



Manitoba Law  
Reform Commission

# ***THE BUILDERS' LIENS ACT OF MANITOBA: A MODERNIZED APPROACH***

Final Report

November 2018



***THE BUILDERS' LIENS ACT OF MANITOBA:***  
**A MODERNIZED APPROACH**

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Throughout this project, the Commission met with and received feedback from stakeholders in the provincial and national construction industries and those with an interest in this project. The Commission is grateful to the following organizations for their considerable interest in this project: the Winnipeg Construction Association, the Manitoba Heavy Construction Association, the Mechanical Contractors Association, the Manitoba Subcontractor's Association, the Manitoba Association of Architects, the Canadian Construction Association, the Surety Association of Canada, the General Contractors Alliance of Canada, Manitoba Hydro, and the Workers' Compensation Board of Manitoba.

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Please note that the information provided and recommendations made in this report do not necessarily represent the views of those who have so generously assisted the Commission in this project.

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## EXECUTIVE SUMMARY

*The Builders' Liens Act*<sup>1</sup> (the “Act” or the “Manitoba Act”) has long been relied upon by those involved in the construction industry, including property owners, financiers of construction projects, contractors, subcontractors, and suppliers of construction material to ensure that persons contributing to the improvement of land are paid for that contribution in accordance with their contractual entitlements. To achieve its fundamental purpose, the Act includes two statutory remedies: trust provisions and lien provisions.

Pursuant to the statutory mandate of the Manitoba Law Reform Commission (“the Commission”) to improve and modernize the law, the Commission has chosen to study Manitoba’s construction remedies legislation for several reasons. First, Manitoba’s construction industry has expanded and changed significantly since the current legislation was enacted in 1982. While the Act was extensively reviewed in the 1970’s by this Commission, there have been no substantive changes to the legislation in almost 40 years. Additionally, recent judicial criticisms of the Act have identified a need for a thoughtful and comprehensive review of the separate remedies available under the statute to improve its cohesion. Finally, this review has been undertaken during a growing national conversation over whether legislative solutions should be enacted to address delays in payment within the construction industry.

The Commission released a Consultation Report in February 2018 that identified issues for discussion and invited stakeholders to comment on proposed reforms. Through written submissions and in-person meetings, the Commission received thoughtful and comprehensive input from organizations and individuals in the construction industry (both local and national organizations) as well as professional associations, legal practitioners, potential owner representatives, and other interested bodies. The feedback received was given careful consideration by the Commission and helps to inform this report.

In this Final Report, the Commission recommends streamlining the Act to make it more accessible and user-friendly while also refocusing the Act on its original purpose of providing payment protections for those within the construction contract pyramid. With respect to the current lien and trust remedies contained in the Act, the Commission recommends reforms that would clarify the purposes and processes of these remedies as well as reforms to improve their interaction. In addition, the Commission recommends the addition of two new remedies, namely, (1) a prompt payment legislative regime to ensure that construction project funds flow down the construction payment chain on a timely basis, and (2) mandatory surety bonding on public contracts to provide additional funds for completion of projects in the event of contractor default.

The Commission recognizes that different segments of the construction industry have varying and often competing interests. The Commission’s role is not to favor one group or segment of the

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<sup>1</sup> CCSM c B91 [*Builders' Liens Act*].



industry over any other but to conduct a comprehensive review of the legislative history of Manitoba's construction lien legislation, including consideration of the purpose of liens and trusts within the industry, identify and analyze issues within the legislative scheme as it currently stands, and develop recommendations that modernize the laws intended to support Manitoba's construction industry.

In making its recommendations, the Commission seeks to modernize and expand Manitoba's approach to legislating payment remedies for use by the construction industry while also preserving the province's longstanding and entrenched legislative history.

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## RÉSUMÉ

L'industrie de la construction, y compris les propriétaires de biens-fonds, les financiers investissant dans des projets de construction, les entrepreneurs et les sous-traitants ainsi que les fournisseurs de matériaux de construction, s'appuie depuis longtemps sur la Loi sur le privilège du constructeur (ci-après, la « Loi » ou la « Loi du Manitoba ») pour veiller à ce que les personnes qui contribuent à l'amélioration d'un bien-fonds soient rémunérées pour cette contribution conformément à leurs droits contractuels. Pour atteindre son objectif fondamental, la Loi prévoit deux types de recours : les dispositions fiduciaires et les dispositions ayant trait au privilège.

En vertu du mandat légal de la Commission de réforme du droit du Manitoba (ci-après, la « Commission ») visant l'amélioration et la modernisation des dispositions législatives, la Commission a choisi d'étudier les recours prévus par les dispositions législatives régissant le domaine de la construction au Manitoba pour plusieurs raisons. Premièrement, l'industrie de la construction du Manitoba a connu une nette expansion et a beaucoup évolué depuis que la loi actuelle a été promulguée en 1982. Bien que la Loi ait été revue de manière approfondie dans les années 1970 par la Commission, il n'y a pas eu de modifications de fond apportées aux dispositions législatives en près de 40 ans. De plus, des critiques récentes formulées par le milieu judiciaire au sujet de la Loi ont mis en lumière un besoin d'entreprendre un examen réfléchi et exhaustif de chacune des mesures prévues par la Loi afin d'améliorer sa cohésion. Finalement, l'examen a été entrepris dans le cadre d'un débat national croissant visant à déterminer si des solutions législatives devraient être adoptées pour régler des retards de paiements dans l'industrie de la construction.

La Commission a publié un rapport de consultation en février 2018 qui définissait des points à discuter et invitait les parties prenantes à commenter les réformes proposées. Grâce à des présentations écrites et à des réunions en personne, la Commission a reçu des commentaires réfléchis et exhaustifs de la part d'organismes locaux et nationaux et de personnes travaillant dans l'industrie de la construction ainsi que d'associations professionnelles, d'avocats, de représentants de propriétaires potentiels et d'autres organismes intéressés. Les commentaires reçus ont été soigneusement étudiés par la Commission et aident à éclairer ce rapport.

Dans le présent rapport final, la Commission recommande de simplifier la Loi pour la rendre plus accessible et conviviale, tout en la réorientant vers son objectif original de fournir des protections relatives aux paiements pour ceux qui travaillent dans les différents niveaux de la pyramide des contrats de construction. En ce qui concerne les recours ayant trait aux privilèges et aux fiducies énoncés dans la Loi, la Commission recommande des réformes qui clarifieraient leurs objectifs et leur fonctionnement ainsi que des réformes pour améliorer leur interaction. De plus, la Commission recommande l'ajout de deux recours, à savoir : 1) un régime législatif de règlement rapide pour veiller à ce que les fonds alloués aux projets de construction parviennent aux échelons inférieurs de la chaîne de paiement en temps opportun; 2) un cautionnement obligatoire pour les contrats publics afin de prévoir des fonds additionnels pour la réalisation des projets en cas de manquement de l'entrepreneur.

La Commission reconnaît que divers secteurs d'activité de l'industrie de la construction ont des intérêts différents et souvent opposés. Le rôle de la Commission n'est pas de favoriser un groupe ou un secteur d'activité de l'industrie par rapport à un autre. Il s'agit plutôt de mener un examen exhaustif de l'historique des textes législatifs portant sur le privilège du constructeur au Manitoba, y compris des objectifs des privilèges et des fiducies dans l'industrie. De plus, la Commission relève et analyse des enjeux dans le régime législatif actuel et formule des recommandations pour la modernisation des lois visant à appuyer l'industrie de la construction du Manitoba.

En élaborant ses recommandations, la Commission vise à moderniser et à élargir l'approche du Manitoba dans le domaine des recours liés aux paiements prévus par les lois dans l'industrie de la construction, tout en préservant la longue tradition législative solidement établie dans la province.

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## GLOSSARY

**Counterclaim:** a claim presented by a defendant in opposition to or for deduction from the claim of the plaintiff. If established, such will defeat or diminish the plaintiff's claim.

**Ex Parte:** a judicial proceeding or order taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.

**Fiduciary:** A person who has rights and powers which (s)he is bound to exercise for the benefit of another with whom (s)he stands in a fiduciary relationship. (S)he is not allowed to derive any profit or advantage from the relation between them, except with the knowledge and consent of the other person. Examples of fiduciary relationships include: trustee and beneficiary of a trust, solicitor and client, principal and agent.

**Floating Charge:** a continuing charge on specified assets which allows their owner to deal freely with the property in the usual course of business until the security holder intervenes to crystallize and enforce the charge.

**In Personam:** directed toward a particular person; designates equitable proceedings or actions instituted seeking judgment against an individual in his/her personal capacity.

**In Rem:** directed toward a particular thing; designates equitable proceedings or actions instituted to recover real or personal property or brought to enforce a right to possess a thing itself.

**Payee:** one to whom money is paid or is to be paid.

**Payer:** one who pays, or who is to make a payment.

**Privity of contract:** that legal relationship or connection which exists between parties to the same contract.

**Set-off:** the equitable right to cancel or offset mutual debts or cross demands.

**Vacate:** the process under section 55(2) of the Act whereby a lien registered against land is removed from title pursuant to an order of the Court of Queen's Bench.

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## CHAPTER 1 - INTRODUCTION

Construction law in Manitoba is composed of a complex web of contractual terms, statutory provisions, and common law concepts. *The Builders' Lien Act* of Manitoba establishes two statutory remedies available to persons involved in the construction industry: lien provisions and trust provisions.

The purpose of the Act was eloquently described in the Manitoba Law Reform Commission's Report in 1979 and recently cited with approval by the Manitoba Court of Appeal as follows:

[...] The fundamental purpose of this legislation [...] is to ensure that a person contributing to the improvement of land is paid for that contribution in accordance with his contractual entitlement.<sup>2</sup> [emphasis in original]

### 1. Why Current Remedial Legislation Exists

It was pointed out during the consultation process that there is no business model comparable to that of the construction industry. At a broad level, work performed and materials supplied on a project typically involve many tiers or layers of two-party contracts while contractual remedies available at common law are limited to those parties bound to each other by the terms of each specific contract by the principle of “privity”. Most construction projects give rise to a complex construction contract pyramid composed of many two-party contracts connected to form a series of payment chains that require payment for completed work to flow from owner to contractor to sub-contractor/supplier, and so on. There is considerable legal risk in this model for an innocent party whose contract may be remote from the owner or the contractor in possession of the project funds.

At the contractual level, receivables on a construction project are typically based upon bespoke or unique work or services performed under a contract or sub-contract. Unlike in a standard consumer contractual relationship where the product is generally ready-made and can be inspected before purchase, construction deliverables are often unique to the project and project plans themselves. Entitlement to payment is therefore always subject to the payer's subjective assessment of whether the contractual obligations have been fulfilled satisfactorily, which can be difficult to prove.

*The Builders' Liens Act* of Manitoba and similar statutes in other provinces and territories have long provided remedial schemes intended to supplement and enhance inadequate common law contractual remedies to provide more effective means to collect payment from various sources or levels within the construction contract pyramid.

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<sup>2</sup> *Canotech Consultants Ltd. v. 5994731 Manitoba Ltd.*, 2017 MBCA 48 (CanLII), [2017] MJ No 130 (QL), at para 21.

## 2. Need for Reform

### A. Time for Review

The last major review of Manitoba's construction industry remedial legislation was conducted by the Commission during the 1970s and took almost 10 years to complete.<sup>3</sup> At that time, many other Canadian provinces were also reviewing their lien legislation. The outcome in Manitoba was introduction of the Act in 1981 which brought together for the first time in one statute the province's remedial legislative schemes for builders' liens and construction project trust provisions.

Manitoba has now had thirty-seven years experience with the legislative reforms initiated in 1981. It is time to review and refresh the Act.

### B. Judicial Criticisms of the Act

While the 1981 reforms did strengthen and improve Manitoba's remedial legislation for the construction industry, the courts have sometimes struggled to find clarity of legislative intent in the current Act. For example, Kroft JA observed:

...*The Builders' Liens Act* is not a seamless or symmetric web. It might be better described as a jigsaw puzzle which not only has a few pieces missing but to complicate matters further includes additional pieces from other puzzles.<sup>4</sup>

In 2015, when a novel argument arising under Manitoba's Act in a lien vacation proceeding was heard by the Supreme Court of Canada, Rothstein, J, writing for the Court observed:

The trust provisions were formerly provided for in *The Builders and Workers Act*, R.S.M. 1970, c. B90, while the lien provisions were provided for in *The Mechanics' Liens Act*, R.S.M. 1970, c. M80. These two acts were repealed and essentially incorporated into [*The Builders' Liens Act*], S.M. 1980-81, c. 7, in 1981 as a result of the 1979 Commission Report (Provincial Drywall, at para. 22). However, in consolidating these two acts [*sic*], the legislature did not expressly delineate how the lien and trust provisions were to interact in situations such as this case, where both remedies are pursued at the same time by a contractor or subcontractor.<sup>5</sup> [emphasis added]

These judicial criticisms need to be addressed to permit more effective and just administration of the statutory remedies currently included in the Act.

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<sup>3</sup> Manitoba Law Reform Commission, *Report of Mechanics Lien Legislation in Manitoba*, Report #32, (August 13, 1979) online: <[http://www.manitobalawreform.ca/pubs/pdf/archives/32-full\\_report.pdf](http://www.manitobalawreform.ca/pubs/pdf/archives/32-full_report.pdf)> [Manitoba Report, 1979].

<sup>4</sup> *Provincial Drywall v. Gateway*, 1993 CanLII 9375, 85 Man R (2d) 316 (MBCA) at para. 23.

<sup>5</sup> *Stuart Olson Dominion Construction Ltd. v. Structural Heavy Steel*, 2015 SCC 43 (CanLII), [2015] 3 SCR 127, para. 33 [*Structal*].

### C. Changes in the Industry

Manitoba's construction industry has expanded over the past three or four decades and is undergoing significant change. Canadian standard form contracts<sup>6</sup>, which include reasonable payment terms, are readily available and much used. However, public and private owners frequently modify standard forms to suit their own priorities and often develop special form contracts that allow for modern methods of financing, design and construction of their projects. Complex project delivery models, such as public-private partnerships (P3s), can substantially alter aspects of the classic construction contract pyramid, introducing long-term licence/lease arrangements (sometimes on Crown-owned lands) with operation and maintenance obligations for the new structure or facility typically remaining in private hands for 30 year terms. Integrated design-build project delivery models<sup>7</sup> are also increasingly used and various forms of construction management<sup>8</sup> have become popular. The impact of all of these changes on contract forms, the classic payment chain, payment terms, and the potential shift of risks within the construction contract pyramid calls for review and possible reform of the Act.

