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Builders' Liens in Nova Scotia: Reform of the *Mechanics' Lien Act*

Final Report - June 2003

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act* to *Establish an Independent Law Reform Commission.*

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Law Reform Commission of Nova Scotia

To: The Honourable Jamie Muir
Minister of Justice and Attorney General

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report, ***Builders' Liens in Nova Scotia: Reform of the Mechanics' Lien Act.***

Keith R. Evans
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Commissioner

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LAW REFORM
COMMISSION
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NOVA SCOTIA

Final Report

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Builders' Liens in Nova Scotia: Reform of the *Mechanics' Lien Act*

SUMMARY

A lien is a charge, or claim, which one person has on the property of another as security for the payment of a debt. Builders' lien legislation grants people who perform work, provide services, or furnish materials in relation to real property (land, buildings or other structures) with a lien on the property improved by the lien holders' efforts. The lien comes into existence on the commencement of the lien holders' contribution of work, services, or materials.

Builders' lien statutes are meant to provide builders, suppliers, and others who improve land with some protection against an inability or refusal to pay by the property owner, a contractor or a subcontractor. Confusingly, Nova Scotia's builders' lien statute is known as the *Mechanics' Lien Act*. When this type of legislation was introduced, "mechanic" commonly meant a person who performed manual labour.

Construction projects typically involve a pyramid-like structure of independent contracts. The owner is at the top, the next level is occupied by the general contractor, and additional levels are occupied by subcontractors. For example, a landowner could enter an agreement with a general contractor for the construction of a building. The general contractor could engage the services of specialist subcontractors, who in turn could subcontract aspects of their work. Other people could have contracts to supply materials which are used as part of the project. Payments as part of a construction project are generally made as the work progresses and proceed from top to bottom of the pyramid.

Given the number of contractual relationships that a construction project can involve, one party's inability or refusal to pay can negatively affect numerous people occupying lower positions in the construction pyramid. Prior to the introduction of builders' lien legislation, builders or others working on a construction project would only have had a claim against those with whom they had directly contracted. In the event of a general contractor's inability or refusal to pay, for instance, a subcontractor would have had no claim against the property owner for amounts owing, even though the subcontractor's efforts may have increased the value of the property. Under builders' lien legislation, if lien holders are not paid for their work, the ultimate remedy is that a property may be sold, with proceeds divided among lien holders in priority to certain other creditors. Builders' liens therefore serve as a type of security for people who might otherwise be unable to obtain payment for the value which they have provided.

Selected recommendations for reform

In January 2003, the Commission published a Discussion Paper, *Builders' Liens in Nova Scotia: Reform of the Mechanics' Lien Act*, which contained the Commission's preliminary suggestions on reforming the *Mechanics' Lien Act*. Having taken into account the comments received on the Discussion Paper, the Commission makes a number of recommendations, which include the following:

- The *Act* should be retained, but is in need of improvement.
- The *Act* should apply to the provincial Crown, and holdbacks and liens should apply to Crown construction projects, but not so as to make Crown property liable for sale to satisfy liens. Rather, it should be possible to acquire liens, and to register charges or claims against provincial Crown property, but it should not be possible to sell such property as a result.
- The ability to shelter should be eliminated from the *Act*.
- The time period for registering a lien, and correspondingly, the time period for retaining a holdback, should be extended to 60 days each.
- The right to information in the *Act* should be expanded.
- In order to allow lien holders to preserve their lien claims in the period prior to an arbitration being held, the Uniform Law Conference of Canada model provisions should be adopted in Nova Scotia.
- Trust fund provisions in the context of builders' liens should be adopted in Nova Scotia.
- The Small Claims Court should also have jurisdiction over builders' lien claims up to the value of the Court's monetary jurisdiction (currently $10,000).
- References to ships and vessels should be deleted from the definition of activities giving rise to a lien in the *Act*.
- Sections which make distinctions on one's right to appeal based on the amount of money that is involved should be eliminated.
- The *Act's* title should be changed to the *Builders' Lien Act*.
- Changes to the *Act* should coincide with an informational or educational program, to be provided by the Government.

I. INTRODUCTION

1. The topic

A lien is a charge, or claim, which one person has on the property of another as security for the payment of a debt.[1] *Mechanics' lien* (also known as builders' or construction lien) legislation grants people who perform work, provide services, or furnish materials in relation to real property (land, buildings or other structures) with a lien on the property improved by the lien holders'[2] efforts. The lien comes into existence on the commencement of the lien holders' contribution of work, services, or materials.

The meaning of the term "mechanic" in this context is not restricted to people who work with machinery. Rather, when this type of legislation was introduced, "mechanic" commonly meant a person who performed manual labour.[3] To avoid confusion, in this Report the more meaningful term, "builders' lien" (and related terms) will be used.

Builders' lien statutes are meant to provide builders, suppliers, and others who improve land with some protection against an inability or refusal to pay by the property owner, a contractor or a subcontractor. Prior to their introduction in Canada by statute in the nineteenth century, builders' liens were not part of the common law.[4]

Construction projects typically involve a pyramid-like structure of independent contracts. The owner is at the top, the next level is occupied by the general contractor, and additional levels

[1] S.F. Kneeland, *A Treatise Upon the Principles Governing the Acquisition and Enforcement of Mechanics' Liens* (New York: McDivitt, Campbell & Co., 1876) at 7. "Security" means a thing which makes the enforcement or enjoyment of a right more certain or secure: D.A. Dukelow & B. Nuse, eds., *The Dictionary of Canadian Law* (Scarborough, Ont.: Carswell, 1991) at 967. In the builders' lien context, security would take the form of land, or a payment made into court, in substitution for the land, from which a lien claim may be satisfied.

[2] When referring to people who acquire liens, the terms "lien holder" and "lien claimant" are often used inter-changeably. In the strictest sense, there is a difference in meaning, as someone who holds a lien may choose not to assert a claim based upon that lien. In this Report, for ease of understanding, "lien holder" will be used to refer to all people possessing liens, regardless of whether claims are made on those liens.

[3] See, for instance, the definition of "mechanic" in J.A. Simpson & E.S.C. Weiner, eds., *The Oxford English Dictionary*, 2d ed., vol. IX (Oxford: The Clarendon Press, 1989) at 534.

[4] Peter G. Darby, *Mechanics' Lien: A Study Paper* ([Halifax]: Nova Scotia Law Reform Advisory Commission, 1973) at 8.

are occupied by subcontractors. For example, a landowner could enter an agreement with a general contractor for the construction of a building. The general contractor could engage the services of specialist subcontractors, who in turn could subcontract aspects of their work. Other people could have contracts to supply materials which are used as part of the project. Payments as part of a construction project are generally made as the work progresses and proceed from top to bottom of the pyramid.

Given the number of contractual relationships that a construction project can involve, one party's inability or refusal to pay can negatively affect numerous people occupying lower positions in the construction pyramid. At common law, however, builders or others working on a construction project would only have a claim against those with whom they had directly contracted. In the event of a general contractor's inability or refusal to pay, a subcontractor, for instance, would have no claim against the property owner for amounts owing, even though the subcontractor's efforts may have increased the value of the property. Under builders' lien legislation, if lien holders are not paid for their work, the ultimate remedy is that a property may be sold, with proceeds divided among lien holders in priority to certain other creditors. Builders' liens therefore serve as a type of security for people who might otherwise be unable to obtain payment for the value which they have provided.

2. Definitions

This Report attempts to present legal information as clearly as possible. As some of the language relates to specific legal concepts, the words used may not be familiar to everyone. This section provides definitions of such words used in this Report.

Act — Law made by elected members of government. Also referred to as "statute" or "legislation".

Action — Court proceeding by which a person makes a claim or asserts a right.

Arbitration — Settling of a dispute by an arbitrator, an impartial person chosen by the parties to the dispute.

Builders' lien — A lien granted by legislation to people who perform work, provide services, or furnish materials in relation to land, buildings or other structures improved by the lien holders' efforts. Also known as a "mechanics' lien" or "construction lien".

Chattel lien — A lien available to someone who has performed work, such as repairs, on movable property, distinguished from immovable property, namely land and whatever is attached to it.

Common law	Law developed over the years by judges when making decisions in court.
Construction contract pyramid	The pyramid-like structure of independent contracts that is typical of a construction project.
Crown	The Government and its various departments and agencies.
Holdback	An amount which a person required to pay under a construction contract (the "payor") must retain, for a period determined by statute, from each payment due to the person or persons with whom the payor has a contract. The holdback is withheld to protect people who contract with the person to whom the holdback amount is owed.
Insolvent	Unable to pay one's debts as they become due.
Legal description	A description sufficient to describe a property for the purpose of its registration at a Registry of Deeds.
Legislation	Law made by elected members of government. Also referred to as "Act" or "statute".
Lien	Charge, or claim, which one person has on the property of another as security for the payment of a debt.
Mortgage advance	An amount actually given under a mortgage.
Payor	The person required to pay under a construction contract.
Registry of Deeds	A property registry where documents relating to Nova Scotia land ownership are filed and maintained. People can visit a registry in order to obtain property ownership information.
Security	A thing which makes the enforcement or enjoyment of a right more certain or secure. In the builders' lien context, security would take the form of land, or a payment, made into court in substitution for the land, from which a lien claim may be satisfied.
Set off	A claim by a defendant in a lawsuit that the plaintiff owes the defendant money which should be subtracted from the amount of damages claimed by the plaintiff.

Sheltering How a lien holder who does not meet statutory deadlines for registration or for taking action can still be entitled to a lien. As long as any other lien holder has commenced an action in relation to the same property within the same statutory time limits and has registered a certificate providing details of the action, this may entitle other lien holders to continue with their claims.

Statute Law made by elected members of government. Also referred to as "Act" or "legislation".

Trust fund provision A requirement that money received under a construction contract should be applied first of all to the payment of amounts owed by the recipient to persons immediately below him or her in the construction contract pyramid.

3. Prior reform efforts in Nova Scotia

Builders' lien legislation was introduced in Nova Scotia in 1879.[5] Since 1899, when the first comprehensive statute on builders' liens appeared,[6] for the most part intervening changes have been small in number and adopted in piecemeal fashion. In many respects, the current statute has changed little since 1899.

In 1973, the Nova Scotia Law Reform Advisory Commission (NSLRAC) issued a Study Paper, which Peter E. Darby, a professor at the Faculty of Law, Dalhousie University, had prepared on builders' liens.[7] In a comprehensive and detailed report, Professor Darby identified deficiencies in the Nova Scotia legislation and discussed how it differed from builders' lien legislation in other provinces. Professor Darby did not recommend eliminating the *Mechanics' Lien Act*,[8] but he did propose numerous amendments.

[5] R.S.N.S. 1879, c. 31.

[6] S.N.S. 1899, c. 29.

[7] Darby, note 4, above, at 8, 13.

[8] R.S.N.S. 1989, c. 277 [hereinafter N.S. *Act*].

In 1976, the NSLRAC published a report, which consisted of a draft statute and the content of Professor Darby's study.[9] The draft statute was written by Judge Peter O Hearn,[10] based largely on the recommendations in Professor Darby's study. Following additional consultations with interested parties, including representatives of the Nova Scotia Barristers' Society, the construction industry, and financial institutions, in 1979 the NSLRAC published another report on builders' liens.[11] It also contained an amended version of the earlier draft statute.

The NSLRAC draft statute as a whole was never enacted. Some of the suggested NSLRAC reforms have, however, been implemented since 1976:

- Builders' liens are available to those who rent equipment used on land.[12]
- The current statute contains a definition of "substantial performance," which is used to determine when time begins to run for the release of a statutory holdback.[13]
- The statutory holdback itself has been reduced to 10%.[14]
- A registered mortgage is explicitly given priority over any existing lien for which no claim of lien has been filed at the time that mortgage funds are advanced.[15]
- The situation of wage earners under the statute has been improved.[16]

[9] Nova Scotia Law Reform Advisory Commission, *Report to the Attorney General of the Nova Scotia Law Reform Advisory Commission on Builders' Liens* (Halifax: Queen's Printer, 1976) [hereinafter 1976 NSLRAC Report].

[10] Nova Scotia Law Reform Advisory Commission, *Fourth Annual Report: 1975-1976* (Halifax: [Queen's Printer, 1976]) at 6.

[11] Nova Scotia Law Reform Advisory Commission, *Report to the Attorney General of the Nova Scotia Law Reform Advisory Commission on Builders' Liens* (Halifax: Queen's Printer, 1979) [hereinafter 1979 NSLRAC Report].

[12] N.S. *Act*, note 8, above, s. 6(2).

[13] Substantial performance is discussed below at Part II.6.

[14] The holdback amount was formerly 20%, except where the contract price or actual value of work exceeded $15,000, in which case the holdback was 15%: R.S.N.S. 1967, c. 178. The concept of holdbacks is discussed below at Parts II.6 and 8.

[15] N.S. *Act*, note 8, above, s. 23(2). A mortgage advance is an amount actually given under a mortgage: R.S. Vasan, ed., *The Canadian Law Dictionary* (Don Mills, Ont.: Law and Business Publications Canada Inc., 1980) at 28.

[16] Note 8, above, s. 16.

There have been no amendments to the Nova Scotia statute since 1984. In 2001, a private member's bill would have required mortgage advances against construction projects to be held in trust for tradespeople.[17] The bill did not proceed beyond the first reading stage.

