Report on the Builders Lien Act and the Pipeline Problem

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British Columbia Law Institute

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(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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Introductory Note

The British Columbia Law Institute has the honour to present:

Report on the Builders Lien Act and the Pipeline Problem

The recommendations made in this Report address a problem that arises occasionally in connection with the *Builders Lien Act*. A variety of provincial statutes create a "right of entry" which authorizes certain kinds of activity, usually associated with the exploitation of natural resources, on private land in circumstances that would otherwise amount to trespass. The landowner will normally have a claim for some kind of compensation but has no right to resist the exercise of the right of entry. The construction of a pipeline over private land is a familiar example of the exercise of a right of entry and gives rise to the most visible problems in connection with the *Builders Lien Act*.

A typical scenario will involve a pipeline contractor who has not paid the subtrades or workers that participated in its construction. Since a pipeline falls within the definition of "improvement" in the Act the unpaid persons are entitled to liens under the Act and these are "perfected" by a filing in the Land Title Office. The effect of this is to create what appears to be an encumbrance on the title of the landowner which can severely limit the ability of the owner to deal with the property. This can cause real hardship through a lost sale of the property or a potential withdrawal of credit. Removing the lien can be an expensive and time-consuming process. This is highly unfair since the landowner is essentially disinterested in the pipeline construction and may well have been opposed to it.

The recommendations make it clear that no lien arises for work carried out under a right of entry as against the registered owner of the land over which the right of entry was exercised. They also provide a summary procedure for removing liens of this kind that may have been improperly filed.

Gregory K. Steele, Q.C.
Chair, British Columbia Law Institute

November, 2003

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I. Introduction - The *Builders Lien Act*

British Columbia's *Builders Lien Act*[1] was created to enhance the financial integrity of relationships within the construction industry. Legislation of this kind has been part of British Columbia law since 1879 and over the years it has become more sophisticated and elaborate as the practices of the construction industry have evolved.

The most recent version of the act was enacted in 1997 and it is undeniably complex. Readers seeking a detailed exposition of the Act and its operation should consult our publication: "Questions and Answers on the New *Builders Lien Act*."[2] For the purposes of this Report, the following features of the Act should be noted.

The Act protects participants in a construction project (the "improvement") such as subcontractors, workers and material suppliers by providing for a lien against the improvement itself and the land on which it is located. The Act calls for the registration of the lien claim in the proper land title office within a stipulated time[3] if the claimant is to obtain a full measure of protection under the Act.

Two further features of the Act should be noted. First, the definition of "improvement" is extremely broad:

> "improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

This definition is capable of extending to a wide range of activities normally associated with resource exploitation and extraction.

Second, it should be noted that in order for a valid lien to arise work on the improvement need not have been done at the express request of the owner.

Section 3(1) provides:

> An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

It is these two features of the Act that set the stage for what we refer to as "the pipeline problem."

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1. S.B.C. 1997, c. 45. Selected provisions of the act are set out as Appendix A to this Report.

2. British Columbia Law Institute (1997).

3. *Builders Lien Act,* ss. 15, 20.

II. The Pipeline Problem

At the time the most recent version of the *Builders Lien Act* was in preparation concerns were raised respecting the vulnerability of land owners with respect to liens arising out of improvements carried out on their land, but done under the authority of statutory powers which gave those owners no option but to allow the improvement to be made. The instances of this that have attracted the most publicity concern the construction of pipelines across private land.[4] Where the pipeline contractor fails to pay the workers, subcontractors and suppliers, those persons end up filing liens against the land through which the pipeline is being constructed. In the debates surrounding the Act, the problem was described in the following terms:[5]