### D. Demand for Prompt Payment Legislation

Manitoba sub-contractors have been seeking legislative intervention since at least 2009 to address their inability to receive payment promptly in this province. It is reported that similar payment problems and demands for a solution exist across Canada.

The Commission, therefore, undertook to include in this review consideration of the call for new provisions aimed at improving the timeliness of payments within the construction industry.

From the outset, the Commission considered whether any such new statutory remedy would best be provided in stand-alone legislation, or incorporated into the existing statute.

In February 2018, Bill 218 – *The Prompt Payments in The Construction Industry Act*<sup>9</sup> (“Bill 218”) was introduced in Manitoba's Legislature by a private member of the legislative assembly. The Bill progressed to second reading before the House prorogued for the summer. To date, no legislation has been passed.

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<sup>6</sup> Standard construction contracts typically used in Canada are those developed by the Canadian Construction Documents Committee (CCDC), a national joint committee including owner representatives and appointed members from the Association of Canadian Engineering Companies, Canadian Construction Association, Construction Specifications Canada and Architectural Institute of Canada.

<sup>7</sup> An “integrated design-build project delivery model” is a project delivery model where design work and the construction phase proceed coincidentally as opposed to the classic sequence of design, procurement of a contractor and then construction based on a fully completed design.

<sup>8</sup> “Construction management” refers to a project delivery model in which an owner typically retains a general contractor to assist in procurement and management of trade contractors.

<sup>9</sup> 3<sup>rd</sup> Sess, 41<sup>st</sup> Leg, Manitoba, 2017-18 (second reading 24 April 2018).

## **E. Ontario's Prompt Payment Legislative Experience**

For several years, certain construction industry representatives in Ontario pursued enactment of stand-alone prompt payment legislation in that province.<sup>10</sup> Bill 69, *An Act respecting payments made under contracts and subcontracts in the construction industry* was introduced in the Ontario Provincial Parliament on May 2013. Considerable industry pressure mounted both for and against Bill 69, and passage of the Bill was denied in 2014.

The Ontario Attorney General and Minister of Economic Development, Employment and Infrastructure thereafter retained experienced construction lawyers to examine the issue and provide independent expert advice on prompt payment legislative options, including possible amendment to include prompt payment within Ontario's *Construction Lien Act*<sup>11</sup>. On April 30, 2016, the Ontario government released the resulting report entitled "Striking the Balance: Expert Review of Ontario's Construction Lien Act"<sup>12</sup>, hereafter referred to as the "Ontario Report", which provided a comprehensive assessment of prompt payment regimes world-wide and recommended significant amendments to Ontario's legislation.

In December 2017, the Ontario Parliament passed Bill 142- *Construction Lien Amendment Act*<sup>13</sup> adopting many of the recommendations contained in the Ontario Report. *The Construction Lien Act* was re-named the *Construction Act*<sup>14</sup> and arguably the most significant change was the introduction of a prompt payment regime within that time-honoured, industry-specific remedial legislative context. Most of the amendments took effect July 1, 2018, while others are effective October 1, 2019, including the prompt payment and adjudicative provisions. The Ontario Report and resulting legislative amendments to Ontario's legislation have been a valuable resource for the purposes of this review.

## **3. Review Process**

### **A. Mandate of the Manitoba Law Reform Commission**

Pursuant to its governing legislation, the Commission is mandated to inquire into and consider any matter relating to law in Manitoba with a view to making recommendations for the improvement, modernization and reform of law.<sup>15</sup> Regularly reviewing and updating statutes is one means of performing this function. Addressing problems within an existing statute, particularly those identified by the legal profession and judiciary, is another. Keeping pace with societal changes

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<sup>10</sup> 2<sup>nd</sup> Sess, 40<sup>th</sup> Leg, Ontario, 2013.

<sup>11</sup> RSO 1990 c C30 [*Construction Lien Act*].

<sup>12</sup> Reynolds, Bruce & Sharon Vogel, *Building a Federal Framework for Prompt Payment and Adjudication*, June 8, 2018, online: <http://www.constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf> [Reynolds, "Ontario Report"]

<sup>13</sup> Sess, 41<sup>st</sup> Parl, Ontario, 2017 (assented to 5 December 2017)[*Construction Lien Amendment Act*].

<sup>14</sup> RSO 2017, c 33 [*Construction Act*].

<sup>15</sup> *The Manitoba Law Reform Commission Act*, CCSM c L95 at s 6.



affecting user groups reliant upon particular statutes and giving due consideration to industry demands for more legislative intervention are still further means of performing the Commission's function.

## **B. Consultation**

Throughout 2017, the Commission conducted a comprehensive review of the legislative history of Manitoba's construction lien legislation, including consideration of the purpose served by each of the current remedies, liens and trusts.

In February 2018, the Commission released its Consultation Paper<sup>16</sup> summarizing the current legislative scheme and the Act's historical context, and proposing options for modernizing the Act. Consideration was given to the Ontario Report and the prompt payment legislation now introduced in that province. Options for improving payment delays in the industry, including amendments to the Act, were contemplated. In total, the Consultation Paper identified 46 issues for discussion during the consultation phase of the project.

## **C. Stakeholder Participation**

Notice of this review together with an invitation for Stakeholders to comment on the Consultation Paper was posted on the Commission's website on February 18, 2018. The invitation was directed to approximately 90 individuals and organizations in Manitoba's construction industry and nationally and those otherwise impacted by the Act, including: professional associations, lawyers, potential owner representatives, and other affiliated bodies. In addition, notice was circulated to membership of the Construction & Infrastructure Law, Insolvency Law, Real Property and Canadian Corporate Counsel Association Sections of the Manitoba Bar Association on the Commission's behalf.

Thoughtful and comprehensive written submissions were received from 13 associations and individual Stakeholders after which 10 meetings were held in April and May to discuss issues of concern to each Stakeholder who requested such an opportunity. Additionally, the Commission attended a meeting with 21 members of the Construction & Infrastructure Section of the Manitoba Bar Association where discussions were held, feedback was elicited and an invitation was extended for additional feedback to be provided to the Commission.

Stakeholders bringing a national perspective to this review included:

- **Canadian Construction Association ("CCA")** which has approximately 20,000 members through a network of 63 regional and local construction associations across Canada. Membership includes owner groups, general contractors, subcontractors,

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<sup>16</sup> Manitoba Law Reform Commission, *The Builders' Liens Act: A Modernized Approach- Consultation Paper*, February 18, 2018.

suppliers, manufacturers, design professionals, and various other service providers. CCA distributes Canadian Construction Documents Committee standard form construction contracts and related documents through its Member Associations.

- **Surety Association of Canada (“SAC”)** – the national association of the Canadian surety industry with members including surety companies, reinsurers and other surety industry participants across Canada. This association was a member of the 14 person advisory committee for production of the Ontario Report published in 2016 from which Prompt Payment and other amendments resulted in the 2017 Ontario *Construction Act*.
- **General Contractors Alliance of Canada (“GCAC”)** – with over 400 general contractor members across Canada whose work ranges from small residential and commercial construction to multi-billion dollar infrastructure projects.

Important representations were also received from the following local industry groups representing contractors, sub-contractors, suppliers and affiliates carrying on business in Manitoba:

- **Winnipeg Construction Association (“WCA”)** – affiliated with the CCA with 820 members including approximately 80 industrial and commercial general contractors, more than 300 sub-contractors responsible for most trade work in Manitoba, and over 300 material manufacturers and suppliers. The WCA provides a wide range of training and other supportive services to its cross-industry membership and lobbies for their common interests.
- **Manitoba Heavy Construction Association (“MHCA”)** – membership includes horizontal and subsurface contractors which self-perform most of their work (few sub-contractors required) constructing highways, earthmoving, installing sewer, water and other underground services, etc.
- **Mechanical Contractors Association of Manitoba (“MCAM”)** - members typically supply and install mechanical equipment of high value for heat, ventilation, and air conditioning systems, water treatment plants, industrial plants, etc. Often they are subcontractors to a general contractor on such projects, but they sometimes contract directly with owners instead.
- **Manitoba Subcontractor’s Association (“MSA”)** - provides resources to subcontractors within Manitoba and currently has 31 members.

Further, submissions were received in writing and/or meetings were held with the following: the **Construction Law & Infrastructure Section of the Manitoba Bar Association**, four individual **lawyers**, one law firm and the Creditors Rights & Insolvency Group of another, **Manitoba Hydro** a large Crown agency/owner, the **Manitoba Association of Architects (“MAA”)**, and **Winnipeg Land Titles Office**. The **Manitoba Workers’ Compensation Board** responded on one item of interest to that entity.

The Commission was also in direct communication with Bruce Reynolds, co-author of the Ontario Report as well as a recently released report prepared for Public Services and Procurement Canada for useful commentary. This latter report will be considered further in this report.

Stakeholders were advised that their written responses and additional feedback respecting this project and the Consultation Paper would influence formulation by the Commission of its final recommendations to be published in its Final Report.

## **4. Stakeholder Feedback**

Stakeholder contributions to this project were extremely valuable to the Commission's review. From the feedback received, the Commission has identified four major themes which have been used to guide development of the recommendations provided in this Final Report: preserve trust and lien remedies, create a new remedy to promote prompt payment, modernize the Act, and promote inter-jurisdictional consistency.

### **A. Four Major Themes from Stakeholder Feedback**

#### **(a) Preserve Trust and Lien Remedies**

Technical and challenging as the detailed provisions in the Act can be, industry users have come to know, appreciate and rely upon the two remedies that have been available in one form or another for their payment protection for more than a century. There was no suggestion from any Stakeholder that the Commission should consider or recommend a reduction in the current scope of either remedy.

#### **(b) Create a New Remedy for Prompt Payment in the Act**

With the exception of the MCAM, all Stakeholders, including national and local industry representatives as well as practicing lawyers who took a position on the issue, preferred that any new remedy to encourage prompt payment be incorporated into the existing Act and not in stand-alone prompt payment legislation.

The Commission has accordingly proceeded on this basis, developing recommendations for the inclusion of prompt payment provisions within the Act to co-exist with and supplement the two existing remedies already provided.

#### **(c) Modernize the Act**

Stakeholders universally welcomed the Commission's review and supported the majority of proposals to modernize the Act which were set out in the Consultation Paper.

Some Stakeholders identified new issues to be considered and, in one important instance, a national Stakeholder proposed pertinent reforms to address central components of the *Structal*

problem identified in the 2015 judgment of the Supreme Court of Canada which is discussed in depth in Chapter 5 below.

#### **(d) Promote Inter-jurisdictional Consistency**

During the consultation process, the Commission was encouraged to strive toward increasing the consistency of construction industry remedial legislation across the country when making recommendations for reform of the Act. Uniform provincial lien and related legislation would be welcomed, particularly by the numerous construction companies and professionals whose work is inter-jurisdictional.

At the same time, Stakeholders acknowledged that existing remedies (trusts and liens) have long evolved with important differences in each province. For example, while Manitoba and Ontario lien statutes derived from the same American source in 1873, each province has gone its own way since then. The shared source and close geographic connection, however, still provide good reason to look to Ontario's statute when seeking to increase consistency inter-jurisdictionally.

Given the differences among provinces, it is the Commission's position that this review should first take into account Manitoba's history, precedents, local circumstances and the requirements of the local industry and institutions before recommending amendments intended to align Manitoba's existing statutory provisions with those of Ontario or other jurisdictions. Where new remedies are recommended, there is more opportunity to follow promising advances being made in other jurisdictions.

In this Final Report, the Commission has recommended that Manitoba adopt some structural logic found from Ontario's new *Construction Act* specifically in the grouping of sections, division of Parts, and re-naming of section headings, as well as the adoption of certain administrative procedures. Such commonalities could significantly simplify the legal recourse available to industry members and their counsel in at least two of Canada's neighbouring jurisdictions.

### **B. Industry Requests for Involvement in Next Stage of Reform Process**

The Commission's broad and thorough consultative process during this review was reported to have been much appreciated by industry Stakeholders. The economics of the construction sector are deeply dependent upon the statutory remedies set out in the current Act and all indications are that members are fiercely committed to participating in final determination of the degree and feasibility of all legislative regulation the Act provides to and imposes on their industry. The Commission therefore wishes to pass along to government the requests made by the industry that they be included in the process of final drafting of a new Act, much like they were included during the 1980 reforms in Manitoba and the recent reforms in Ontario.

## **F. Draft Legislation**

The unusually high degree of Stakeholder interest in the reform process combined with the notorious complexity of the current Act have prompted the Commission to consider how it might best present the results of its research, consultations and analysis. Along with the recommendations provided in this Final Report, the Commission has also prepared and appended draft legislation to this report as **Appendix A** and **Appendix B**, which re-configure the Act and set out at least preliminary drafts of the revisions recommended in this Report. Appendix A shows the changes between the current and proposed draft legislation while Appendix B provides an example of draft legislation.

The Commissioners do not pretend to be legislative drafters and recognize that those with the skills and expertise within the government are much more suited to the task of re-writing the Act in accordance with modern principles of legislative drafting. The document contained in Appendices A and B are to be used by the readers of this report solely as a guide to demonstrate the recommended reforms.

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## CHAPTER 2 - OVERVIEW & HISTORY OF CONSTRUCTION LIEN & TRUST LEGISLATION IN MANITOBA

The law regulating the construction industry in Manitoba includes negotiated contracts, statutory provisions, and common law concepts. This chapter provides an overview of the current state of the law and how it came to be.

### 1. Essential Base – Contracts

Underpinning the statutory remedies contained in the Act for claimants seeking to be paid for work, services or materials provided to improve the value of an owner's land, is each claimant's specific contract or sub-contract. Each contract or sub-contract sets out terms for the claimant's proper performance and establishes the legal basis for its entitlement to ultimately be paid an agreed sum.

As the work progresses, contractually approved changes to the scope of the work can alter the nature and value of work, services or materials to be provided and, consequently, the total amount to which a claimant is entitled to be paid. The Act does not alter performance requirements, the contract price, sub-contract prices or the total amount the owner must pay for construction of the project.

