



Posted on: January 3, 2018

WHAT LAND CAN YOU LIEN?

Published in the Construction Business Magazine May/June 2013 issue

The *Builder's Lien Act* (the "Act") is an effective remedy for collection of debts owed in construction projects as it permits the claimant to secure the debt claim by filing a lien against title to property. The lien gives the claimant an interest in land which can be sold to satisfy the debt owed. Often the only asset for recovery in a construction project is the land of the owner of the construction projects. If the services or materials relate to an improvement of that land then a creditor can potentially use a claim of lien to recover on debts owed to it.

However, a key question often arises as to whether the lien claim under the Act can be validly registered against particular types of land. In short, not all land is lienable under the Act. As a result, it is useful to review which types of land in British Columbia are subject to a claim of lien under the Act. In doing so, it should be noted there are some surprises as what may be liened and some current creative approaches.

1. Crown Land

With respect to Crown Land there is an important distinction between Federal Crown Land and Provincial Crown Land:

(a) Provincial Crown Land

Provincial Crown Land is clearly caught by the Act as lienable land whether owned directly by the Province or an agent of the Province. However, pursuant to section 31(b) of the Act, there can be no order for sale of an interest in land owned by the Provincial Crown.

(b) Federal Crown Land

As a constitutional matter, liens under the Act cannot be filed against title to Federal Crown land. The Act is a statute of the British Columbia Legislature and the Federal Crown cannot be bound by the Provincial Crown.

However, the legislation creating Federal Crown agencies may specifically allow for the Federal Crown agent to be subject to liens under the Act. For example, the *National Energy Board Act* subjects the Federal Crown



property to liens under the Act with respect to pipeline projects.

2. Highways

Highways, as defined by the *Highway Act*, are specifically excluded from the application of the Act pursuant to section 1.1 of the Act.

Where a construction project involves a highway, consideration should be given to whether the project also involves other lands which are directly related to the supply of labour and materials from which the debt arose. These related lands may possibly be liened. It is always useful to make an investigation of this sort where at first the land in question is one which is outside of the application of the Act. For example, there may be road work in which there may be staging areas and structures beyond the highway which are also work on which can be liened.

3. Aboriginal Land

Aboriginal Land situated on a Federal reserve are not lienable as they are subject to Federal jurisdiction and the express provisions of the *Indian Act* stating that reserve lands are not subject to seizure under legal process. However, the *Indian Act* does provide some exemptions with respect to leased lands on the reserve such that this type of interest in reserve lands may be subject to a lien under the Act.

It is unclear as to what the status of a claim of lien under the Act is with respect to land that is not reserve land but is subject to an Aboriginal land claim.

Also, it is interesting to note that some Aboriginal bands have started to maintain *de facto* land registry systems to facilitate commercial development of reserve lands which fall outside of the British Columbia Land Title Office system. The efficacy of registering claims under such a registry of Aboriginal Land is not clear but should be investigated if one is dealing with an unpaid debt arising from a project on Aboriginal Lands. This is a developing area of law which should be watched in the future.

4. Mines

To be lienable, mining properties must be located on lands registered under the *Land Titles Act* or the scheme of the *Mineral Tenure Act*. Either way, a claim of lien under the Act can be registered against such mining properties, unless it is a Crown-granted mineral claim.

However, if the mining property is held under the *Mineral Tenure Act*, the lien must be filed in Gold Commission Office.



It is important to note that many minerals are excluded from the *Mineral Tenure Act* scheme, including coal, petroleum, natural gas, sand and gravel.

5. Petroleum and Natural Gas

One of the more exotic properties in which to claim a lien is with respect to petroleum and natural gas properties which operate outside of the Land Title Office system.

The Mineral Title Branch of the British Columbia Ministry of Energy and Mines maintains a register for petroleum and natural gas properties and will accept claims of liens on what is described as an “information only basis”. However, such procedures are significantly different than the Land Title Office system and have raised questions as to efficacy and reform of this system.

6. Landlords and Notices of Interest

An important situation arises in the context of leased property. Landlords who lease their property to others may effectively exempt themselves from a claim of lien under the Act by filing in the Land Title Office a Notice of Interest.

The general principle underlying this exemption is that a landlord should not be subject to its land being sold to pay for the debts incurred on its tenant’s project which the landlord has not expressly requested or paid for. However, if a Landlord expressly requests that work be carried out by its tenant on the leased property the Notice of Interest filed by the Landlord on title will not avoid the liability of a lien claim by a debtor carrying out work in such an improvement.

Conclusion

Given the problems of claiming a lien against lands set-out above, creative approaches have been pursued in order to give effect to lien claims. If a portion of the work done by the unpaid contractor to a project was carried out on lienable land, it may be possible to claim for the full amount of such work against the lienable portion of the land even though the other portion of the work was carried out on otherwise unlienable lands.

Further, it is prudent to investigate the type of land on which the work is to be carried out. The type of land can affect the risk and reward profile of such an engagement and dictate appropriate protections be pursued or negotiated before carrying out such work.

If you have any questions about this article, please contact our Construction Law Group.