> R. Neufeld: ... The minister may be able to address my concern. It has to do with pipelines. Where pipelines are constructed across private land, the private landowner, as I understand it, has absolutely no right to refuse a pipeline right-of-way across his or her land.
>
> On occasion I've had it in my constituency, where most of the pipelines in British Columbia are, that a person who was in the process of selling their land had a pipeline across it, the pipeline had been built, some subcontractors hadn't been paid, and there was a lien put against the pipeline. In effect, there was a lien put against the land. As I read "improvement" and the description of it, that's exactly what happened. The sale was null and void. The owner of the land, with absolutely no control of a pipeline being constructed across their land, all of a sudden lost the sale of their property that they had been negotiating for quite a while.
>
> This is not a common occurrence, but it has occurred in other areas, specifically with municipalities, and with one other landowner in my constituency of Peace River North, where there are actually hundreds and hundreds of small and large pipelines being built. That's my concern.
>
> I don't have any problem with the intent of the act - none whatsoever. In fact, I think it's a good act. But I do have a problem with how we address pipelines that go across private property when the private property owner has no authority to say no. It's the same as drilling a well on private property. The private property owner has absolutely no authority to say, "No, I don't want it there," because, the Crown actually sells the right to access whatever is below the ground. The owner of the land has to allow that to happen, and there is a board in place to look after that. Maybe the minister could help me a little bit with that one.

The Minister's response was as follows:

> Hon. D. Miller: The member is correct, both with respect to pipelines and wells -- gas wells, etc. – where the owner really has no choice. The people who want to use the land, either for

[4] *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361 , Part 3.

[5] Hansard – Volume 7, Number 10 – Monday, July 28, 1997 – Part 1, p. 6407.

> a pipeline or drilling purposes, can apply, and the owner's protection, if you like, is through an arbitration process. Most often, I suspect, there is a voluntary agreement between the owner and the company that wants to use the land. This issue isn't dealt with in the existing legislation, and unfortunately is not dealt with in this new legislation. It's an issue for resolution, and I gather that it came to the attention of the sector and the ministry -- those involved in putting the bill together -- at a late stage, therefore no proposed solution could be put together in time for this bill. So it really is an outstanding issue. It needs to be addressed, and we will continue to work on that. Presumably that would take the form of amendments in future years, once some form of resolution can be found.

Six years later, the amendments proposed by the Minister have still not come into being and the problem continues.

It should be emphasized at this point that the core problem is not that innocent landowners and their property are regularly being held liable to answer for debts arising out of pipeline construction. We are aware of no instances where that has, in fact, occurred. The problem lies in the fact that a lien can be filed and, once filed, removing it can be a difficult and time consuming process.

Until the landowner is able to remove the lien the land is tied up and the ability of the owner to deal with or dispose of it is extremely limited. It was this kind of issue that was referred to in Hansard with a sale being lost. The filing of a lien can also create difficulties where the landowner has given the property as security for the repayment of money under a line of credit or other arrangement that involves further advances. The lender on learning of the lien may refuse to make any further advances or extend further credit until the lien is removed or, in an extreme case, call a demand loan.

III. The Need for Comprehensive and Rational Legislation Concerning Liens in the Resource Sector

Addressing the concern, and the circumstances surrounding it raises a larger issue. The fact that liens are being filed in respect of this kind of work indicates there is a demand for some sort of security by those engaged in various phases of resource exploitation. A suggestion is made from time to time that lien legislation be developed that focuses specifically on resource extraction industries.[6]

6. A form of protection already exists for some participants in the forest industry through the operation of the *Woodworker Lien Act*, R.S.B.C. 1996 c. 45. The former Law Reform Commission of British Columbia in its Report on the *Woodworker Lien Act* (no. 137, 1994) recommended that this Act be replaced by new and modern legislation. A private members bill to implement the Law Reform Commission's recommendation was brought forward in 2002 by M.L.A. Blaire Suffredine, Q.C.: *Forest Work Security Interest Act*, Bill M. 205. It should also be noted that the *Builders Lien Act* extends to some aspects of mining activity, and, in section 18, provides for the filing of lien claims in the office of the Gold Commissioner.

There appears to be a need for more specific protection for persons who provide value in relation to resource extraction and improvements associated with it. But developing an appropriate scheme is a long term project. However such a scheme might evolve, there seems to be a consensus that such protection should not be at the expense of the owner of the surface rights who has no stake in the venture. This Report addresses the shorter term question as to what legislative measures will ensure that the owner's interest is not encumbered by liens arising out of resource extraction activities.