### 2. Builders' Liens

#### A. History and Purpose of Liens

Lien provisions in the Act provide the right to claim and enforce liens based upon the cost of work, services or materials provided to improve the value of an owner's land. Under a complex set of provisions in the Act, a lien claimant can ultimately force a sale of an owner's land to recover its valid and enforceable claim from proceeds of the sale if necessary in extreme cases.<sup>17</sup> More often, however, lien claims are enforced instead against security posted to stand in place of the land.

The legal origin of builders' liens (sometimes called mechanics or construction liens) is Roman law – the law of European countries governed by the Civil Code. Historically, the law of England contained no lien provisions and does not to this date.<sup>18</sup>

Due to their colonial connections with European countries, the Province of Quebec and the American state of Louisiana operate under laws based upon the Roman Civil Code. All other

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<sup>17</sup> *Builders' Liens Act*, *supra* note 1, ss 68-71.

<sup>18</sup> See Latham, Michael, "Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry", HMSO, Department of the Environment, 1994, cited in Bristow, David et al, *Construction, Builders' and Mechanics' Liens in Canada*, loose-leaf, 7th ed (Toronto: Carswell, 2005), at footnote 3 at 1-3.

Canadian provinces and territories and American states operate under laws based upon English common law principles.

In 1791, the common law state of Maryland was the first in North America to introduce lien legislation modelled on Roman law principles.<sup>19</sup> All common law jurisdictions of North America eventually followed suit. The first such statutes to come into force in Canada were enacted in Ontario and Manitoba in 1873. Because there is no right to a lien upon land in favour of a person performing work, providing services or supplying materials either at common law or in equity, the lien is entirely a creature of statute.<sup>20</sup>

Courts have interpreted lien legislation to be primarily concerned with the commercial interests of persons who contribute work, services or materials to the improvement of real property, whether by a contractor under contract with the owner or by any sub-contractor or supplier, with the primary purpose of better enabling such persons to recover the amounts owing to them. Such remedial statutes have also been found to have a secondary purpose of ensuring business efficacy by protecting the commercial interests of others, including the owner and financier of the improvement, to allow project funds to flow through the contractual chain while managing the risk to lenders and owners for liability to those providing the work, services or materials.<sup>21</sup>

## **B. General Nature of the Lien**

Lien rights arise when the claimant commences work, provides services or supplies materials for the improvement of the owner's land.<sup>22</sup> In Manitoba, a lien right may charge not only the owner's land, but also the money retained as holdback and amounts payable at the time.<sup>23</sup>

The value of a claimant's lien right fluctuates with the unpaid value of its completed work. In its unregistered state, the lien has been usefully described as follows:

...the lien subsists as an "inchoate" statutory security, the effect of which is to collateralize the credit advanced by contractors and/or subcontractors and suppliers [...whether or not they have a contract with the owner of the property].<sup>24</sup>

The existence of an unregistered lien right is time-limited by the statutes which create them so that builders' liens automatically expire unless specified steps are taken within time periods allowed for fixing or crystallizing the accrued inchoate or floating charge. Usually a lien is fixed

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<sup>19</sup> *Ibid* at 1-3.

<sup>20</sup> *Ibid*. See also *Johnson v. Crew*, [1835] OJ No 74 5, UCQB (OS) 200(CA) at 6.

<sup>21</sup> *Town-N-Country Plumbing & Heating (1985) Ltd. et al. v. Schmidt et al.*, 1991 CanLII 7989, 93 Sask R 278 (SK CA), at para 27, rev. on other grounds in [1989] SJ No 486.

<sup>22</sup> *Builders' Liens Act*, *supra* note 1 at s 13.

<sup>23</sup> *Ibid* at s 13, s 26 & 27(7).

<sup>24</sup> *Bristow*, *supra* note 18, at 1-1 & 1-2.

by registration against title to the land, or, where Crown land ownership is at issue, by giving written notice of the claim for lien as required by the Act.

The permitted time for registration or serving notice of a claim for lien in Manitoba is 40 days from the earliest of certain events, such as completion or abandonment of the contract under which the lien arises, last date of material supply or issuance of a certificate of substantial performance as the project nears completion.<sup>25</sup>

### **C. Effect of Lien Registration**

Liens are often registered while the work is still progressing. The effect of lien registration on an active construction project is dramatic. Several sections of the Act prohibit payments from continuing in the face of a registered lien, a result colloquially referred to as “*staying the hand of the paymaster*”.<sup>26</sup> When this occurs, mortgage companies refuse to make further advances to the owner, the owner is prevented from paying the contractor and so on. The normal flow of payments down all contract payment chains is suspended until the lien registration is removed from the land.

Failure to suspend advances or payments results in the lender losing priority for such advances and the owner risks liability for double payment of amounts paid out in face of a registered claim for lien.<sup>27</sup>

### **D. Statutory Relief from the Commercial Effect of Lien Registration**

Section 55(2) of the Act provides a safety valve to relieve the disruption caused by registration of a lien and to allow an incomplete construction project to proceed after one or more liens have been registered:

#### **Vacating lien on payment into court, etc.**

55(2) Upon application, a judge may order security or payment into court in an amount equal to the holdback required under this Act as it applies to a particular contract and any additional money payable with respect to that contract but not yet paid but not exceeding the total amount of the claims for liens then registered against a parcel of land and may then order that the registration of those liens be vacated.

This provision allows an application to be made to Manitoba’s Court of Queen’s Bench for an order vacating the lien(s) registered. Upon the posting of security by the applicant (usually the contractor, but sometimes the owner) in an amount described in the Act, the Court may order

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<sup>25</sup> *Builders’ Liens Act*, *supra* note 1 at s 43 & s 44.

<sup>26</sup> *Ibid*, ss 25(1), (2) & (3), ss 27(1)&(3), s 30 & s 31.

<sup>27</sup> *Ibid* at ss 27(1),(2)&(3), s 31, see also: *South Westman Regional Health Authority Inc. v. Accurate Dorwin Co.*, 2001 MBCA 127, [2001] MJ No 327 whereby double payment was ordered for the value of the lien registered when the owner proceeded to pay out.



that the registered lien(s) be discharged by the Registrar in the applicable land titles office, and the security posted then stands in place of the land, subject to a first charge in favour of the claimant(s) whose lien(s) has/have been vacated.<sup>28</sup>

From 1981, when the current process was introduced, until 2012, sub-section 55(2) operated quite effectively. In 2014, novel facts and legal arguments exposed the Legislature's failure to provide for the interaction of trust and lien provisions contained in the same remedial statute in *Stuart Olson v Structal Heavy Steel* ("Structal").<sup>29</sup> This case was later considered by the Court of Appeal and the Supreme Court of Canada.<sup>30</sup>

### **E. Enforcement of Lien Claims**

Only liens duly registered or for which notice has been given can be enforced.<sup>31</sup> Strict compliance with the statutory requirements for registration or giving notice of a claim for lien must be proven to establish that a lien is valid and enforceable. To prove a claim for lien, the claimant must issue a statement of claim upon commencing an action in the Court of Queen's Bench. Unless an action is commenced within two years from the date of registration and a pending litigation order is registered, the lien will expire.<sup>32</sup> This two year requirement applies whether the claimant seeks to enforce its claim against land or against security posted to vacate its lien under section 55 of the Act.<sup>33</sup>

### **F. The Role for Statutory Holdback**

The Legislature has capped an owner's potential liability to lien claimants by creating provisions involving retention of a holdback from contract price amounts payable. In Manitoba, the holdback is equal to 7.5% of each payment made on account of the contract price.<sup>34</sup> If an owner complies with the requirement to deduct and retain holdback according to the Act, it can limit its monetary exposure to lien claims in the event of a payment default by others on the project.<sup>35</sup>

### **G. Peculiarity of Lien Rights**

Lien rights are fragile in nature. They are quick to expire and cannot be resurrected if not acted upon in a timely and compliant manner. Because the legislation creating them is remedial and derogates from the common law context in which they exist, the technical requirements set out for proper exercise of such rights are strictly construed by the courts. Once a claimant proves

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<sup>28</sup> *Builders' Liens Act*, *supra* note 1 at s 56(1).

<sup>29</sup> 2013 MBQB 48.

<sup>30</sup> The decision of the Court of Queen's Bench was overturned by the Court of Appeal in 2014 MBCA 8, 303 Man R (2d) 122 and the Supreme Court of Canada *supra* note 5.

<sup>31</sup> *Builders' Liens Act*, *supra* note 1 at s 41(3).

<sup>32</sup> *Ibid* at s 49(2) & (4).

<sup>33</sup> *Ibid* at s 51 & s 56.

<sup>34</sup> *Ibid* at s24(1).

<sup>35</sup> *Ibid* at s 27(1).

that it is a person intended to benefit from the Act and that it has properly exercised its statutory right of lien, interpretation of the Act to determine a qualified claimant's rights of recovery may be more liberally construed.<sup>36</sup>

### **3. Statutory Construction Trusts**

#### **A. History and Purpose of Trust Provisions**

The second distinct set of legislative provisions found in the Act for the benefit of persons in the construction industry create statutory trusts. Trust provisions seek to keep the owner's funds for financing the project within the construction contract pyramid and flowing down the proper contractual payment chains.

The trust concept originated in the Middle Ages in England during the Crusades when it became necessary to devise a method for regulating the conduct of persons who held property for the use or benefit of others during long absences of crusading property owners. Equity courts administered by the church devised the concept which was eventually accepted into English common law and continues to find many applications to this day.

In 1883, Manitoba enacted *The Payment of Builders and Workers Act*<sup>37</sup> requiring builders to maintain pay lists for time worked and amounts owing to each of their employees. The employees were granted rights of action to sue for unpaid wages, and if the owner directly paid the wages claimed, its payment obligations to the contractor were accordingly reduced.

The statute continued to be employee-focussed with various minor revisions and name changes from 1883 to 1932. In that year, amendments to *The Builders' and Workmen's Act*<sup>38</sup>, as it was then re-named, added beneficiaries to serve as the base for introduction in Manitoba of a statutory trust intended to keep construction contract funds within the contract pyramid for each specific project.<sup>39</sup>

In Manitoba, the trust provisions were intended to stop out-of-town contractors who secured Winnipeg contracts from leaving the area without paying their debts.<sup>40</sup> In April 1932, the Winnipeg Tribune reported the following:

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<sup>36</sup> Bristow, *supra* note 18 at footnote 58, 1-11, 1-2. See also *Clarkson Co v Ace Lbr.* [1963] SCR 110 reversing [1962] OR 748 (CA) adopting dissenting judgment at 757.

<sup>37</sup> (1883) 46 & 47 Vict c 21.

<sup>38</sup> *An Act to amend "The Builders' and Workmen's Act"*, SMB 1932, c2.

<sup>39</sup> The Winnipeg Free Press reported on April 11, 1932 that the impetus for the amendment arose from a contractors meeting in Vancouver where it was reported that a similar scheme had originated in the state of Michigan and had been adopted in Wisconsin where it had worked well.

<sup>40</sup> One prominent contractor was quoted as saying:

We have had for several years contractors stepping into Winnipeg and having a real good time on the proceeds of their contracts, buying cars, living in the best places and carrying on 'high'. Then they leave the city and the

Members of the Winnipeg Builders' Exchange and representatives of material supply houses today commended the recent amendment to the Builders' and Workmen's Act as one of the greatest benefits of recent years to the western contracting business.<sup>41</sup>

The new provisions designated the builder, contractor and sub-contractor as trustees of all payments received on account of the contract price and listed the beneficiaries to be paid prior to a trustee appropriating or converting any part of the trust fund to its own use or to any use not authorized by the trust.<sup>42</sup>

The trust provisions continued in *The Builders and Workers Act* with little change until that Act was repealed in 1981 upon the amalgamation of its provisions with lien provisions then found in *The Mechanics' Lien Act*<sup>43</sup> to form the current Act.

## **B. Trustees Designated by the Act**

The Act contemplates more than one trust fund arising according to whose hands hold money intended for use or used to pay the contract price for work, services and materials provided by the contractor and its sub-contractors to improve the value of an owner's land.

The owner is trustee of the sums it receives to finance a construction project under section 5(2) of the Act. Further, as sums become payable to the contractor on the basis of certification by a payment certifier, all money in the hands of the owner or at any time thereafter received by the owner for payment under the contract constitutes a trust fund pursuant to section 5(1) of the Act.

As payments flow down the payment chain, first to the contractor (under section 4(1)) and then to the sub-contractor(s) (under section 4(2)) each in turn becomes a trustee of all sums received by each of them on account of the contract price.

## **C. Duty and Liability of Trustees**

Each trustee is expressly directed in the Act to not appropriate or convert any part of a trust fund for which the trustee has responsibility to itself or for its own use or for any use not authorized by the trust until payment has been made to listed beneficiaries of the trust of amounts then owing to them.<sup>44</sup> At common law this obligation is part of the fiduciary *duty of loyalty* that trustees owe to the beneficiaries of a trust.

Breach of trust by a trustee can result in quasi-criminal charges under section 7 of the Act, and upon summary conviction, a fine may be imposed for up to \$50,000 or the wrong-doer can face

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country, and behind there is a bad record of debts unpaid for materials and to sub-contractors. (Winnipeg Free Press, "Trust Fund Bill looked upon as boon to builders" (April 11, 1932))

<sup>41</sup> Winnipeg Tribune, "Builders laud amendments to Workmen's Act" (April 11, 1932).

<sup>42</sup> *supra* note 37, s 1.

<sup>43</sup> RSM c 157.

<sup>44</sup> *Builders' Liens Act*, *supra* note 1 at ss 4(3), 4(4) & 5(3).

two years imprisonment. This offence may also apply to every officer or director of a corporation who knowingly assents to or acquiesces in an offence under this section.

The trust provisions in the Act do not provide a complete code of applicable law. Common law and equitable trust principles with associated remedies, such as tracing, are also available to beneficiaries who are at liberty to sue a trustee for breach of trust and may obtain a personal judgment against the wrongdoer in the event that misdirected trust funds cannot be traced and recovered in a civil proceeding.<sup>45</sup>

#### **D. Beneficiaries of the Trust**

Manitoba's Act lists the contractor, all sub-contractors, all persons who have supplied materials or provided services for purposes of performing the contract or any sub-contract under the contract, the Workers Compensation Board for assessments related to the project and workers employed to perform the contract or a sub-contract under the contract, as beneficiaries entitled to receive trust funds in the hands of the owner.<sup>46</sup>

As contractor claims for payment are certified and project funds are released down the payment chain, the owner is included in the list of beneficiaries entitled to receive trust funds from the contractor for "any set-off or counterclaim relating to performance of the contract".<sup>47</sup> The contractor or sub-contractor is included as a beneficiary entitled to receive trust funds from a subcontractor for "any set-off or counterclaim relating to the performance of the sub-contract".<sup>48</sup>

#### **E. Relationship of Trusts to Liens**

Since both trust and lien rights are based upon a claimant's contractual right to be paid for work, services or materials provided to improve the value of an owner's land, they arise and co-exist for certain time periods.

