periods (COVID-19) Order, MO86/2020, s. 3.

[3] *Ibid*, s. 1.

[4] *Builders Lien Act*, SBC 1997, c 45 [BLA], s. 20.

[5] *Ibid*, s. 8.

[6] See the British Columbia Law Institute's [Consultation Paper on the Builders Lien Act \(Prepared by the Builders Lien Act Reform Project Committee\)](#) (September 2019) [Consultation Paper] for a comprehensive discussion of the Shimco decision and its various consequences.

[7] *Wah Fai Plumbing & Heating Inc.*, 2011 BCCA 26.

[8] *Preview Builders International v. Forge Industries Ltd.*, 2013 BCSC 1532.

[9] See the Consultation Paper, *supra* note 6.

[10] *Ibid*.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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