

● **Construction Law Advisory**

Date June 24, 2011

Subject **How to Collect on Road Improvement Projects**

Workers, material suppliers and subcontractors on highway projects may find themselves in a tight spot if the contractor or subcontractor who hired them becomes insolvent. Section 1.1 of the *Builders Lien Act*, S.B.C. 1997, c.45 (the “Act”) exempts highways from the application of the Act. This generally includes all public streets, roads, trails, lanes, bridges, trestles, tunnels, ferry landings, ferry approaches, and any other public ways (see the *Transportation Act* S.B.C. 2004, Chapter 44). So how do these unpaid parties pursue money for work performed on a highway project? Where do they turn in the event no Labour and Material Bond has been posted by the contractor or subcontractor which hired them? Is there any possibility they may file a lien on the work? Luckily for them, it is likely that the “Act” may be of assistance to these unpaid creditors. In fact, the Act could help to secure payment in a superior manner to an unsecured action for debt.

The Act provides separate and distinct mechanisms to enable an unpaid party to secure payment for work performed. The question is which of these apply to highway projects:

- 1) Filing a lien claim on the property pursuant to section 2 of the Act. This remedy is available to contractors, subcontractors, or workers who perform or provide work, supply material or any combination of the two in relation to an improvement on the property. The law has consistently interpreted the pool of eligible claimants under the Act strictly to those working directly on the land and improvement or to those working offsite who provide work, services or supplies which are “fundamental to or integral” to the improvement itself. Justification for this restrictive approach is possibly due to the ability of lien claimants to apply for a court order for the sale of the property subject to the lien pursuant to section 31 of the Act.
- 2) Claiming the holdback money held pursuant to sections 4 and 5 of the Act. This remedy has been held to be a completely separate remedy from filing a lien claim against the property. Parties claiming part or all of the mandatory 10% holdback may do so outside of the strict time periods applicable to lien claims outlined in section 2 of the Act, provided the holdback remains in the hands of the payor.
- 3) Claiming trust money received by the contractor or subcontractor for payment on account of the price of the contract or subcontract in connection with the improvement. Section 10 of the Act outlines how such contract money received is impressed with a constructive trust for the benefit of “persons engaged in connection with the improvement”.
- 4) Any person against whose title a lien is claimed, and higher level contractors and subcontractors, may apply to have the lien cancelled on payment of a sufficient level of security into court to satisfy the lien pursuant to sections 23 and 24. In the case where security is paid into court, that amount may become a third source of satisfaction such as in the form of a lien payment bond.

● To What Extent does the Section 1.1 Exclusion Apply?

To determine the likelihood that the Legislature intended the section 1.1 exemption to exclude all operations of the Act, look no further than the logical reasons for including the exemption. Quite apart from the obvious public policy reason to protect city streets and other ‘highways’ from being sold to satisfy an adjudged lien, there exists a very practical reason for including the exemption: “highways” do not have a certificate of title from the Land Title Offices against which a lien could be filed.

These issues do not extend to the “money sources of satisfaction” for unpaid parties (mechanisms 2, 3 and 4 above). Claims against the money paid to the contractor or subcontractor avoids any effect on the property involved in the dispute. Consequently, it is unlikely that the section 1.1 exemption could be intended to exclude the “money sources of satisfaction” available under the Act.

In *Defazio Bulldozing & Backhoe Ltd. v W.A. Stephenson Construction (Western) Ltd.* [1985] B.C.J. No. 512, Carrothers J.A. discusses the effect of the section 1.1 exemption, concluding that “what section 3 [the current section 1.1] does do, in addition to exempting “highways” from the lien provisions, and which would be most unfortunate in the present case, is to exclude the operation of the Act altogether.” This conclusion is surely incorrect since the purpose of the exemption as stated above cannot logically extend to the “money sources of satisfaction”.

Additionally, the comments of Carrothers J.A. in *Defazio Bulldozing* are not binding on subsequent court rulings because they were made in addition of those necessary to determine the outcome of the case: what is commonly referred to in legal jargon as *obiturn dictum*.

Contrary to Carrothers J.A.’s conclusion, the Supreme Court of Canada (“SCC”) case *Canadian Bank of Commerce v T. McAvity & Sons Ltd.* [1959] S.C.R. 478 regarding the nearly identical provisions of the then current *Mechanics Lien Act*, R.S.O. 1950, c.227 stands for the proposition that trust money may still be claimed by unpaid parties on public works projects (mechanism number 2 above). There, the SCC outlined the same purposes of the exemption as stated above. It determined that the express wording of the exemption clause that “nothing in this act shall extend to a highway or to any work or improvement to a highway” is aimed at defeating any property effect upon a highway (ie. the sale of public infrastructure). The only application of the exemption is thus to exclude operation of the provisions of the Act to highways as a physical object. Therefore, the exemption only affects the lien claim against the property itself. The SCC goes on to confirm this interpretation by suggesting that since the group of possible claimants against trust money held by the contractor or subcontractor is larger than that entitled to file a lien claim, it would defeat the fundamental purpose of the legislation to deny the trust to those working on a highway who would otherwise have no security interest at all.

On the authority of the SCC, it would be logical to allow contractors, subcontractors, workers, material suppliers or other parties involved on municipal road improvements to claim money held in trust pursuant to section 10 of the Act and other “money sources of satisfaction”. While ‘highways’ remain off-limits for genuine lien claims, the Act is still of utility in the disastrous event that the party who hired the unpaid party becomes insolvent.

- The constructive trust principle provided by section 10 of the Act may allow an unpaid party to recoup some or all of its loss and should not be forgotten when performing work on municipal roads or other 'highways' as defined in the *Transportation Act*. Contractors who are outside of the limits of being entitled to file a lien on a property should be aware of the possible claim against trust money and should contemplate making both claims so as to ensure payment for work performed.

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