In the short run, liens are usually seen as being more potent than mere trust rights because of their power to attach to property and impede commerce. On the other hand, lien rights are quick to expire and may fail or prove to be unenforceable if not promptly exercised in strict accord with various time and other technical requirements set out in the Act. When lien rights expire, a claimant will be left with only common law contractual rights of action to sue for recovery of a debt, or, if trust funds have been misappropriated, the claimant may also sue for breach of trust.

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<sup>45</sup> See *Glenko Enterprises Ltd. v. Keller*, 2000 MBCA 7, 150 Man R (2d) 1 [*Glenko*] at 30.

<sup>46</sup> *Builders' Liens Act*, *supra* note 1 at ss 5(1).

<sup>47</sup> *Ibid*, s 4(1)(d).

<sup>48</sup> *Ibid*, s 4(2)(d).

Section 9 of the Act provides that the existence of a trust or cause of action asserting the existence of a trust or any breach of trust under the Act is not affected by expiry of the time for filing a lien.

Trust rights arise as payments claimed under the contract are certified and come due. They continue for 180 days from notice of a breach for tracing purposes but otherwise trust rights continue for six years allowing a claimant to sue for a personal judgment on allegations of breach of trust.<sup>49</sup>

## **F. Type of Trust Scheme in the Act**

In some Canadian jurisdictions, construction trust provisions follow privity of contract and each payer in the contractual chain becomes a trustee only for those with whom it stands in a direct contract, i.e. has privity.<sup>50</sup> Another type of construction trust scheme is the “envelope trust” where all money received on account of any contract or subcontract price constitutes a trust fund for the benefit of everyone supplying work, services or materials on account of a contract or subcontract.<sup>51</sup> New Brunswick’s legislation establishes an envelope trust relationship, as an example.<sup>52</sup>

Manitoba’s trust provisions do not fit neatly into either above description. Privity concepts do appear at the level where payments reach the hands of the contractor<sup>53</sup> and sub-contractor<sup>54</sup>, but Manitoba’s Act differs from Ontario’s where trust funds in the hands of the owner as trustee are solely for the benefit of and payment to the contractor. Instead, in Manitoba, the owner as trustee is prohibited from appropriating or converting any part of the sums obtained to finance the project and amounts certified for payment of parts of the contract price to or for his own use or to or for any use not authorized by the trust *until* the contractor has been paid “and provision for the payment of other beneficiaries of the trust have been made.”<sup>55</sup>

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<sup>49</sup> *The Limitation of Actions Act*, CCSM c L150, s 2(1)(i).

<sup>50</sup> The statutes of Ontario, Nova Scotia, Saskatchewan, and British Columbia establish trust relationships between payers and those it has engaged in direct contract pursuant to the *Construction Act*, *supra* note 14, s 7(1)&8(1); *Builders’ Lien Act*, RSNS, c 277, ss 44A(1) & 44B(1) [Nova Scotia Act]; *The Builders’ Lien Act*, SS 1984-85-86, c B-7.1, ss 6(1), 7(1) & 8(1) [Saskatchewan Act]; and *Builders Lien Act*, SBC 1997, c 45, s 10(1)[BC Act].

<sup>51</sup> Bristow, *supra* note 18.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Builders’ Liens Act*, *supra* note 1 at s 4(3).

<sup>54</sup> *Ibid.*, s 4(4).

<sup>55</sup> *Ibid.*, s 5(3).

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## CHAPTER 3 – OVERVIEW: BROAD REFORMS OF THE LEGISLATION

Based on the Commission’s review of the Act and feedback received through the consultation process, six significant broad issues are identified for legislative reform as discussed below. Specific, detailed revisions to the Act are discussed together with the basis for such recommendations in chapters to follow.

### 1. Re-structuring the Act

As statutes go, the Act is quite lengthy, running to 38 pages and containing 82 sections. There are a few headings interspersed in the text, but little in the way of helpful guides to the reader. The majority of the Act is devoted to technical rules surrounding lien rights. Trust provisions account for a mere six sections of the Act. The logic of placement of certain sections is often difficult to determine.

Stakeholders, particularly lawyers, urged the Commission to keep the lien remedy intact, but to clean it up and attempt to make it easier for unrepresented claimants to use. As judges have observed, the amalgamation of two former statutes to produce the Act in 1981 was not a complete drafting success. Kroft, J.A.’s description of “[a] jigsaw puzzle which not only has a few pieces missing but [...] includes additional pieces from other puzzles” is an apt description and demonstrates what can go wrong when statutory language is drawn from various sources.

A review of remedial legislation of other provinces shows that the format of Ontario’s former *Construction Lien Act* best organized content similar to that in the Act by using broad sections typically called “parts”, concise headings and plain language. The Commission is inspired, as a first step, to re-structure and clean up the historic issues with the Act in preliminary draft form as part of this review process. Some wordy, repetitive sections of the Act (for example, sections 24 and 25 on holdbacks) still require the deft hand of an expert legislative draftsman to condense and make them more useable. Substantive revisions recommended in this Final Report by the Commission are then added to the preliminary draft form of the Act which is found at **Appendices A & B**.

### 2. Codification of Trust Provisions

Brief as the current trust provisions contained in the Act are, they nevertheless statutorily impose a broad range of latent, undisclosed rights and liabilities that define a trust at common law. This legal backdrop was fully explained in Chapter 2 of the Consultation Paper and drew strong reactions from many industry Stakeholders. Most had little prior appreciation of the force and potential effect of equitable principles augmenting the bare bones trust provisions in the Act. There was no suggestion that Stakeholders wish to dispose of the trust remedy, and, in fact, the WCA

encouraged the Commission to do its best to align possible enhancements of the trust remedy with the new objective of provoking more timely payments.

A large national Stakeholder provided a compelling argument for reforming the trust provisions in the Act to make them completely express, instead of leaving them to be implied by the courts. This suggestion was supported by additional industry Stakeholders who believe that such provisions would be more readily understood and complied with by users.

The option to codify the trust remedy in the Act is discussed in more detail in Chapter 5.

### **3. Modernizing Lien Provisions**

Restructuring the Act, relocating certain sections, and cleaning up gaps and inconsistencies while inserting more headings to guide the reader, as discussed above, would go some distance toward improving the reader's opportunity to understand and duly exercise the technical requirements of the lien remedy. Stakeholders also drew upon their experience in other jurisdictions in recommending additional reforms to holdback procedures to improve administration of the Act on large, long-term high-value mega projects.

### **4. A Legislative Response to the Structural Decision- Priority of Trust Provisions**

The facts of the Structural decision were that a subcontractor exercised its lien rights and the contractor then vacated the lien under section 55(2) of the Act upon posting the full lien value of \$15 million in the form of a lien bond. Following the posting of the bond, the claimant sought to coincidentally exercise its trust rights and succeeded in having the owner stop payment of some \$3.5 million certified and payable to the contractor for work completed by the subcontractor prior to registration of the lien.

Never before had a claimant in Manitoba sought or obtained double security under the Act for an unproven, disputed claim. Upon hearing the matter, the Supreme Court of Canada stated that Manitoba's Legislature failed to provide for the interaction of trust provisions with lien provisions in 1981 when both remedies were first included in the same statute.

The negative impact of the Structural decision on the established operation of the section 55(2) safety valve in the Act cannot be overstated. The challenge of how to restore the effectiveness of section 55(2) and provide a commercially reasonable mechanism for vacating and securing liens registered against land loomed large as a major fix called for in this review.

The current Act is devoid, in every respect, of guidance on proper interaction of the lien and trust remedies. A number of reforms are therefore recommended to address this issue.

## **5. Establishing a Prompt Payment Remedy**

Currently, there is no remedy in the Act for the enforcement of *timely* compliance with payment terms contained in construction contracts and sub-contracts.

Stakeholders described a culture of non-compliance in the industry whereby the time taken to process payment claims before release of periodic (usually monthly) portions of the contract price has stretched from fewer than 30 days to more than 70 days over the past decade. This assertion was studied and verified as a national concern in the Ontario Report. The problem is that, at each tier of the construction contract pyramid, the contractor and sub-contractors must finance their payroll, material supply purchases, and other costs for the project in advance of being paid. Beginning with owners and/or their payment certifiers, payments are frequently slow to be reviewed, approved and paid. Competitive procurement practices and imbalances in bargaining power make it difficult for industry members to price, anticipate, and be compensated for slow payment processes. As a result, there are complaints about the unfair role the industry members play in financing construction projects.

Members of the Manitoba Association of Architects who frequently serve as payment certifiers for project owners, reported that review and approval of monthly invoices with 28-30 day payment is possible on vertical (i.e. building) construction projects. Owners of massive engineered projects may have more difficulty meeting tight timelines. Trade contractors across Canada, who are at the bottom of the pyramid, have led the movement for legislative relief in the form of prompt payment legislation. As with Bill 218 in Manitoba, stand-alone legislation has been their first choice rather than wait for or attempting to take on the onerous task of reforming existing lien legislation in order to incorporate a brand new remedy. This strategy has been effective in forcing legislators and the balance of the industry to attend to the concern.

In the Commission's opinion, it is difficult to see any benefit to stand-alone prompt payment legislation *other* than avoidance of the very task undertaken in this review. There is logic to adding a prompt payment remedy, if there is to be one, to the existing Act. As a new remedy it must be compatible with the existing trust and lien remedies and, just as with trusts and liens, a prompt payment scheme would serve to remedy ineffective aspects of the very same base contracts and subcontracts.

An extensive review and analysis of the prompt payment movement and options for Manitoba is found in Chapter 6 of this Report.



## **6. Mandating Surety Bonding as a Remedy**

An issue that was not addressed in the Consultation Paper but that arose during the course of consultations was the possibility of reforming the legislation to impose mandatory bonding requirements on Manitoba construction projects. An experienced commercial lawyer observed that increased involvement of sureties under appropriate bond forms and broad requirements for use of performance bonds (providing protection of the owner in event of contractor default) and labour & material bonds, or L & M Bonds, (for protection of subcontractors in the event of contractor default) would provide an extra source of project funds plus added protection for owners and industry participants that would justify the resulting increase to capital costs.

Ontario's 2017 amendments to its legislation, resulting from recommendations in the Ontario Report, added mandatory bonding for all public projects with a contract price of \$500,000 or more.<sup>56</sup>

In the interest of possibly advancing inter-jurisdictional consistency and taking advantage of impressive efforts made in Ontario by the surety industry to improve bond coverage while simplifying claim protocols in concert with prompt payment legislation, the Commission considered this issue and has includes certain recommendations in Chapter 8 of this report.

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<sup>56</sup> *Construction Act*, *supra* note 14, Part XI.1 s 85.1(1)-(5) and Regulation 304/18 s 12.

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## CHAPTER 4 - REFORMING GENERAL PROVISIONS

### 1. Overview

It is proposed, as illustrated in Appendices A & B, provisions of general application, including defined terms, interpretative guides, the scope and application of the Act, and various sections applying to more than one remedy be collected under one section of the Act. Such provisions are found under the heading: Part I- General Provisions.

### 2. Modernizing the Terminology in the Act

#### A. The Lien

The lien remedy established by the Act was termed a “mechanics lien” from 1873 to 1981 when, under the current legislation, it was changed to a “builders lien”. At the same time, many other jurisdictions in Canada, including Ontario, adopted the name “construction lien”. In its 2017 amendments to its former *Construction Lien Act*, Ontario simply makes reference to “the lien”.

There are many types and uses of liens in other areas of the law. Legal researchers will, we suspect, continue to use the most established term “construction lien” when publishing and searching legal sources for the lien established by remedial construction legislation. It therefore seems ill-advised to break with established practice and drop all description of the lien within the Act.

**Recommendation #1: The Act should be amended to replace the term “builders’ lien” in the Act, forms, and regulations with the term “construction lien”.**

#### B. Modernizing the Name of the Act

Throughout Canada, it has been customary for the title of construction industry remedial legislation to reference only the lien remedy despite the fact that the statutes often provide more than one remedy for the industry. Since the amalgamation of the previous statutes into the current Act in 1981, the name, *The Builders’ Liens Act*, has suggested that the only remedy under the Act is the statutory lien.

While adding additional remedies for prompt payment and surety bond remedies to the lien and trust provisions contained in its former *Construction Lien Act* in 2017, Ontario re-named its statute the *Construction Act*. From the Commission’s perspective, Ontario’s new title does not truly describe the remedial purpose of this specialty legislation. Instead, the Commission recommends that Manitoba adopt a more informative name for the modernized version of the Act.

**Recommendation #2: The title of *The Builders' Liens Act* should be changed to *The Construction Contract Remedies Act*.**

### **3. Universal Application of the Act**

During the consultation stage of this review, Stakeholders were invited to provide feedback on section 3 of the Act which creates exceptions to the application of the Act in respect of certain Crown entities and works:

#### **Crown, etc. bound**

3(1) Subject to subsection (2), the Crown, all Crown agencies, and all boards, commissions and bodies performing any duties or functions under an Act of the Legislature on behalf of the Crown, are bound by this Act.

#### **Act not to apply to provincial highways, etc.**

3(2) This Act does not apply to or in respect of work relating to or contracts of the Crown with respect to the construction, repair or maintenance of highways, bridges, air strips, docks and ferry terminals under the control and management of the Crown.

#### **Act not to apply to certain Manitoba Hydro contracts**

3(3) This Act does not apply to contracts, or work related to contracts, entered into by Manitoba Hydro with respect to or in any way associated with the construction, repair or maintenance of hydro-electric generating stations or facilities, and plant appurtenant thereto.

Section 3(2) of the Act above provides an exemption or carve-out for all Crown highway projects which are instead subject to *The Highways and Transportation Construction Contracts Disbursement Act*<sup>57</sup>. Section 3(3) further carves out and excludes from application of the Act all Manitoba Hydro projects related in any way to the construction, repair or maintenance of hydro-electric generating stations and their facilities.

