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THE BUILDERS' LIEN ACT: CERTAIN SPECIFIC PROBLEMS

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THE BUILDERS' LIEN ACT:

CERTAIN SPECIFIC PROBLEMS

I

INTRODUCTION

Our study of the Builders' Lien Act originated as part of a project which was designed to deal with small defects in the law. Four problems with the Act had been brought to our attention by lawyers in the province. Those were discussed in our Small Projects Report No. 17, June 1975, but no final recommendations were made. It was subsequently decided that additional problems should be dealt with and we therefore issued a Draft Report in June, 1978 in order to allow comment on our tentative proposals. We have not received any comment on the Draft to indicate that our basic proposals should be modified. For the most part, our final recommendations, therefore, follow those set out in our Draft Report. These recommendations appear throughout the Report and are collected in Appendix A. We have attached a draft Builders' Lien Amendment Act as Appendix C which we feel would adequately implement our recommendations.

II

REPEAL OF THE ACT

Although we have gone beyond the subjects discussed in our Small Projects Report, we have not gone into the full field of the law relating to builders' liens. The fundamental question of whether or not there should be a Builders' Lien Act at all, however, should be seriously considered. In our Draft Report we invited comment on this question.

Our present Builders' Lien Act (R.S.A. 1970, c. 34, as amended) is the result of a Public Inquiry into "The Adequacy of the Provisions of the Mechanics' Lien Act 1960 (S.A. 1960, c. 64, as amended)" conducted by His Honour Chief Judge Nelles V. Buchanan (Retired). The very existence of our present Report testifies to the fact that problems continue to exist with the legislation. These problems may in fact be intractable.

When he made his recommendations, Chief Judge Buchanan strongly suggested that the Act should be repealed:

> The information available to me from many sources outside as well as inside this Province suggests that repeal of the Mechanics' Lien Act would have a generally beneficial effect on the building industry. While it might cause instances of hardship -- and loss of a lucrative area of litigation to lawyers -- at least during an initial period of adjustment, this might well be less than the hardship the Act now causes not only in construction generally, but to members of the citizenry at large .... As legislation which confers special benefits on particular classes of persons, the Act is justified only if there is an important reason for conferring such privileges. The evidence before me has not indicated a pressing need for such protection.
>
> (Report of the Commissioner of the Public Inquiry into the Adequacy of the Provisions of the Mechanics' Lien Act, 1960, p. 47.)

There is strong support on our Board for that suggestion. Before considering a recommendation for repeal, however, we would have to conduct our own study to assess the effects of the Act and the likely effects of its repeal. Because of our other commitments, we must defer for the present consideration of the making of such a study.

One significant group of sub-contractors within the province is giving serious consideration to recommending repeal. The Electrical Contractors Association of Alberta, representing approximately 160 electrical contractors from all parts of the province, has established a committee to make representation on problems with the Builders' Lien Act from the sub-contractors viewpoint. That committee has advised us that it may well recommend repeal to the government as the only suitable solution to the problems of uncertainty and delay caused by the Act.

III
SPECIFIC PROBLEMS

1. Payment of holdback upon substantial performance

Section 15 of the Builders' Lien Act requires an owner to hold back for the benefit of potential lien claimants 15 per cent of the value of work done under a contract. The owner may not pay out this holdback, except at his peril, until the expiration of the time specified in the Act, which is generally 35 days after the completion or abandonment of the contract or the furnishing of the last work or materials. The decisions under the former Mechanics' Lien Act established that the contract must be entirely completed, so that the lien period did not commence if there was even an insignificant amount of work to be done or materials to be delivered under the contract.

In order to improve the flow of construction funds, Chief Judge Buchanan recommended that the owner should be entitled to pay out the holdback 36 days after "substantial performance" of

the contract. Accordingly, clause 2(1)(a) of the Builders' Lien Act now defines "completion of the contract" to mean "substantial performance, not necessarily total performance of the contract." Subsection 2(2) goes on to provide that a contract "shall be deemed to be substantially performed" when the work or a substantial part of it is ready for use or is being used, and when the work is capable of completion or correction at a cost varying from 3 per cent to 1 per cent of the contract price. It was intended that the possibility of trifling amounts of work remaining to be done after the main body of the work was completed would not force the owner to retain the holdback for excessively long periods of time.

Unfortunately, the Act does not consistently incorporate the substantial performance concept. By subsections 15(2) and 18(1), the owner is required to retain the holdback for the period specified in section 30 of the Act. Although subsection 30(1) states that a lien of a contractor or sub-contractor must be filed within 35 days of completion or abandonment of the contract, this subsection is limited to cases "not otherwise provided for". Subsections 30(2) and (3) provide the time limit for material suppliers and those performing services but these time limits are not related to "completion of the contract", the phrase which is necessary to import the substantial performance concept.

This difference in wording led Mr. Justice Kane of the Appellate Division of the Supreme Court of Alberta (Chief Justice Smith concurring) to conclude in Glenway Supply (Alta.) Ltd. v. Knobloch, [1972] 6 W.W.R. 513, that the substantial performance provision does not apply to a contract to provide materials or services or mixed materials and services because these are "otherwise provided for" in subsections 30(2) and 30(3). In

that case, the sub-contractor, who had returned to provide materials and services of "trivial value" compared with the sub-contract in question, could register his lien at any time within 35 days of the furnishing of the last materials or the performance of the last services. The concept of substantial performance, in the judge's view, is restricted to subsection 30(1) and does not apply to contracts for materials, services or both.

The judgment of Mr. Justice Clement (also concurred in by Chief Justice Smith) raises a second problem. He held that subsection 30(1) applies where the contract is for the supply of materials and services (but presumably not if it is for one or the other). Therefore the substantial performance concept was applicable. However, he concluded that the deemed substantial performance provided for by subsection 2(2) is merely a rebuttable presumption. In the Glenway case, he held that the presumption had been rebutted by evidence that the final work was needed before the contract was satisfactorily completed.

Both judgments would compel owners, if they want to be safe, to retain the holdback until the last nail is driven. The case has therefore reduced the effectiveness of the substantial performance concept. In addition, since "completion" in section 30 may sometimes mean substantial performance and sometimes actual completion, it is difficult for a lien claimant to know into which category his lien falls, and thus within which period of time he must register his lien.