IV. Is the Problem Confined to the *Petroleum and Natural Gas Act*?

The "hard cases" that have received the most publicity in relation to this issue seemed to have involved construction on private land where the entry onto it was authorized under the *Petroleum and Natural Gas Act*. Part 3 of the *Petroleum and Natural Gas Act* authorizes the entry onto private land for the purposes of exploration, development and production of hydrocarbons. The Act contemplates that the person exercising this right of entry will enter into an agreement with the land owner for a lease containing prescribed terms. The question of the compensation to which the land owner is entitled is left for negotiation. Where the resource developer and the land owner cannot agree on compensation, the Act provides that the dispute be heard by a mediation and arbitration board created by the Act which has the power to impose a form of surface lease on the owner and stipulate the compensation to which the owner is entitled. This process is not dissimilar to expropriation.

But the *Petroleum and Natural Gas Act* is not the only enactment that confers powers of this kind on resource developers. The *Mineral Tenure Act*,[7] the *Coal Act*[8] and the *Pipeline Act*[9] all provide for some form of "taking" of privately owned land by resource developers authorized to exercise rights under them. What these three Acts have in common is that they all expressly incorporate Part 3 of the *Petroleum and Natural Gas Act* to "takings" carried out under them. Analogous rights arise under the *Forest Act*[10] and the *Mining Rights of Way Act*.[11] These expressly authorize the creation of rights of way over private land in favour of resource developers. With respect to these statutes, the backstop is the *Expropriation Act*.[12] A somewhat ambiguous provision is a

[7] R.S.B.C. 1996, c. 292.

[8] R.S.B.C. 1996, c. 51.

[9] R.S.B.C. 1996, c. 364.

[10] R.S.B.C. 1996, c. 157.

[11] R.S.B.C. 1996, c. 294.

[12] R.S.B.C. 1996, c. 125.

section of the *Water Act*[13] which provides that "... every ... holder of a license that authorizes the carriage or supply of water or electricity to the public has, so far as is necessary in the ... exercise in his or her rights, at all times a free right of entry and exit on and over any land and premises." Copies of extracts from all these statutes are appended.

There are a variety of other statutes which create a right to enter land against the will of the land owner but most of these are associated with rights of inspection and the like. Their exercise is not likely to be of a kind that will give rise to liens.

A preliminary question, therefore, is whether the search for a solution should be confined to improvements constructed pursuant to rights conferred by the *Petroleum and Natural Gas Act* or should it also address improvements made under the authority of one of the other statutes described? Our view is we should take this opportunity to cast the net as wide as possible. It would be an embarrassment if legislation were to address only the *Petroleum and Natural Gas Act* and then to have the same problem arise with the exercise of rights under one of the other statutes and have no means of dealing with it.

We recommend that the *Builders Lien Act* be amended to achieve this goal.

V. Defining a "Statutory Right of Entry"

A pivotal feature of reforming legislation will be a definition that will delimit, as precisely as possible, the Act or Acts that are of concern. We recommend the following:

> "statutory right of entry" means a right to enter and use private land under the authority of
>
> > *Forest Act*, sections 120 and 121
> > *Mining Rights of Way Act*, section 2
> > *Water Act*, section 32
> > *Petroleum and Natural Gas Act*, Part 3
> > *Coal Act,* section 7
> > *Pipeline Act*, Part 4
> > *Mineral Tenure Act*, section 19, or
> > any other enactment designated by regulation
>
> and includes a right to enter and use private land created by agreement with the owner of the land if that right might have been acquired without the agreement of the owner under the authority of one of these enactments.

[13] R.S.B.C. 1996, c. 483, s. 32

In drafting this definition, we have taken the broadest view possible, not only including all of the Acts described above, but including a power to add to the list by regulation. This power is a hedge against two possibilities. The first is that in our review of the provincial statutes, we may have overlooked a provision that ought, properly, be a part of such a list. Second, it is entirely possible that future legislation might create a similar right of entry and it is desirable to have a simple mechanism to deal with it.[14]

It is essential that a definition like this recognize that in the normal course of events, the arrangement between the resource developer and the land owner will be concluded by an agreement between them. Only in a minority of cases will it be necessary for the resource developer to resort to arbitration or compulsory mediation. It is important that a definition sweep in consensual agreements that are reached under the shadow of an imposed solution.