4. Other reform efforts in Canada

Since the 1960s, the topic of builders' liens has been a popular one, engaging the interest of law reform bodies or legislatures in most other Canadian jurisdictions. For instance, in Ontario, law reform commission reports led to substantial changes to that province's *Mechanics' Lien Act* in the 1960s. In the same decade, the report of an Alberta public inquiry also resulted in substantial amendments to Alberta's builders' lien statute, but in Saskatchewan, the recommendations of a public inquiry on builders' liens were not followed.[18] In 1977, the Institute of Law Research and Reform at the University of Alberta published a report on remaining problems with that province's *Builders' Lien Act*,[19] the Manitoba Law Reform Commission published a report on builders' lien legislation in 1979,[20] while the topic of builders' liens was studied again in Saskatchewan in the 1980s.[21] Builders' liens have also been the subject of reports by other law reform bodies or government branches: British

[17] Bill No. 44, *Mechanics' Lien Act (amended)*, 2d Sess., 58th General Assembly, 2001 (1st reading 2 May 2001). Trust fund provisions are discussed below at Part III.7.

[18] Law Reform Commission of British Columbia, *Report on Debtor-Creditor Relationships: Part II - Mechanics' Lien Act: Improvements on Land* ([Vancouver: Department of Attorney General], 1972) at 18-19.

[19] University of Alberta, Institute of Law Research and Reform, *The Builders' Lien Act: Certain Specific Problems* (Edmonton: The Institute, 1977).

[20] Manitoba Law Reform Commission, *Report on Mechanics' Lien Legislation in Manitoba* (Winnipeg: The Commission, 1979).

[21] Saskatchewan, Special Advisory Committee to the Minister of Justice on Builders' Liens, *Liens in the Construction Industry* (Regina: Saskatchewan Justice, [1984]).

Columbia (1972);[22] Northwest Territories (1989);[23] Newfoundland (1990);[24] and New Brunswick (1992).[25]

In 1960, the Conference of Commissioners on Uniformity of Legislation in Canada, predecessor to the Uniform Law Conference of Canada (ULCC),[26] resolved that the subject of a uniform *Mechanics' Lien Act* should be discontinued from its agenda.[27] The Conference had devoted many years to the preparation of a series of draft statutes, but had been unable to achieve a consensus. In the 1990s, however, the ULCC returned to the topic of builders' liens, in the context of arbitration, there being a concern that lien holders' statutory remedies might conflict with arbitration procedures. Arbitration statutes generally require that court proceedings be stopped (stayed) while an arbitration is in process. On the other hand, lien statutes contain mandatory time limits for the commencement and trial of an action to enforce a lien. The ULCC's efforts resulted in the 1998 model *Liens and Arbitration Provisions Act*.[28]

With the exception of Nova Scotia, all of the Atlantic Canadian provinces have made amendments to their builders' lien statutes as recently as the 1990s.[29] Some people therefore believe that the Nova Scotia statute is not being kept as up-to-date as similar legislation in other parts of Atlantic Canada. Examples of legislative initiatives in other parts of Canada

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[22] Note 18, above.

[23] Northwest Territories, Committee on Law Reform, *Mechanics' Lien Law in the Northwest Territories: Final Report* ([Yellowknife]: The Committee, 1989).

[24] Newfoundland Law Reform Commission, *Report on the Mechanics' Lien Act: Certain Substantive Issues* (St. John's: The Commission, 1990).

[25] New Brunswick, Law Reform Branch, Office of the Attorney General, *The Mechanics' Lien Act: Time For Repeal?* ([Fredericton: Office of the Attorney General], 1992).

[26] The Uniform Law Conference of Canada (ULCC) is an independent organization which promotes the uniformity of legislation in Canada concerning subjects for which uniformity may be found possible and advantageous.

[27] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Forty-second Annual Meeting* (Quebec, Que., 1960) at 25.

[28] Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Halifax, N.S., 1998), Appendix D.

[29] New Brunswick last amended its statute in 1994 (S.N.B. 1984, c. 26), Newfoundland last changed its statute in 1999 (S.N. 1999, c. 22), and Prince Edward Island's most recent amendment is from 1996 (S.P.E.I. 1996, c. 28).

include the Ontario legislation being substantially changed in 1983, Saskatchewan enacting major changes in 1986, Manitoba creating a new statute in 1987,[30] and British Columbia adopting a new Act in 1997.[31]

5. Development of the project

Since 1993, the Commission has received a number of letters suggesting that the *Mechanics' Lien Act* should be reformed. The Commission is also aware that the Nova Scotia branch of the Canadian Bar Association has long considered builders' lien legislation as a suitable reform topic.[32] In 1999, the Commission first selected this topic as the basis for a project, but limited resources and other commitments prevented the Commission moving forward on this subject until recently.

The construction industry forms an important part of the Nova Scotia economy. In the Commission's view, Nova Scotia's laws should facilitate the well-being, good management, and fair operation of this industry, one which touches many lives. In addition to people in the construction trade, the *Mechanics' Lien Act* is of importance to commercial and real property lawyers, employees of certain government departments, financial institutions, architects, engineers, and individual property owners. The *Mechanics' Lien Act* is more than 100 years old, and in some respects, has remained unchanged for all of its lifespan. Given these circumstances, the Commission considered it appropriate to examine the *Mechanics' Lien Act* in detail and where suitable, to make proposals for reform.

Further to the Commission's general practice, it formed an Advisory Group to help identify issues relevant to a discussion of possible reforms to the *Act*. The Advisory Group consisted of people with experience in aspects of the construction industry. The Group included members from the building trade, the construction law Bar, financial institutions, and the architectural profession. The Group met in June and September, 2002, in order to review background materials prepared by Commission staff and to discuss problems with the statute, as well as possible remedies. The Commission is grateful for the participation and suggestions of the Advisory Group members. A list of the Advisory Group members is provided at Appendix B.

In January 2003, the Commission published the Discussion Paper, ***Builders' Liens in Nova Scotia: Reform of the Mechanics' Lien Act.*** Copies of the Paper were sent, among others,

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[30] D.N. Macklem & D.I. Bristow, *Construction Builders' and Mechanics' Liens in Canada*, 6th ed., vol. 1 (Toronto: Carswell, 1990) at iii, 1-5.

[31] British Columbia, *Builders' Lien Act*, S.B.C. 1997, c. 45.

[32] See, for example, K.A. MacDonald, "Legislation and Law Reform - The Results" (1995) 13(3) Ad Hoc 1.

to representatives of construction industry organizations, House of Assembly members, judges, executives of the Nova Scotia Barristers' Society and the Canadian Bar Association - Nova Scotia Branch, as well as to university and public libraries. The Commission sent an announcement about the Discussion Paper to the province's newspapers, as well as to radio and television stations. CBC Radio, the *Chronicle Herald* (Halifax), the *Lawyers' Weekly*, *InForum* (Nova Scotia Barristers' Society), and the website for the Construction Industry of Nova Scotia are among the media which mentioned the availability of the Discussion Paper.

The Discussion Paper made a number of proposals for reforming the *Mechanics' Lien Act*, including: extending the *Act*'s application to the provincial Crown; eliminating the ability to shelter ("piggy-backing" on another lien claim that has been made in time); expanding the right to information; adding certain guidelines for the arbitration of a builders' lien dispute; adopting trust fund provisions; and changing the *Act*'s title to the *Builders' Lien Act*. The Discussion Paper also invited comments on such issues as abolishing the *Act*, making non-compliance penalties part of any proposed trust fund provisions, and making the builders' lien system simpler, without reducing its effectiveness. Appendix A lists all Discussion Paper proposals.

The Discussion Paper was well-received. A list of persons who commented on the Discussion Paper is provided at Appendix B to this Final Report. Most commentators who contacted the Commission agreed with the Paper's proposals. Disagreement with the Paper was confined to a small number of issues. Some commentators also suggested aspects which had not been included in the Discussion Paper.

Having taken into account the comments received, and where appropriate, having completed additional research, the Commission has prepared this Final Report.

The next part of this Report provides general information on builders' liens. Part III contains discussion of specific issues, as well as recommendations for reform.

II. GENERAL INFORMATION

1. What are builders' liens?

A lien is a charge, or claim, which one person has upon the property of another as security for the payment of a debt.[33] Builders' lien legislation grants people who perform work, provide

[33] Note 1, above. This section is not meant as an exhaustive discussion of builders' lien law. Rather, it is meant to provide an introduction to sections of the *Act* and related concepts relevant to the Commission's recommendations for reform.

services, or furnish materials in relation to land, buildings or other structures with a lien upon the real property improved by the lien holders' efforts. The range of identified relevant work or services is quite wide. At s. 6, the *Act* refers in part to "making, constructing, erecting, fitting, altering, improving, or repairing" in relation to land and a variety of structures or improvements.[34] People who rent equipment that is used to perform relevant work are also entitled to liens.[35] More generally, section 6 provides a lien to "any person who performs any work or service upon or in respect of ... land." Section 6 of the *Act* therefore employs such general language that on a literal level, services provided in relation to land, but not of a construction nature, would seem to qualify as giving rise to a lien.

Important direction, however, about what type of activity gives rise to a lien was provided by O Hearn, J. in *Thompson and Purcell Surveying Ltd.* v. *Burke*.[36] This case involved a lien claim by a surveyor. O Hearn, J. agreed that if taken literally, it was "perfectly rational" to derive from then-s. 5 (now s. 6) the proposition that the section provided a lien for any person who performed any service upon or in respect of any land for any owner. Following a review of the case law, O Hearn J. concluded, however, that certain activities within the literal meaning of s. 5 were not meant to be included. He suggested agriculture as one example. Generally, he stated, "all activities constituting ordinary user of the land and its facilities in production or enjoyment would usually fall outside the scope of the *Act*." O Hearn J. suggested this was the reason why mines and mining had to be expressly included in the statute, as those activities were more analogous to agriculture and forestry than to construction work. In order for a lien to arise, O Hearn J. held that the statute required "something in the nature of a structure or improvement on the land," either "underway or at least in contemplation." The structure or improvement did not have to involve an increase in the land's value.[37]

[34] N.S. *Act*, note 8, above, s. 6(1).

[35] Note 8, above, s. 6(2).

[36] (1977), 39 NSR (2d) 181 (Co. Ct.)

[37] Note 36 , above, at 194. Also of note in this context is *Girard* v. *Shaunslieve Development Corp.* (1981), [1981] NSJ No. 108 (N.S. Co. Ct.), online: QL (NSJ), which involved a claim for wrongful dismissal and a claim for salary and other benefits. The plaintiff brought his action under the N.S. *Mechanics' Lien Act.* It was necessary for O Hearn J. to discuss the nature of the plaintiff's work activities. Where the activities related to matters of a maintenance nature, O Hearn J. held that it was not appropriate to pursue such claims under the N.S. *Act*. For example, the plaintiff mentioned having trained a building superintendent to operate a carbon dioxide testing machine for the building's boilers. O Hearn J. commented: "The last mentioned item would not, I think, give rise to a lien, as this machine would seemingly be used in maintenance rather than construction." (para. 74)

2. When do builders' liens arise?

For the most part, builders' liens come into being upon the commencement of work, services or materials provided to a construction project.[38]

3. Restrictions on application

The *Act* does not affect either the federal or provincial Crown.[39] It also does not apply to "any public street or highway," nor to any work done or ordered by a municipal corporation on a public street or highway.[40]

4. Registering a lien & starting a legal action

Although liens are created automatically, upon the commencement of work, services, or the supply of materials, a lien holder must take certain steps in order to benefit from a lien. If the steps are not taken in time, then one's right to a lien will ordinarily expire.[41] On a practical level, the first step will be for a lien holder to provide written notice to the owner of the property involved. This notice should cause a reasonable property owner to stop making payments to the general contractor, following which payments throughout the construction contract pyramid should also cease. A lien holder must then register a lien at the Registry of Deeds[42] for the district where the relevant real property is located. The *Act* specifies relevant periods during which a lien is to be registered. For example, a contractor or subcontractor

[38] Darby, note 4, above, at 50. S. 24(1) of the N.S. *Act* allows contractors and subcontractors, in cases not otherwise provided for in the *Act*, to register a lien claim before the performance of their contracts. Similarly, under s. 24(2), a lien claim involving materials may be registered before the materials are provided.

[39] Note 4, above, at 28. The term "Crown" refers to the Government and its various departments and agencies: adapted from J.A. Yogis, *Canadian Law Dictionary*, 4th ed. (Hauppauge, N.Y.: Barron's, 1998) at 68. The authority which represents Canada as a whole is often referred to as the federal Crown, while the authority which represents Nova Scotia as a whole is often referred to as the provincial Crown.

[40] N.S. *Act*, note 8, above, s. 3.

[41] Note, however, the concept of sheltering, in the next section.

[42] A Registry of Deeds is a property registry where documents relating to Nova Scotia land ownership are filed and maintained. People can visit a registry in order to obtain property ownership information: Nova Scotia, Service Nova Scotia and Municipal Relations Website, *Property Registries in Nova Scotia* <http://www.nsbs.ns.ca/registry2000/land_reg_broch.pdf> (date accessed: 5 June 2003).

may register a lien before a contract is performed, during its performance, or within 45 days after the contract is completed or abandoned.[43]

The simple act of giving notice of a lien claim or of registering a lien might create enough pressure for a lien claimant to obtain payment, even if not from a person directly liable under contract to pay the lien claimant.[44] If not, then the next step is to begin a legal action against the owner of the real property involved, as well as against the person by whom one is owed money under a construction contract. An action is a court proceeding by which a person makes a claim or asserts a right. For the most part, lien holders will have 90 days from the time of completing work in which to take such action. If a lien holder has extended credit to an owner or contractor, it seems that the lien holder will have up to 90 days after expiry of the credit period in which to commence an action, if the credit period is mentioned in the claim for lien.[45] If the relevant contract is being supervised by an architect, engineer, or other person who issues certificates to approve payment, then an action must be taken within 30 days of registering a claim.[46] When the action is begun, the lien holder will receive a certificate, known as a *lis pendens*, which is also to be registered at the relevant Registry of Deeds.[47]

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[43] N.S. *Act*, note 8, above, s. 24(1).

