



## LOOKING OUT FOR THE LITTLE GUY: SMALL CONTRACTOR PAYMENT PROTECTION AND RECOVERY

Payment protection for large corporate logging contractors with full phase replaceable logging agreements has been significantly improved by the lien provisions of Part 1, and the insolvency Compensation Fund provisions of Part 2, of the *Forestry Service Providers Protection Act* (FSPPA). But what payment protection is available for small, independent owner/operator contractors with relatively small claims, say under \$100,000? This article will address that question.

### Small contractors should not assume that the FSPPA does not apply to them.

Firstly, small contractors should not assume that the FSPPA does not apply to them. If they provide services to a forest products owner they are entitled to a lien under that Act, provided that those services consist of felling, bucking, yarding, skidding, processing, chipping, grinding, decking, loading, hauling, unloading, dryland sorting, or logging road construction and maintenance. If they provide subcontracting services to a contractor who has entered into a contract with a forest products owner, they are not entitled to a lien under the FSPPA, but they have a charge on all accounts due to the contractor. The lien or charge may be registered by filing a financing statement in the Personal Property Registry.

Small contractors to a licence holder who becomes insolvent are also protected by the FSPPA and may have access to the Forestry Service Providers Compensation Fund, provided that the licence holder holds one of the following licence agreements set out in Section 12 of the *Forest Act*: a forest licence; a timber licence; a tree farm licence; a community forest agreement; a First Nations woodland licence; a community salvage licence; a woodlot licence; a licence to cut; a free use permit; a Christmas tree permit; a timber sale

licence; a forestry licence to cut; or a road permit. Subcontractors do not have a direct claim to the Compensation Fund, but the Administrative Authority under the Fund's Administrative Agreement will attempt to ensure that claims of eligible contractors will be applied to their unpaid subcontractors.

If a small contractor does not have a claim under the FSPPA, because of the nature of its services or the licence under which it performs those services,

that contractor may still have a claim under the *Woodworker Lien Act* (WLA). The WLA was not revoked when the FSPPA was proclaimed. The WLA gives a lien for "labour or services," which are not limited to the traditional phases of a timber harvesting operation. They include most work usually associated with a timber harvesting operation, including mill processing operations.

However, a woodworker lien is generally only available to wage earning individuals who personally render services, not to corporations, with the possible exception of "one man" companies and wage earning shareholders who are paid by their companies.

A woodworker lien requires the filing of a statement of the lien in a registry of the Supreme Court, and is subject to strict time limits, so small contractors who wish to claim such a lien for their labour or services should consult legal counsel.

Small contractors with claims not covered by the FSPPA or the WLA will have to seek recourse in the courts to recover those claims. If the claim is \$25,000 or less, the contractor must proceed in Small Claims Court. The purpose of that Court is to allow people who bring claims to have them resolved and to have enforcement proceedings

concluded in a just, speedy, inexpensive and simple manner. The contractor can be self represented in Small Claims Court, which will save legal costs if the claim is disputed. Also, if the claim exceeds \$25,000, the contractor may reduce its claim and "elect down" to that monetary limit of the Small Claims Court.

Claims greater than \$25,000 must be pursued in Supreme Court. That will require the contractor to retain a lawyer. The legal costs involved will depend on whether a defence is filed to the claim. If no defence is filed, the legal costs to commence an action and obtain a default judgment are not excessive. However, if a substantive defence is filed, the contractor should consider its prospects for success and the legal costs that will be incurred because commercial litigation can be expensive. The contractor should also consider that, even if it obtains judgment, enforcing that judgment against a defendant with few assets and no viable business can be difficult and expensive, and may be unsuccessful.

The lien, charge, and insolvency protection of the FSPPA, and the lien protection of the WLA, are always preferable to a court action and an unsecured judgment, even with such available enforcement remedies as garnishment orders and writs of execution. To avoid losses small contractors should maintain vigilant credit practices, pursue unpaid accounts swiftly, and seek and obtain legal advice when necessary. ▲

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