It is our opinion that the substantial performance concept is sound insofar as it affects the release of the holdback. An owner should be able to release the holdback 36 days following

substantial performance of the prime contract without having to be concerned with the dates of completion of sub-contracts under the prime contract.

We have considered whether or not the time limited for registering a lien should be 35 days after substantial performance of the contract, sub-contract or work. If an owner is able to release holdback money upon substantial performance, consistency would require that the period for registering a lien run from substantial performance of the lien claimant's work.

However, we do not think that consistency is the paramount consideration. Indeed, it cannot be achieved without depriving sub-contractors of their full lien period, because substantial performance of the prime contract may well occur before substantial performance of the work of the finishing tradesmen. We think that the tradesman should have his full lien period even if the owner is permitted to release the holdback before the period ends for the filing of the tradesman's lien for the late work. This would result in the possibility of an ineffective lien being filed, i.e. one which attaches a lien fund which has been reduced to zero by the valid release of the holdback. If the holdback has not been released, however, a properly filed lien would attach it, and we think that a sub-contractor should be able to attach any unpaid money for a period of 35 days after actual completion of his work even though the owner may no longer be required to retain any money. Immediately prior to releasing the holdback upon substantial performance but before lien periods have expired, the owner should make one last title search to be certain no valid liens have been registered.

We will now propose several amendments to the Builders' Lien Act which we think will solve the problems disclosed by the Glenway case and additional problems relating to substantial performance.

(a) Subsection 15(2); Subsection 18(1); Clause 2(1)(a)

Subsections 15(2) and 18(1) authorize an owner to release the holdback retained pursuant to section 15. Subsection 15(2) provides that the holdback is to be retained for the time limited by section 30. Subsection 18(1) provides that payments from the lien fund, which consists of the holdback plus any balance unpaid, may be made upon expiration of the time limited by section 30. However, section 30 applies not only to the main contract but to all sub-contracts and to the work of wage earners. It follows from what we have said that it should be made clear that the owner can, 36 days after substantial performance of the prime contract, release the holdback relating to that contract even if lien periods of sub-contractors and labourers have not expired. This is the very heart of the substantial performance doctrine.

Clause 2(1)(a) defines "completion of the contract" in terms of substantial performance. Subsections 15(2) and 18(1) could be amended to use this defined term. However, elsewhere in the Act we feel that "completion of the contract" should have its natural meaning so that only the time for release of the holdback will be tied to substantial performance. This can be accomplished by removing the definition found in clause 2(1)(a) and by using the term "substantial performance" rather than "completion of the contract" in subsections 15(2) and 18(1).

RECOMMENDATION #1

(1) That clause 2(1)(a) of the Builders' Lien Act be repealed.

(2) That subsection 15(2) and 18(1) be amended to provide that the period of time that the holdback or lien fund must be retained by the owner is 35 days after abandonment or substantial performance of the contract.

(b) Subsection 2(2)

Subsection 2(2) sets out the circumstances in which a contract "shall be deemed to be substantially performed". We believe that this presumption was originally intended to be conclusive and that it should be made so. Otherwise the owner will only be able to rely on it if he is sure that a court will find that the contract is in fact substantially performed, and he will rarely run the risk. We think that a conclusive result can be achieved by providing that if the circumstances set out in the subsection occur the contract is substantially performed.

This formula for substantial performance applies only to the main contract. Section 16 provides a procedure for release of that portion of the holdback relating to a sub-contract 36 days after a supervisor has certified the completion of the sub-contract. To speed up the flow of funds, we feel that the certificate should be based on substantial performance and not actual completion of the sub-contract. This is discussed under our proposals for section 16 below. In order to give supervisors and the court help in determining when there has been substantial performance of a sub-contract we recommend that the formula for substantial performance apply to sub-contracts as well.

We have some concern with the wording of clause 2(2)(a) which requires that "the work or a substantial part thereof [be] ready for use or [be] used for the purpose intended" before the percentage of completion formula applies. It might be possible for a court to interpret "ready for use or being used" as meaning that the improvement is "ready for occupancy or being occupied." This would render the concept of early holdback release under section 16 useless. We feel that, with regard to sub-contracts, the court would rather consider the "work" done under that sub-contract as being used or ready for use when it is completed to a degree to allow further work based on it to proceed.

RECOMMENDATION #2

> *That subsection 2(2) of the Builders' Lien Act be amended to provide that if the circumstances set forth in the subsection occur the contract, or a sub-contract, is substantially performed.*

(c) Section 16

Section 16 permits the owner to release that portion of the holdback referable to a certain sub-contract 36 days after the receipt of the supervisor's certificate indicating that the sub-contract is completed. It is designed to speed up the flow of funds by allowing the early payment of that portion of the holdback relating to a specific sub-contract without waiting for completion of the main contract. We confirm our tentative opinion expressed in Report No. 17 that the section would be more effective if it were clear that payment could be made after the substantial performance of the sub-contract. We suggest, therefore, that the section provide that the supervisor may issue a certificate of completion upon the "substantial performance" of the sub-contract. Supervisors, or the court, could certify completion of a sub-contract when there has been substantial performance of it. The appropriate portion of the holdback could then be released at an earlier date.

In our Draft Report we suggested that the section should conclusively deem that any work done under a sub-contract which is the subject of a completion certificate was completed on the date the certificate was issued. It was brought to our attention that this was inconsistent with our approach to the release of holdback funds which was to allow lien claimants their full time to file but to allow owners to pay out 35 days after substantial performance.

We agree that this is inconsistent and have modified our recommendation. We now suggest that if after 35 days following

the issue of the supervisor's certificate certifying completion of a sub-contract, the sub-contractor or any one filing under him files a valid lien, it will attach only that portion of the holdback which could have been released by the owner but which was not released prior to the lien being filed. Thus, once the 35 days has expired, an owner will be in a position to release part of the holdback under section 16, but until he actually does so, a validly registered lien could attach those funds. If this happens the owner should be able to apply to the court to pay the funds into court and have the lien removed.

Finally, there is a minor problem with section 16 which was not raised in Report No. 17. On several occasions, the word "contract" is used where it is clear from the context that the word "sub-contract" should be used. In order to clarify the Act, we suggest that this confusion of terms be rectified. We have also re-worded the section in an attempt to make it clearer.