[44] S. 14 of the N.S. *Act* contemplates that where someone is entitled to a lien for payment of a debt in relation to work, services, or materials, an owner, contractor or subcontractor might step forward and pay the lien holder. The amount paid to the lien holder will in turn be treated as a payment under the contract between the owner, contractor, or subcontractor who stepped forward and the person directly liable by contract to the lien holder.

[45] The relevant section of the N.S. *Act,* s. 26(1), is confusing. One interpretation is that a lien holder's time in which to register will be 90 days, plus whatever remains of any credit period that has been granted. Darby, note 4, above, at 82 , as well as Macklem & Bristow, note 30, above, accept this interpretation. In *Atlantic Paving Co. Ltd.* v. *Cameron Properties Ltd.*, [1955] 2 D.L.R. 731, at 736, in considering a similar provision from the 1952 New Brunswick *Mechanics' Lien Act*, the N.B. Court of Appeal held that the 90 day period for expiry of a registered lien would begin at the expiry of any period of credit. H.J. Kirsh, ed., *Construction Liens Across Canada* ([Toronto]: Canadian College of Construction Lawyers Inc., [2000]), however, suggests (page 94) that an action must be commenced within the credit expiry period.

[46] N.S. *Act*, note 8, above, s. 26(1).

[47] Note 8, above, s. 25.

5. Sheltering

A lien holder who does not meet the relevant statutory deadlines for registration or for taking legal action will not necessarily be deprived of a lien. Rather, if any other lien holder has commenced an action in relation to the same property within the same statutory time limits and has registered a certificate providing details of the action, this may entitle other lien holders to continue with their claims.[48] This concept is known as "sheltering" or sometimes the "umbrella principle."[49] In addition to benefitting lien holders who haven't registered, sheltering can be used to preserve claims by lien holders who have registered a lien, but who have failed to begin a court action within the statutory time period. As long as at least one lien holder has taken action within the same allotted time frame and has registered the relevant certificate, the claims of other lien holders may be preserved.[50]

6. Retention of holdbacks

The person required to pay under a construction contract ("the payor") must retain, for a period determined by the statute, a certain percentage from each payment due to the person or persons with whom the payor has a contract. The amount retained, known as a holdback, is withheld to protect people who contract with the person to whom the holdback amount is owed.[51] Participants in a construction project are entitled to a charge, or claim, on the holdback amount set aside for them.[52] This means that in the event of non-payment, they will be able to sue not only the person with whom they contracted, but also the person who engaged by contract the person with whom they contracted.[53]

In Nova Scotia, the payor under a construction contract is required to retain 10% from the value of each payment made under the contract, with this amount to be retained until 45 days after "substantial performance".[54] Substantial performance occurs when the work or improvement is ready for use, or is being used for the intended purpose, and when any remaining work can

[48] Note 8, above, s. 25.

[49] Darby, note 4, above, at 84.

[50] N.S. *Act*, note 8, above, s. 26(1).

[51] Darby, note 4, above at 38.

[52] N.S. *Act*, note 8, above, s. 13(4).

[53] Darby, note 4, above, at 36.

[54] N.S. *Act*, note 8, above, s. 13(2).

be completed at a cost of 2.5% or less of the contract price.[55] Once 45 days have elapsed after substantial performance, the payor is entitled to release 75% of the holdback funds, with the remaining 25% to be released 45 days after all the required work is performed completely.[56]

The holdback scheme can be better understood with the help of the diagram on the next page. Imagine that the property owner (O) wishes to have a building constructed on his or her property. O contracts with a general contractor (G) who will coordinate construction of the building. The total price for this main contract is $150,000. From each payment to G, O will deduct 10%. At the end of the project, assuming that all required payments have been made, O will have retained a total of $15,000 in holdbacks.

G also contracts with 3 subcontractors (S1, S2 and S3) to complete major aspects of the building. Each of the subcontracts is for $40,000. From each subcontract, G will then deduct a 10% holdback, or $4,000. Assume also there is a fourth level in this construction pyramid, as each subcontractor engages a sub-subcontractor (SS1, SS2 and SS3). The total amount of each sub-subcontract is $10,000, resulting in a 10% holdback of $1,000 each.

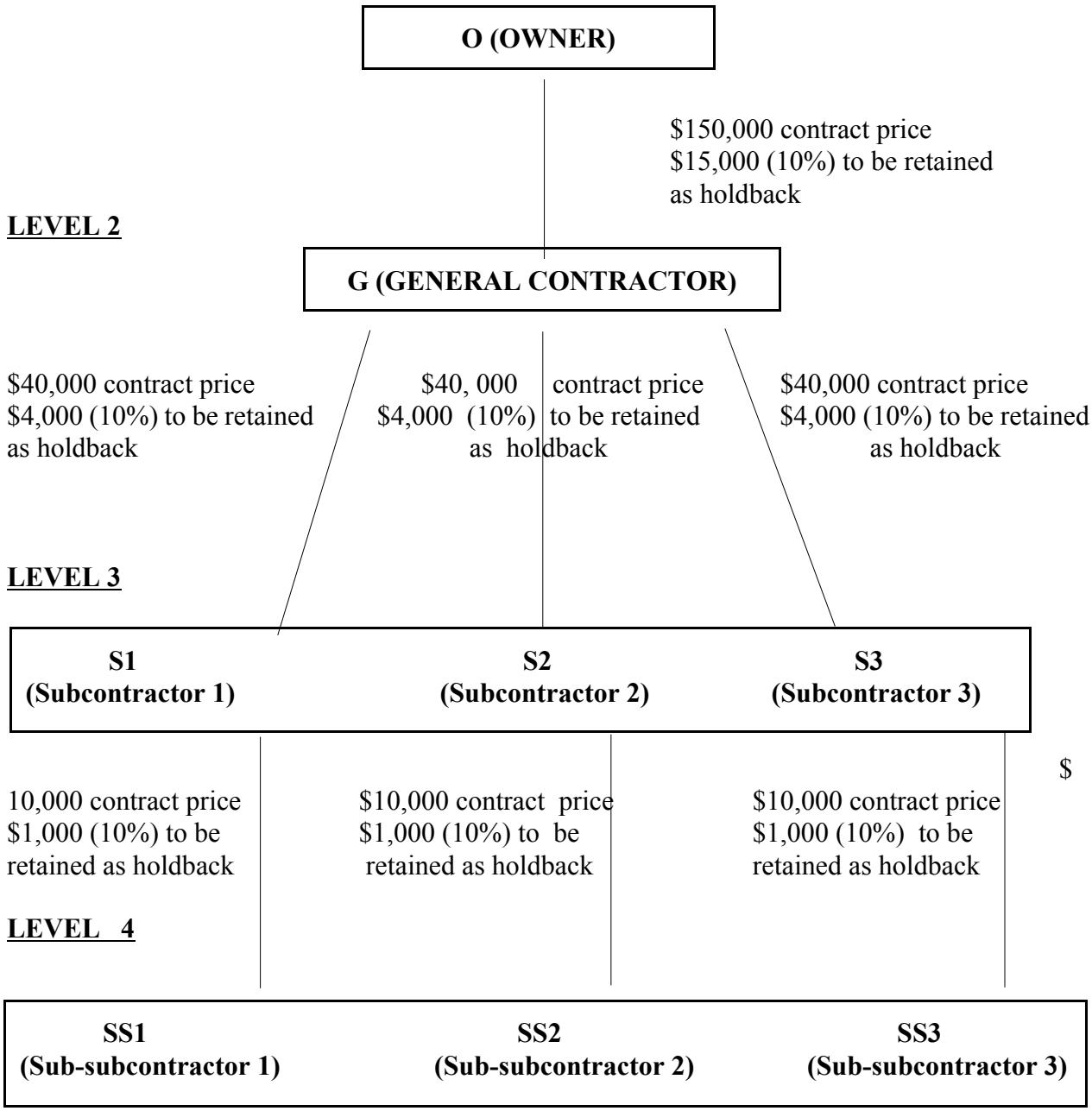
Holdbacks do not function solely as a benefit to people owed money under a construction contract. It would not be reasonable to expect a payor to be responsible, in addition to meeting payments due under his or her own contract, to pay all amounts which might remain outstanding under contracts which apply at levels below the payor in a construction pyramid. A payor may have no knowledge of how many other people are involved in a construction project. For instance, a property owner may not be aware of how many subcontractors have been engaged. Moreover, a payor will have no control over the amounts paid under a contract to which the payor is not a party. Holdbacks therefore operate in conjunction with another feature of mechanics' lien legislation, namely that the amount which a payor owes under a contract will also be the maximum amount to which a payor could be held liable, by virtue of liens, to parties with whom the payor has no direct contractual link. The holdback is one possible maximum amount for which a payor could be liable to others, occupying lower levels of the construction pyramid, with whom the payor has not contracted directly. If, however, the payor owes an amount larger than the statutory holdback, then lien holders will be entitled at most to that higher amount.[57]

[55] Note 8, above, s.13(1).

[56] N.S. *Act*, note 8, above, s. 13(2). The remaining 25% of the holdback amount (2.5% of the total contract amount) is sometimes referred to as the "finishing holdback": Kirsh, note 45, above, at 92.

[57] Macklem & Bristow, note 30, above, at 4-39.

SAMPLE CONSTRUCTION CONTRACT PYRAMID



Returning to the diagram, for example, assuming compliance with the statute, O's maximum possible exposure for lien claims from parties below level 2 will be $15,000, unless O owes a higher amount. If a higher amount is owing, then the maximum amount for which O would be liable for liens would be that amount.

Holdbacks therefore serve a dual role: helping to ensure that a certain amount will be available to help pay participants in a construction project, and setting out a possible maximum extent to which a party in a construction project could be held liable to other participants lower in the construction pyramid, with whom there is no direct contractual link.

7. Trust fund provisions

In addition to lien and holdback provisions, the legislation in some jurisdictions, though not in Nova Scotia, makes construction contract funds subject to a "trust". A trust is an entity that holds assets for the benefit of certain persons. The person with responsibility for the assets is the trustee. The person for whose benefit the trust operates is the beneficiary.[58] The basic principle behind a trust fund provision is that money received under a construction contract should be applied first of all to the payment of amounts owed by the recipient to persons immediately below him or her in the construction contract pyramid. A recipient of funds will only be entitled to apply the funds received to their own purposes when they have paid other people to whom they owe money under a construction contract. Trust fund provisions are meant to ensure that money meant in part to pay people at lower levels in the construction contract pyramid actually reaches those people.

8. Distribution of holdbacks

A person at one level of the construction pyramid might have contracts with multiple parties on the next level. This means that someone on a higher level could retain multiple holdbacks for the benefit of people on a lower level. For instance, in the diagram, G retains three separate holdback amounts, $4,000 from each of S1, S2, and S3. These amounts are withheld in order to meet claims by the sub-subcontractors at Level 4. Should one of the Level 4 parties make a claim for holdback money retained by G, he or she would be restricted to that portion of the holdback which has been withheld from the person with whom he or she has contracted.[59] As an example, SS1 would make a claim against G for a portion of the $4,000 withheld from S1, rather than the $12,000 which G has retained in total from the parties at Level 3.

[58] S.H. Gifis, *Dictionary of Legal Terms*, 3d ed. (Hauppauge, N.Y.: Barron's, 1998) at 510.

[59] Darby, note 4, above, at 38-39.

People who are owed money which has been withheld to provide holdbacks for others will only be able to claim that money when those people lower in the construction pyramid, and for whose benefit the holdback has been retained, have been paid or their liens have expired.[60] Returning to the diagram, this means, for example, that S2 will not be able to claim any of the $4,000 that G has retained until SS2 has been paid, or his or her lien has expired.

9. Continuing with a lien action

If a party to a construction project remains unpaid, despite having attempted to receive payment from a holdback, that person can then pursue a lien action against the owner of the land improved through the lien holder's efforts.[61] Using the diagram to provide an example, assume that SS3 approaches S3 for payment but is told that S3 is unable to pay what is owing on its contract. SS3's next step would be to claim against the $4,000 holdback which G is supposed to have withheld. If G, however, is unable to pay, as for instance through insolvency,[62] then without additional recourse, SS3 would have no means of receiving payment. A lien on the owner's land can provide SS3 with another possible means of getting paid.

It is by no means inevitable, though, that a lien action will lead to the affected land being sold to satisfy the claim. Like any other participant in the construction contract pyramid, the property owner who complies with the *Act* will only be liable to those below him or her in the pyramid to the amount of the 10% holdback, or if applicable, to any higher amount owing. Only in cases where the owner is not in a position to pay the amount owing might it be possible to sell a property by court order to meet the claims of lien holders.

