

LIEN CLAIMANTS DEFEAT CANADA REVENUE AGENCY



BY ADNAN HABIB

commercial and construction litigation

ORIGINALLY PUBLISHED IN THE SPRING 2009 EDITION OF THE BAILIWICK NEWSLETTER

On February 2, 2009 the British Columbia Supreme Court in the decision of PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc., dealt with the ability of Canada Revenue Agency (formerly known as Revenue Canada) (“CRA”) to use a Requirement to Pay to seize holdback funds under the *Builders Lien Act* (the “BLA”).

This case involved an application to determine whether CRA is entitled to its super priority to various funds that certain general contractors held back from two subcontractors, Condura Forming Ltd. (“Condura”) and Norex Civil Contractors Inc. (“Norex”), who defaulted on a number of subcontracts on various projects and at the same time owed CRA money.

The funds at issue represented the 10% holdback maintained under s.4 of the BLA. The position of the general contractors who held back the monies was that the funds were not due and owing to Condura or Norex because they defaulted in their subcontract obligations. In addition, by virtue of the right of set-off no money is or ever will be owed by them to Condura or Norex. The position of the lien claimants was that as no money was owed or could be owing to Condura or Norex, CRA could not claim the holdback monies. The position of CRA was that at the time the general contractors made the 10% holdback deductions from the progress draws of Condura and Norex, these monies were beneficially owned by or owed to Condura or Norex. CRA further argued that any right of set-off would be a potential debt and would not have priority over the RTP.

The Court reviewed the nature of the holdback under the BLA and the deemed trust claimed by CRA. The Court recognized that CRA had a strong claim to the property of the tax debtor regardless of when it was acquired or what security interest was charged against it. The Court did not view the holdback fund established by the BLA as an ordinary trust in which the beneficiary has an unrestricted beneficial interest. Madam Justice Arnold-Bailey stated “It creates a fund to which the Subcontractor from whom it is held “in trust”, may eventually become entitled. The entitlement arises when, generally speaking, the project is finished or discontinued, the subsequent holdback period has expired and any claimed set-off has been resolved.” The Court further stated that until that entitlement arises, the subcontractor’s interest in the fund is a conditional right and no more. If the subcontractor was never entitled to the holdback fund and CRA was allowed to claim it then it would be taking money out of the hands of the contractor, not the tax debtor.

The Court indicated that a claim to set-off is involved as part of the determination of what money, if any, the subcontractor is entitled to. This question must first be resolved before CRA can assert its interest in the holdback fund. If the amount of the set-off is greater than the holdback then the subcontractor would not receive any money and the sub-subcontractor’s lien claims will be satisfied from the holdback funds. If the set off is less than the holdback then the subcontractor’s entitlement is equal to the amount of the holdback minus the set-off. CRA would then be able to seize this entitlement to these funds ahead of the lien claimants.