RECOMMENDATION #3

That section 16 of the Builders' Lien Act be amended:

(1) To provide that a supervisor or the court may issue a certificate of completion of a sub-contract any time after substantial performance of the sub-contract.

(2) To provide that a lien registered by a sub-contractor or by a person claiming under that sub-contractor 36 days after completion of the sub-contract has been certified, attaches only to the amount, if any, which was permitted by section 16 to be paid by the owner but which was not paid before registration of the lien and that the owner be allowed to pay that amount into court and have the lien removed.

(3) By substituting the word "sub-contract" for the word "contract" where the context requires.

2. Removal of liens on payment into court

The Builders' Lien Act makes two provisions for removal of liens on payment of money into court. These are as follows:

(1) <u>Section 18</u>. This section permits an owner to pay into court the whole of the "lien fund" (i.e., the holdback plus any other amount which has not been paid by the owner in good faith prior to the registration of a lien). Under subsection 18(4), the owner is then discharged from any liability in respect of liens. This procedure appears to be designed for the case in which the contractor has become financially unable to continue with the project. The owner can pay what he owes and get rid of the contractor and everyone claiming under him.

(2) <u>Section 35</u>. This section provides for the cancellation of the registration of a lien upon the giving of security for or the payment into court of the amount of the claim and such costs as the court may fix. This procedure appears to be designed for the case in which one lien has appeared on the certificate of title and its validity is disputed. The owner or contractor can pay the money into court in order to clear the title so that the flow of construction and mortgage money may be permitted.

The question which was actually raised with us concerning the procedure on payment of money into court was one which arose from <u>dicta</u> in the judgment of the Chambers judge in <u>Driden Industries Ltd.</u> v. <u>Sieber</u>, [1974] 1 W.W.R. 165 (Alta. S.C.), rev.d on appeal [1974] 3 W.W.R. 368 (App. Div.). In that case Driden, a principal contractor, paid the amount of the claim of Sieber, a sub-contractor, into court, in order to clear the title of Sieber's registered lien. Sieber did not bring an action within 180 days of the date of the registration of the lien, and he did not file a certificate of <u>lis pendens</u> against the owner's title in respect of his lien claim. Shannon J. held that Driden was entitled to the

money because Sieber had failed to bring the action as required by section 32. In the course of his judgment, however, he referred to the possibility that a lien claimant might be said to be required by section 32 to file a certificate of lis pendens even though the lien had been removed from the title. He thought this absurd in view of the fact that the section is designed to clear the title. The suggestion put to us was that it should be made clear that the certificate of lis pendens is not necessary, a proposition with which we agree.

Upon appeal, the Appellate Division held that section 32 does not apply at all when money is paid into court under section 35. Mr. Justice McDermid, who gave the judgment of the court, specifically said that a certificate of lis pendens need not be filed. That may be taken to settle the matter insofar as the final court of appeal of the province is concerned, but we think that it would be advisable to amend the Act so as to put the matter beyond doubt if it should be raised in the Supreme Court of Canada. The same considerations apply to an application to pay money into court under section 18, and we think that the amendment should apply to that section as well.

In both sections 18 and 35, payment into court results in the removal of the lien from the title to the land concerned. However, clause 35(1)(a) provides for an order that "the registration of [the] lien be cancelled", while clause 18(4)(b) provides for an order "that the liens be removed from the title". In order to allow one subsection to apply to both sections, we recommend that the wording in clause 35(1)(a) be amended to conform with the terms used in clause 18(4)(b).

Recommendation #4

(1) *That a section be added to the Builders' Lien Act to provide that where the court has ordered that a lien be removed from the title to*

the land concerned pursuant to clause 18(4)(b), or clause 35(1)(a),the lien does not cease to exist merely because no certificate of lis pendens is registered.

(2) *That clause 35(1)(a) be amended to incorporate the term "liens be removed from the title to the land concerned" as used in clause 18(4)(b).*

3. Expediting disposition of liens

The Appellate Division's decision that section 32 does not apply once payment into court has been made relieves the lienholder of the duty imposed by clause 32(1)(a) to commence an action within 180 days of the registration of the lien. Although this question was not raised with us, we discussed it in Report No. 17 because the Appellate Division decision reversing that of Mr. Justice Shannon came out while we were considering the question of the lis pendens. We now feel that it would be beneficial to deal with that question and others in the context of Chief Judge Buchanan's recommendation that lienholders "who desire to take advantage of their security should be required to act promptly".

Under the previous Mechanics' Lien Act, an owner or other person affected could serve a notice upon a person who had registered a claim for a lien requiring him to take proceedings on the lien within 30 days, or the lien would cease to exist. Otherwise, the lien continued for six years with provisions for renewal. Chief Judge Buchanan felt that there was no justification for allowing a lien, once registered, to continue for six years or more and

that it was equally wrong to place the onus on someone other than the lienholder to serve notice in order to get an action started. He took the position that, in order to prevent registered liens from interfering unduly with the flow of construction money, the lien claimant should be compelled to take proceedings on his lien within 90 days of registering his claim. This would prevent the lien claimant from resting on his rights and would obviate the necessity of having the owner or contractor make the first step to initiate the action.

The Legislature did not accept the recommendation for a 90-day period. Instead, section 32 now provides that a lien that has been registered ceases to exist unless action is commenced and a certificate of lis pendens filed within 180 days from the date of registration. It appears to us that the extension of the period from 90 to 180 days makes it desirable that an owner or other person affected have a mechanism available to require proceedings to be commenced earlier than the 180-day period fixed by section 32. Accordingly, we think that a provision as in the former Mechanics' Lien Act should be inserted in the Builders' Lien Act. In view of the extension of the period, we think this proposal is consistent with Chief Judge Buchanan's view that expedition is an important consideration. We think that, rather than imposing an onus on the owner, it would confer an additional power on him which he could exercise to his benefit. The form of notice should be prescribed by regulation, and may be adapted from Form 6 of the Mechanics' Lien Act, R.S.A. 1955, c. 197.

Recommendation #5

That the Builders' Lien Act be amended to provide that an owner or other person affected by a registered lien may serve a notice on the lien claimant that if the lien claimant does not take proceedings upon

his lien and file a certificate of lis pendens within 30 days of the service of the notice, the lien will cease to exist.