A property owner faced with a lien action will generally apply to court under s. 28(4) of the *Act* for an order to "vacate" the lien. Under this procedure, the owner pays an amount (in the form of money or bond) to the court. The amount paid is meant to cover the owner's potential obligation to pay the lien claimant. In exchange for the financial security provided by the owner, the court will issue an order whereby the lien claim is removed from the owner's

[60] Note 4, above, at 39.

[61] Assuming the requirements to register a lien and to take action within the statutory periods were satisfied.

[62] Insolvency is the inability to pay one's debts as they become due: Dukelow & Nuse, note 1, above, at 520-521.

land. The lien claim does not disappear. Rather, it is transferred to the fund of money provided by the owner to the court. This procedure benefits the owner, by unburdening his or her real property from a lien claim and provides comfort to a lien claimant, in the form of a fund to meet his or her claim.[63]

If a lien holder, for whatever reason, is unable to establish a lien claim, this does not mean that the debt owing to the lien holder no longer exists. Rather, the lien holder will still be entitled to seek judgement against the party with whom he or she has contracted.[64]

10. Application outside of land

Over the years, the Nova Scotia statute developed some curious features. It is not entirely restricted to claims against land or buildings. For example, it refers to a lien against a ship.[65] Secondly, the statute refers to chattel liens, in other words liens on movable property, distinguished from immovable property, land and whatever is attached to it. The statute entitles someone who has altered and improved movable property, such as a car, with the right to sell the item if he or she has not been paid for three months. The majority of the *Act*'s sections relate to liens on land and have no connection to a chattel lien. For the most part, this Paper will be confined to liens on land, though chattel liens are discussed below at Parts III.9 and 10.[66]

III. RECOMMENDATIONS FOR REFORM

1. Is the *Act* necessary?

In 1976, the NSLRAC preferred reform over abolition of the *Act*. The NSLRAC suggested there remained a need for a lien "... in the case of builders and material men who have no direct remedy against an insolvent owner or contractor, and that it is fundamentally just they should be able to maintain a claim against the product of their work and materials until the claim is satisfied." Moreover, the NSLRAC suggested that even in an instance where a builder

[63] The process for vacating a lien is described in *Tri-Corp General Contracting and Sales Ltd.* v. *Oceanside Construction Ltd.* (1988), 87 N.S.R. (2d) 332 (N.S.S.C.A.D.).

[64] N.S. *Act*, note 8, above, s. 46.

[65] Note 8, above, s. 6(1).

[66] One of the Commission recommendations, found at Part III.9, is that the portion of the *Act* involving chattel liens should be relocated to a more appropriate statute.

could sue an owner directly, "...it seems equally just that he should have the right to have what he has built sold to pay him off before other creditors."[67]

In preparing the Discussion Paper, the Commission assumed that the *Act*, though in need of certain changes, should be retained. Prior to undertaking this project, communications received by the Commission referred to the need for the *Act*'s reform, rather than its abolition. Advisory Group members also did not propose, nor even debate, abolition of the *Act*. As a result, the Discussion Paper did not discuss in any detail the possibility of abolishing the *Act*. However, the Commission still wished to bring this issue to the attention of readers. As a result, the Discussion Paper invited comments on whether it would be feasible to abolish the *Mechanics' Lien Act*, rather than to amend it.

Comments received on the Discussion Paper were overwhelmingly in favour - explicitly or implicitly - of retaining builders' liens in Nova Scotia. For instance, one commentator suggested that the *Act* "performs a valuable function for tradespeople when their employer fails to pay or becomes insolvent." The only commentator who was not a supporter of builders' liens acknowledged that their abolition now would likely not be feasible. The Commission is not aware of any sizeable support in Nova Scotia for the position that the builders' liens system is no longer needed. As a result, the Commission recommends that the *Act* should be retained. However, as will be developed in the rest of this Report, the Commission is also of the view that the *Act* is in need of improvement.

The Commission recommends:

- The *Act* should be retained, but is in need of improvement.

2. Application to provincial Crown & municipal authorities

In Nova Scotia, as in other provinces, the authority which represents the province as a whole is often referred to as the provincial Crown. At common law, a statute will only bind the Crown if express words or the context makes it clear that the Crown is meant to be bound.[68] This rule is reflected in s. 14 of the Nova Scotia *Interpretation Act*, which states that the Crown

[67] 1976 NSLRAC Report, note 9, above, at 2.

[68] P.W. Hogg, *Constitutional Law of Canada*, 4th ed., vol. 1 (Scarborough, Ont.: Carswell, 1997) at 10-13 to 10-14.

will not be bound by legislation "unless it is expressly stated therein that [the Crown] is bound thereby."[69] As a result, the *Mechanics' Lien Act*, which does not mention application to the Crown, imposes no lien or holdback obligations on the Crown. Since the holdback provisions depend on the availability of a lien, and as there is no lien possible on Crown lands, neither the holdback nor the lien provisions are compulsory in relation to Crown construction projects.

As an added restriction in the context of public property, the Nova Scotia statute does not "extend to any public street or highway." Although the *Act* in general applies to municipal authorities, this is not so in relation to "any work or improvement done or caused to be done by a municipal corporation" on a public street or highway.[70]

The draft *Act* proposed in 1979 by the NSLRAC would have applied to the Crown, but not so as to make public land liable for sale. The draft *Act* would also have allowed a lien holder to recover judgment against the Crown for the amount of his or her lien.[71]

The Discussion Paper took the position that the provincial Crown should no longer be free from obligations under the *Act*. The provincial Crown is a significant property owner, the Commission suggested, indistinguishable in many respects from other commercial interests.[72] The Commission also pointed out that as the provincial Crown already tends to comply voluntarily with the holdback provisions of the *Act*, it should suffer no ill effects from this being made an explicit obligation. To continue to treat the Crown differently, the Commission added, could also lead to confusion in instances where "private-public partnerships" are established to build and operate certain facilities, such as schools. The Commission therefore suggested that as far as is reasonable, the provincial Crown should be treated like any other owner under the *Act*. As, however, certain property, such as roads and government buildings, is of vital interest to the province as a whole, the Commission thought it would be inappropriate to make provincial Crown property liable for sale to satisfy liens under the *Act*. Rather, the Discussion Paper suggested, it should be possible to acquire liens, and to register charges or claims against provincial Crown property, but it should not be possible to sell such

[69] R.S.N.S. 1989, c. 235.

[70] N.S. *Act*, note 8, above, s. 3.

[71] 1979 NSLRAC Report, note 11, above, at 5.

[72] The building of the Lingan power plant for Nova Scotia Power, then a provincial Crown agency, illustrated the potential for unfair results through the non-application of liens and holdbacks to Crown projects. In 1981, Mr. William Gillis, MLA for Antigonish, who supported extending the *Act's* application to the provincial Crown, suggested that subcontractors involved in construction of the power plant had been unable to collect some $218,000 (1981 dollars) in amounts owing to them: Nova Scotia, House of Assembly, *Debates* (22 May 1981) at 3509-3510.

property as a result. Consistent with the proposal to extend the *Act*'s application to the provincial Crown, but with public property not to be sold to satisfy obligations under liens legislation, the Discussion Paper did not see a need to retain the current restriction against the *Act* being applied to work on public streets or highways.

The Commission affirms its conclusions and reasons on this issue from the Discussion Paper. In terms of the requirement for holdbacks, there seems to be no strong reason to treat the provincial Crown differently from other property owners contracting for construction work. The Commission understands that holdback requirements already tend to be incorporated into construction contracts used by the provincial Crown. Making the *Act* apply to the Crown should also help to lessen possible confusion about the applicability of holdback payments and lien rights to a particular project, as all construction projects would operate under the same requirements. As one commentator suggested, recent innovations in the financing of construction projects, such as the use of "public/private partnerships," mean that the legal status of a building or other improvement being constructed may change over the course of construction work. This could create uncertainty or confusion that could be avoided by establishing a single set of rules for holdbacks and liens.

Although the Crown may not be distinguishable from other property owners in terms of contracting for construction work, the nature of Crown property, which is owned and operated for the benefit of all Nova Scotians, does set it aside. It would not be appropriate to have a Crown property such as a hospital or bridge sold for non-payment of a lien claim. As a result, though the Commission takes the view that holdbacks and liens should apply to provincial Crown construction projects, and that it should be possible to register a charge or claim against provincial Crown property, a successful claimant who obtains a judgment in court against the Crown should not be able to have the Crown property sold to pay the amount of his or her claim.

The Commission therefore recommends that the *Act* should apply to the provincial Crown, but not so as to make Crown property liable for sale to satisfy liens. Holdbacks and liens should apply to Crown construction projects, and it should be possible to register charges or claims against provincial Crown property, but that property could not be sold to satisfy the amount of a successful claim in court.

Consistent with its recommendation about extending the *Act* to apply to the provincial Crown, the Commission also recommends that the *Act* should apply to construction work relating to public streets or highways. Moreover, the Commission understands that in many cases, public streets are being completed by private developers and eventually transferred to the Crown or municipality. During the transfer process, confusion may arise about whether liens acquired against a private developer are applicable against the Crown. To avoid potential confusion and unfairness, the current restriction against the *Act* applying to work on public streets or highways should be removed.

The Commission recommends:

- The *Act* should apply to the provincial Crown, and holdbacks and liens should apply to Crown construction projects, but not so as to make Crown property liable for sale to satisfy liens. Rather, it should be possible to register charges or claims against provincial Crown property, but that property should not be sold to satisfy the amount of a successful claim in court.

- The current restriction against the *Act* applying to public streets or highways should be removed.

3. Sheltering

A lien holder who fails to register his or her lien within the relevant statutory period is not necessarily deprived of the lien. Rather, if any other lien holder has commenced an action in relation to the same property within the same statutory time limits and has registered a certificate providing details of the action, this will entitle other lien holders to continue with their claims.[73] This concept is known as "sheltering" or sometimes the "umbrella principle." In addition to benefitting lien holders who haven't registered, sheltering can be used to preserve claims by lien holders who have registered a lien, but who have failed to commence a court action within the required time period. As long as at least one lien holder has begun an action in time and in relation to the same property, and has registered the relevant certificate, the claims of other registered lien holders subject to the same time limits may be preserved.[74]

Sheltering by unregistered lien holders is unique to Nova Scotia. This concept was dispensed with in Ontario in 1970 and eliminated from Saskatchewan legislation in 1986.[75] The majority of provinces, though, allow a registered lien holder to preserve his or her lien by sheltering

[73] N.S. *Act*, note 8, above, s. 25.

[74] Note 8, above, s. 26(1).

[75] Macklem & Bristow, note 30, above, at s. 73.

under an action commenced by another person against the same property within the same applicable time limit.[76]

The 1979 NSLRAC *Act* would have eliminated sheltering in instances where no registration had taken place. The NSLRAC reasoned that to allow sheltering by unregistered lien holders caused undue delays in the release of holdback. The 1979 *Act* would, however, have retained sheltering to prevent the expiry of a registered lien. The NSLRAC considered sheltering in that context to be advantageous in bringing lien holders before a court without multiplying actions.[77]

The Discussion Paper proposed that sheltering should be eliminated from the *Act*. Sheltering, it was suggested, can be unfair to those lien holders who diligently and punctually pursue their claims. By providing a second chance, it was also suggested, sheltering can encourage people not to comply with all of the *Act*'s requirements.

The Commission remains of the view that sheltering should not be part of the *Act*. Sheltering can serve as a disincentive for lien holders to make their claims in a timely fashion. It tends to add complexity and uncertainty to the builders' liens system. The Commission also takes the view that other Report proposals, relating to an extended time period for filing liens, trust provisions, improved information rights and access to the Small Claims Court, all of which should result in a system which is fairer and easier for lien holders, will diminish the need for sheltering.

The Commission recommends:

- The ability to shelter should be eliminated from the *Act*.

4. Time period for filing liens and retaining holdbacks

In general, a lien holder in Nova Scotia will have 45 days from the time of completing a contract for work, materials, or services in which to register a lien. Holdbacks are retained for the same length of time. In New Brunswick and Prince Edward Island, lien holders have 60-day registration and holdback retention periods.

[76] Note 30, above, at 7-6.

[77] 1979 NSLRAC Report, note 11, above, at 59-60; Darby, note 4, above, at 84-85.

A number of commentators discussed the possible extension of the 45-day time period for registration of liens. In particular, it was suggested that the 45-day time period was likely the product of an era when a 30-day payment period was the norm. Now, by contrast, 60-day payment periods are seen by some as more realistic, while other people prefer 90-day periods. Another commentator suggested that extra time would benefit both lien holders and those who pay for work, services or materials, ultimately eliminating the need to file liens in certain cases and therefore reducing expenses for all parties.

The Commission recommends that the time period for registering a lien, and correspondingly, the time period for retaining a holdback, should be extended to 60 days each. This would allow the Nova Scotia time periods to reflect more closely commercial practice. It would make the Nova Scotia time periods consistent with those in the two closest provinces, where Nova Scotian firms are likely to do business. Extending the time period for lien registration would also in part lessen the need for a sheltering provision, in that lien holders will have 15 more days to determine whether there is a need to register their claim.

The Commission recommends:

- The time period for registering a lien, and correspondingly, the time period for retaining a holdback, should be extended to 60 days each.

5. Right to information

Participants in a construction project are often not aware of contractual details or payment information relating to agreements between an owner and the contractor, the mortgagee, or an unpaid vendor. This information could be important in determining whether it would be necessary or even worthwhile for a subcontractor to pursue a lien claim, as well as whether it would be feasible to continue providing work, services, or materials. For this reason, in varying levels of detail, most Canadian builders' lien legislation provides lien holders with the right to seek relevant information from owners and certain other parties.