The Commission heard from a number of Stakeholders who argued that the provisions of the Act, including trust and lien provisions as well as any added prompt payment regime, should apply to all construction projects in Manitoba without carve-outs like those established by section 3. The CCA expressed the view that construction work performed on highways and provincial roads specifically should fall under the Act because the remedies provided to contractors and sub-contractors who contract with the Manitoba Department of Infrastructure pursuant to *The Highways and Transportation Construction Contracts Disbursement Act* are not afforded the same rights or protections as payees as those entitled to the remedies under *The Builders' Liens Act*.

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<sup>57</sup> CCSM, c H65. Note that s. 18(1) of Bill 12- *The Red Tape Reduction and Government Efficiency Act*, which received 1<sup>st</sup> reading on March 14, 2018 but has not received Royal Assent changes the name of this legislation to *The Infrastructure Contracts Disbursement Act*, CCSM, c I36.

This view was shared by the SAC and a number of Manitoba’s participating lawyers. The MHCA suggested that one piece of remedial legislation should cover all projects in the province. The WCA most strongly opposed exclusion from the Act of any Manitoba Hydro projects.

The Act accommodates the sanctity of Crown ownership of land under section 16, exempting such lands from attachment by liens and any associated threat of sale under the Act. An alternate scheme has long been provided in the Act under which liens on such projects instead attach holdback and certain project funds in the payment chain.

Manitoba Hydro did not comment on the possibility of revoking section 3(3) under which their hydro electric generating projects are presently excluded from application of the Act. They did observe, however, that garnishment proceedings have been taken against payments on such projects because section 3(3) renders inapplicable section 6(2) which would otherwise prohibit garnishment of project trust funds.

There are no Crown or other carve-outs in Ontario’s *Construction Act* limiting the universal application and availability of remedies provided under the legislation. Inter-jurisdictional consistency with Ontario is a factor to be considered in this case as is the purpose of the Act.

A larger consideration is the prospect of possible implementation of a prompt payment scheme in Manitoba. The Commission has come to share the view that universal application of all remedies without Crown-related exemptions is the best option for achieving the purpose of the Act.

**Recommendation #3: Sub-sections 3(2) and (3) of *The Builders’ Liens Act* should be deleted to remove carve-outs for Crown entities and certain Crown works.**

**Recommendation #4: *The Highways and Transportation Construction Contracts Disbursement Act* should be repealed.**

#### **4. Public-Private-Partnerships (P3’s)**

Changing forms of construction contracts and evolving project delivery models contributed to the need for this review and call for possible legislative amendments. One of the more complex project delivery models is the public-private partnership, also known as a “P3”.

The typical structure and purpose of a P3 can be described as a project delivery model whereby a government body obtains long-extended payment terms for cost of construction upon entering into a development agreement with one or more private entities. These private entities undertake, in whole or in part, to finance, design, build and, over an extended term (often 30 years), operate and

maintain a structure or land improvement before handing it back to the government body on certain terms in a specified condition.

The government or public party to such agreements typically owns or otherwise has possession of the land to be used. The private entities usually create a special purpose vehicle (i.e. a corporation) to enter into the development agreement. The development agreement typically exists above the legal context to which the Act applies (i.e. is not a construction contract) and normally includes a lease or licence or other grant of a right of access whereby the public entity allows the private entities to use, occupy and be in possession of the government site.

The private partner or entity typically also creates a corporation to act as owner for the life of the build, and during any long term operation and maintenance of the new facility. This owner hires a construction company to at least build the facility and, at this level, the agreement qualifies as a contract under definitions in the Act.

This project delivery model has, to date, been most often used in Manitoba by the City of Winnipeg primarily for development of bridges and certain roadworks. In other provinces large provincial highway projects, hospitals, jails, nursing homes, schools and a wide variety of vertical construction has made use of this model.

Manitoba has indicated an interest in making future use of the P3 model. On November 10, 2017, the provincial government repealed *The Public-Private Partnerships Transparency and Accountability Act*<sup>58</sup> which had imposed requirements on public sector organizations planning to take part in P3 agreements including requirements that the organization first undertake a preliminary analysis of the risks, costs and benefits of using the P3 agreement, holding public consultations and appointing a fairness monitor to oversee purchasing processes in advance of procurement efforts.

Assuming that Manitoba's use of the P3 model may increase, it is the Commission's opinion that special provisions ought to be included in the Act along with a definition of the term "public-private partnership". The complex nature of P3 projects has the potential to complicate access to remedies available under the Act. The Commission has identified five potential issues that should be considered and addressed to allow P3 delivery models to be effectively accommodated in revised legislation.

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<sup>58</sup> SM 2012, c 36. This Act was repealed by the enactment of *The Red Tape Reduction Act*, SM 2017, c 34, s 14 on November 10, 2017.

**A. Is the government/public interest in project lands subject to the attachment of liens, or exempt under section 16 as the Act currently stands?**

While Crown and municipal lands, including streets and highways, are not subject to attachment by liens, a wide variety of other government/public land interests are. Universities, school boards, health authorities, and other publicly funded institutions do not currently fall under the definition of “Crown Agencies” in section 1(1) of the Act and therefore are not excluded by section 16. Such properties are therefore lienable in the ordinary course.

Because there is an existing and effective lien remedy in the Act for projects coming under section 16, it seems unnecessary to require investigation, disclosure and potentially different lien treatment from one P3 to the next. The simplest solution is to include all P3 projects which meet prescribed criteria in the section 16 scheme that provides that liens do not attach to land.

**B. Does the government/public P3 partner come within the definition of “Owner” for purposes of the Act with resulting obligations to retain holdback or be a trustee of project funds?**

The public partner under a P3 agreement is only a party to the development agreement and stands remote, not paying for or being a direct party to the construction contract. It is therefore appropriate to exclude the public partner from obligations related to administration of remedies under the Act.

**C. Is the interest in project lands granted by government to the private partner for access to the project site for construction and subsequent purposes subject to lien rights?**

The interest acquired by the private partner in the project lands for purposes of completing the development could be analogized to that of a tenant under a lease agreement. Often a lease, a mere licence or some other partial land interest is conferred. Rather than attempt to provide for fixing a charge on the various types of land interests that might be granted on P3 projects, it seems more practical and sufficiently effective to relieve P3 projects from the complexities of dealing with charges on all land interests granted by the government/public partner under such a development agreement. This would leave claimants with the same lien rights on a P3 project as currently arise for Crown, Crown agency and municipal projects under section 16.

**D. During the post-construction operation and maintenance phase of a P3 project, which repairs should give rise to relief under the Act?**

Although the definitions in Manitoba's Act are reasonably clear about the nature of repairs that are included within the definitions of "construction" and "improving land" giving rise to lien rights, the peculiar nature of value-sustaining maintenance obligations on P3 projects may benefit from the distinction being freshly drawn.

In the Ontario Report, the writers grappled with the issue of when repair obligations give rise to lien rights on P3 contracts and chose to define "capital repairs" for the purpose of P3 projects. Their definition has been taken into account in the following proposed definition for "capital repair" which the Commission recommends be included in the P3 provisions in the Act:

**"capital repair"** means a repair to land or to a structure intended to extend its normal life, improve its value or productivity and does not include work, services or materials provided to prevent deterioration or to maintain the land or structure in a normal functional state.

**E. If surety bonding is made mandatory on public projects under the Act, would P3 projects be included in that requirement?**

The Commission strongly recommends that the contracts and sub-contracts for construction of P3 projects be subject to and have access to all remedies in the Act, including any mandatory surety bonding. Special accommodation as to bonding limits for extreme high value P3 projects similar to that adopted in Ontario merits consideration.

**Recommendation #5: The Act should be amended to address public-private partnerships by:**

- a) defining the term "public-private partnership" in the Act;**
- b) revising section 16 to include all P3 projects that meet prescribed criteria establishing that liens on such projects do not attach to land;**
- c) excluding the public partner from the obligations of an owner related to the administration of remedies under the Act;**
- d) defining "capital repairs" for P3 projects and thereby stating which maintenance obligations of a private partner under a P3 agreement give rise to lien rights under the Act; and**
- e) providing that any mandatory bonding requirements apply to P3 projects with appropriate modification.**

## 5. Engineering, Procurement & Construction Contracts Exception

Another complex, high-value form of construction contract, often utilized by Manitoba Hydro but also commonly used in manufacturing or processing plants, is referred to as an Engineering, Procurement & Construction or “EPC” contract. Such contracts involve engineering or design, procurement of materials for manufacturing and assembly of high value equipment and, finally, construction to install the specialty equipment on site.

It is common when parties utilize an EPC contractual arrangement that contract values accrue over a number of years and work is often performed by contractors and sub-contractors outside of Canada, often in Europe or Asia.

Given the extended terms of these contracts and international reach of the contractual relationship, Manitoba Hydro has suggested that the Act provide accommodation to address circumstances in which substantial EPC contract values accrue over long periods outside of Canada.

For commercial reasons, EPC contracts are typically required by the purchaser to be entered into by the off-shore manufacturer in their entirety meaning that holdback retention for the pre-installation value of such contracts is caught by the Act. Off-shore manufacturers and suppliers typically have no knowledge of the remedies afforded by the Act nor any intention to pursue lien, holdback, trust or other statutory remedies designed for reliance and use within Manitoba. On high value contracts of extended duration, retention of 7.5% of the contract price for contracts extending over several years imposes needless costs on the owners including tax and rate payers in the case of public owners.

The Commission agrees with Manitoba Hydro that it is appropriate to allow parties to contract out of certain provisions in the Act where an owner enters into a contractual arrangement with an off-shore contractor to engineer, procure, and manufacture materials or equipment off-shore.

**Recommendation #6: The Act should be amended to enable parties to contractual arrangements where an owner enters into an EPC contract with a non-Canadian contractor to design, engineer, procure and manufacture materials and/or install equipment to expressly provide in the contract that the Act does not apply to those portions of the contract price to be paid to the contractor in respect of services provided or materials procured, manufactured or assembled outside of Canada and the costs associated with the delivery of such materials or equipment to their place of installation in Manitoba.**



## 6. Professional Design Services

Section 36 of the current Act expressly excludes the professional design services of architects and engineers from lien rights under the Act. In at least four other provinces, lien rights have been expressly granted to design professionals,<sup>59</sup> and in the absence of an express exclusion, the courts have sometimes entertained arguments for the existence of such rights as an element of services in other jurisdictions.<sup>60</sup>

During the Commission's consultation process, the Manitoba Association of Architects (MAA), proposed that the exemption of architects from the application of the lien provisions in the Act be re-examined. The MAA suggested that affording architects lien rights in Manitoba could assist them in the collection of their professional fees. The MAA made clear that they had not canvassed their entire membership on this point. They were also not inclined to seek deduction of holdback from their fees pending completion of construction projects. Note that the Commission did not receive a submission from the engineering profession during its consultations.

Consideration has been given to MAA's position, and the Commission has concluded that to include professional designers in the Act at this point would be inconsistent with the general approach being recommended in this Final Report. In the Commission's view, the lien and all other remedies provided in the Act should be available to participants in the actual process of construction. The focus is on refining and expanding collection remedies for industry members within the complex construction contract pyramid.

When professional designers have collection difficulties, their payer is just one step away, standing in privity of contract with them. MAA acknowledged that they rarely sue their clients to collect disputed fee entitlements and, yet, that remedy is always available, and is also the ultimate enforcement tool for the exercise and enforcement of lien rights. The Commission, therefore, recommends that the Act expressly exclude professional designers from the benefits pursuant to any of the remedies available under the Act.

**Recommendation #7: The exclusion of professional architects and engineers from the lien provisions in the Act should be maintained and extended to all remedies available under the Act.**

<sup>59</sup> Ontario's *Construction Act*, *supra* note 14, ss. 14(1) & 3 expressly entitles architects to file a lien; the *Builders' Lien Act*, the Saskatchewan Act, *supra* note 49, defines "improvement" as including the services of licensed architects and professional engineers; the BC Act provides that "services" giving rise to lien rights include services of an architect or engineer; and the Civil Code of Quebec, CCQ-1991, art. 2726 ["Quebec Act"] provides that a construction hypothec (equivalent to a builder's lien) is available for work done by an architect or engineer.

<sup>60</sup> See, for example, *Peter Hemingway Architect Ltd. v. Abacus Cities Ltd.*, 1980 CarswellAlta 266. See also *Armbro Materials and Construction Ltd. v. 230056 Investments Limited et al.* where it was held that an engineering firm has a valid lien given the nature of the services provided.

## 7. Further Revisions to General Provisions of the Act

Additional sections of the Act of general application require amendment to modernize the legislation and improve the Act.

### A. Section 2(1) – Substantial Performance Values

During the consultation process, the Commission sought feedback on whether the current values utilized to determine when a contract is substantially performed and therefore due for certification and release of accumulated holdback remain appropriate. These values were last set in 1981.

The current values for substantial performance are set out in section 2(1):

#### **Substantial performance**

**2(1)** For the purposes of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when

- (a) the structure to be constructed under the contract or sub-contract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
- (b) the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than
  - (i) 3% of the first \$250,000 of the contract price,
  - (ii) 2% of the next \$250,000 of the contract price, and
  - (iii) 1% of the balance of the contract price.

The majority of Stakeholders consulted agreed that the values used in determining substantial performance of a contract or sub-contract should be increased to match those in Ontario. The Commission concurs and recommends that Manitoba adopt the values recently adopted in Ontario.

**Recommendation #8: Sub-section 2(1)(b) of the Act should be revised to provide that a certificate of substantial performance may be issued if the cost to complete the contract or subcontract is no more than: 3% of the first \$1,000,000, 2% of the next \$1,000,000 and 1% of the balance of the contract price.**

### B. Section 58 – Rights to Information

Section 58 of the Act provides a lien claimant with the right to obtain certain information from the owner, contractor, or its agent. However, where the claimant's lien rights have expired leaving it

with only a trust claim, it is no longer entitled to information pursuant to section 58. This gap illustrates the failure of the Legislature in 1981 to sufficiently integrate the trust and lien remedies when the two former statutes were amalgamated.

Stakeholders agreed with the option of expanding such rights to serve all claimants under the Act, irrespective of their status under different remedies. The Commission therefore recommends that section 58 of the Act be relocated to the general application section of the Act and the rights to information granted to lien claimants be extended to trust beneficiaries as well.