We believe that the argument advanced for allowing persons affected by a lien to force the lien claimant to take action continues to be persuasive when an owner or contractor has paid money into court or given security pursuant to section 35 or when an owner has paid the amount of the lien fund into court pursuant to section 18. We recognize that in some ways the urgency is reduced in these situations since the title to the property is clear and mortgage advances can continue. The lien claimant is nevertheless in an enhanced position by virtue of the security over ordinary creditors, and providing the funds for payment in or maintaining security for an extended period of time could prove a hardship to the party who provided them. We therefore think that the person providing the security in place of the land should be able to serve a notice upon the lienholder requiring him to take action or lose his lien against the security or money in court.

RECOMMENDATION #6

That the Builders' Lien Act be amended to provide that where a lien has been removed from the title and security given or money paid into court under section 18 or section 35, the owner or other person affected may serve a notice on the lien claimant that if the lien claimant does not take proceedings upon his lien within 30 days of the service of the notice, the lien against the security or the money in court will cease to exist.

This same argument applies in determining whether the requirement to commence an action within 180 days should apply once payment into court has been made under section 35 or under section 18 and the lien thereby removed from the title. Even though under Recommendation #6 a person affected may serve notice requiring an action to be commenced, a lien

claimant should still be required to proceed with expedition. The burden should be upon him to proceed to assert his claim against the money in court so that it will not be tied up over an extended period of time to secure a claim which has not been established. This would change the present law as declared by the Driden decision.

RECOMMENDATION #7

> *That the Builders' Lien Act be amended to require a lien claimant to commence proceedings within 180 days of registration of the claim for lien notwithstanding that the lien has been removed from the title to the land under section 18 or 35.*

4. Claims against money paid into court under section 35

It does not seem to us that it would be appropriate to deal with section 35 without noting and correcting what appears to be a fundamental problem. The section calls for the discharge of a particular lien upon payment into court of the amount of the claim and enough to cover the estimated costs of proceedings. Since the registration of the lien is then cancelled, it appears that the lien claimant loses any security he had in the land. This conclusion is reinforced by the decision of the Manitoba Court of Appeal in Northern Electric Co. Ltd. v. Frank Warkentin Electric Ltd. (1972), 27 D.L.R. (3d) 519 where it was suggested that the claimant whose lien is cleared upon payment into court cannot share in the proceeds of a sale of the land by subsequent lien claimants. The money paid into court therefore becomes the only security for the lienholder whose lien is removed. However, subsection 35(2) states that this money is "subject to the claims of all persons for liens to the same extent as if the money had been realized by the sale of the land in an action to enforce the lien". It appears from this that all other lien claimants could come in and demand

a share of the money. That seems to us unfair to the lien claimant who has been deprived of his security in the land.

The problem may be theoretical as we are not aware that it has caused any difficulty to date. We suspect that the reason for this is that section 35 is normally used in a case where one lien has appeared in an otherwise healthy project and must be removed in order to permit the flow of construction and mortgage money. In such a case, other lien claimants are likely to be paid and will have no need to claim a share of the money in court.

There are various ways of dealing with the problem. Section 40(1) of the Saskatchewan Mechanics' Lien Act (S.S. 1973, c. 62) requires proof that no other person is entitled to a lien before payment into court may be made to remove a lien from the title. We think such a provision would render section 35 virtually useless. In the great majority of cases work will be continuing on the project and there will inevitably be subsisting liens. Another way to deal with the problem would be to reverse the provision so that no other lien claimant could claim against the money in court. The difficulty with that is that there might be a case in which other lien claimants would be prejudiced by the reduction in the amount of money available to them, while the lien claimant whose lien is discharged would have security for his whole claim. A third solution would be to require other lien claimants to exhaust other remedies, but to have the money remain in court until they do so. That appears to us likely to cause too much delay.

We think that the best way to resolve the problem is to give the lien claimant whose claim is discharged priority to the extent that he proves a valid claim, but to

provide that the percentage holdback cannot be used to make the payment into court under section 35. It appears to us that such a provision would be fair to the lien claimant whose claim is discharged because he would have a first claim against the money paid into court. The owner or other person wanting to pay in would have his freedom somewhat restricted, as he would not be able to use any part of the holdback, but we think that to be fair also. If there is one isolated lien which is filed, based upon a disputed claim, the owner would be able to use section 35. If, on the other hand, he is going to want to make a payment which will affect the interests of others, he should proceed under section 18 and pay the whole lien fund into court and have all lien claimants come in against the money so paid in. One problem with this approach arises from the fact that the first lien claimant could receive full security for his lien from the payment into court under section 35. If after that a major default were to occur, subsequent lien claimants would likely receive only partial security from the holdback. Unequal treatment of lienholders is the result. However, section 20 of the Act enables the owner or contractor to make payments directly to lien claimants in good faith provided the payments do not encroach upon the holdback. A payment into court for the benefit of one claimant is not more adverse to the interests of other lien claimants than is a direct payment to that lien claimant.

Recommendation # 8

That the Builders' Lien Act be amended to provide that a lien claimant whose lien is removed from the title to the property under section 35 shall have a first charge for the amount of his claim as proved plus costs upon the money in court or the security given, but that no part of the percentage holdback to be retained under the Act can be paid into court under section 35.

Should the other lien claimants be entitled to claim against any money which is not payable to the lien claimant whose lien has been removed under section 35? In most cases, the question will not arise since section 35 is used primarily to clear an individual lien to allow a healthy project to proceed. In these cases, it is clear that any excess should be returned to whomever paid it in. However, to the extent that the money may have come from the "balance owing" portion of a lien fund, it appears to us that if necessary, other lien claimants entitled to that lien fund should be able to share in the excess. Inasmuch as only lien claimants with subsisting liens at the time of payment in would be able to claim against the lien fund as it exists at that time, only they should be able to claim against any excess paid in under section 35. Further, so that there will be no difficulty about payment back out of court of any excess, only those who have registered their claims for a lien at the time of the commencement of the application for payment out should be entitled to share. The applicant for payment out would then be able to ascertain from the Land Titles Office all those who could be affected by his application. We suggest that he should be required to serve them with notice of his application for payment out.

Recommendation # 9

That the Builders' Lien Act be amended to provide that other lien claimants be entitled to claim against excess money paid into court under section 35 if, at the time of the application for payment in, they had a subsisting lien which was a claim against the lien fund and if, at the time of the commencement of the application for payment out, they have registered that lien. The applicant for payment out should be required to serve everyone who is affected by the application.