Section 32 of the Nova Scotia *Act* entitles a lien holder at any time to require that the owner or his agent identify the terms of the contract or agreement between the owner and the contractor. The owner or agent will have a reasonable time to do so, as well as to identify the amount due upon the contract or agreement. If the owner or agent fails to do so within a reasonable time, or if the owner or agent falsely states the terms or the amount owing, then the owner shall be liable for any resulting loss suffered by the lien holder who made the demand for information. A lien holder can make an application to court for an order requiring

the owner or agent to produce and to allow the lien holder to inspect any such contract or agreement.

The 1979 NSLRAC *Act* would have permitted a demand for information to be made of the owner or of any contractor or subcontractor occupying a place between the lien holder and the owner in the contractual pyramid. The 1979 NSLRAC *Act* would also have allowed demands to be made of mortgagees and unpaid vendors of the land subject to a building contract. Under the 1979 NSLRAC *Act*, those who did not comply with lawful demands for information, or who knowingly or negligently misinformed a lien holder, would have been liable for any resulting loss.[78]

In contrast to the current Nova Scotia *Act*, the equivalent Ontario statute has comprehensive and detailed provisions[79] (found in full at Appendix C of this Paper) pertaining to the right to information in the context of builders' liens. A lien holder, trust fund beneficiary,[80] or mortgagee is entitled to request the following from an owner or contractor: the names of the parties to the contract; the contract price; the state of accounts between the owner and contractor; a copy of any labour and material payment bond[81] relating to the contract posted by the contractor with the owner; as well as an indication whether the contract refers to liens arising and expiring on a lot-by-lot basis.

In Ontario, a lien holder, trust fund beneficiary, or mortgagee may request from a contractor or subcontractor the names of the parties to a subcontract, the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor, a statement of whether there is a provision in a subcontract providing for certification, and a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

In the event that an owner is selling his or her interest in a premises that is a home, the Ontario statute permits a lien holder, trust fund beneficiary or mortgagee to request the name and address of the purchaser, the sale price, the amount of the purchase price paid or to be paid prior to the transfer of title, the scheduled date of the property transfer, and the lot and

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[78] 1979 NSLRAC Report, note 11, above, at 15.

[79] Ontario, *Construction Lien Act*, R.S.O. 1990, c. C-30 [hereinafter Ontario statute], ss. 39-40.

[80] Trust funds in the context of mechanics' liens are discussed below at Part III.7.

[81] A labour and material bond is a guarantee that the contractor or subcontractor named in the bond will pay all amounts owing for labour and materials arising under a particular contract. If the contractor or subcontractor fails to pay what he or she owes, then the "surety", the company which issued the bond, will be responsible to pay the amounts owing: K. Collier, *Construction Contracts*, 2d ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1987) at 299, 301.

plan number or other legal description[82] of the premises as contained in the agreement of purchase and sale, as well as the date on which a permit authorizing occupancy or a certificate of completion and possession has been issued.

From a mortgagee or unpaid vendor, a lien holder or trust fund beneficiary in Ontario may request: sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement; a statement showing the amount advanced under the mortgage; the dates of those advances; and any arrears in payment, including any arrears in the payment of interest; or a statement showing the amount secured under the agreement of purchase and sale and any arrears in payment including any arrears in the payment of interest.

In Ontario, requests for information must be made in writing. The information required is to be provided within a reasonable time, which is defined as not exceeding 21 days. A person who fails to provide information requested or knowingly or negligently misstates that information is liable to the person who made the request for any damages sustained as a result.

The Discussion Paper took the position that the current Nova Scotia provision relating to the right to information should be expanded. As an example, it was noted that it could be important for a lien holder to know how much has been advanced under a mortgage, information which does not have to be provided under the current *Act*. The Commission pointed to the importance of timeliness when a lien holder is seeking relevant financial information. As a result, the Commission suggested that an amended statute should provide specific guidance about how soon relevant financial details must be provided. The Commission also agreed that the consequences of ignoring or deliberately failing to respond properly to a lawful demand for information should be clear. The Commission was in favour of a more detailed provision and pointed to the Ontario provision as a model. However, the Commission expressed concern that the Ontario type of right to information provision might be too high a standard. In some cases, the Commission suggested, locating and making available the type of information that may be requested could prove difficult or costly. Some participants in the construction industry might also be reluctant to provide certain details, such as pricing information, for fear that it could be shared with their competitors. Rather than suggesting adoption of the Ontario right to information provision, the Commission invited comments about whether the Ontario provision sets too high a standard.

The Commission remains of the view that the right to information section of the *Act* needs to be expanded, to include more possible participants in a construction project and to increase the range of information that can be demanded. The current section, under which any lien holder may demand certain information from the owner or the owner's agent, does not reflect

[82] A legal description is a description sufficient to describe a property for the purpose of its registration at a Registry of Deeds: adapted from Dukelow & Nuse, note 1, above, at 571.

the business reality that other participants, such as subcontractors and mortgagees, may be the people with the information most significant to a lien holder's claim or willingness to continue providing work, services, or materials. By referring simply to "the terms of the contract or agreement," the current section also does not identify with sufficient detail the types of relevant information that a lien holder might reasonably require.

Further to a comment received about the Discussion Paper, the Commission recommends that a standard form, to be used for right of information demands under the *Act*, should be developed. The form would make it clear what types of information could be demanded from whom, the time period for complying, and the consequences of not responding in time to a legitimate request.

The Commission affirms its Discussion Paper suggestion that the consequences of ignoring or deliberately failing to respond properly to a lawful demand for information should be clear in an amended Act. However, the Commission takes the view that the length of time in which recipients of information demands have to respond, as well as the nature of non-compliance penalties, involve policy considerations which should more properly be determined by the House of Assembly.

Given its scope and specificity, the right to information section from the Ontario builders' lien statute could serve as a guide to possible changes in Nova Scotia. The Commission does not recommend its wholesale adoption. Rather, only those provisions consistent with Nova Scotia construction business practices should be adopted for use here.

The Commission recommends:

- The right to information section in the *Act* should be expanded.
- A standard form, to be used for right of information demands under the *Act*, should be developed.
- The consequences of ignoring or deliberately failing to respond properly to a lawful demand for information should be clear in an amended *Act*. The length of time in which recipients of information demands must respond, as well as the nature of non-compliance penalties, should more properly be determined by the House of Assembly.
- Although the right to information section from the Ontario builders' lien statute could serve as a guide to possible changes in Nova Scotia, only those provisions consistent with Nova Scotia construction business practices should be adopted for use here.

6. Arbitration

The Nova Scotia *Act* does not refer to arbitration.[83] This topic was also not covered in the 1979 NSLRAC *Act*.

Arbitration was, however, recently considered by the Uniform Law Conference of Canada (ULCC). The ULCC's predecessor, the Conference of Commissioners on Uniformity of Legislation in Canada, studied builders' liens generally for many years, but abandoned the goal of drafting model legislation suitable for application to the country as a whole. Rather than pursuing a stand-alone builders' lien statute, in recent years the ULCC devised model *Liens and Arbitration Provisions*, which were meant to be adapted and added to already existing builders' lien legislation. The model provisions are reproduced at Appendix D.[84]

To ensure that parties do not attempt to avoid the arbitration process by simultaneously pursuing court actions, once a matter is brought to arbitration, court proceedings relating to those issues must typically be stayed (halted). Section 20.1 of the model ULCC provisions provides that despite a stay of proceedings granted by a court to assist the conduct of an arbitration, lien holders will still be able to take all steps necessary under relevant builders' lien legislation, in order to preserve a lien or the security to which it attaches.

Section 20.2 provides that where the contract or sub-contract of a lien holder includes a provision respecting arbitration, then to take any step to preserve a lien or security shall not be treated as a waiver of the right to arbitrate.

The third model provision, at s. 20.3, concerns arbitration that involves the same construction project or improvement with which a lien holder was concerned, but which takes place between parties to an arbitration agreement to which the lien holder is not a party. In such a situation, the lien holder will not be prevented from taking steps to enforce a lien. In other words, the effect of a stay of proceedings pending arbitration is limited to the parties to the arbitration agreement and will not affect third party actions. This will be so even if a lien holder is taking action against a party also involved in an arbitration process.

The Discussion Paper acknowledged that arbitration can be an efficient and cost-effective process to resolve disputes stemming from construction contracts. Indeed, some standard form contracts require the parties to submit their disputes to arbitration, rather than going to

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[83] Arbitration is the settling of a dispute by an arbitrator, an impartial person chosen by the parties to the dispute: Yogis, note 39, above, at 21.

[84] The model provisions do not seem to have been adopted by any jurisdiction: Uniform Law Conference of Canada, homepage, Table of Uniform Statutes Enacted, Listed by Statute <www.ulcc/en/us/index.cfm?sec=3 > (date accessed: 13 June 2003).

court.[85] Although agreeing that arbitration is an option which could be cheaper and quicker than going to court, the Discussion Paper did not propose that arbitration should be mandatory in the context of builders' liens. Rather, the Discussion Paper suggested that an amended statute should mention the possibility of submitting builders' lien disputes to arbitration.[86] To allow lien holders to be able to preserve their lien claims in the period prior to an arbitration being held, the Commission was also in favour of incorporating the ULCC provisions, to apply in the event the parties bring their dispute to arbitration.

Comments received were in agreement with the Discussion Paper suggestions, which the Commission affirms.

The Commission recommends:

- Although arbitration should not be made mandatory in the context of builders' liens, an amended *Act* should mention the possibility of submitting builders' lien disputes to arbitration.

- In order to allow lien holders to preserve their lien claims in the period prior to an arbitration being held, the three ULCC model provisions should be adopted in Nova Scotia. As a result, despite a court-granted stay of proceedings to assist the conduct of an arbitration, lien holders will still be able to take all steps necessary under the *Act*, in order to preserve a lien or the security to which it attaches. Where the contract or sub-contract of a lien holder includes an arbitration provision, then to take any step to preserve a lien or security shall not be treated as a waiver of the right to arbitrate. Third, the effect of a stay of proceedings pending arbitration will be limited to the parties to the arbitration agreement and will not affect third party actions.

7. Trust fund provisions

In addition to lien and holdback provisions, the legislation in some jurisdictions, though not in Nova Scotia, makes construction contract funds subject to a trust. The basic principle behind a trust fund provision is that money received under a construction contract should be

[85] For example, there are the standard form contracts developed by the Canadian Construction Documents Committee: British Columbia Law Institute, *Report on Builders Liens and Arbitration* (Vancouver: The Institute, 2002) at 2.

[86] People who have their builders' lien dispute arbitrated would still be subject to the *Commercial Arbitration Act*, S.N.S. 1999, c. 5.

applied first of all to the payment of amounts owed by the recipient to persons immediately below him or her in the construction contract pyramid. A recipient of funds will only be entitled to apply the funds received to his or her own purposes when he or she has paid other people owed money by the recipient under a construction contract. The trust fund is meant to protect contract funds from the claims of creditors who are not part of the construction pyramid. A major advantage of a trust fund provision is its automatic application – unlike liens there is no need for a claimant to register or provide notice in order to preserve a claim. Therefore, for instance, a lien holder who loses the protection of a lien by failing to register the lien in time will still have access to the trust fund.

Depending on the circumstances and the legislation involved, a person who does not comply with trust fund provisions might be responsible for financial losses that ensue, or may be liable for more serious consequences, such as a fine or even imprisonment. For example, under the New Brunswick *Mechanics' Lien Act,* to knowingly not comply with the trust fund provisions is a provincial penal offence.[87] Under the New Brunswick *Provincial Offences Procedure Act*, such an offence will ordinarily result in a fine of between $120 and $5,000, though in limited circumstances, a 90-day prison term could be imposed.[88]

The 1979 NSLRAC *Act* would have made trust provisions part of Nova Scotia law. The 1979 *Act* provided that all sums received, with respect to the construction of a structure, by a contractor or subcontractor on account of the contract price, or by an owner further to a mortgage, made with a view to the construction, would be received in trust. The purpose of the trust would have been to pay wage earners and suppliers of services and materials, as well as to deal with any just set off [89] or counterclaim on the part of an owner, contractor, or subcontractor. Under the NSLRAC *Act*, the recipient of trust fund money could not have put it to his or her own use until all persons who had supplied him or her with services or materials for the construction had been paid and all just claims of set off or counterclaim had been satisfied. If a person knowingly converted any trust fund amount to a use not authorized by the trust, then the NSLRAC *Act* would have subjected that person to a fine or imprisonment.[90]

[87] R.S.N.B. 1973, c. M-6.

[88] S.N.B. 1987, c. P - 22.1 , ss. 56(6), 63(2).

[89] A set off is a claim by a defendant in a lawsuit that the plaintiff owes the defendant money which should be subtracted from the amount of damages claimed by the defendant: adapted from G.N. Hill & K.T. Hill, *Real Life Dictionary of the Law* (Los Angeles: General Publishing Group, 1995) at 378.

[90] 1979 NSLRAC Report, note 11, above, at 11-12.

