

NO CONSTRUCTION LIENS ON FOREIGN GOVERNMENT LAND IN ONTARIO

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Contractors working on foreign governments' land in Ontario may not be entitled to lien. The recent case of *Construction Excedra Inc. v. Kingdom of Saudi Arabia* ("*Excedra*") [1] is an important reminder that construction liens do not attach to land that enjoys diplomatic immunity. The court in *Excedra* also clarified that notes or certificates issued by Canada's Department of Foreign Affairs (the "DFA") are conclusive proof of the diplomatic status of land. As such, a contractor can likely determine the diplomatic status of land by requesting copies of any such notes or certificates.

Since contractors working on land with diplomatic status will not have lien rights, they should take additional steps to protect themselves before starting work. For example, contractors may limit the work they do on credit by negotiating short payment terms with the owner.

The Facts

In March 2010, the defendant owner, Kingdom of Saudi Arabia as represented by the Cultural Bureau of the Royal Embassy of Saudi Arabia (the "Owner"), hired the plaintiff contractor, Construction Excedra Inc. (the "Contractor"), to design and build a cultural centre. The cultural centre was constructed over the course of three years. A dispute ultimately arose over whether the Owner owed the Contractor the amount of \$964,150 and the Contractor had a lien registered against title to the land.

There were a number of facts suggesting that the land on which the cultural centre was built enjoyed diplomatic immunity. The Owner purchased the land in 2005 with the intention of building a centre for educational and cultural functions, including supporting Saudi students studying in Canada. Further, the DFA issued a note in 2005 stating that the land would form part of the Saudi Embassy. In 2015 and 2016, the DFA also issued certificates to the Owner stating that the land enjoyed the privileges and immunities afforded to diplomatic premises.

When Does Land Enjoy Diplomatic Immunity?

Canada is a party to a convention that makes diplomatic premises immune from the attachment of a lien.

Article 22(3) of the *Vienna Convention on Diplomatic Relations* ("VCDR")^[2] provides that "the premises of the mission...shall be immune from search, requisition, attachment or execution." As such, if land is "premises of the mission" within the meaning of the VCDR, no lien may attach to it.

Both the Owner and the Contractor agreed that the certificates issued by the DFA were conclusive proof of the facts set out in them; namely, that the land was diplomatic premises. However, they disagreed about the timing of the diplomatic status. The Owner claimed that the certificates were proof that the land had enjoyed diplomatic status since the date it was purchased (i.e. the 2015 and 2016 certificates were retroactive to 2005). In contrast, the Contractor claimed that the certificates were only proof that the land enjoyed diplomatic status from the date that the certificates were issued (i.e. from 2015 and 2016 forward). Since the lien was registered in 2013, before the certificates were issued, the Contractor claimed that the court could not rely on the certificates to conclusively determine the status of the land at the time the lien was registered.

Justice Corthorn agreed with the Owner that the certificates had retroactive effect such that the land had enjoyed diplomatic status since the Owner purchased it. Her Honour made this finding for four reasons. First, the certificates reaffirmed the 2005 note that extended diplomatic status to the land. Second, certificates are typically issued by the DFA in response to issues that arise. One would expect them to be issued retroactively, not proactively. Third, the status and immunity of land turns on the nature of the activity conducted on the land. Where that activity is commercial instead of diplomatic, no diplomatic immunity is enjoyed. However, the cultural centre was used for diplomatic purposes, including the post-secondary education of Saudi citizens. Fourth, in the recent case *Tracy v. Iran*,^[3] the court similarly held that DFA certificates were conclusive evidence of the diplomatic status of land. Accordingly, Justice Corthorn ordered that the Contractor's lien claim be dismissed and the lien be discharged from title to the land.

Protecting Your Business If Liens Cannot Not Attach

Although contractors cannot register liens against diplomatic lands, they can still take steps to protect themselves in the event of non-payment. For example, prime contracts should require payment in the shortest time possible to minimize the amount of work that the contractor performs on credit.

If the contractor does perform work on credit and the owner fails to pay, it may still be possible to bring a breach of contract, unjust enrichment or other claim against the owner. However, if the owner is an embassy or other foreign state entity, it may be able to assert the defence of state immunity. Actors with state immunity cannot be sued in Canadian courts.

by Laura Brazil

[1] 2017 ONSC 105 ("Construction Excedra").^[ps2id id='1' target='']

[2] Foreign Missions and International Organizations Act, S.C. 1991, c. 41, Schedule B.[ps2id id='2' target='']

[3] 2016 ONSC 3759.[ps2id id='3' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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