5. Procedure

The Appellate Division in the Driden case thought that

some procedure should be prescribed in the Act to be followed when money is paid into court under section 35. We think that our previous recommendations fill the hiatus which made the Appellate Division think such provisions necessary. Under our recommendations, the owner or contractor would be able to require the lien claimant to bring proceedings within 30 days. If the owner or contractor does not serve notice to that effect, the Act itself would require the lien claimant to bring proceedings within 180 days of the registration of the claim for lien. These provisions appear to us to be adequate to ensure that the claim is disposed of one way or the other, and we do not think that the owner or contractor paying in should have the burden of applying for directions for disposition of the matter.

6. Effect of section 18 on unregistered liens

In the course of our consideration of sections 35 and 18, we concluded that the effect of section 18 and section 31 is to create a difficulty with regard to liens which are not registered at the time of payment into court of the lien fund to which they attach. Subsection 18(4) provides that upon payment into court of the lien fund, the owner is discharged from any liability in respect of liens. It is arguable that this might prevent the unregistered lienholder from registering, which he must do to preserve his lien by virtue of section 31. On the other hand, it might be held that the unregistered lienholder's rights may not be extinguished by an application to which he was not a party. If so, he would be able to register his lien even if other liens were cleared from the title as a result of the payment into court of the lien fund.

In either case, the result is undesirable. If the unregistered lien claimant cannot register, he may lose his right to share in the lien fund. If he can register, the only purpose served by encumbering the owner's land with a lien is to preserve the lien against the lien fund and not

against the land itself. Presumably the owner could then get the lien removed by proving that the lien fund is already in court. The result is a cumbersome method of preserving the lien against the fund.

We suggest that any unregistered lienholder be allowed to apply to participate in the distribution of the lien fund paid into court under section 18 at any time before his lien would lapse for non-registration. Once he has made such an application, he should no longer be required to register to maintain the lien which he may have against the lien fund.

Recommendation #10

That the Builders' Lien Act be amended to provide that once a lien fund has been paid into court under section 18, an unregistered lien claimant entitled to share in that fund may file a notice of motion applying to share in the fund; and that a lienholder who files notice of such an application at a time when he could have registered his lien need not register in order to preserve his lien against the lien fund.

7. Service of notice to prove lien

Subsection 38(3) allows any party to a builder's lien action to file and serve "upon any lienholder a notice to prove lien in the prescribed form". Under the present wording of the section, however, this can be done only after service of the statement of claim by which the action was commenced. As stated in Report No. 17, cases have arisen in which a lien claimant has issued a statement of claim, but has refrained from serving it. This is unfair to the other parties. We think that the subsection should be amended to provide that once a statement of claim has been issued, a party to the action may serve a notice upon a lienholder to prove his lien.

Recommendation #11

That section 38(3) of the Builders' Lien Act be amended to provide that a party may file and serve a notice to prove lien at any time following the issue of the statement of claim.

8. Appointment of receivers and trustees

Subsection 40(2) authorizes any party to an action to apply to the court for the appointment of a trustee with broad powers to manage, dispose of or complete a construction project. Subsection 40(3) provides that mortgage moneys advanced to the trustee appointed under subsection (2) take priority over all subsisting liens. This encourages the mortgagee to advance funds for the protection and preservation of the security not only for his benefit but for the benefit of the lien claimants.

A problem was raised with us regarding the fact that an action must be commenced and the statement of claim served before these provisions become available. Where no such action has been commenced and the person wishing to appoint a trustee is not a lien claimant who can commence an action, the benefits of subsection 40(3) cannot be quickly obtained, if at all. The case raised with us involved a trustee in bankruptcy who wished to have a trustee appointed under the Act. Although a receiver could be appointed under the Judicature Act, it is doubtful that he could receive mortgage advances in priority to lien claims.

Report No. 17 cited College Housing Co-op. Ltd. v. Baxter Student Housing Ltd., [1975] 1 W.W.R. 311 (Man. C.A.), reversed on appeal [1976] 1 W.W.R. 1 (S.C.C.), where the Manitoba Court of Appeal held that the Court of Queen's Bench had inherent jurisdiction to make an order appointing a receiver with power to receive mortgage money in priority to registered liens.

Subsequent to the date of Report No. 17, however, the Supreme Court of Canada reversed this decision, stating at page 4 that the court could not make an order contrary to "the unambiguous expression of the legislative will".

We believe that there are cases in which it could be beneficial to all parties to allow the court to appoint a trustee with the powers available under subsection 40(3) whether or not a lien action has been commenced. We therefore recommend that subsection 40(2) be amended to allow any person interested or affected to bring such an application at any time.

We believe that subsection 40(1), which provides for the appointment of a receiver of the rents and profits after service of the statement of claim, should be similarly amended. Although it is likely that the court has this power presently under the Judicature Act, this amendment would clarify the situation.

Recommendation #12

That subsection 40(1) and 40(2) of the Builders' Lien Act be amended to allow an application by an interested person at any time for an order appointing a receiver or a trustee.

9. Definition of the lien fund

Two problems involving the definition of the lien fund have arisen which were not discussed in Report No. 17.

The first problem arises from the definition of the lien fund in subsection 15(1). It is defined as being the percentage holdback plus "any amount payable under the contract" not paid before registration of a lien, less any amount released under section 16. Under subsection 15(5), the lien fund represents the maximum liability of the owner under the Act.

In our Draft Report we referred to two Alberta District Court decisions which gave conflicting interpretations of the definition of the lien fund. Subsection 15(1) seems to define the lien fund as the holdback plus the entire amount remaining payable. A possible reading would thus include the 15 per cent holdback twice, once as the percentage required to be retained, and once as part of the amount payable under the contract. In Guglietta and Borelli v. Oldach (1977), 6 A.R. 514, Judge Cormack refused to adopt this interpretation and thereby avoided having the owner make a double payment. However, in Schlumberger Canada Ltd. v. Superior Contracting (1977), 4 Alta. L.R. (2d) 191, Judge Patterson did include the holdback twice in computing the lien fund.