In contrast to the current law in Nova Scotia, Ontario's statute includes detailed trust fund requirements[91] (reproduced in full at Appendix E). The Ontario statute imposes trusts on owners, on contractors and subcontractors, and on vendors. The owner's trust relates to amounts received that are to be used in the financing of the construction project. The contractor or subcontractor's trust involves all amounts owing to or received by a contractor or subcontractor, on account of the contract or subcontract price of a construction project. If an owner sells his or her interest in a premises, an amount equal to what the owner receives, minus any reasonable expenses and any mortgage pay-out amount, forms a trust fund for the benefit of the contractor. For each type of trust, the trustee is ordinarily not entitled to use the funds for his or her own benefit until the intended beneficiaries have been paid all amounts owing. However, a trustee who pays in whole or in part for the supply of services or materials to a construction project out of money that is not subject to a trust will be entitled to retain an equivalent amount from trust funds. Payments made by a trustee to a beneficiary for amounts owing in relation to an improvement will discharge the trustee's obligation to the same extent.

In Ontario, if someone fails to comply with the trust fund provisions, but did not intend to commit fraud, that person could be held liable for any damages that ensue. It is also noteworthy that in Ontario where a corporation was involved in a breach of trust, every director or officer, as well as any person, including a corporate employee or agent, who has effective control over the corporation or its relevant activities, who assented to or acquiesced in, conduct that he or she knew or reasonably ought to have known amounted to breach of trust by the corporation, can also be held liable for the breach of trust.

Ontario's legislation formerly included more serious penalties. Any person who knowingly put any part of trust funds to his or her own use or to an unauthorized use was liable to a fine of not more than $5,000, imprisonment for up to two years, or both. Where a corporation was involved, a director or officer who knowingly assented to or acquiesced in any such unauthorized use by the corporation was liable to the same penalty.[92] These were eliminated from the legislation, following the recommendation by an Advisory Committee to the Ontario Attorney General that these provisions were unnecessary in light of s. 296 (now s. 336) of the Criminal Code of Canada, which makes it a criminal offence to convert trust funds with an intent to defraud.[93]

[91] Ontario statute, note 79, above, ss. 7-13.

[92] Ontario, *Mechanics' Lien Act*, R.S.O. 1980, c. 261, s. 3(7).

[93] Macklem & Bristow, note 30, above, at 9-58.3.

In Nova Scotia, a 2001 private member's bill would have required mortgage advances against construction projects to be held in trust for tradespeople. This bill did not proceed beyond the first reading stage.[94]

In the Discussion Paper, the majority of the Commission agreed that trust fund provisions in the context of builders' liens should be adopted in Nova Scotia. Trust fund provisions would serve as an added protection, it was suggested, to help ensure that people participating in a construction project would be paid. In particular, trust funds would be helpful in situations where the person primarily liable on a contract became unable to pay, as through insolvency. The majority of the Commission took the position that the Ontario trust fund provisions could serve as a model for similar provisions in Nova Scotia.

The Commission did not take a position on the question of whether trust fund provisions should be reinforced by the possibility of penalties, in the form of fines or imprisonment. On the one hand, potential penalties would underscore the seriousness of the need to comply with trust fund provisions. On the other hand, existing law, both civil and criminal, might be adequate to deal with failures to comply. The Commission invited comments on whether penalties for non-compliance should be made part of any proposed trust fund provisions in Nova Scotia.

Commentators who addressed this issue were very supportive of trust fund provisions. One commentator, for instance, suggested that trust fund provisions form the most important part of builders' lien legislation. Following its review of comments received, the Commission remains of the view that adopting trust provisions would significantly improve the *Act*. Trust provisions would serve as an additional safeguard, to help ensure that people are paid for Construction work, services, or materials they provide. The automatic application of trust provisions should serve as a comfort to those concerned about missing a deadline for registration of a lien or for commencing a legal action to enforce a lien. In determining what type of trust fund provision would be appropriate for Nova Scotia, the Commission recommends that the Ontario equivalent could serve as a useful model.

To have no means of enforcing a trust fund provision could seriously undermine its usefulness. This was echoed strongly by the comments which the Commission received on this issue. The Commission recommends that if trust fund provisions are included in an amended *Act*, a penalty for non-compliance should be included. Similar to the policy considerations which underlie a possible penalty for failure to comply with a right to information demand, the nature of this penalty should be a matter for the Assembly to determine. Moreover, to underscore the seriousness of not complying with trust fund provisions, an amended *Act* should expressly state that corporate officers and directors could be held personally responsible for the failure of their corporation to comply with trust fund provisions.

[94] Note 17, above.

The Commission recommends:

- Trust fund provisions in the context of builders' liens should be adopted in Nova Scotia.
- The Ontario trust fund provisions could serve as a model for similar provisions in Nova Scotia.
- A penalty for non-compliance should be made part of any proposed trust fund provisions in Nova Scotia, but the nature of this penalty should be a matter for the Assembly to determine.
- An amended *Act* should expressly state that corporate officers and directors could be held personally responsible for the failure of their corporations to comply with trust fund provisions.

8. Applicable Court

Where feasible, the Commission wishes to suggest changes that will result in a simpler builders' lien system. Streamlining the court process involved in the hearing of builders' lien claims could be an improvement. Currently, disputes involving builders' liens are heard by the Supreme Court of Nova Scotia. Another possible venue for the hearing of builders' lien claims is the Small Claims Court, which is meant to provide a quick, informal, and inexpensive forum for resolving disputes where $10,000 or less is in issue.[95] It is not necessary to be represented by a lawyer in the Small Claims Court. Cases are heard by adjudicators, decision-makers who are practicing members of the Nova Scotia Barristers' Society, but who are not judges. The Commission understands that many lien claims involve fairly small amounts of money and are not complicated. In essence, a lien claim is a means of collecting a debt.

[95] See generally, *Small Claims Court Act*, R.S.N.S. 1989, c. 430. Recent changes, not yet in effect, will increase the amount of claims which can be heard to $15,000: *Justice Administration Amendment (2002) Act*, S.N.S. 2002, c. 10, ss. 38, 41, 50.

The Discussion Paper invited comments about whether, in cases where the parties are not proceeding to arbitration, the Small Claims Court should also have jurisdiction over builders' lien claims up to the value of the Court's monetary jurisdiction.[96]

For the most part, comments received were in favour of extending jurisdiction over certain builders' liens claims to the Small Claims Court. For instance, one commentator suggested that many subcontractors, having experience with Small Claims Court procedures for the purpose of debt collection, would take advantage of the savings in money and time associated with pursuing a builders' lien action in Small Claims, if available. The Commission shares the view that many lien claims could be resolved in a simpler, speedier, and less expensive manner, if decided by the Small Claims Court.

Not all builders' liens claims could be made in the Small Claims Court. Rather, they would have to fit within the court's current monetary limit of $10,000. Further to comments received, the Commission also agrees that the Small Claims Court should not have exclusive jurisdiction over builders' liens claims that fall within its monetary limit. Rather, the Small Claims Court would share its builders' lien jurisdiction with the Supreme Court. Subject to monetary limits, lien holders would decide where to take action to enforce their claims.

Implementing this suggestion might require an additional change to the Small Claims Court's jurisdiction. The court currently cannot hear claims "for the recovery of land or an estate or interest therein."[97] If a lien claim is deemed to involve an interest in land, then the *Small Claims Court Act* should be amended, to make it clear that even if a lien claim involves an interest in land, the Court could still hear the claim.

The Commission recommends:

- The Small Claims Court should have a non-exclusive jurisdiction (shared with the Supreme Court) over builders' lien claims up to the value of the Small Claims Court's monetary jurisdiction (currently $10,000).

- The *Small Claims Court Act* should be amended, to make it clear that even if a lien claim is deemed to involve an interest in land, the Court could still hear the claim.

[96] This would be the same type of shared jurisdiction applicable to matters under the new *Liens Act*, (S.N.S. 2001, c. 33) which is not yet in operation, and which will not apply to liens on land.

[97] *Small Claims Court Act*, R.S.N.S. 1989, c. 430, s. 10 (a).

9. Chattel liens

Unlike immovable property (land and items attached to it), movable property, such as a car, can be moved from place to place. At common law, someone who performs work, such as repairs, on movable property is entitled to a lien for the value of the services provided. This lien has effect for only so long as the lien holder retains possession of the movable property.[98] This type of lien is known by a variety of names, including chattel lien, garage keepers' lien, artificers' lien, and workmen's lien.

S. 45 of the *Act* was not necessary to provide someone with a chattel lien, as this right already exists at common law. Rather, what it does in addition is to give the lien holder a right to sell the property in question if no payment has been received for three months. The section also sets out a procedure which lien holders must follow in order to sell the movable property.

Few jurisdictions in Canada other than Nova Scotia retain a chattel lien provision in their builders' lien legislation.[99] Other provinces have tended to create separate legislation to govern chattel liens. The leading Canadian authority on builders' liens no longer considers it necessary to devote a section to chattel liens.[100]

In the Discussion Paper, the Commission took the position that it is no longer appropriate to include a chattel lien provision in the *Act*. Most of the *Act's* procedures relate to liens on land and have no connection to a chattel lien situation. The Commission therefore agreed that the chattel lien provision should be removed from the *Act* and relocated to a more appropriate statute.

The Commission also noted that the House of Assembly recently enacted the *Liens Act*, [101] which sets out rules involving such details as the creation, registration, and enforcement of liens, but only with respect to movable property. The new *Liens Act*, which is not yet in operation, will eliminate s. 45 of the *Mechanics' Lien Act* and replace that section with more detailed provisions. The Commission suggested that the necessary steps should be taken to bring the *Liens Act* into operation, as this would accomplish the intent behind the Commission's suggestion concerning s. 45 of the *Mechanics' Lien Act*.

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[98] D.N. Macklem & D.I. Bristow, *Construction and Mechanics' Liens in Canada*, 5th ed. (Toronto: Carswell, 1985) at 575.

[99] Macklem & Bristow, note 30, above, at 1-13.

[100] Note 30, above, at iv.

[101] S.N.S 2001, c. 33.

This issue did not generate much commentary, but feedback received was favourable to the Discussion Paper suggestions, which the Commission affirms.

The Commission recommends:

- S. 45 of the *Act*, which concerns chattel liens, should be relocated to a more appropriate statute.

- The new *Liens Act* should be brought into operation, as this would accomplish the intent behind the Commission's suggestion concerning s. 45 of the *Mechanics' Lien Act*.

10. Application to ships and vessels

For the most part, the *Act* is meant to protect people who provide work, services, or materials for the improvement of land. Nonetheless, at s. 6 of the *Act*, which sets out activities which could give rise to a lien, the provision of work, service, or materials in relation to a ship or vessel is mentioned. This provision first made its appearance in 1917.[102]

The 1979 NSLRAC report referred to the inclusion of ships or vessels as a "dubious expedient." Accordingly, the 1979 draft *Act* did not mention liens on ships or vessels. The NSLRAC explained that under the Nova Scotia law of that time (which remains the same in this respect) shipbuilders and repairers would still enjoy a chattel lien on a vessel while it is in their possession. Moreover, the NSLRAC suggested that including ships or vessels could lead to problems with certain parts of the *Act*, in particular sections relating to registration.[103]

The Discussion Paper did not consider it appropriate that a statute meant to provide protection for those involved with construction projects on land should also refer to liens on a ship or vessel. To illustrate the strange results that can ensue, a lien holder would not be able to register a lien claim against a ship at a Registry of Deeds, which functions only to record information relating to land ownership.

If the reference to ships and vessels is deleted from the *Act*, people involved in ship construction or repair would still be entitled to a lien. One lien would be a common law possessory lien. It would have effect as long as the lien holder retains possession of the

[102] S.N.S. 1917, c. 72, s. 1.

[103] 1979 NSLRAC Report, note 11, above at 43.

affected property. Another type of available lien is one under the *Federal Court Act*.[104] S. 22(2)(n) of the *Federal Court Act*, when read in conjunction with s. 43(3) of the same statute, provides a statutory lien for "any claim arising out of a contract relating to the construction, repair or equipping of a ship."

Given recent developments in Canadian maritime law, the Nova Scotia *Act* may not be applicable in any event to provide for a lien on a ship. In a series of decisions in the 1980s and 1990s, the Supreme Court of Canada set out the character of Canadian maritime law, the body of law which governs aspects of navigation and shipping and related matters in this country.[105] This law is under federal jurisdiction. It is uniform across Canada, regardless of which court is applying it. It is based in part on principles of the English common law, relating to such aspects as contract and tort, that have been incorporated into Canadian law. It is also not the law of any province. What this means is that where there is federal law to govern a matter that falls under the scope of Canadian maritime law, there is no longer any room for the operation of a provincial statute.

Federal law relating to ship repairs or related work does exist, in the form of s. 22(2)(n) of the *Federal Court Act,*[106] when read in conjunction with s. 43(3) of the same statute. Courts have also decided that contracts for the construction or repair of ships have the sufficient connection to maritime activities that is needed in order to be governed by Canadian maritime law.[107]

Whether a claimant proceeded on the basis of a common law chattel lien or Canadian maritime law, in neither case would the right to a lien depend on the N.S. *Act*. The Commission affirms its position from the Discussion Paper and recommends that references to ships and vessels should be deleted from the definition of activities giving rise to a lien at s. 6 of the *Act*.

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[104] R.S.C. 1985, c. F-7.

[105] See, for example, *Q.N.S. Paper Co.* v. *Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; W. Spicer & W. Laurence, "Not Fade Away: The Re-emergence of Common Law Defences in Canadian Maritime Law," (1992), 71 Can. Bar Rev. 700 at 700-707.

