



THE FORESTRY SERVICE PROVIDERS PROTECTION ACT: HOW IT WORKS IN PRACTICE

The *Forestry Service Providers Protection Act* became law in April 2013. The legislation is unique to British Columbia and the drafters broke new ground when the law was written. With the benefit of 18 months under our belts, we have some understanding about how the law works in practice.

The new law provides a *lien* over a licensee's timber. As the law now reads, once a log has been milled into lumber any lien over it is lost. But, if the licensee sells any timber or lumber to a third party, the contractor has a *charge* over that licensee's accounts receivable.

An unpaid contractor has an opportunity to register his lien and charge in the Personal Property Registry—the same place that security agreements and repairers liens get registered.

However, registration in the Personal Property Registry has no legal impact. Registration does not prevent licensees from selling their timber; the lien does not attach to any timber that is sold; nothing prevents licensees from milling their timber into lumber or from selling that lumber; any payment owed to the licensee by a purchaser is not attached by that registration; and the licensee's lender can lend further money with impunity. At best, one can say the licensee and its lender might become nervous and the contractor might enjoy a "warm and fuzzy feeling" when registering.

Nor is the failure to register the lien in the Personal Property Registry of any legal consequence. The lien exists regardless.

As I say, registration is of little effect. What is essential, to enforce a *lien*, is the

starting of a lawsuit and the securing of a court injunction over the licensee's timber. To enforce a *charge*, one must serve notice to the party owing the licensee. This will capture that money, albeit to place it into a sheriff's hands to be fought over in a subsequent court case.

The legislation provides for unpaid contractors to share pro rata in all of the licensee's timber and to share pro rata in the licensee's receivables. In practice, two contractors working for the same licensee—each on completely different BCTS timber sales—may feel uncomfortable about a pro rata distribution. A contractor harvesting on timber sale X might be uncomfortable about his fellow contractor, who did no work in relation to timber sale X, coming and claiming a lien over that timber and a right to

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the receivables for the subsequent sale of that timber.

Interestingly, most of the cases I have been involved with have been in the northwest part of the province and we are often dealing with raw log exports. Once logs leave the jurisdiction of British Columbia and if the accounts receivable is from an offshore company, there really is no jurisdiction to enforce liens and charges.

Here's another interesting scenario where a lien may not work. Imagine that Company A is the successful bidder on a BCTS timber sale. In turn, it makes a deal with Company B to have Company B purchase the timber from it. And, Company B engages a contractor to fell, skid, process and deck the timber. If Company B becomes insolvent, who is the owner of the decked timber still in the forest? A lien only applies to the timber owned by Company B. If Company A remains the owner, there is no lien.

My most frustrating experience has arisen from the fact that unpaid stumpage owed to the government takes prior-

ity over a contractor lien or charge. In one case, a licensee had three BCTS timber sales. One of those was an area-based sale and it was three-quarters logged when the licensee became insolvent and the contractor stopped working. A court order permitted a seizure and sale of the timber.

Going into court, we thought we knew how much the government was owed. But, after seizure, more stumpage bills were issued, including a final instalment for the area-based sale. After the sheriff took his fees and the government took its unpaid stumpage, only 4 per cent of the value of the timber was recovered for the contractors. Essentially the contractors, at their own expense, had acted as the government's tax collectors. (This, by the way, was a case where the licensee did not have any bank financing. Had there been bank financing, it would also have had priority over the contractors' claims.)

For these contractors the fund still exists and they are hopeful of recovering from it. Until that happens, the entire process has been costly without any

reward. Not even a "thank you" from government for collecting its \$240,000 in unpaid stumpage. The saga continues. These contractors look forward to that day when they might thank government for the creation and seeding of the fund.

Finally, contractors need to be aware that conflicting messages are being sent to them. The message from government is "keep working." If a block is three-quarters logged and the sale is an area-based one, then the contractor is wise to log it to its conclusion. Otherwise, the government may take all of the timber proceeds as stumpage.

The contrary message, from the fund itself, is "stop working." The fund has rules to say that a contractor should be shutting down fairly promptly after non-payment. A contractor cannot receive compensation for more than 60 days' worth of unpaid work.▲

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