Two cases have been reported since we issued our Draft Report which have considered the calculation of the lien fund. In Kronsage v. Pool (1978), 5 Alta. L.R. (2d) 333, Judge Dea of the Alberta District Court referred to the conflicting cases and decided to include the 15% just once. In Revelstoke Companies Ltd. v. Simper (1978), 6 Alta. L.R. (2d) 252 Chief Justice Milvain of the Trial Division of the Supreme Court of Alberta, in what was clearly obiter, came to the same conclusion.

It is certain that the intent of the Act was not to make an owner who retains the required holdback liable for more than he would have been on his contract. We recommend that the definition of the lien fund be amended to ensure that the Act carries out that intent.

Recommendation #13

> *That subsection 15(1) of the Builder's Lien Act be amended to define the lien fund to include the percentage retained by the owner under section 15, plus only the additional amount payable under the contract which has not been paid.*

The second problem with the definition of the lien fund is that it appears to create a fixed sum at the moment a lien is filed (15 per cent plus the remaining balance unpaid). This is available to lien claimants not all of whom may yet have registered. By subsection 15(6), it is only before the registration of any liens that this lien fund may be reduced by payments made in good faith other than from the holdback. By virtue of subsection 9(2), the mortgagee has priority over a lien only to the extent that advances have been made *bona fide* prior to the registration of the statement of lien. This applies whether or not the mortgagee has assumed, under section 17, the responsibility for retaining the holdback.

The effect of subsection 15(6) is that, once a lien is registered, all payments by an owner cease. It often takes two weeks or more to get an isolated lien off the title under section 35. Although the lien may be small, a cautious owner or mortgagee will not make any progress payments or mortgage advances during this period. Indeed, it has even been suggested that section 15(6) means that progress payments cannot be safely made even after the lien is subsequently removed upon payment into court or discharged by payment of the claim.

We see no reason why the owner or mortgagee should not be able to make payments from the lien fund so long as he retains the 15 per cent holdback plus enough to pay any registered lien. That will encourage the flow of construction funds for the benefit of all concerned and it will not prejudice the claim of the lienholders against the percentage holdback which is the security provided for them by the Act.

With regard to a particular filed lien, subsection 9(3) would continue to give that lien priority over subsequent mortgage advances. We feel that the mortgagee can adequately protect himself by retaining sufficient funds to cover the amount of the filed liens. With respect to unregistered liens, subsection 9(2) would continue to give mortgage advances, bona fide made, priority.

Such an amendment would also make it clear that the filing of one lien does not freeze the lien fund even after that lien is removed or discharged.

The amendment would also make it clear that a mortgagee could continue to make advances in good faith so long as he retains the amount of registered liens without the worry that some unregistered liens may have priority because the lien fund was fixed on the registration of the first lien.

RECOMMENDATION #14

> *That section 15 be amended to allow the lien fund to be reduced by payments made in good faith other than of the holdback plus the amount of registered liens.*

10. Service of process on lienholders

One final concern, which was not discussed in Report No. 17, is the method of serving registered lien claimants. Although lien claimants are required to provide an address for service in their liens by clause 25(2)(f) of the Act, process must still be served on them as required by the Rules of Court. It has been suggested to us that a section be added to the Act providing that service of all documents on a lienholder may be effected by registered mail addressed to the lienholder at the address contained in the statement of lien.

One member of our Board felt very strongly that the notice to commence proceedings should be served personally. If, for some reason, the lienholder did not receive the notice his lien would be gone and there would be no way to regain the security. Even failure to receive a statement of claim is less harsh, since a default judgment can be opened up.

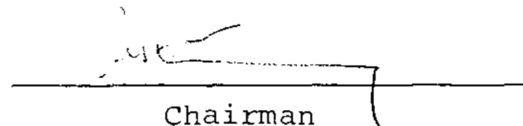
However, the majority feels that, since the lien claimant is required to provide an address for service and since provision is made in section 28 of the Act for the up-dating of this address, it should not be prejudicial to allow service to be made by registered mail. The need for service arises quite often, particularly under section 18 and section 35. In an action to enforce a lien, all registered lien claimants must be served with the statement of claim and then served again with the notice of a pre-trial application. The cost of frequent personal service does not appear to us to be justified.

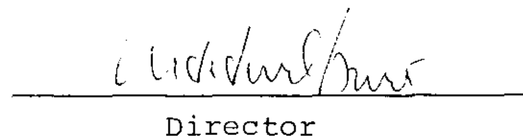
Of course, once an action has been commenced and a lienholder has given a solicitor's office or other address at which documents may be served, a lienholder need no longer keep the Land Titles Office informed of the change of his address for service with regard to that action.

Recommendation #15

That a section be added to the Builders' Lien Act to allow all process to be served on lienholders by registered mail at the address for service provided by the lienholder, or failing such an address, at the address for service contained in the registered statement of lien.

W.F. BOWKER
W.H. HURLBURT
D.B. MASON
J.P.S. MCLAREN
ELLEN PICARD
W.A. STEVENSON
W.E. WILSON

BY 
Chairman


Director

March, 1979

APPENDIX A

THE BUILDERS' LIEN ACT

Recommendations

Recommendation #1 (p. 7)

(1) That clause 2(1)(a) of the Builders' Lien Act be repealed.

(2) That subsection 15(2) and 18(1) be amended to provide that the period of time that the holdback or lien fund must be retained by the owner is 35 days after abandonment or substantial performance of the contract.

Recommendation #2 (p. 9)

That subsection 2(2) of the Builders' Lien Act be amended to provide that if the circumstances set forth in the subsection occur the contract, or a sub-contract is substantially performed.

Recommendation #3 (p. 10)

That section 16 of the Builders' Lien Act be amended:

(1) To provide that a supervisor or the court may issue a certificate of completion of a sub-contract any time after substantial performance of the sub-contract.

(2) To provide that a lien registered by a sub-contractor or by a person claiming under that sub-contractor 36 days after completion of the sub-contract has been certified, attaches only to the amount, if any, which was permitted by section 16 to be paid by the owner but which was not paid before registration of the lien and that the owner be allowed to pay that amount into court and have the lien removed.

(3) By substituting the word "sub-contract" for the word "contract" where the context requires.

Recommendation #4 (p. 12)

(1) That a section be added to the Builders' Lien Act to provide that where the court has ordered that a lien be removed from the title to the land concerned pursuant to clause 18(4)(b), or clause 35(1)(a), the lien does not cease to exist merely because no certificate of *lis pendens* is registered.