**Recommendation #9: Section 58 of the Act should be revised to grant the current rights to information of lien claimants to trust beneficiaries and relocate section 58 to the *General Provisions* section of the Act.**

### **C. Re-location of General Provisions**

Three other sections included in various parts of the Act have also been identified for relocation to Part I of the Act given their application to more than one remedy. They include:

1. sections 11 & 12 – Attempts to Circumvent the Act;
2. section 29 – Contracts to Conform to the Act; and
3. section 6(3) -Assignment of Rights.

**Recommendation #10: Sections 11, 12, 29, and sub-section 6(3) of the Act should be relocated to Part I of the Act containing the provisions of general application.**

### **D. Definitions of General Application**

Defined terms are critical to operation of a statute. The following list includes new definitions recommended for inclusion in the Act as well as some current defined terms which require amendment. The recommended new or revised definitions for the following terms are located in Appendices A & B.

#### **(a) “construction contract pyramid”**

This is a new term recommended for addition to the Act to assist in describing the complex contractual context in which the remedies apply. The term has been used in proposed revisions to the trust section of the Act.

#### **(b) “improvement”**

Manitoba definitions of “construction” and “improving land” have long set out particulars essential to determining exactly what kinds of construction activities attract relief under the Act.

Recommendations included in this Final Report contemplate adoption of substantial text from Ontario's comparable statute, most particularly in the areas of potentially new prompt payment and bonding remedies. In Ontario, much use is made of the word "improvement" which combines all of the elements of the terms "construction" and "improving land" in Manitoba. The Commission recommends that the word "improvement" replace the two aforementioned terms in the Act.

**(c) "joint venture"**

For some larger scale projects specialized companies sometimes form an association with others to bring required expertise together for performance of necessary work in the ad hoc legal form known as a "joint venture". Joint ventures do not qualify to be included in the legal term "person" and so have not been contemplated by definitions in the Act of "contractor" and "sub-contractor". It is recommended that a new definition of "joint venture" therefore be added to Part I of the Act and that the definitions of "contractor" and "sub-contractor" be revised accordingly.

**(d) "project"**

The Act has not had a defined term for describing the purpose for the trust fund and like general matters, and so it is recommended that this new defined term should be added to the list.

**(e) "contract price" & "sub-contract price"**

The Act currently includes sub-contract price- within the definition for "contract price". This has sometimes given rise to confusion, and is unhelpful. Breaking "subcontract price" out to stand on its own definition is recommended.

**(f) "contract" & "sub-contract"**

Neither current definition of the two terms above has contemplated an amendment to the contract or sub-contract. In fact it is a common occurrence for such agreements to be revised in the course of work, by change order, etc. It is necessary for the Act to contemplate changes during the life of a project, otherwise disputes can develop about the fixed versus adjusted value of a "contract price", etc. Accordingly, it is recommended that definitions of the above terms be revised to qualify "as amended from time to time".

<p><b>Recommendation #11: The terms "construction contract pyramid", "improvement", "joint venture", "project", and "sub-contract price" should be defined in the Act and the current definitions of "contract price", "contract", "sub-contract", "contractor" and "sub-contractor" should be revised.</b></p>
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## CHAPTER 5 - REFORM OF THE TRUST REMEDY

As previously stated, while the majority of the provisions contained in the current Act govern the nature and procedural requirements of the builders' lien remedy, the substantial implications of the trust remedy are poorly supported by the limited statutory guidance contained in the Act. The Commission's review of the statutory trust remedy and feedback elicited during the consultation process suggest a need for meaningful reform to the trust provisions contained in the current Act.

### 1. Codification of Construction Trust Law

Currently, the trust provisions in the Act are brief, limited to sections 4-9. An interpreter of these provisions must look outside the statute to equitable principles and the common law to extrapolate their purpose and practical application. The law on this point is clear in Manitoba. In *Glenko Enterprises Ltd. v. Keller et al.*<sup>61</sup> (hereinafter "*Glenko*"), the Court of Appeal held that the Act did not constitute a complete code prohibiting actions for breach of contract or breach of trust. Huband, J.A., writing for the majority stated:

[45] There is nothing in *The Builders' Liens Act* that prohibits actions based upon breach of contract. The Act adds certain provisions which lead to new remedies that would not otherwise be available, but it subtracts nothing.

[46] *The Builders' Liens Act* creates a statutory trust. Having done so, the usual remedies that might be available for a breach of trust arise. One of those remedies is to trace the moneys constituting the trust, but that remedy is available only where the moneys can be traced, and only if the action is commenced within the time limit in s. 8. That limitation aside, there is nothing in the Act limiting other possible causes of action that may arise when a breach of trust takes place. An *in personam* claim against the trustee for breach of trust, a claim against a stranger to the trust who has knowingly received trust funds, or a claim against a stranger for knowingly assisting in a breach of trust are incidental to the creation of the statutory trust.<sup>62</sup>

As mentioned in Chapter 3, the Commission was advised during consultations that the industry finds the imposition of latent, undisclosed obligations and potential liability for payer/trustees in respect of their handling of project trust funds intolerable and unfair. It was submitted that only if statutory duties are express, clear and not subject to surprise judicial interpretations should they be imposed. The point was well made. The Act is intended to assist persons in the industry to obtain payment. If implications of the trust scheme are not apparent to users of the Act, non-compliance should be anticipated.

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<sup>61</sup>*Glenko, supra* note 45.

<sup>62</sup>*Ibid.*

It is interesting to note that the trust scheme in Ontario's former *Construction Lien Act*, while no more complete or extensive than Manitoba's, was described by the Ontario Superior Court of Justice as a "complete code" in 2017.<sup>63</sup>

With the law as it currently stands being unclear and difficult for those who rely on the trust provisions contained in the Act and for those who may find themselves off-side of these provisions, the alternative option is codification of trust law as it pertains to the construction trust relationship within the statute. In the leading treatise on statutory interpretation, Ruth Sullivan describes the consequences of codification as follows:

Canadian courts outside Quebec use the terms "code", "exhaustive code", "complete code" and sometimes "codification" to refer to legislation that purports to set out a complete and comprehensive statement of the law governing a matter. The key feature of a code is that it is meant to offer an exhaustive account of the law in an area, it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution. Once a code is in place, subsequent elaboration of the law dealt with in the code is carried out within its (statutory) framework and is governed by its principles and policies.<sup>64</sup>

When considering how to assess whether a statute provides the complete codification of law in a given area, Sullivan relies on the Nova Scotia Court of Appeal's ruling in *Pleau v. Canada (AG)*<sup>65</sup>:

[50] First, consideration must be given to the process for dispute resolution established by the legislation... Relevant to this consideration are, of course, the provisions of the legislation... particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered

[51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation ... should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation ... What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative...scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

[52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy. [emphasis in original].

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<sup>63</sup> *Campoli Electric Ltd. v. Georgian Clairlea Inc.*, 2017 ONSC 2784, at para 50.

<sup>64</sup> Sullivan, Ruth, *Sullivan on the Construction of Statutes* (6<sup>th</sup> ed.), Markham: LexisNexis, 2014, 547-548).

<sup>65</sup> 1999 NSCA 159.

Legislation of a complete code for the trust remedy provided in the Act setting out a clear statement of purpose, essential components, procedures, rights, duties and enforcement provisions is recommended.

**Recommendation #12: The Act should be amended to include a complete codification of the rights and obligations imposed by the statutory trust on parties to contracts and sub-contracts to which the Act applies in Manitoba.**

## **2. Three Requirements for a Valid Trust**

To be valid and enforceable, an express trust must be created in accordance with the three certainties, namely:

- certainty of intention (to create a trust);
- certainty of subject matter (property in the trust); and
- certainty of object(s) (purpose and/or beneficiaries of the trust).

Practically, these three legal requirements of a valid trust are significant when a legal challenge is brought from within the construction contract pyramid by a trustee facing allegations of breach of trust or upon the insolvency of a participant in a construction project where the protective schemes in the Act are exposed to competing claims from other creditors.

### **A. Intention to Create a Trust**

Where legislation is passed to impose trust obligations, Canadian courts have generally accepted without much analysis that such statutes satisfy the requirement for *certainty of intention* to create a valid and enforceable statutory trust.<sup>66</sup> Even so, it is the Commission's position that an express statement of the intended purpose of the trust is recommended to enhance the clarity of intent and to guide users of the Act.

The Commission recommends that a statement of purpose akin to the following be included at the beginning of the section containing the trust provisions in the Act:

“The codified trust remedy creates a trust, designates trust funds, appoints trustees and designates beneficiaries entitled to payment from project-specific funds as they flow down the contractual payment chains which make up each project's construction contract pyramid pursuant to express terms of the trust while providing avenues of legal recourse where a beneficiary suffers loss, costs or damages upon trust funds being

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<sup>66</sup> *British Columbia v. Henfrey*, [1989] 2 SCR 24, 59 DLR (4th) 726.

misappropriated or converted to a use not authorized by the terms of the trust set out in this Part.”

**Recommendation #13: The Act should be amended to add an express statement of purpose for the trust remedy.**

## **B. Trust Property**

The Act establishes a series of trusts for certain funds held in possession of an owner, or as received by a contractor, and subcontractor pursuant to sections 4, 5(1) and 5(2). These provisions were pieced together in 1981 from more than one source without regard for the normal sequence of events on a construction project which brings such funds into existence. Feedback received during consultations supported the Commission’s view that these provisions tended to confuse the origin and extent of the trust fund so ought to be clarified.

### **(a) Owner’s Role**

Sub-section 5(2) is the chronological starting point for *certainty of subject matter* or property of the trust. It currently reads:

#### **Advances on mortgages, etc.**

5(2) All sums received by an owner that are to be used in the financing of a structure or improving land, including the purchase price of the land and payment for the discharge or withdrawal of prior encumbrances against the land, constitute, subject to the payment of the purchase price and of payments for the discharge or withdrawal of prior encumbrances against the land, a trust fund for the benefit of the persons mentioned in subsection (1).

During the consultation process, the Commission was advised of several issues with the provisions establishing the trust over monies as contemplated by sub-section 5(2).

First, Manitoba Hydro pointed out that since many large owners, including Manitoba Hydro itself, do not borrow or even *appropriate*<sup>67</sup> an entire fund to a given project, the wording for the creation of the original trust fund for each project should be adaptable to such circumstances. In the case of Manitoba Hydro, appropriation, or the prescribing of money to a particular use, occurs but only upon requisitioning payment for an approved invoice. There was no issue taken with the concept that whether the entire fund is isolated or not at the outset, an owner should only undertake a construction project when it has both the financial capacity and intention of appropriating sufficient funds to pay for completion of the project. Another Stakeholder articulated that an

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<sup>67</sup> “Appropriate” is defined in Black’s Law Dictionary as, *inter alia*, “to prescribe a particular use for particular money; to designate [...] a fund or property for a distinct use”.



owner's designation of its own money for the project should also be contemplated by section 5(2) in addition to obtaining funds from third parties other than lenders.

Additionally, the Act currently grants lien rights against insurance and sale proceeds.<sup>68</sup> Such funds and surety bond proceeds should also be identified as potential sources of trust funds.

To address the issues raised above, the Commission recommends that sub-section 5(2) be revised to contemplate settlement of project funds in the trust by the owner and reference the most probable sources of such funds. Additionally, rather than specifically designating lists of potential beneficiaries of the original trust fund in the owner's hands, the Act should provide that the section 5(2) trust fund is more generally "for use as authorized" under the Act.

Additional recommendations are made in this Chapter to expressly set out purposes for which the original trust fund may be used by the owner.

**Recommendation #14: Section 5(2) of the Act should be amended to clarify the owner's obligations to settle money to establish and/or increase the trust fund and contemplate additions to the fund from insurance and sale proceeds as well as surety bond payments.**

#### **(b) Payment Certification and Release of Trust Funds**

Section 5(1) of the Act also contemplates imposition of a trust on monies in the owner's hands or received by the owner which have become payable to a contractor under contract upon certification by the payment certifier for the benefit of a list of beneficiaries.

Payment certification is the process by which a payment certifier reviews contractor applications for payment and provides a certificate approving specific amounts to be paid from time to time under a contract. Payment certifiers may be appointed by a lender or the owner and often are the design professionals for the project.

Section 5(1) of the Act has not been the subject of judicial consideration since it was enacted in 1981, but has been carefully considered by the Commission. This section clearly provides that the normal procedures for invoicing, approval and payment of portions of the contract price are central to the release of trust funds down the payment chain. Information detailing which beneficiaries earned specific amounts claimed and paid for each progress invoice is included within the normal payment process.

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<sup>68</sup> *Builders' Liens Act*, *supra* note 1, ss. 20 & 21.

One of the issues considered by the Commission is the need for increased transparency and accountability in the payment application, certification and approval process and the effect that such reforms may have on the timeliness of payment. The majority of the feedback received on this issue, if not all, welcomed the prospect of such reforms. Only one national Stakeholder was strongly against tracking trust funds as certified claiming that such information is commercially confidential and sensitive. The Commission disagrees. As a trustee, a contractor has a fiduciary duty to account for the funds it requests and receives for work performed on its account by its sub-contractors and suppliers.

In its written submission, the CCA advised that it has long promoted full disclosure by owners of their end of the payment approval process. The MHCA supported holding trustee contractors and subcontractors to account for the specific amounts claimed and paid on account of their subs.

In Stakeholder meetings with the MCAM and the WCA, the concept of full disclosure discussed above were described as shining a bright light on the payment claim approval process. If coupled with an acknowledgement of the section 5(1) principle that ‘he who contributes to the month’s work and progress claim should be promptly paid from the amounts approved and paid’, many of the payment defaults that occur in the ordinary course alleged against contractors and subcontractors should be exposed and perhaps cease.

The WCA and MCAM, in particular, encouraged the Commission to do its best to recommend trust enhancements which might help solve the prompt payment crisis.

It was generally accepted that greater transparency in the certification of payment process would assist lower tier claimants in the timely assertion of their payment rights. A number of strategies for incorporating greater transparency into the process have been identified by the Commission.

### **(c) Minimum Requirements for a “Schedule of Values”**

To increase the transparency of the payment certification process, it is recommended that “schedule of values” be defined within the Act and that the Act should require the contractor to provide such a schedule to the owner or payment certifier to assist in the payment certification process. Further, upon request, any claimant should be entitled to particulars of the dates and amounts requested, denied, approved and paid on its account.

