

A SMALL VICTORY ON WAGE LIENS

Thanks to CMBA-BC's efforts, the British Columbia government does not weaken mortgage security

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There was a major review of British Columbia's Employment Standards Act (ESA) by the B.C. Law Institute (BCLI). Contained in the midst of the 325-page report was a recommendation from the BCLI to amend a section of the ESA, which would have the effect of whittling away the concept of indefeasible title and the priority interests of mortgage lenders. It would have strengthened the super-priority of wage liens, which represent the unpaid wages of employees.

Essentially, super-priority liens entitle the government to the equity in real estate in priority to substantially all secured creditors, including mortgage lenders. We have written about super-priority liens in previous articles. As an association, we are extremely concerned about a government

trend towards fortifying super-priority liens, which has the impact of weakening mortgage security. Making mortgage lending riskier for lenders only makes mortgages costlier for borrowers. However the good news is the BCLI listened to our concerns and will not be proceeding with its wage lien recommendations at this juncture. This represents a clear victory for CMBA-BC and the mortgage lending and brokering community. Our rationale to BCLI is explained below:

PROPOSED WAGE LIEN SUPER-PRIORITY OVER MORTGAGE ADVANCES

In this letter, we examined the proposed changes concerning section 87, which permits wage liens to have priority over

advances under:

- a registered land mortgage, to the extent the advances were made after the Director registered a certificate of judgement against the land; and
- PPSA securities, without any need for the Director to register anything.

We understand that among the monies included in wage liens are holiday and vacation pay, and entitlements on termination. The lien arises from the time the wages become payable, even when the determination that they are indeed payable comes some time later. The lien, without registration, is a secured debt. It survives a sale of the employer's assets to a purchaser buying in good faith, despite the lack of need for registration or notification of its existence.

AS AN ASSOCIATION, WE ARE EXTREMELY CONCERNED ABOUT A GOVERNMENT TREND TOWARDS FORTIFYING SUPER-PRIORITY LIENS, WHICH HAS THE IMPACT OF WEAKENING MORTGAGE SECURITY



As you (BCLI) have explained in your consultation paper, under the ESA, wage liens enjoy a super-priority over other liens, charges and security interests with one exception carved out under section 87(5). That section requires the Director to file a certificate of judgment in order to give the wage lien priority over monies advanced under a mortgage following the date on which the certificate is registered. There is no similar exception for PPSA liens, and BCLI therefore recommends harmonizing the rules by removing the carve-out for mortgage transactions.

The policy reasons you provide for bringing consistency by removing the filing requirement for the Director under land mortgages, rather than adding the requirement for PPSA transactions include that:

- contracting commercial entities are in a better position to protect themselves against loss of priority, by such means as indemnities, than are unpaid employees; and
- enterprise risk should be borne in the first instance by the venture and the backers of a venture, rather than by the employees of the venture.

The BCLI recognizes that the risk of the wage lien complicates some commercial transactions, but it nevertheless preferred the above policy reasons. Simply put, the BCLI recognized the risk to lenders but preferred protecting wages before loans.

INCREASING THE COST OF MORTGAGE LOANS MAKING HOUSING LESS AFFORDABLE

We wish to point out that there are some fundamental and important differences between mortgages and personal property liens, which justify the different treatment between the two. After all, the legislature in its wisdom would only have created the

super-priority exception for mortgages in section 87(5) for some fairly compelling reasons. While we cannot discern from a review of Hansard what those exact reasons would have been, we can offer the following justification for the differing treatment:

Section 23(2) of the Land Title Act provides that: “An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to” the exceptions set out in subparagraphs (a) to (j). Real estate is highly controlled with a title registry system which shows ownership and charges against title which is subject to very few exceptions which are not noted on title. Mortgage lenders and property owners rely on this title to make informed decisions about mortgage lending and borrowing. These decisions are made carefully using underwriting processes which take the state of property title directly into account. The role of mortgage lenders in assisting home buyers and owners to acquire and retain housing cannot be understated. Creating uncertainty for mortgage lenders by permitting unregistered wage liens to take priority over secured debt will add to the cost of housing as increases in lender mortgage risk will result in higher borrowing costs.

Home ownership is considered to be a pivotal goal of many, if not most people. This is reflected in current political policy, such as the B.C. government’s “30-point plan for housing affordability in British Columbia,” which aims to make housing more affordable and not less.

By contrast, the title of personal property is not highly controlled. Most personal

property, such as furniture, clothes, electronics and even business assets, is not listed in a registry which tracks ownership or disposal. There is no expectation of personal property indefeasibility. Super-priority wage liens clearly do not create the same challenges and risks for personal property owners or lenders that they do when registered against real estate titles.

We acknowledge that the proposed wage lien super priority against real estate potentially only impacts property owners who are employers and “others.” However this is not an insignificant number. A recent report from the Fraser Institute concluded that the number of self-employed Canadian workers has increased dramatically in the past two decades. In terms of total employment, the sector accounted for 15 per cent in 2013. Many predict the rate of self-employment to increase to 45 per cent by the year 2020.

To remove the section 87(5) exemption to simply make the superiority rule relating to real estate the same as that applied to personal property appears to be a weak rationale for making change. Is there evidence of a problem with collecting unpaid wages which do not rank as superiority wage liens against real estate which would justify the change? There does not appear to be a problem with the status quo, and if it not broken, why attempt to fix it?

The proposal to remove the carve-out for the super priority of unregistered wage liens against real estate title is an attack on the principle of the indefeasibility of real estate title and will cause mortgage loans to become riskier, and therefore more expensive. I ask that you reconsider this element of your proposed changes to the Employment Standards Act in light of this view. ■