(2) That clause 35(1)(a) be amended to incorporate the term "liens be removed from the title to the land concerned" as used in clause 18(4)(b).

Recommendation #5 (p. 14)

That the Builders' Lien Act be amended to provide that an owner or other person affected by a registered lien may serve a notice on the lien claimant that if the lien claimant does not take proceedings upon his lien and file a certificate of *lis pendens* within 30 days of the service of the notice, the lien will cease to exist.

Recommendation #6 (p. 15)

That the Builders' Lien Act be amended to provide that where a lien has been removed from the title and security given or money paid into court under section 18 or section 35, the owner or other person affected may serve a notice on the lien claimant that if the lien claimant does not take proceedings upon his lien within 30 days of the service of the notice, the lien against the security or the money in court will cease to exist.

Recommendation #7 (p. 16)

That the Builders' Lien Act be amended to require a lien claimant to commence proceedings within 180 days of registration of the claim for lien notwithstanding that the lien has been removed from the title to the land under section 18 or 35.

Recommendation #8 (p. 18)

That the Builders' Lien Act be amended to provide that a lien claimant whose lien is removed from the title to the property under section 35 shall have a first charge for the amount of his claim as proved plus costs upon the money in court or the security given, but that no part of the percentage holdback to be retained under the Act can be paid into court under section 35.

Recommendation #9 (p. 19)

That the Builders' Lien Act be amended to provide that other lien claimants be entitled to claim against excess money paid into court under section 35 if, at the time of the application for payment in, they had a subsisting lien which was a claim against the lien fund and if, at the time of the commencement of the application for payment out, they have registered that lien. The applicant for payment out should be required to serve everyone who is affected by the application.

Recommendation #10 (p. 21)

That the Builders' Lien Act be amended to provide that once a lien fund has been paid into court under section 18, an unregistered lien claimant entitled to share in that fund may file a notice of motion applying to share in the fund; and that a lienholder who files notice of such an application at a time when he could have registered his lien need not register in order to preserve his lien against the lien fund.

Recommendation #11 (p. 22)

That subsection 38(3) of the Builders' Lien Act be amended to provide that a party may file and serve a notice to prove lien at any time following the issue of the statement of claim.

Recommendation #12 (p. 23)

That subsections 40(1) and 40(2) of the Builders' Lien Act be amended to allow an application by an interested person at any time for an order appointing a receiver or a trustee.

Recommendation #13 (p. 24)

That subsection 15(1) of the Builders' Lien Act be amended to define the lien fund to include the percentage retained by the owner under section 15, plus only the additional amount payable under the contract which has not been paid.

Recommendation #14 (p. 26)

That section 15 be amended to allow the lien fund to be reduced by payments made in good faith other than of the holdback plus the amount of registered liens.

Recommendation #15 (p. 28)

That a section be added to the Builders' Lien Act to allow all process to be served on lienholders by registered mail at the address for service provided by the lienholder, or failing such an address, at the address for service contained in the registered statement of lien.

APPENDIX B

Concordance of Recommendations and Draft Legislation

Recommendation	Page	Section in Draft Bill	Section in Builders' Lien Act affected or added
1(1)	7	2(a)	2(1)(a)
1(2)	7	3(b); 5(a)	15(2); 18(1)
2	9	2(b)	2(2)
3	10	4	16
4(1)	12	6	32.1
4(2)	13	7	35(1)
5	14	8	35.1
6	15	6	32.1
7	16	6	32.1
8	18	7	35
9	19	7	35
10	21	5(b)	18
11	22	9	38
12	23	10	40
13	24	3(a)	15
14	26	3(c)	15
15	28	11	54.1

APPENDIX C

THE BUILDERS' LIEN AMENDMENT ACT

1 The Builders' Lien Act is amended by this Act.

2 Section 2 is amended

(a) by repealing subsection (1)(a);

(b) by repealing subsection (2) and substituting the following:

(2) For the purposes of this Act, a contract or a sub-contract is substantially pefformed if

(a) the work or a substantial part of it is ready for use or is being used for the purpose intended, and

(b) the work to be done is capable of completion or correction at a cost of not more than

(i) 3% of the first $250,000 of the contract or sub-contract price,

(ii) 2% of the next $250,000 of the contract or sub-contract price, and

(iii) 1% of the balance of the contract or sub-contract price.

3 Section 15 is amended

(a) by repealing subsection (1) and substituting the following:

15(1) In this section and section 18, "lien fund" means the amount required to be retained by the owner under subsection (2), plus any additional amount payable under the contract which has not been paid by the owner under subsection (6),

less any amount permitted by section 16 to be paid.

(b) by repealing subsection (2) and substituting the following:

(2) Whether or not a contract provides for installment payments or payment on completion of the contract, an owner liable on a contract under which a lien may arise shall, when making payment under it, retain for 35 days after abandonment or substantial performance of the contract an amount equal to 15% of the value of the work actually done.

(c) by repealing subsection (6) and substituting the following:

(6) Subject to subsection (6.1), a payment made in good faith by an owner or mortgagee to a contractor reduces the lien fund by the amount of the payment.

(6.1) A payment made under subsection (6) does not reduce the lien fund below the percentage required to be retained under this section and the sum claimed as due or to become due on any statements of lien registered at the time of the payment.

4 Section 16 is amended by repealing subsections (2), (3), (4), (5) and (6) and substituting the following:

(2) If a contract is under the supervision of a supervisor and a period of 35 days has elapsed after the supervisor issues a certificate certifying the completion of a sub-contract made directly under that contract to

(a) the person primarily liable upon the contract, and

(b) the person who became a sub-contractor by the sub-contract,

the amount to be retained by the person primarily liable on that contract shall be reduced

(c) by 15% of the sub-contract price, or

(d) if there is no specific sub-contract price, by 15% of the actual value of the work done and materials furnished under that sub-contract,

but this subsection does not operate if and so long as any lien derived under that sub-contract is preserved by anything done under this Act.

(3) A contractor or sub-contractor may at any time after substantial performance of the sub-contract demand a certificate of completion of the sub-contract from the supervisor.

(4) A demand under subsection (3) shall be made in writing and may be served on the supervisor

(a) personally, or

(b) by registered mail,

and a copy of the demand shall be served on the owner or his agent in the same manner.

