

● Construction Law Advisory

Date January 27, 2011

Subject **BC Court of Appeal clarifies that a *Shimco*-style holdback lien cannot succeed if no holdback has been retained**
(*Wah Fai Plumbing & Heating Inc v. Ma*, 2011 BCCA 26)

The BC Court of Appeal has tapered a contractor's or subcontractor's ability to make a claim on the holdback amount meant to be retained by an Owner commissioning improvements to their property under section 4 of the *Builders Lien Act*. In the recent decision of *Wah Fai Plumbing & Heating Inc. v. Ma*, the Court re-confirmed the strict timeframe applying to all lien claims made under the legislation, which after *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd*, 2002 BCSC 193 became available in two flavours: one on the property itself and one on the statutory holdback.

As determined in *Shimco*, the extinguishment of the lien on the property does not automatically extinguish the lien possible on the holdback amount provided litigation is commenced prior to the holdback amount being validly paid out within 55 days pursuant to section 8(2) of the Act. The dual lien theory has met significant criticism because, among other things, of the fear it would create a right *in personam* against an owner for the holdback obligation. Hypothetically, if an Owner failed to retain a holdback as required under the Act, the lien claim could still be enforced against the Owner personally.

The precise worry explained above is the subject of the appeal in *Wah Fai Plumbing*. Since the Owner of the property did not bother to retain a holdback amount from the general contractor, would they be liable personally to an unpaid subcontractor bringing a *Shimco*-style claim?

Levine J.A. took the opportunity to instruct that the Act does not allow for interpretation that a claimant whose lien against the property has been extinguished is able to then claim against a nonexistent holdback. In fact, the failure of the Act to provide for enforcement of a holdback lien when there is no holdback should be interpreted to suggest that lien claims against a nonexistent holdback are unavailable regardless of when they are commenced. In concurring reasons, Chiasson J.A. put it this way: "The legislation is silent on any remedy that may be available to a claimant arising out of an owner's failure to meet the statutory obligation to retain funds to which that lien could attach. There may be such a remedy, about which I give no opinion, but a declaration of lien is not one of them."

Perhaps the conclusion of this case will stimulate a reconsideration of the legislation in relation to the precise right created by the holdback lien provisions. Nevertheless, this case serves to bolster the proposition that **contractors and subcontractors should be quick to finalize liens against the property and take all necessary steps to substantiate those claims**. If claimants miss the opportunity to file their lien claim on the property, there may be nothing left to claim against.

Further information is available from Brian McLean, Chris Armstrong, or William McLean at 604-925-0672 or chrisarmstrong@mcleanarmstrong.com. Article written by Chris Moore, Articled student.