[106] R.S.C. 1985, c. F-7.

[107] *Hawker Industries Ltd.* v. *Santa Maria Shipowning & Trading Co.*, [1979] 1 F.C. 183 (F.C.A.); *Benson Bros. Shipbuilding Co. (1960) Ltd.* v. *Mark Fishing Co.* (1978), 89 D.L.R. (3d) 527 (Fed. C.A.); Cdn. *Gen. Electric Co.* v. *The Queen* [1979] 2 F.C. 410 (Fed. C.A.).

The Commission recommends:

- References to ships and vessels should be deleted from the definition of activities giving rise to a lien at s. 6 of the *Act*.

11. Right of appeal

The *Act* includes two sections, 39 and 40, which involve a lien holder's right to appeal a court decision about his or her claim. Section 39 indicates that in any action where the total amount of lien claims represents $100 or less, the court judgement is not to be appealed, though a new trial may be possible. Under s. 40, where the total amount of claims is more than $100, any party affected may appeal the decision to the Nova Scotia Court of Appeal,[108] the judgement of which shall not be appealable. These sections of the Nova Scotia statute have been in existence for so long without amendment that they have likely lost their original usefulness. For example, the wording of s. 39, including the monetary limit, has remained virtually unchanged since 1899. The rationale for s. 39 was likely to encourage the speedy resolution of disputes where smaller sums of money were at stake. However, a sum of $100 was worth considerably more in the early years of the last century,[109] and it is difficult to conceive today of a situation where it would be worthwhile to take a lien claim to court in order to seek $100 or less.

In 1973, the NSLRAC Study Paper agreed with the principle of barring appeals in "petty actions", but deemed the limitation figure of $100 in s. 39 (then s. 38) "unrealistically low." As a result, that report recommended revising the amount upwards to at least $500. Further to that suggestion, the draft 1979 *Act* would have raised the amount in s. 39 to $500.

The Discussion Paper suggested that as long as a trivial amount - such as a few dollars - is not in issue, it is inappropriate to base an ability to appeal a decision upon a particular amount of money. This might give the impression, it was suggested, that lien claims of certain lesser amounts are not seen by the law to reflect the same significance as higher valued claims. Determining a fair threshold amount would be difficult, the Discussion Paper added, and could be seen as arbitrary. As a result, the Discussion Paper took the position that it would

[108] S. 40 actually refers to the Appeal Division of the Supreme Court, which is now known as the Court of Appeal: *Judicature Act*, R.S.N.S. 1989, c. 240, s. 9.

[109] For example, according to the Inflation Calculator maintained at the Bank of Canada website <www.bank-banque-canada.ca/en/inflation_calc.htm> a fixed set of consumer purchases that cost $100 in 1914 would cost $1,705.56 in current dollars (date accessed: 12 June 2003).

be preferable to eliminate sections 39 and 40, which make distinctions on one's right to appeal based upon the amount of money that is involved.

As mentioned in the Discussion Paper, section 40 can be called into question for another reason. The effect of s. 40 is to eliminate any appeals of Nova Scotia Court of Appeal decisions in builders' lien matters where the claims are for more than $100. The Nova Scotia Court of Appeal is the highest level of court situated in the province. An appeal of one of its decisions would be to the Supreme Court of Canada. The 1973 NSLRAC Study Paper questioned the rationale of precluding appeals to the Supreme Court of Canada, and suggested that, "in principle any person who can fit himself within the criteria applied by the Supreme Court of Canada should have access to that Court."[110] Further to that suggestion, the provision making appeal to the Nova Scotia Court of Appeal final and binding was eliminated from the 1979 draft *Act*. At that time, the NSLRAC had doubts about the constitutional validity of preventing appeals to the Supreme Court of Canada.[111]

The Discussion Paper suggested that the constitutional concern of the NSLRAC still seems to be valid. S. 40 of the *Supreme Court Act* allows for an appeal by leave to the Supreme Court from any final or other judgement in part "of the highest court of final resort in a province...whether or not leave to appeal to the Supreme Court has been refused by any other court...." In the case of *Crown Grain Co.* v. *Day*,[112] the English Privy Council declared invalid a Manitoba statute that made decisions of the Manitoba superior court in builders' liens actions "final and binding," from which "no appeal shall lie therefrom." It was held that the Manitoba statute was inconsistent with the of the *Supreme Court Act* of the day, which contained an earlier version of the current s. 40. No subsequent cases have emerged to dislodge the principle that even if an area is under provincial jurisdiction, a province cannot decide that a matter will be finally disposed of at the provincial court of appeal level. This is an application of the concept of federal paramountcy. Where there are inconsistent or conflicting federal and provincial laws, the federal law prevails.[113] In the Discussion Paper, the Commission suggested that the lack of constitutional support for s. 40 serves as another reason to eliminate that section.

In the Discussion Paper, the Commission's preference was for sections 39 and 40 of the *Act* to be eliminated. If, however, sections 39 and 40 are to be retained in the *Act*, the Commission

[110] Darby, note 4, above, at 91.

[111] 1979 NSLRAC Report, note 11, above, at 61-62.

[112] [1908] A.C. 504 (J.C.P.C.). At that time, cases from the Supreme Court of Canada could be appealed to the Judicial Committee of the Privy Council in London, England.

[113] Hogg, note 68, above, at 8-11, 16-2.

suggested that the monetary limits in those sections, as well as any other references to money in the *Act* should be updated, to reflect current values of money.

Comments received on this issue supported the Discussion Paper suggestions, which the Commission affirms.

The Commission recommends:

- Sections 39 and 40 of the *Act*, which make distinctions on one's right to appeal based on the amount of money that is involved, should be eliminated.

- If, however, the monetary limits in sections 39 and 40 are to be retained in the *Act*, those limits, as well as any other references to money in the *Act*, should be updated, to reflect current values of money.

12. Title of statute

In 1979, the NSLRAC suggested that the *Act's* title "perpetuate[d] an obsolete meaning of 'mechanic', which most people [found] misleading."[114] As a substitute title, the NSLRAC suggested the *Builders' Lien Act*.

The Discussion Paper agreed that the statute's current title is confusing, as it relies on an obsolete usage of the term 'mechanic', which has little meaning for most people. The Commission suggested that changing the *Act's* title to the *Builders' Lien Act* would make it more meaningful.

The Commission maintains this view and affirms its Discussion Paper suggestion.

The Commission recommends:

- The *Act's* title should be changed to the *Builders' Lien Act*.

[114] 1979 NSLRAC report, note 11, above, at 40.

13. Miscellaneous recommendations

The Commission is in favour of an *Act* which is simpler, yet which still remains effective. If implemented, the Commission's recommendations concerning sheltering, the removal of provisions involving chattel liens and ships, an end to money-based rights of appeal, and a more meaningful title for the *Act* will simplify the builders' lien system in Nova Scotia. Expanding the Small Claims Court's jurisdiction to include builders' lien claims should also simplify proceedings in certain cases.

Having said this, the Commission is of the view that in some instances the *Act* could be made more effective through greater specificity or enhanced protections. The Commission acknowledges that its recommendations involving an expanded right to information, the introduction of trust fund provisions, and certain guidelines pertaining to arbitration will result in a more detailed and perhaps more complicated statute. In the Commission's perspective, any resulting drawbacks should be more than balanced by the greater clarity and safeguards that should accompany such changes.

The Commission seeks to recommend, where appropriate, changes to the *Act* which will result in a simpler law, though without sacrificing any fairness or protection under the current *Act*. As a result, the Discussion Paper invited comments on how the *Act* could be simplified, without reducing its effectiveness.

Having reviewed the comments received, the Commission adopts a number of those suggestions received.

One was that changes to the *Act* should coincide with an informational or educational program, to be provided by the Government. It was suggested to the Commission that many people in the construction industry lack awareness of the *Act* and what it is meant to accomplish. As part of the publicity surrounding any changes to the *Act*, it would be timely and helpful for the Government to make available on an ongoing basis information about builders' liens. This information could take the form of published and online materials, as well as instructional sessions.

Another suggestion related to notice of a lien claim. The *Act* does not require a lien holder, upon registration of a claim, to send a notice to the affected property owner. The Commission understands that in practice, such a notice will often be sent, but it is not required. Many people are not aware of the purpose of the Registry of Deeds, or how to determine whether their property has been subjected to a lien. To bring to a property owner's attention the existence of a registered lien claim, which could speed up eventual payment, the Commission recommends that an amended *Act* require a registered lien holder to notify the affected property owner of the claim.

The Commission assumes that any examination of the *Act* by the House of Assembly will

include a review of the *Act*'s language. As part of that review, the Commission recommends that rather than the Latin term, *lis pendens*, the easily understood, "certificate of pending litigation," be used.

The Commission recommends:

- Changes to the *Act* should coincide with an informational or educational program, to be provided by the Government.
- An amended *Act* should require a registered lien holder to notify the affected property owner of the claim.
- Rather than the term, *lis pendens*, the easily understood, "certificate of pending litigation" should be used.

IV SUMMARY OF RECOMMENDATIONS

1. Is the *Act* necessary? [pages 18-19]

- The *Act* should be retained, but is in need of improvement.

2. Application to provincial Crown & municipal authorities [page 19-22]

- The *Act* should apply to the provincial Crown, and holdbacks and liens should apply to Crown construction projects, but not so as to make Crown property liable for sale to satisfy liens. Rather, it should be possible to register charges or claims against provincial Crown property, but that property should not be sold to satisfy the amount of a successful claim in court.

- The current restriction against the *Act* applying liens to public streets or highways should be removed.

3. Sheltering [pages 22-23]

- The ability to shelter should be eliminated from the *Act*.

4. Time period for filing liens & retaining holdbacks [23-24]

- The time period for registering a lien, and correspondingly, the time period for retaining a holdback, should be extended to 60 days each.

5. Right to information [pages 24-27]

- The right to information section in the *Act*, should be expanded.

- A standard form, to be used for right of information demands under the *Act,* should be developed.

- The consequences of ignoring or deliberately failing to respond properly to a lawful demand for information should be clear in an amended *Act*. The length of time in which recipients of information demands must respond, as well as the nature of non-compliance penalties, should more properly be determined by the House of Assembly.

- Although the right to information section from the Ontario builders' lien statute could serve as a guide to possible changes in Nova Scotia, only those provisions consistent with Nova Scotia construction business practices should be adopted for use here.

6. Arbitration [pages 28-29]

- Although arbitration should not be made mandatory in the context of builders' liens, an amended *Act* should mention the possibility of submitting builders' lien disputes to arbitration.

- In order to allow lien holders to preserve their lien claims in the period prior to an arbitration being held, the three ULCC model provisions should be adopted in Nova Scotia. As a result, despite a court-granted stay of proceedings to assist the conduct of an arbitration, lien holders will still be able to take all steps necessary under the *Act*, in order to preserve a lien or the security to which it attaches. Where the contract or sub-contract of a lien holder includes an arbitration provision, then to take any step to preserve a lien or security shall not be treated as a waiver of the right to arbitrate. Third, the effect of a stay of proceedings pending arbitration will be limited to the parties to the arbitration agreement and will not affect third party actions.

7. Trust fund provisions [pages 29-33]

- Trust fund provisions in the context of builders' liens should be adopted in Nova Scotia.

- The Ontario trust fund provisions could serve as a model for similar provisions in Nova Scotia.

- A penalty for non-compliance should be made part of any proposed trust fund provisions in Nova Scotia, but the nature of this penalty should be a matter for the Assembly to determine.

- An amended *Act* should expressly state that corporate officers and directors could be held personally responsible for the failure of their corporations to comply with trust fund provisions.

8. Applicable Court [pages 33-34]

- The Small Claims Court should have a non-exclusive jurisdiction (shared with the Supreme Court) over builders' lien claims up to the value of the Small Claims Court's monetary jurisdiction (currently $10,000).

- The *Small Claims Court Act* should be amended, to make it clear that even if a lien claim is deemed to involve an interest in land, the Court could still hear the claim.

9. Chattel liens [pages 35-36]

- S. 45 of the *Act*, which concerns chattel liens, should be relocated to a more appropriate statute.

- The new *Liens Act* should be brought into operation, as this will accomplish the intent behind the Commission's suggestion concerning s. 45 of the *Mechanics' Lien Act*.

10. Application to ships and vessels [pages 36-38]

- References to ships and vessels should be deleted from the definition of activities giving rise to a lien at s. 6 of the *Act*.

11. Right of appeal [pages 38-40]

- Sections 39 and 40 of the *Act*, which make distinctions on one's right to appeal based on the amount of money that is involved, should be eliminated.

- If, however, references the monetary limits in sections 39 and 40 are to be retained in the *Act*, those limits, as well as any other references to money in the *Act*, should be updated, to reflect current values of money.

12. Title of statute [page 40]

- The *Act's* title should be changed to the *Builders' Lien Act*.

13. Miscellaneous recommendations [pages 41-42]

- Changes to the *Act* should coincide with an informational or educational program, to be provided by the Government.

- An amended *Act* should require a registered lien holder to notify the affected property owner of the claim.

- Rather than the term, *lis pendens*, the easily understood, "certificate of pending litigation" should be used.

APPENDIX A

List of Proposals from Discussion Paper

APPENDIX A

List of Proposals from Discussion Paper

III PROPOSALS FOR REFORM

1. Is the *Act* necessary?

- The Commission invites comments on whether it would be feasible to abolish the *Mechanics' Lien Act*, rather than to amend it.