(5) The supervisor of whom the demand is made shall, within 10 days of the making of the demand, issue and deliver to the applicant the required certificate of completion and if the supervisor reglects or refuses to issue or deliver the certificate of completion within the 10 days, the court

(a) upon the application of the contractor or a sub-contractor, and

(b) upon being satisfied that the sub-contract has been substantially performed,

may, upon such terms and conditions as to costs or otherwise as seem just, make an order that the sub-contract has been completed and the order has the same effect as a certificate of completion issued by the supervisor.

(6) If, after the expiration of 35 days following the date of a certificate issued to a sub-contractor by a supervisor certifying completion of the sub-contract, the sub-contractor or a person claiming under or in respect of the sub-contractor registers a lien, the lien attaches only to the amount, if any, no longer required to be retained by the person primarily liable on the contract pursuant to subsection (2) but which has not been paid before registration of the lien.

(7) Where a lien is registered which may attach to the amount referred to in subsection (6), the owner or a mortgagee authorized by the owner to disburse the moneys secured by a mortgage may,

(a) by interlocutory application in any proceedings that have been commenced to enforce a lien, or

(b) on application by originating notice of motion,

pay into court the amount to which the lien may attach, and the provisions of section 18 apply with the necessary changes made as if it were a payment into court under subsection 18(2).

(8) If a contract is not under the supervision of a supervisor, the court,

(a) upon the application of the contractor or a sub-contractor, and

(b) upon being satisfied that the sub-contract has been substantially performed,

may, upon such terms and conditions as to costs or otherwise as seem just, make an order that the sub-contract has been completed and the order has the same effect as a certificate of completion issued by a supervisor.

5 Section 18 is amended

(a) by repealing subsection (1) and substituting the following:

18(1) Notwithstanding section 30, upon the expiration of 35 days after abandonment or substantial performance of the contract, payment of the lien fund may be validly made so as to discharge every lien in respect thereof unless a valid statement of lien is registered at the time of payment.

(b) by adding the following after subsection (4):

(4.1) A person who has an unregistered lien may

(a) within the time limited by section 30 for registering the lien, and

(b) by notice of motion,

file an application to share in the money paid into court under subsection (2) and the lien does not cease to exist as a charge against the money paid into court for the sole reason that the lien was not registered within the time limited by section 30.

6 The following is added after section 32:

32.1 Notwithstanding section 32 and section 35.1, if the court has ordered that a lien be removed from the title to the land pursuant to section 18(4) or section 35(1)(a),

(a) the lien, as a charge against the money paid into court or against the security given, does not cease to exist because a certificate of <u>lis pendens</u> is not registered, but

(b) the lien ceases to exist if no action is commenced within the time limited by section 32(1) or section 35.1(1) or such other period as the court may order under section 35.1(1), as the case may be.

7 Section 35 is repealed and the following is substituted:

35(1) Upon application by originating notice, the court may

(a) order that a lien be removed from the title to the land upon the giving of security for or the payment into court of the amount of the claim and such costs as the court may fix, or

(b) order that the lien be removed on any proper ground.

(2) Money paid into court or any security given under subsection (1)

(a) stands in place of the land, and

(b) is subject to the claims of

(i) the person whose lien has been removed, and

(ii) every person who

(A) at both the time of filing the application under subsection (1) and at the time of filing the application for payment out under subsection (4), has a subsisting claim for lien, and

(B) has registered the lien prior to the time of filing the application for payment out under subsection (4),

but such amount as is found to be owing to the person whose lien has been removed plus costs is a first charge on the money or security.

(3) Money paid into court or security given under this section shall not reduce the amount to be retained by the owner under section 15(2).

(4) If money has been paid into court or security given, the court may, upon notice to every person affected, order the money to be paid out or the security to be delivered to the person entitled as the case may be.

8 The following is added after section 35:

35.1(1) If no proceedings have been commenced in which a lien that has been registered may be realized, that lien ceases to exist 30 days from the date that a notice to commence proceedings in the prescribed form is served on the lienholder unless, before the expiration of the 30 days or such other period as the court may order on application upon notice,

(a) an action is commenced to realize upon the lien or in which the lien may be realized upon under this Act, and

(b) a certificate of lis pendens in the prescribed form is registered in the appropriate land titles office.

(2) The court may, upon an ex parte application, reduce the 30-day period provided in subsection (1) to such period as it considers necessary.

(3) A copy of the order of the court made pursuant to subsection (2) shall be served with the notice provided under subsection (1).

9 Section 38(3) is repealed and the following is substituted:

(3) At any time after the statement of claim has been issued, a party may file with the clerk of the court and serve upon any lienholder a notice to prove lien in the prescribed form.

10 Section 40 is amended by repealing subsections (1) and (2) and substituting the following:

40(1) At any time after a lien has been registered, any person interested in the property to which the lien attaches or otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver upon such terms and upon the giving of such security or without security as the court considere appropriate.

(2) At any time after the lien has been registered, any person interested in the property to which the lien attaches or otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, upon the giving of such security or without security as the court considers appropriate, appoint a trustee

(a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(b) with power upon approval of the court to complete or partially complete the improvement.

11 The following is added after section 54:

54.1 Except when otherwise directed by the court, a document relating to an action or proceeding under this Act or a notice under section 35.1 is sufficiently served upon a lienholder at the latest address for service provided by the lienholder or if the lienholder has not provided an address at the address for service contained in the registered statement of lien.

12 This Act comes into force on the date upon which it is assented to.

ACKNOWLEDGMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney General and the University of Alberta, makes the Institute's work possible.

The Institute is of course much indebted to His Honour Chief Judge Nelles V. Buchanan, whose careful and thoughtful report is the foundation of the Builders' Lien Act. We think that the proposals we have made are in the main consistent with the intent of his report, and, indeed, most of them are intended to see that that intent is carried out.

We have received valuable assistance from Mr. Emmanuel Mirth, who has placed his thorough knowledge and understanding of the subject at the Institute's disposal, but who, of course, bears no responsibility for what we have done.

This report, and the draft report which we circulated, are largely the work of Andrew R. Hudson of the Institute's legal staff. Much of the Research was done by Ann DeVillars while she was a student and on the Institute's staff. Mr. David Elliott has given us much help with the drafting of the proposed legislation.