A subsidiary definition is also useful to identify the land involved. We suggest the following:

> "servient land" means private land over which a statutory right of entry has been exercised.

VI. The Substantive Provisions

The next question to address is the drafting approach that should be adopted to protect the owner of "servient land" from liens that might be filed arising out of an improvement made in the exercise of a "statutory right of entry." While various approaches are possible the one that commends itself to us is simply to legislate a direct statement in the Act excluding the lien from the *Builders Lien Act*. We recommend that a provision comparable to the following be added as subsection (3) of section 2:[15]

> (3) Subsection (1) does not create a lien against servient land with respect to an improvement made on or under that land in the exercise of a statutory right of entry.

14. An alternative approach might be to not mention any Acts specifically but leave the whole of the list to be prescribed by regulation.

15. This is a convenient location for such a provision since the immediately preceeding subsection also speaks to circumstances in which no lien is created.

This provision stipulates that there is no lawful basis for the registration of a lien claim against servient land.[16] It will not, however, prevent the actual registration of a lien claim if someone appears at the Land Title Office with a document that describes the land and meets the other formal requirements of a lien claim. It is therefore desirable that the Act clearly specify the right of the owner to get the lien off the title in a summary manner.

Section 25 of the *Builders Lien Act* provides for summary applications to remove the liens claims and a paragraph might be added to subsection 2 which stipulates the circumstances as ones that justify summary removal of the lien. We recommend that section 25(2) be amended by adding a new paragraph (c) so that it reads

> An owner ... may ... apply to the court and the court may cancel a claim of lien if it is satisfied that
> ...
> (c) the claim of lien is against servient land with respect to an improvement made on or under that land in the exercise of a statutory right of entry.

VII. The Applicability of Other Provisions of the Act

The measures described above should provide sufficient protection for the registered owner of the servient land. They do not, however, go so far as to oust the applicability of other features of the Act that might benefit persons who might, but for these measures, wish to claim a lien against servient land.

We are thinking particularly of the trust provisions contained in sections 10 to14 and the requirement that holdbacks be retained under the Act. The utility of maintaining the trust provisions and continuing to require the retention of holdbacks even where it is not possible to file a lien was explained in Chapter 18 of "Questions and Answers on the New Builders Lien Act."[17]

16. A question arises as to the impact, if any, that this recommendation may have on ss. 18(1)(b) and 18(3) of the Act which concern the filing of claims of lien against certain mineral titles issued under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, i.e. mineral or placer claims, and mining or placer leases. Whether or not any revision is called for turns on the meaning to be attached to the obscure reference to "property" in s. 18(1)(b). This highlights the need for a comprehensive legislative scheme for liens connected with natural resource extraction.

[17] *Supra* n. 2. *See* Appendix B to this Report.

It would be desirable to make this clearer through the addition of a further subsection to section 2. A new subsection for it might read

> (4) Subsection (3) does not limit the application of sections 10 to14 or the obligation on any person to retain a holdback under this Act.

VIII. Summary

The concerns which have caused this area to be examined reveal both long-term and short-term problems. The long-term problem is to consider, in a larger context, the possible need for a regime of liens in relation to resource extraction activities. The short-term task is to identify amendments to the *Builders Lien Act* that will ensure that involuntary owners do not find themselves saddled with liens arising out of resource extraction activities in which they are financially disinterested. Our recommendations are embodied in the draft legislation set out

IX. Recommended Legislation

BUILDERS LIEN (RIGHTS OF ENTRY) AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Builders Lien Act*, S.B.C. 1997, c. 45 is amended in section 1 by adding the following definitions:

"servient land" means private land over which a statutory right of entry has been exercised

"statutory right of entry" means a right to enter and use private land under the authority of

Forest Act, sections 120 and 121
Mining Rights of Way Act, section 2
Water Act, section 32
Petroleum and Natural Gas Act, Part 3
Coal Act, section 7
Pipeline Act, Part 4
Mineral Tenure Act, section 19, or
any other enactment designated by regulation

and includes a right to enter and use private land created by agreement with the owner of the land if that right might have been acquired without the agreement of the owner under the authority of one of these enactments.

