

August 29, 2018

BC Law Institute
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Attn: Greg Blue

Re: BCLI Consultation Paper on the Employment Standards Act – Wage Liens and Impact on Mortgages

On behalf of the Canadian Mortgage Brokers Association - BC (CMBA-BC), I thank you for the opportunity to make submissions concerning the BC Law Institute (BCLI) Project Committee's consultation paper on redrafting the Employment Standards Act (ESA). The Committee has produced an insightful consultation paper on an outdated statute ripe for revision. We commend you for the thorough analyses and recommendations.

CMBA-BC

By way of background, CMBA-BC is a 28-year-old professional association representing many BC mortgage brokers and private mortgage lenders.

Proposed Wage Lien Super-Priority over Mortgage Advances

In this letter, we wish to examine the proposed changes concerning section 87. The section currently 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 the following as to wages liens. Wage liens include, but are not limited to, holiday pay, vacation pay, and entitlements on termination. The lien arises from the time the wages become payable, even in circumstances when the determination that the wages are indeed payable comes some time later. The lien, without registration, is a secured debt. The lien 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 the liens existence.

As you have explained in your consultation paper, under the ESA, wage liens enjoy a super-priority over other liens, charges and security interests. An exception to this is provided in section 87(5). That section requires the Director to have filed a certificate in the Land Title Office against the subject land in order to give the wage lien priority over monies advanced under the subject land mortgage. It is only monies advanced after the registration of the certificate that are lower in priority to the lien.

The Project Committee sees this different handling of wage lien priorities as between land mortgages and PPSA securities to be inconsistent and in need of harmonization. Rather than adding to the PPSA requirements that the Director be required to file a certificate to obtain priority for the wage lien, the Project Committee favours doing away with the need for the registration when it comes to land mortgages. The policy reasons it cites for such an approach 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 first instance by the venture and the backers of a venture, rather than by the employees of the venture.

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

In our respectful view, the need for consistency is misplaced. Removal of the section 87(5) exemption to make the super-priority rule relating to real estate the same as that applied to personal property is a weak rationale for making the change. Forcing consistency onto distinct matters would be at least as troublesome as would be the making of distinctions without a difference – both lead to irrational outcomes.

In this instance, it can reasonably be expected that if the changes the Committee recommends were made all borrowers in the real estate loan market will be made to, in effect by more expensive loans and transaction costs, insure the wages of some employees of some borrowers. If insurance for employees from employers is the goal, then the proper target for the premiums should be not all borrowers but rather all employees and/or all employers.

There are some fundamental and important differences between mortgages and personal property liens which justify the different treatment between the two. These differences have historically been recognized and policy, including the section 87(5) exemptions, has been created accordingly. This recognition by the legislature is reflected, importantly for consumers, by lenders. Because of the greater certainty of security provided by land mortgages, land mortgages have been historically favourably priced as compared to chattel mortgages. Lenders have been able to rely on provisions such as section 23(2) of the Land Title Act which provides:

An indefeasible title, as long as it remains in force and uncancelled, 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)].

If this conclusory state of title is to be chiselled away piece by piece then the exceptions, and there seem to be more and more, become the rule. The state of land title no longer provides certainty or predictability such that a lender can rely on it in pricing the loan and performing due diligence. This greater risk related to the mortgage

security will result in higher mortgage pricing and this greater due diligence need will result in higher transaction costs, all of which is ultimately borne by the borrower. Some lenders may indeed find the risk such that they are not willing to make loans at all or at least some of the loans. The greater scarcity of money of course will lead to greater costs of borrowing money.

The result is more expensive lending environment, including a more expensive residential loan market is counter to the often-stated goal of the government to make home ownership easier; see for example the BC government's central policy reflected in "30 Point Plan for Housing Affordability in British Columbia".

Granted the cost of your program could be argued to be so small as to consider the future painted by this letter to be an overreaction. We acknowledge that the proposed wage lien super-priority against real estate potentially impacts only 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 2013¹. Many predict the rate of self employment to increase to 45% by the year 2020.² As well, the cost of your program should not be considered in isolation from other impacts on the market. Quite properly it should be seen as part of a cumulative increase for the cost of money and the cost of housing.

We suggest the distinction between personal property and land as security for a loan continue to be recognized. The title of personal property, as compared to the title of land, 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. Lenders who accept chattels as security recognize the greater risk as compared to real estate

¹ <https://ipolitics.ca/2015/06/26/fraser-institute-the-evolution-of-self-employment-in-canada/>

² <https://business.financialpost.com/technology/personal-tech/intuit-says-45-of-canadians-will-be-self-employed-by-2020-releases-new-app-to-help-with-finances>

security and price their loans accordingly. 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. Ignoring this distinction moves real estate secured loans closer to the chattel loan market and pricing.

Is there evidence of a problem with collecting unpaid wages which do not rank as super-priority wage liens against real estate title which would justify the change? Without such evidence, there does not appear to be a good reason to make changes to section 87(5). If the status quo is not broken, why attempt to fix it?

With all due respect, we find this part of your analysis flawed and your recommendation not sound. We very much ask you to reconsider.

Thank you.

Yours truly,

A handwritten signature in black ink, appearing to read 'S. Gale', written in a cursive style.

Samantha Gale, CEO