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<b>HEINTZMAN, WEST AND GOLDSMITH ON CANADIAN BUILDING CONTRACTS</b> Thomas G. Heintzman, Bryan G. West, and Immanuel Goldsmith Release No. 5, November 2024
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Heintzman, West and Goldsmith on Canadian Building Contracts provides a systematic analysis of the law of contracts as it applies to building contracts in Canada. The work includes all relevant court decisions dealing with the formation, material provisions, breach and remedies for breach of construction contracts. Separate chapters deal with construction lien legislation, subcontractors, architects and engineers, bonds and arbitration.

This release features updates to the case law and commentary in Chapter 16 (Construction, Builders' and Mechanics' Liens).

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## Highlights

**§ 16:4. Statutory Protections Do Not Preclude Other Legal Rights** — The Acts' protections are products of statute, with no common law equivalent. For a right to be enforced, the right must be found in the particular lien statute being relied upon and the statutory requirements for triggering that right must be met. Generally speaking, the Acts are liberally interpreted so far as the rights they confer upon those to whom they apply, but restrictively interpreted so far as to whether the procedural requirements for the right (or continued existence of the right) have been met. The Acts do not eliminate a personal right that an owner, contractor or subcontractor may have against any party, except to the extent that such right may contravene such a statute, and that right can be pursued even if the lien rights are unenforceable.

**§ 16:6. Liens** — The first statutory protection adopted by Canadian common law provinces is the statutory lien — i.e. the construction lien, the builders' lien, or mechanics' lien (originally an American invention). The lien right gives subcontractors, suppliers, and workmen a lien (i.e. interest) in the property being improved. This lien (whether referred to as builders' lien, a construction lien, or a mechanics lien) acts as a legal claim or encumbrance on the property (or, more properly, on the owner or landlord's interest in that property), ensuring that the claimant has a secured interest in the property equivalent to the value of the unpaid work or materials provided. This right serves as a powerful tool for securing payment, as it can ultimately lead to the sale of the property to satisfy the debt if necessary.

**§ 16:7. Holdbacks** — The second statutory protection are the holdbacks, created primarily for the benefit of subcontractors. Under lien legislation, owners (and sometimes contractors, and subcontracts) are required to retain a specified percentage of each payment (typically in the range of 10% of the payment) made under a construction contract as a holdback. This holdback acts as a financial reserve to ensure that funds are available to satisfy lien claims that may arise — but only up to the value of the holdback. Claimants have a right to assert valid liens against this holdback in addition to land, providing an additional layer of security for payment of those lien claims. In some jurisdictions, such as BC, case law has established that wherever a lien right arises, two separate liens are created: (i) a lien against land; and (ii) an independent lien against the holdback. In BC, the lien against the holdback (referred to as "*Shimco* lien"), can even survive discharge of its twin lien against land. A second holdback is usually required after a lien is filed on the project, as against all amounts payable by a payor to payee if the payee is subject to holdback obligations (referred to as the notice holdback, amount payable, of holdback part B).