2. Section 2 is amended by adding the following as subsections (3) and (4)

(3) Subsection (1) does not create a lien against servient land with respect to an improvement made on or under that land in the exercise of a statutory right of entry.

(4) Subsection (3) does not limit the application of sections 10 to14 or the obligation on any person to retain a holdback under this Act.

3. Section 25(2) is amended by adding the following as paragraph (c)

(c) the claim of lien is against servient land with respect to an improvement made on or under that land in the exercise of a statutory right of entry.

4. This Act comes into force by regulation of the Lieutenant Governor in Council.

Appendix A

Applicable Legislation - Selected Provisions

BUILDERS LIEN ACT
SBC 1997 CHAPTER 45

Definition and interpretation

1. (1) In this Act:
"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

Lien for work and material

2. (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

(a) performs or provides work,

(b) supplies material, or

(c) does any combination of those things referred to in paragraphs (a) and (b) has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

(d) the interest of the owner in the improvement;

(e) the improvement itself;

(f) the land in, on or under which the improvement is located;

(g) the material delivered to or placed on the land.

(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

Deemed authorization

3. (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

(2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.

(3) Subsection (1) does not apply to an improvement on land owned by the government.

Holdback

4. (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

(2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.

(3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.

Contract money received constitutes trust fund

10. (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

(4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

Crediting of money earmarked for particular improvement

12. If a person makes a payment from money in a trust fund constituted in respect of a particular improvement, a person who receives the money must credit it against the debt in respect of the improvement.

Procedure to file a claim of lien under the Mineral Tenure Act

18. (1) In order to file a claim of lien in respect of a mineral title held under the Mineral Tenure Act other than a Crown granted mineral claim, the lien claimant must

(a) file in the office of the gold commissioner in which the mineral title is recorded a claim of lien in the prescribed form, and

(b) if the property that is the subject of a mineral title is registered in a land title office, also file in the land title office a copy of the claim of lien.

(2) On the filing of the claim of lien under subsection (1), the gold commissioner must endorse a memorandum of the filing on the record of the mineral title in the gold commissioner's office.

(3) If the property that is the subject of a mineral title described in the claim of lien is registered in a land title office, the registrar must endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land or mineral title described in the claim of lien.

Powers of court, registrar or gold commissioner to remove claim of lien

25. (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

(a) a lien is extinguished under section 22 or 33,

(b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,

(c) an action to enforce the claim of lien has been discontinued, or

(d) the claim of lien has been satisfied.

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

(a) the claim of lien does not relate to the land against which it is filed, or

(b) the claim of lien is vexatious, frivolous or an abuse of process.

(3) An application under subsection (1) or (2) may be made without notice to any other person.

FOREST ACT
RSBC 1996 CHAPTER 157

Right of way across private land

120. (1) The regional manager or district manager may authorize a person to acquire a right of way on private land under this section if the person has a right to harvest timber and the regional manager or district manager determines that constructing a road on private land will provide access to the timber without unnecessary disturbance to the natural environment or cultural heritage resources.

(2) If the regional manager or district manager authorizes a person to acquire a right of way on private land, the regional manager or district manager

(a) must determine the location of the right of way, and the period during which the person is to have the right of way, and

(b) may impose conditions to be met with respect to the road to be constructed on the right of way.

(3) A person authorized to acquire a right of way on private land, after a notice has been published in the Gazette and served on every person having a registered interest in the private land, with or without the consent of a person having an interest in the private land and on paying compensation under this section,

(a) has a right of way on the land described in the notice, for the period specified in the notice,

(b) if the registrar is satisfied that compensation has been paid to the person or into court under this section, may register a copy of the notice as a charge against the land, and

(c) may construct, use and maintain a road on the right of way according to the notice.

(4) The *Expropriation Act* does not apply to the acquisition of a right of way on private land under this section.