### **(d) Express Duty of Good Faith**

During the consultation process, there was widespread support for imposing an express duty of good faith on owner trustees, their agents and payment certifiers. One lawyer cited a case of collusion and there were frequent comments about unfair conduct/tactics particularly by public

owners, their project leads and payment certifiers causing needless delay in the payment certification processes.

Given the concerns expressed about bad faith in the payment certification process, the Commission has considered whether an express statutory duty of good faith ought to be imposed along with a definition of what constitutes “good faith”. The concept has been defined in several Manitoba statutes including *The Securities Act* which defines “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”<sup>69</sup> In *The Corporations Act*, “good faith” means “honesty in fact in the conduct of the transaction concerned.”<sup>70</sup> In that Act, the definition is useful in interpreting the statutory duty of care under section 86.<sup>71</sup> Other Acts impose a statutory duty of good faith without defining the phrase.<sup>72</sup> Therefore, while rare, neither imposing a statutory duty of good faith nor providing a definition of the phrase would be unique in Manitoba.

Notably, the courts have recognized the existence of a common law duty of good faith that applies to all contracts to act honestly in the performance of contractual obligations.<sup>73</sup> At a minimum, the Supreme Court of Canada has held that acting in good faith in relation to contractual dealings means being honest, reasonable, candid and forthright.<sup>74</sup> While integrating a statutory duty into the Act may therefore seem unnecessary, doing so would complete the codification of the trust provisions of the Act and clearly set out the obligations of the owner and payment certifier during the payment certification process.

The Commission is not suggesting that a fiduciary duty be imposed on payment certifiers. Instead, it proposes that the Act expressly provide that payment certifiers be required to perform that task with honesty, integrity and due regard to the legitimate contractual and statutory interests of affected parties. Such an express definition would further clarify legislative intent when the term “good faith” otherwise appears in the Act.<sup>75</sup>

The issue of whether members of design professional associations ought to be exempt from any statutory duty of good faith arose during the course of consultations. The Manitoba Association of

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<sup>69</sup> CCSM c S50, s 4(2).

<sup>70</sup> CCSM c C225, s 44(2).

<sup>71</sup> Section 86 of *The Corporations Act* states that: “[a] trustee in exercising his powers and discharging his duties shall (a) act honestly and in good faith with a view to the best interests of the holders of the debt obligations issued under the trust indenture; and (b) exercise the care, diligence and skill of a reasonably prudent trustee.”

<sup>72</sup> See, for example, ss 33(3) and 74(2) of *The Trustee Act*, ss 65(3)&(4) of *The Personal Property Security Act*, and s 13 of *The Highways and Transportation Construction Contracts Disbursement Act*.

<sup>73</sup> *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494.

<sup>74</sup> *Ibid*, at para 74.

<sup>75</sup> For ease of reference, see Appendix B – s 71 re prompt payment adjudicator determination of liability for costs; s 75 re immunity for prompt payment adjudicator; s 80(1) re defence of lien claimant for grossly exaggerated lien registration; ss 103(1) & (2) re state of mind of payer of holdback; s 105(1) re direct payments by owner or contractor; and s 138(3) re state of mind of surety upon payment under bond.

Architects suggested that their members ought to be exempt from any such statutory duty on the basis that their professional code of conduct already imposes such a requirement. It seems unreasonable that architects or other regulated professionals would be granted an exemption under the Act on this basis since a duty imposed by the rules of their profession could be modified at any time and is not enforceable against their owner-principals as a breach of trust.

**Recommendation #15: The Act should be amended to modify the obligations of the contractors and payment certifiers during the payment certification process by imposing mandatory minimum disclosure requirements in the schedule of values and by establishing a statutory duty of good faith on owners and their payment certifiers in the payment certification process.**

### **C. Object / Beneficiaries of the Trust**

Given that the objects or beneficiaries of a trust should be selected to meet the objective or purpose of the trust, the Commission has considered whether the current list of trust beneficiaries set out in sections 4 and 5 of the Act is appropriate. Specifically, the Commission considered whether certain listed trust beneficiaries should be removed from the legislation to improve the focus on members of the construction contract pyramid.

The Act provides that both at the time an owner receives money to finance a construction project under section 5(2) and at the time a portion of the contract price is certified for payment under section 5(1), the objects or beneficiaries of trust funds in the owner's hands are:

- (a) the contractor and all sub-contractors and other persons who have supplied materials or provided services for the purpose of performing the contract or any sub-contract under the contract;
- (b) the Workers' Compensation Board (WCB); and
- (c) workers who have been employed for the purpose of performing the contract or sub-contract under the contract.

As portions of the contract price flow down the payment chain, the list of beneficiaries expands. Under section 4(1), beneficiaries entitled to payment from trust funds received by the contractor are:

- (a) sub-contractors, suppliers and others who have contracted with the contractor....;
- (b) the WCB (for the contractor's assessments respecting its work);
- (c) workers who have been employed by the contractor; and
- (d) the owner for any set-off or counterclaim relating to the performance of the contract.

Under section 4(2) of the Act, beneficiaries entitled to payment from trust funds received by a subcontractor are:

- (a) sub-contractors, suppliers and others who have sub-contract with the sub-contractor....;
- (b) the WCB for the sub-contractor's assessments respecting its work;
- (c) workers who have been employed by the sub-contractor; and
- (d) the contractor or any sub-contractor for any set-off or counterclaim relating to the performance of the sub-contract.

### **(a) Workers' Compensation Board**

The Act confers beneficiary status directly on the provincial government agency that provides compensation to injured workers. The no-fault worker compensation system administered by the WCB was introduced in Manitoba in 1920.<sup>76</sup> The WCB was first included as a beneficiary when Manitoba's remedial trust provisions were introduced in *The Builders' and Workers Act* in 1932.

The obligation of contractors and sub-contractors to pay assessments to the WCB to fund the no fault worker compensation system in Manitoba represents an overhead or business operating cost not unlike the obligation to remit payroll tax, source deductions, goods and sales tax, etc. In the event of default, the WCB statute provides various avenues of recourse, including certain rights to recover against an owner on whose land compensable injuries might occur.<sup>77</sup>

WCB assessments are not, however, a specific line item in the schedule of values around which payment certification is typically organized in standard form construction contracts. Instead, the Act calls for the payer's "reasonable anticipation" of its WCB assessment amount that relates to its own forces work for which payment has been certified and paid.

Standard form Canadian construction contracts have evolved since 1932 to expressly impose positive obligations on contractors to provide certificates of compliance to owners as evidence that their WCB assessment obligations have been satisfied. This procedure appropriately obliges the contractor to attend to this overhead cost in the ordinary course without needing to give special status to the WCB against the trust funds created in the Act.

The only other province with legislation that provides beneficiary status to the equivalent organization responsible for the compensation of workers is New Brunswick.<sup>78</sup> Although construction lien acts in British Columbia, Ontario and Saskatchewan at one time also expressly included workers compensation boards in their lists of beneficiaries under their statutory trust provisions, they no longer do.<sup>79</sup>

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<sup>76</sup> *The Workmens' Compensation Act*, RSM 1920, c 159.

<sup>77</sup> *The Workers Compensation Act*, CCSM c W200, ss 85(1) & (2).

<sup>78</sup> *Mechanics' Lien Act*, RSNB 1973, c M-6, s 3(1) [New Brunswick Act]

<sup>79</sup> Bristow, *supra* note 18, 9-18, para 9.3.1.

In response to inquiries made by the Commission, the WCB expressed no objection to deletion of that entity from the list of beneficiaries.

**Recommendation #16: The Workers' Compensation Board should be removed as a trust beneficiary in sub-sections 4(1), 4(2) and 5(1) of the Act.**

### **(b) Wage Earners**

The inclusion of workers employed by a contractor or sub-contractor who perform work under the contract or sub-contract as trust fund beneficiaries also called for review.

Historically, salaried construction company employees in Manitoba were extremely vulnerable in the event of payment disruptions affecting their employers. In 1883, this was, in fact, the target group for statutory relief under *The Builders' and Workmen Act*. Since then, however, a comprehensive scheme of Manitoba labour laws has developed to fully occupy the field,<sup>80</sup> which provides much more timely and effective recourse than can arise under the Act where provisions focus on recovery of monthly construction contract progress payments, at best. Salaried employees are typically entitled to bi-monthly payment, so that disruption in their pay requires more immediate attention and relief.

In its 1979 Report, the Commission observed that workers at that time rarely if ever sought recourse under *The Builders' and Workers Act*.<sup>81</sup> After some consideration, the Commissioners at that time declined to recommend removal of workers from the beneficiary lists in the Act out of an abundance of caution.<sup>82</sup> Now, more than 37 years later, workers virtually never seek relief under the Act.

It should be noted that each of the provinces which have trust provisions within their construction liens legislation, being British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, and Nova Scotia, enable wage earners or labourers to be beneficiaries of trust funds of a contractor or sub-contractor.<sup>83</sup>

During consultations, those Stakeholders who participated universally supported removal of workers from the list of beneficiaries under the Act. No contrary submissions were received.

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<sup>80</sup> See *The Employment Standards Code*, CCSM c E110.

<sup>81</sup> Manitoba Report, 1979, *supra* note 3 at 27.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Builders' Lien Act*, RSA 2000, c B-7, s 22(1) [Alberta Act]; BC Act *supra* note 50, s 10(1); *Construction Act*, *supra* note 14 at s 8(1)(b); Nova Scotia Act, *supra* note 50, s 41B(1)(b); Saskatchewan Act *supra* note 50, s 7(1)(d); New Brunswick Act, *supra* note 78, s 3(1).

**Recommendation #17: Wage earners should be removed as a trust beneficiary in sub-sections 4(1), 4(2) and 5(1) of the Act.**

### **(c) Trustee Rights of Set-off and Counterclaim**

The Act allows trustees (the owner, the contractor and any sub-contractor) to recover set-offs and counterclaims related to performance of the work from trust funds *as beneficiaries* of the trust. These claw-back rights are listed in sub-sections 4(1)(d) and 4(2)(d) of the Act:

#### **(b) Receipts of contractor constitute trust fund**

4(1) All sums, including any interest on the holdback, received by a contractor on account of a contract price constitute a trust fund for the benefit of  
[...]

(d) the **owner** for any set-off or counterclaim relating to the performance of the contract.

#### **(c) Receipts of sub-contractor constitute trust fund**

4(2) All sums, including any interest on the holdback, received by a sub-contractor on account of a contract price in the sub-contract, constitute a trust fund for the benefit of  
[...]

(d) the **contractor** or **any sub-contractor** for any set-off or counterclaim relating to the performance of the sub-contract.

In its 1979 Report, the Commission recommended against extending the obligation of the trust to compensate the owner, contractor, or sub-contractor for set-offs or counterclaims, stating:

There is no such express statutory right under the present “*Builders and Workers Act*”. And, in any event, although it does appear there may be a right to set off or claim in circumstances when it can be argued that the money did not become payable, we have reservations as to whether or not this would, in fact, be an improvement and wonder whether it might cause more harm than good in light of the fact that such obligations are usually spelled out in more detail in the contracts between parties. Whether there is a “just” set-off or counterclaim might also, we think, introduce a criterion other than a contractual one in a dispute which goes to court thereby encouraging needless litigation.<sup>84</sup>

The statutes of both Nova Scotia<sup>85</sup> and Saskatchewan<sup>86</sup> allow set-off by trustees. The lien legislation of other provinces with trust provisions does not include express rights to set-off and counterclaim against trust funds by trustees.

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<sup>84</sup> Manitoba Report, 1979, *supra* note 3 at 45-46.

<sup>85</sup> Nova Scotia Act *supra* note 50 at s 44(E)(1).

<sup>86</sup> Saskatchewan Act *supra* note 50 at s 13.

In the Commission's opinion, as long as a statutory right of set-off and counterclaim are provided, which will be addressed later in this Report, no Stakeholder sought to retain beneficiary status to aid exercise of the right.

**Recommendation #18: References to set-offs and counterclaims by the owner, contractor and sub-contractor should be removed from the list of trust beneficiaries in sections 4(1) or 4(2) of the Act.**

#### **(d) Own Forces Work - Add an Express Beneficial Interest**

There is no provision in the current Act expressly entitling a contractor or a subcontractor to recover from trust funds certified and released on its account for the approved value of their own forces work performed and progress claimed from time to time. This oversight should be corrected.

**Recommendation #19: The Act should be amended to expressly provide that the contractor and subcontractor as trustees are entitled to appropriate trust funds to recoup approved costs expended for their own forces' work.**

### **3. Appointment of Trustees**

In addition to the substantive changes to the list of trust beneficiaries, the Commission has also determined it would be prudent to simplify and consolidate in one section express terms of the trust respecting appointment of trustees and deemed trustees. Currently, section 6(4), *Assignment subject to trust*, and section 7, *Offence and penalty*, both make reference to third parties (assignees and corporate officers and directors) being trustees in the first case or liable for breach of trust in the second. These references reflect equitable principles of a constructive trust whereby a court may deem such persons to be bound by their conscience and their knowledge of the trust to the same standards that bind express trustees under the statute.

**Recommendation #20: The Act should be amended to consolidate provisions respecting the appointment of deemed trustees, being sections 6(4) and section 7, with those respecting non-deemed trustees.**



#### **4. Privity Model of Trust – A Solution to the Structural Issue**

When considering potential reforms to the trust provisions contained in the Act, the Commission is cognizant of the issues arising from the Supreme Court of Canada's decision in *Structal*. It is necessary to set out the details of the case.

##### **A. Summary of Facts in *Stuart Olson Dominion Construction Ltd. v. Structural Heavy Steel***

Prior to substantial performance being achieved, disputes arose on the Winnipeg stadium project between the general contractor, Stuart Olson Dominion Construction Ltd. ("SOD") and its heavy steel sub-contractor, Structural Heavy Steel ("Structal").

In September 2012, Structural registered a claim for lien in an amount exceeding \$15 million. The SOD as contractor promptly applied to the Court under section 55(2) of the Act for an order vacating the lien and posted a lien bond for the full amount of the lien claim. By order of the Court, the lien registration against the stadium owner's land was then vacated.

A progress payment was certified which included approximately \$3.5 million for work performed by Structural. SOD received the certified amount but refused to pay it to Structural because the value was included in Structural's lien for which security had been posted. Structural complained to the owner that SOD was breaching its trust obligations and the owner withheld further payments otherwise due to SOD equal to the amount certified on Structural's account pending receipt of a court order directing how it should proceed in the circumstances. SOD applied to the Court for the requested directions.