2. Application to provincial Crown & municipal authorities

- The *Act* should apply to the provincial Crown, but not so as to make Crown property liable for sale to satisfy liens. Rather, it should be possible to acquire liens, and to register charges or claims against provincial Crown property, but it should not be possible to sell such property as a result.

- The current restriction against liens being applied to public streets or highways should be removed from the *Act*.

3. Sheltering

- The ability to shelter should be eliminated from the *Act*.

4. Right to information

- The right to information in the *Act* should be expanded.

- The right to information in the *Act* should be expanded.

- An amended *Act* should provide specific guidance about how soon relevant financial details must be provided.

- The consequences of ignoring or deliberately failing to respond properly to a lawful demand for information should be clear.

- A more detailed right to information provision, such as that in place in Ontario, should be adopted in Nova Scotia.

- **The Commission invites comments** on whether the Ontario right to information provision in its current form would be unwieldy, costly, or unfair if put into practice, and if so, whether possible restrictions could be developed to make the provision more workable.

5. Arbitration

- Although arbitration should not be made mandatory in the context of builders' liens, an amended statute should mention the possibility of submitting builders' lien disputes to arbitration.

- In order to allow lien holders to preserve their lien claims in the period prior to an arbitration being held, the ULCC model provisions should be adopted in Nova Scotia.

6. Trust fund provisions

- Trust fund provisions in the context of builders' liens should be adopted in Nova Scotia.

- The Ontario trust fund provisions could serve as a model for similar provisions in Nova Scotia.

- **The Commission invites comments on** whether penalties for non-compliance should be made part of any proposed trust fund provisions in Nova Scotia.

7. Applicable Court

- **The Commission invites comments on** whether, in cases where the parties are not proceeding to arbitration, the Small Claims Court should also have jurisdiction over builders' lien claims up to the value of the Court's monetary jurisdiction (currently $10,000).

8. Chattel liens

- S. 45 of the *Act*, which concerns chattel liens, should be relocated to a more appropriate statute.

- The new *Liens Act* should be brought into operation, as this will accomplish the intent behind the Commission's suggestion concerning s. 45 of the *Mechanics' Lien Act*.

9. Application to ships and vessels

- References to ships and vessels should be deleted from the definition of activities giving rise to a lien at s. 6 of the *Act*.

10. References to dollar amounts

- Sections 39 and 40, which make distinctions on one's right to appeal based on the amount of money that is involved, should be eliminated.

- If, however, references to monetary limits are to be retained in the *Act*, those limits should be updated, to reflect current values of money.

11. Title of statute

- The *Act's* title should be changed to the *Builders' Lien Act*.

12. A simpler system

- **The Commission invites comments on** whether there are ways to make the builders' lien system in Nova Scotia simpler, without reducing any of its effectiveness.

APPENDIX B

List of Advisory Group Members
and
People Who Commented on Discussion Paper

APPENDIX B

List of Advisory Group Members
and
People Who Commented on Discussion Paper

Members of Advisory Group:

Sandy Fraser	Senior Counsel, TD Bank
Carol MacCulloch	President, Construction Association of Nova Scotia
George W. MacDonald, Q.C.	Lawyer, McInnes Cooper
R. Keith MacGillivray	President, WHW Architects Inc.
Paul Pettipas	Executive Officer, Nova Scotia Home Builders Association
John D. (Jack) MacIsaac, Q.C.	Lawyer, Patterson Palmer
Geoffrey (Geoff) Saunders	Lawyer, Merrick Holm

Comments on Discussion Paper or on Builders' Liens in General:

Gordon N. Forsyth	Lawyer, Pink Breen Larkin (On Behalf of Mainland Nova Scotia Building and Construction Trades Council)
Arthur L. Close, Q.C.	Executive Director British Columbia Law Institute
Carol MacCulloch	President Construction Association of Nova Scotia
Keith Barrett	Barrett Lumber Co. Ltd.
Kevin Clowater	Solid Waste Association of Nova Scotia
Maria G. Franks	Executive Director Legal Information Society of Nova Scotia
Paul Pettipas	Chief Executive Officer Nova Scotia Home Builders' Association
Jim Rossiter	Lawyer, Merrick Holm

APPENDIX C

Ontario *Construction Lien Act*
Part VI (Right to Information)

APPENDIX C

Ontario, *Construction Lien Act*
(R.S.O. 1990, c. C-30)

PART VI
RIGHT TO INFORMATION

Right to information

39. (1) Any person having a lien or who is the beneficiary of a trust under Part II or who is a mortgagee may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, as follows:

from owner or contractor

1. By the owner or contractor, with,

i. the names of the parties to the contract,

ii. the contract price,

iii. the state of accounts between the owner and the contractor,

iv. a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner, and

v. a statement of whether the contract provides in writing that liens shall arise and expire on a lot-by-lot basis.

from contractor or subcontractor

2. By the contractor or a subcontractor, with,

i. the names of the parties to a subcontract,

ii. the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor,

iii. a statement of whether there is a provision in a subcontract providing for certification of the subcontract,

iv. a statement of whether a subcontract has been certified as complete, and

v. a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

from owner

3. By an owner who is selling the owner's interest in a premises that is a home, with,

i. the name and address of the purchaser, the sale price, the amount of the purchase price paid or to be paid prior to the conveyance, the scheduled date of the conveyance and the lot and plan number or other legal description of the premises as contained in the agreement of purchase and sale, and

ii. the date on which a permit authorizing occupancy or a certificate of completion and possession has been issued. R.S.O. 1990, c. C.30, s. 39 (1).

from mortgagee or unpaid vendor

(2) Any person having a lien or any beneficiary of a trust under Part II may, at any time, by written request, require a mortgagee or unpaid vendor to provide the person within a reasonable time, not to exceed twenty-one days, with,

(a) sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement;

(b) a statement showing the amount advanced under the mortgage, the dates of those advances, and any arrears in payment including any arrears in the payment of interest; or

(c) a statement showing the amount secured under the agreement of purchase and sale and any arrears in payment including any arrears in the payment of interest. R.S.O. 1990, c. C.30, s. 39 (2).

by trustee or workers' trust fund

(3) The trustee of a workers' trust fund may at any time by written request require any contractor or subcontractor to permit the trustee, within a reasonable time after making the request, not to exceed twenty-one days, to inspect the payroll records of all workers who are beneficiaries of the fund, and who have supplied labour to the making of the improvement, and who are employed by the contractor or the subcontractor. R.S.O. 1990, c. C.30, s. 39 (3).

respecting publication of certificate of substantial performance

(4) A contractor shall, upon written request whenever made to the contractor by any person, within a reasonable time furnish in writing to the person the date of publication and the name of the construction trade newspaper in which a copy of a certificate of substantial performance has been published under subsection 32 (1). R.S.O. 1990, c. C.30, s. 39 (4).

Liability for failure to provide information

(5) Where a person, who is required under subsection (1), (2), (3) or (4) to provide information or access to information, does not provide the information or access to information as required or knowingly or negligently mis-states that information, the person is liable to the person who made the request for any damages sustained by reason thereof. R.S.O. 1990, c. C.30, s. 39 (5).

Order by court to comply with request

(6) Upon motion, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to the person under this section and, when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a solicitor-and-client basis. R.S.O. 1990, c. C.30, s. 39 (6).

Cross-examination on claim for lien

40. (1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced. R.S.O. 1990, c. C.30, s. 40 (1).

Who may participate

(2) There shall be only one examination under subsection (1), but the contractor, the payer of the lien claimant, and every person named in the claim for lien who has an interest in the premises are entitled to participate therein. R.S.O. 1990, c. C.30, s. 40 (2).

Notice

(3) Any person intending to examine a person under subsection (1) shall give at least seven days notice of the examination specifying the time and place for the examination to,

(a) the person to be examined or the person's solicitor;

(b) every other person named in the claim for lien as having an interest in the premises;

(c) the contractor; and

(d) the payer of the lien claimant. R.S.O. 1990, c. C.30, s. 40 (3).

Application of rules of court

(4) The rules of court pertaining to examinations apply, with necessary modifications, to cross-examinations under this section. R.S.O. 1990, c. C.30, s. 40 (4).

APPENDIX D

Uniform Law Conference of Canada
Liens and Arbitration Provisions

APPENDIX D

Uniform Law Conference of Canada

Liens and Arbitration Provisions

PART N

LIENS AND ARBITRATION

Comment: **This Uniform legislation is drafted to be added as a new Part to an existing statute of the enacting province or territory that provides for builders' liens.**

Certain steps not affected by stay

XX.1 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform International Commercial Arbitration Act*] or equivalent legislation of any other jurisdiction, a stay of proceedings granted by any court of competent jurisdiction to assist the conduct of an arbitration does not prohibit the taking of any step pursuant to this Act:

(a) to register a claim of lien;

(b) to prevent the expiry of a lien;

(c) to preserve the land or personal property to which a lien attaches or any estate or interest in land or personal property to which a lien attaches; or

(d) to have a trustee appointed pursuant to [provision of builders' lien legislation or other statute that provides for the appointment of a trustee in relation to a construction project].

Comment: Section XX.1 ensures that a lien claimant will not be prevented from taking all steps required under the construction lien legislation to preserve its lien or the security to which it attaches as a result of a stay of proceedings ordered pending completion of an arbitration process in which the lien claimant is participating. Required steps in most provinces and territories include the commencement of a lien action, service of the statement of claim and setting the action down for trial within mandatory time limits which vary from place to place. Paragraph (d) also makes it clear that an application by a lien claimant to appoint a trustee to complete or preserve a construction project is permitted.

Right to arbitrate not waived

XX.2 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform International Commercial Arbitration Act*] or

equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in section XX.1 does not constitute a waiver of the lien claimants rights to arbitrate a dispute pursuant to the contract or subcontract.

Comment: Section XX.2 intended to eliminate the possibility that a court will find that the taking of a step required under the builders lien legislation to preserve a lien or the security to which it attaches constitutes a waiver of the lien claimants right to proceed to arbitration under the terms of its contract or subcontract. So long as the lien claimant only takes the minimum steps required to preserve its lien under the *Act,* it will then still be permitted the benefit of the arbitration provisions included in its contract or subcontract.

Certain actions not stayed by arbitration

XX.3 Notwithstanding [legislation of the enacting province or territory comparable to the *Uniform Arbitration Act* or the *Uniform International Commercial Arbitration Act*] or equivalent legislation of any other jurisdiction:

(a) an action to enforce a lien that is commenced by a lien claimant whose contract or subcontract does not provide for arbitration is not stayed by the commencement or continuation of arbitration proceedings between other parties with respect to a matter that, in whole or in part deals with the subject-matter of the action; and

(b) no order shall be made directing a stay of an action described in paragraph (a) solely on the grounds that arbitration proceedings have been commenced or continued between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action.

Comment: Section XX.3 is intended to preclude the possibility that a court will order a lien claimants action stayed where arbitration relating to the same construction project or improvement is pending between other parties under an arbitration agreement to which the lien claimant taking action is not privy.

This issue arises because of the nature of the construction pyramid, the relationship between the contracts existing between the owner, its general contractor, and the various sub-contractors and suppliers involved in a project or improvement and the fact that lien statutes permit limited remedies to be enforced upwards by those at the bottom of the pyramid against parties with whom a claimant is not in privity of contract. Recently, courts have ordered a stay of all actions commenced by parties claiming through a party who is involved in an arbitration, even though the parties being stayed are not privy to the contract which contains the arbitration agreement and are therefore not able to participate in the arbitration process. Section XX.3 provides that the effect of a stay of proceedings pending arbitration shall be limited to the parties to the arbitration agreement and makes it clear that third party actions commenced to enforce lien claims will not be stayed notwithstanding that a party above them in the construction pyramid is involved in an arbitration process.

APPENDIX E

Ontario, *Construction Lien Act*
Part III (Trust Provisions)

APPENDIX E

Ontario, *Construction Lien Act*
(R.S.O. 1990, c. C-30)

PART II
TRUST PROVISIONS

Owner's trust

Amounts received for financing a trust

7. (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (1).

Amounts certified as payable

(2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (2).

Where substantial performance certified

(3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (3).

Obligations as trustee

(4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner. R.S.O. 1990, c. C.30, s. 7 (4).

Contractor's and subcontractor's trust

Amounts received a trust

8. (1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1).

Obligations as trustee

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (2).

Vendor's trust

Amounts received a trust

9. (1) Where the owner's interest in a premises is sold by the owner, an amount equal to,

(a) the value of the consideration received by the owner as a result of the sale,

less,

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 9 (1).

Obligations as trustee

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement. R.S.O. 1990, c. C.30, s. 9 (2).

Payment discharging trust

10. Subject to Part IV (holdbacks), every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee. R.S.O. 1990, c. C.30, s. 10.

Where trust funds may be reduced

11. (1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust. R.S.O. 1990, c. C.30, s. 11 (1).

Application of trust funds to discharge loan

(2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to the trustee, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust. R.S.O. 1990, c. C.30, s. 11 (2).

Set-off by trustee

12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to the improvement. R.S.O. 1990, c. C.30, s. 12.

Liability for breach of trust

By corporation

13. (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust. R.S.O. 1990, c.

C.30, s. 13 (1).

Effective control of corporation

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant. R.S.O. 1990, c. C.30, s. 13 (2).

Joint and several liability

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable. R.S.O. 1990, c. C.30, s. 13 (3).

Contribution

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 13 (4).