(5) A person having a right of way under subsection (3) must compensate a person having an interest in the private land for the extinguishment of the latter person's interest under this section.

(6) If the amount of compensation is not agreed on, it must be determined by the Expropriation Compensation Board established under the *Expropriation Act*.

...

Road and trail construction

121. (1) The minister, for the purpose of providing access to timber or for any other purpose consistent with this Act or the *Forest Practices Code of British Columbia Act* may

(a) construct, maintain and modify roads and trails,

(b) enter on and take possession of private land, and of roads and trails on private land,

(c) enter on private land and take from it timber, stones, gravel, sand, clay or other materials for the purpose of constructing roads and trails,

(d) construct, take possession of and use temporarily roads for the purposes of paragraph (c), and

(e) enter on private land and construct and maintain on it drains to carry water from a road.

MINING RIGHTS OF WAY ACT
RSBC 1996 CHAPTER 294

Power to take necessary right of way on private land

2. (1) Despite any other Act, a recorded holder who desires to secure a right of way across, over, under or through private land for the purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title, or for the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title may take and use private land for the right of way without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land.

(2) The power of a recorded holder to take and use land for a right of way under subsection (1) does not include the power to take and use existing facilities or other improvements in a right of way except that a recorded holder may, subject to section 10, use an existing road.

(3) If private land is taken under subsection (1) without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land, the *Expropriation Act* applies.

WATER ACT
RSBC 1996 CHAPTER 483 SECTION 32

Right of access to land and premises by authorized persons

32. (1) The comptroller, deputy comptroller and every engineer, officer and water bailiff, and every officer and employee of a municipality, improvement district, development district, water users' community or holder of a licence that authorizes the carriage or supply of water or electricity to the public has, so far as is necessary in the discharge of his or her duties or the exercise of his or her rights, at all times a free right of entry and exit on, in and over any land and premises.

(2) Subsection (1) also applies to a person working under the direction of the comptroller, the regional water manager or an engineer.

PETROLEUM AND NATURAL GAS ACT
RSBC 1996 CHAPTER 361
PART 3

Interpretation for Part

6. (1) In this Part, "Crown land" means Crown land not used or occupied by or on behalf of the government and includes

(a) land granted to a railway company under an Act and used or occupied by or on behalf of the company, and

(b) land used or occupied by or on behalf of a railway company subsidized by the government.

(2) In this Part, if a disposition of surface rights of Crown land is made under the *Land Act* and regulations under that Act, the person to whom the disposition is made is deemed to be the owner of land in respect of those surface rights.

(3) Despite subsection (2), for the purposes of this Part, a person is not deemed to be the owner of land in respect of surface rights acquired under a disposition of surface rights of Crown land made by

(a) a permit under section 14 of the *Land Act*, or

(b) a licence under section 39 of the *Land Act* under which the person is granted the non-intensive occupation or use or occupation and use of an extensive area of Crown land for commercial recreational purposes.

(4) For the purpose of subsection (3), the Lieutenant Governor in Council may make regulations defining "non-intensive", "extensive" or both.

Agreement to enter land

9. (1) A person may not enter, occupy or use land, other than Crown land, to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir unless

(a) the person makes, with each owner of the land, a surface lease in the form and content prescribed authorizing the entry, occupation or use,

(b) the board authorizes the entry, occupation or use, or

(c) as a result of a hearing under section 20, the board makes an order specifying terms of entry, occupation and use, including payment of rent and compensation.

(2) A person who enters, occupies or uses land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir is liable,

(a) to pay compensation to the land owner for loss or damage caused by the entry, occupation or use, and

(b) if the board so orders, to pay rent for the duration of the occupation or use.

(3) For the purposes of subsection (2) (a), if a certificate of restoration is required after the entry, occupation or use, the liability for payment of compensation ends on the date stated in the certificate.

Application for mediation and arbitration

16. (1) A person may apply to the board for mediation and arbitration under this section if the person

(a) requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose,

(b) is the owner of land that is entered, occupied or used for a purpose referred to in paragraph (a), and damage to the land or suffering to the owner is caused by the entry or occupation, or

(c) is a person referred to in section 129.

