

THE FUTURE OF BUILDER'S LIEN LAW

The BC Court of Appeal recently clarified builder's lien law in *JVD Installations*.¹ The court also hinted at ways the law may develop in the coming years. The decision has significant implications for both owners and builders. So, let's dig into what the decision says. Then, let's discuss what it means and how you can prepare.

Our story begins with a builder who performed work on a hydroelectric power plant situated on Crown land. This detail is important because Crown land cannot be liened under the BC *Builders Lien Act*. So, when the contractor stopped paying the builder, the builder looked for other ways to recover their payments.

Transmission lines ran from the power plant through an adjacent private property. Crucially, the project owner owned the lines but *not* the private property. In addition, the builder performed no work on the lines or the private property. Despite this – or perhaps

out of desperation – the builder registered a lien against the private property and sued to enforce the lien.

At trial, the judge held the lien was valid because the power plant and lines were interdependent. She reasoned that the power plant and lines were each useless without the other. Therefore, the power plant and lines were a single integrated improvement, which entitled the builder to a lien against the private property. The project owners appealed.

The appeal court overturned the trial judge's decision and held the builder's lien was not valid for two main reasons. First, the trial judge got the law wrong when she used an interdependence test. The wrong test led to the wrong conclusion: that the power plant and lines were a single improvement. The correct test is whether the work is a physical and integral

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improvement to the land. Second, the trial judge got the facts wrong by concluding that the power lines had been improved by the work on the power plant. On the contrary, the power plant work had *zero* effect on the capabilities and benefit of the lines.

In addition to clarifying the single improvement test, the appeal decision hinted at ways builder's lien law may develop in the future. The court mused that it was open to the possibility that a party could register liens against properties on which they performed no work. The court's theoretical limit for such claims was whether the work's "only function is to enhance the value of the liened parcel."² However, while these comments are very interesting and, with the right facts, could provide a pathway for expanding builder's lien claims, this commentary is *not* currently the law. We'll have to wait to see if a future court adopts this law.

So, what does this all mean for parties to construction? Aside from demonstrating the complexity and fact-driven nature of builder's lien law, there are two key takeaways from this decision which are relevant to the construction industry.

1) **The single improvement test is "physical and integral" not interdependence.** Unless a future

court holds otherwise, the "interdependence" test for single improvements has been resolutely rejected. As a result, potential lien claimants will need to carefully consider how their improvement to property relates to adjacent and connected land and improvements. A court might view one project as two separate projects or vice versa, contrary to your perspective. There is a lot of uncertainty in this area, and it is a highly fact-dependent inquiry.

2) **Builder's lien law is still developing.** This appeal court seems open to recognizing liens in additional circumstances beyond what has historically been recognized. Although no-one can predict the future of builder's lien law, the commentary in *JVD Installations* may pave the way for recognition of liens against land on which no work was performed. This raises lots of questions, such as how a court would treat typical municipal improvements like sewers or sidewalks. At least in theory, the test is whether the sole function of the work was to improve the liened land.

There may be other avenues for an unpaid

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claimant to get paid even where liening property is not an option. A lien claim may be made against the holdback funds, provided such funds have not been disbursed, by suing in the BC Supreme Court. This type of lien is commonly known as a *Shimco* lien and may provide the lien claimant a remedy when improvements are made on Crown land or untitled land, or when the deadline to file a lien against the land has lapsed.

Lastly, parties to construction may find remedy through bonds. For example, owners may avoid lien claims against their land if lien claimants are able to recover for unpaid amounts through a Labour & Materials Payment Bond. To that end, owners are encouraged to disclose bond details to unpaid subcontractors so that they can access the bond.

Builder's lien law is complex and can often seem contradictory. *JVD Installations* demonstrates that the law is shifting and evolving, and even courts can struggle to get the law right.

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Footnotes:

1. *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2022 BCCA 81.
2. *Ibid* at para 53.



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Prior to law school, Sheldon earned a Bachelor of Business Administration degree with an emphasis on management at North Island College, where he received the President's Award for graduating at the top of his class. He was deeply involved in student government, sitting on the students' union board, provincial executive, and numerous college committees. In part due to these efforts, he was awarded the Lt. Governor's Medal Award for Inclusion, Democracy, and Reconciliation.

Sheldon hopes to use his experiences and passion for democracy to provide world-class legal services to the public.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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