...

COAL ACT
RSBC 1996 CHAPTER 51

Surface area

7. (1) A free miner may enter, occupy and use coal land and prospect, explore for, develop and produce coal.

(2) The right of entry under subsection (1) does not extend to any of the following:

(a) land occupied by a building;

(b) the curtilage of a dwelling house;

(c) protected heritage property except as authorized by the minister or local government responsible for the protection of the heritage property;

(d) orchard land;

(e) land under cultivation.

....

(7) A free miner is liable to pay compensation to the owners of surface area for loss or damage caused by the free miner entering, occupying or using the surface area.

(8) On application of a free miner or owner, the Mediation and Arbitration Board under the *Petroleum and Natural Gas Act* has authority to settle disputes arising from rights acquired under this Act in respect of entry, use or occupation, security, rent and compensation.

(9) For the purpose of subsection (8) the *Petroleum and Natural Gas Act* applies.

....

PIPELINE ACT
RSBC 1996 CHAPTER 364

Appropriation of land

16. (1) On obtaining a certificate, the company may take and appropriate for the purposes of its undertaking as much of the land or interests in it of any person as may be necessary for the building, construction, laying or operation of the pipeline.

(2) The manner in which and terms on which the company may exercise the right to take and appropriate land or interest in it must be

(a) in accordance with the terms of any agreement affected between the company and the owner of the land, other than Crown land, or an interest in it, or

(b) in the absence of agreement, as set out in this Part.

(3) Part 7 of the *Railway Act* applies to pipelines and necessary works and undertakings connected with them.

(4) Part 3 of the Petroleum and Natural Gas Act, in so far as it is not inconsistent with this Act, applies to flow lines and necessary works and undertakings connected with them.

MINERAL TENURE ACT
RSBC 1996 CHAPTER 292

Land on which a free miner may enter

11. (1) Subject to this Act, only a free miner or an agent of a free miner may enter mineral lands to explore for minerals or placer minerals.

(2) The right of entry under subsection (1) does not extend to
(a) land occupied by a building,

(b) the curtilage of a dwelling house,

(c) orchard land,

(d) land under cultivation,

(e) land lawfully occupied for mining purposes, except for the purposes of exploring and locating for minerals or placer minerals as permitted by this Act,

(f) protected heritage property, except as authorized by the local government or minister responsible for the protection of the protected heritage property,

(g) land in a park, except as permitted by section 21, or

(h) land in a recreation area, as defined in section 23, except as permitted by that section.

Right of entry on private land and compensation

19. (1) A person must not commence a mining activity by a method using mechanical equipment that disturbs the surface unless the recorded holder

(a) first serves written notice on the owner of every surface area on which the recorded holder intends to work or intends to utilize a right of entry for that purpose, and

(b) provides, within 30 days after serving the notice required by paragraph (a), a copy of the notice to the gold commissioner for that mining division and to the district inspector appointed under the *Mines Act.*

(2) A free miner or recorded holder, or any person acting under or with the authority of a free miner or recorded holder, is liable to compensate the owner of a surface area for loss or damage caused by the entry, occupation or use of that area or right of way by or on behalf of the free miner or recorded holder for location, exploration and development, or production of minerals or placer minerals.

(3) On receipt by the gold commissioner of an application from a free miner, recorded holder, owner or other person who, in the opinion of the gold commissioner, has a material interest in the surface, the gold commissioner must use his or her best efforts to settle issues in dispute between them arising from rights acquired under this Act in respect of entry, taking of right of way, use or occupation, security, rent or compensation.

(4) If the gold commissioner is unable to settle the dispute to the satisfaction of the parties to the dispute, the Mediation and Arbitration Board under the *Petroleum and Natural Gas Act* has, on application by a party to the dispute, authority to settle the issues in dispute and, for this purpose, the relevant provisions of Part 3 of the *Petroleum and Natural Gas Act* apply.

(5) In an arbitration under subsection (4) involving a conflict between rights acquired under this Act and rights acquired under the *Land Act*, the Mediation and Arbitration Board must take into account which of the rights was applied for first and, unless injustice would result, must give the holder of those rights due priority in its consideration of the dispute between the parties.

(6) A copy of an order made by the Mediation and Arbitration Board under subsection (4) may be filed at any time in a Supreme Court registry and enforced as if it were an order of the court.

Appendix B

Question and Answers on the New *Builders Lien Act* - chapter 18

Chapter 18
Application of the Builders Lien Act to Improvements on Unregistered Land

18.1 What about improvements on unregistered land?

Registered and unregistered land

Commentary: not all of the land in the province has been brought within British Columbia's land registration system. Where a parcel of land is brought within the system, a certificate of title is created in the appropriate land title office. This certificate records both the ownership of the land and any other interests or claims such as mortgages, leases and builders liens.

However, for land covering the vast majority of the province, no registered title exists. Ownership of the land is in the province itself. Even in urban areas, a significant portion of the land is unregistered. Land used for streets and highways is an obvious example.

Registering a lien against the title to the land on which the improvement is situated is an important part of asserting rights under the *Builders Lien Act*. Consider the following example:

A municipality engages a paving contractor for the construction of a municipal road. A supplier of raw materials such as aggregates or asphalt has not been paid by the contractor. No certificate of title exists for the road

How should the Act apply?

An identical point of principle would arise if the improvement were an animal shelter constructed at the request of the holder of a grazing lease over unregistered Crown land, or a logging road built on a forest tenure.

A starting point is to consider the applicability of the trust created under section 10 of the *Builders Lien Act*.

18.2 Does the trust apply?

Applicability of the trust

Commentary: it was noted earlier that the trust rights created by section 10 of the Act operate independently of the lien remedy. It is not necessary to have registered to have perfected a lien claim by registering to assert rights under the trust.

[*See* paragraph 12.3]

Case law under the former *Builders Lien Act* was clear that a subcontractor or worker could claim rights as a beneficiary under the statutory trust even though it would be impossible to enforce a lien claim because it cannot be registered against the land on which the improvement is situated. (ie. unregistered Crown land)

[*See Bank of Nova Scotia* v. *O. & O. Contractors Ltd.*, (1965) 55 W.W.R. 103 (B.C.C.A.)]

18.3 If there is no place to register, does a lien ever come into existance?

Does the lien exist?

Commentary: yes. Section 2 governs the creation of the lien itself and the ability to register it is not a necessary feature of its creation.

The absence of registration machinery simply means that the lien created under section 2 is liable to be extinguished by section 22 on the expiry of the time limit for filing. During that period, the creditor has the status of "lien holder" although that person can never become a "lien claimant" within the meaning of the Act. Thus, all the provisions applicable to "lien holders" apply.

[*See* paragraph 4.22]

18.4 If the creditor can never become a "lien claimant," is the owner, contractor or subcontractor still required to retain a holdback under section 4?

Holdback requirement

Commentary: yes. Section 4 requires that the person primarily liable under the contract or subcontract "under which a lien may arise" must retain a holdback. As noted in the previous paragraph, the absence of a place to register does not prevent the lien from arising. It only prevents it from becoming enforceable as a "lien claim."

Requiring a holdback in such a case is not an exercise in futility. The holdback will supplement the creditor's rights as a beneficiary under the statutory trust since the holdback may ultimately become subject to the trust and become available to the creditor.

Consider the example set out in paragraph 18.1. Assume the value of the paving contract is $500,000 and the municipality has held back $50,000. The paving contractor owes its main supplier $70,000.

Once the holdback period has expired under section 8, the owner must pay the money to the contractor. That payment, in the hands of the contractor, is a trust fund to which the supplier is entitled and to which it will have enforceable legal rights.

In this example, if the owner had not retained a holdback and merely paid the full amount owing to the contractor upon completion, the contractor may have taken those funds and dissipated them before the supplier had time to take any steps or was even aware that there was a problem. Requiring holdbacks with respect to improvements on unregistered land plays a useful role in strengthening the rights of workers, suppliers and subcontractors.

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