A Queen's Bench judge determined that there was no express requirement in the Act calling for double security for any claim and that it would be commercially unreasonable and contrary to the intention of the Act to do so.<sup>87</sup> On the basis of that determination, the owner paid the amount otherwise due to SOD which used the funds to pay other beneficiaries of the trust including itself. Structural paid all of its sub-trades and suppliers from its own funds, and appealed the Queen's Bench decision in the Manitoba Court of Appeal. The lower court's decision was overturned. SOD then sought and obtained leave to appeal the Manitoba Court of Appeal decision to the Supreme Court of Canada. The pivotal issue argued before that Court was whether, by posting a lien bond in court for an order vacating a registered builder's lien, the contractor had satisfied its trust obligations to Structural.<sup>88</sup>

Rothstein, J. wrote the unanimous decision for the Court observing:

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<sup>87</sup> *Supra* note 29, para. 18.

<sup>88</sup> *Ibid*, para 2.

...in consolidating these two acts, (*The Builders and Workers Act*, R.S. 1970, c. B90, and *The Mechanics' Liens Act*, R.S.M. 1970, c. M80), the legislature did not expressly delineate how the lien and trust provisions were to interact in situations such as this case, where both remedies are pursued at the same time by a contractor or subcontractor.<sup>89</sup>

Concurring with the result in the Manitoba Court of Appeal, the Supreme Court of Canada pointed out that posting security is not the same as making a payment.<sup>90</sup> If SOD had posted the trust funds certified for payment on Structal's account instead of posting a lien bond for the certified portion of the lien claim, SOD would have preserved and protected specific trust funds in compliance with its trust obligations under the Act.

## **B. Options for Reform**

In the Consultation Paper, the Commission approached the issue set out by Justice Rothstein in *Structal* with the following specific reform objectives in mind:

- 1) Seeking a solution which would minimize disruption of express provisions that conform to the purpose of the Act.
- 2) Seeking to maintain effective practices which have developed within the existing trust and lien schemes of the Act.
- 3) Seeking to minimize the negative impact of lien registration and vacation proceedings on the rights of other beneficiaries of the trust.
- 4) Seeking to accelerate final disposition of the rights of the holder of a vacated lien.

The Commission observed that there was not a single amendment that could fill the gap identified by the Supreme Court in the *Structal* decision. Instead a set of amendments were likely necessary.

During the consultation process, the Commission was advised that Ontario faced a similar problem in the early 1980's which legislators addressed by adopting a privity model of trust obligations.

## **C. The Ontario Approach - A Superior Solution**

Prior to 1983, the trust provisions of Ontario's legislation did not require privity of contract to make a trust claim. This meant that lower tier subcontractors could notify the owner of a potential breach of trust, requiring the owner to stop payment to the contractor. According to the GCAC,

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<sup>89</sup> *Structal*, *supra* note 5, para 33.

<sup>90</sup> *Ibid.* para 43.

this caused numerous problems, including the need for duplicate security (one for the trust claim and one for the lien claim). This is the same issue that arose in the *Structal* decision in Manitoba.

As a result of a recommendations contained in a report<sup>91</sup> of the Ontario Attorney General's Advisory Committee, in 1983, Ontario's *Construction Lien Act* was amended and a privity scheme for trust provisions was introduced. The result of this legislative change is that, unlike in Manitoba where an owner's trust obligations extend down the payment chain, Ontario's legislation provides that the owner owes trust duties only to those with whom it shares privity of contract and not to lower-tier sub-contractors, material suppliers, etc. This strict requirement for privity is repeated at each level of the construction contract pyramid. As pointed out by the GCAC, the effect of this privity model of trust obligations is that, if a subcontractor wishes to "stay the hand of the paymaster", its only recourse is to make a lien claim – it cannot halt payment upstream by advancing a trust claim.

During the consultation process, the GCAC provided the following submission on this issue:

*The Manitoba Act does not have this clear privity requirement [...] We strongly recommend amending the Act to bring it in line with other trust legislation in Canada by re-affirming the privity requirement and removing all provisions requiring trustees to make "provision for the payment of any beneficiaries of the trust" where such provisions do not expressly require privity and therefore add confusion to the Act. Adding a clear privity requirement is the only change that we believe is absolutely necessary to respond to the issue of double security raised by Stuart Olson, although we support the (recommendation No. 33 for sole access to security for claim is by exercise of lien rights) as well.*

In the Discussion Paper prepared by the Ontario Advisory Committee prior to the 1983 amendments, it originally recommended that the owner serve as trustee of all trusts down the payment chain, much like the current trust provisions in Manitoba. However, in abandoning its support for such a trust scheme in its Final Report, the Advisory Committee stated:

The sub-section, as originally set out in subsection 7(3) of the Discussion Paper provided for an additional procedure, other than the lien procedures, whereby a beneficiary could stop the flow of trust money in the hands of a trustee above the person who was obliged to pay him.

The Discussion Draft's trust provisions were a **codification of the case law** that had emerged in respect to the owner's obligations as trustee. See *Bre-Aar Excavating Ltd. v. D'Angela Const. (Ont.) Ltd.* [emphasis in original]

After extensive discussions, the Committee decided that there should be no such statutory procedure and that the case law should also be reversed. In the opinion of the Committee, any

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<sup>91</sup> Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act (Toronto: Ontario Ministry of the Attorney General, April 1982), xxxiii.

additional procedure that envisaged a stoppage in the flow of payments no matter how carefully designed, would severely inhibit the flow of money down the construction pyramid [...]. [emphasis added]<sup>92</sup>

The statutes of Ontario, Nova Scotia, Saskatchewan, and British Columbia establish trust relationships between payers and those it has engaged in direct contract.<sup>93</sup>

The WCA indicated its support for the above Stakeholder submission stating: “[w]e believe that privity of contract is a fundamental principle that should be incorporated in the trust provisions of the Act [...]”. The Commission agrees.

Sub-sections 4(3)(d), 4(4)(d) and 5(3)(b) of the current Act impose on the contractor, subcontractors and owners as trustees broad, beyond-privity obligations to “make provision for” the payment of any/all other beneficiaries of the trust. How or when a trustee is to do this is not made clear in the Act, but these express obligations provided support for the argument advanced in *Structal* that double security was required. Such expanded trustee obligations should be stripped away, and each tier of trustees obliged to pay only those beneficiaries with whom each stands in privity of contract.

**Recommendation #21: The Act should be amended to:**

- 1. convert sections 4 & 5 of the Act to a privity of trust model, limiting trustee payment obligations to those with whom the trustee has directly contracted;**
- 2. delete sub-sections 4(3)(d) and 4(4)(d) which currently oblige the contractor and a subcontractor as trustees “to make provision for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received”; and**
- 3. delete sub-section 5(3)(b), which currently obliges the owner, as trustee, after duly paying the contractor, “to make provision for the payment of other affected beneficiaries of the trust”.**

In addition to the reforms recommended above, the lien vacation procedure under section 55(2) has been reviewed and significant reforms in this regard are recommended in Chapter 6.

## **5. Trustee Obligations and Duties**

### **A. Duty of Loyalty**

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<sup>92</sup> *Ibid*, 36.

<sup>93</sup> See footnote 50.

Pursuant to the Act, trustees are expressly prohibited from appropriating or converting any part of the trust fund to or for his own use or to or for any use not authorized by the trust until its prescribed payment obligations have been met. This prohibition is a reflection of the common law fiduciary duty of loyalty – the duty not to place a trustee’s personal interests in conflict with duties owed to beneficiaries of the trust.

The Commission supports the retention of a simplified, general provision in respect of the duty of loyalty as above that applies to all trustees.

## **B. Deposit Relief – Co-mingling Trust Funds**

Where the property in a trust is money, the identity of the subject matter of the trust is easily lost. If the trustee deposits trust money into a general bank account co-mingling it with other trust funds and his own funds after which the trustee draws funds from that general account for any purpose, the probability of successfully tracing and recovering a sum equal to the trust money deposited can be seriously compromised or lost.

Manitoba’s Act, as in most jurisdictions, is silent on the issue of whether a trustee is allowed, on any terms, to deposit trust funds into a general account or otherwise co-mingle them with either the trustee’s own funds or those from other construction projects.

In contrast, the *Builders Lien Act* of British Columbia expressly provides that co-mingling of trust funds does not alone constitute a breach of trust under that statute.<sup>94</sup>

Manitoba courts have held trustees under the Act to be in breach of their trust obligations for co-mingling trust funds on a project with other funds in certain situations. In *Glenko*, the Manitoba Court of Appeal considered when co-mingling of trust funds with other funds may give rise to a breach of trust and concluded that a breach occurs when the trust funds are deposited in such a way that they are placed at risk. At paras. 71 and 89, Huband, J.A., writing for the majority, stated:

[71] It may well be that the simple act of depositing trust funds into a general account would not constitute the taking of a risk, which risk was known to be one which there was no right to take. Where the general account is not overdrawn, and where the contractor does not use the trust funds for other purposes, but rather pays the beneficiaries their entitlement without delay, it might well be concluded that there was little risk, and whatever risk was involved was one which the trustee was entitled to take under the circumstances. But the circumstances in the present case suggest that the risks were high and that Keller Contractors had no right to take such a risk.

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<sup>94</sup> BC Act, *supra* note 50, s 11(7).

[89] ... I reiterate my earlier observation that the mere fact of depositing trust funds along with other funds in a general account is not necessarily a breach of trust. It becomes a breach of trust only where the trust funds are at risk, as where the contractor operates on bank credit, or where the trust funds are used to pay obligations of the contractor other than the obligation to its trust beneficiaries. Where trust funds would be placed at risk, it is not too much to require that contractors depart from past practices and maintain a separate account into which trust funds are deposited and out of which trust obligations are satisfied.<sup>95</sup> [emphasis added]

This same issue has been considered by the lower courts in several provinces. In *Arborform Countertops Inc. v. Stellato et al.*<sup>96</sup>, the Ontario Court (General Division) considered similar facts to those in *Glenko* and held that a failure to set up a proper system to receive, monitor and disburse trust funds is sufficient to constitute a breach of the statutory construction trust. The contractor in that case was using one account for all expenses and deposits.

In *St. Mary's Cement Corp. v. Construc Ltd.*<sup>97</sup>, the Ontario Court of Justice considered the issue of whether a failure to segregate trust funds amounted to a breach of trust. Molloy, J. stated:

[35] [...] Although there is no specific requirement in the [Construction Lien] Act that trust funds be segregated in a special bank account, a contractor who deposits trust funds into a general business bank account and intermingles them with funds from other sources does so at its peril.

[36] [...] In my opinion, the Act contemplates a separate trust fund for every project in which the contractor is involved and separate accounting for every trust fund. It is only by separately accounting for the monies held in trust that a contractor can ensure that trust monies are not in fact applied to other purposes. The fact that the Act does not expressly require that trust funds be kept separate from the general accounts of the contractor is not determinative of whether a failure to do so constitutes a breach trust. A trustee has an obligation to protect the trust funds. Allowing trust funds to be intermingled with other monies and used for general purposes is inconsistent with the trustee's duty to maintain proper control of the trust funds: see *Re Air Canada and M&L Travel Ltd.* [...] [emphasis added]

The statements made in the paragraphs emphasized above in *St. Mary's* were repeated by Justice Molloy in *RSG Mechanical Inc. v. ABCO Construction Inc.*<sup>98</sup>. *St. Mary's* was distinguished, however, by the Ontario Court of Justice (General Division) in *Tam-Kal Ltd. v. Stock Mechanical*<sup>99</sup>:

[50] It is to be noted [...] that, in *St. Mary's*, supra, the books and records of the defendant appear to have been deficient in that it was not possible to determine exactly what amounts

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<sup>95</sup> *Supra* note 45.

<sup>96</sup> 29 OR (3d) 129, [1996] OJ No 1275.

<sup>97</sup> 32 OR (3d) 595, [1997] OJ No 1318.

<sup>98</sup> [2000] OJ No 4287 (SCJ), 17.

<sup>99</sup> [1998] OJ No 4577.

had been paid in respect of any particular project. [...] In addition, I am unable to conclude that the provisions of s. 8 of the CLA require the establishment of separate trust funds for each project. The thrust of s. 8 in my opinion is that all funds received by a contractor or subcontractor by way of payment on a contract or subcontract constitute trust funds and cannot be applied by the contractor or subcontractor for its own use or for any other purpose until all subcontractors and suppliers have been paid in full.

The case law does not always support the proposition that the action of depositing and co-mingling trust funds in a general operating account, in and of itself, constitutes a breach of trust. Further, the case law is inconsistent on what steps are necessary for a trustee to abide by its statutory obligations in such a situation. Based on the Court of Appeal's decision in *Glenko*, co-mingling trust funds is a breach of trust only where the trust funds are placed at risk.

Recent amendments in Ontario now expressly permit trustees to deposit trust funds in a general account and, *provided* that the trustee maintains detailed records per project as prescribed, the trust funds are deemed to be traceable, and the co-mingling does not constitute a breach of trust.<sup>100</sup>

The Commission considered whether statutory guidance, like that contained in the Ontario and British Columbia legislation is warranted. During consultations, the Commissioners were overwhelmingly advised by the industry that setting up a trust account *per project* would be highly prohibitive both administratively and financially. They were, however, supportive of Manitoba adopting a provision like section 8.1 in the Ontario Act.

**Recommendation #22: The Act should be amended to allow trustees to deposit trust funds into a general account provided the trustee maintains detailed records on a per project basis. Provided that where the record keeping requirements have been maintained, the act of co-mingling the trust funds should not constitute a breach of trust pursuant to the Act and the trust funds are deemed to be traceable.**

### C. Section 10 – Record Keeping

Section 10 of the Act currently sets out obligations for every contractor and sub-contractor to maintain certain records in respect of each contract or sub-contract “by virtue of which a lien may arise”<sup>101</sup> in their place of business for not less than a year.<sup>102</sup> The Act stipulates that records must be kept current on a monthly basis at a minimum<sup>103</sup> and that separate records must be maintained in respect to each separate contract and sub-contract.<sup>104</sup> Sub-sections 10(6) and 10(7)

<sup>100</sup> *Construction Act*, *supra* note 14, s 8.1.

<sup>101</sup> *Builders' Liens Act*, *supra* note 1, s 10(1).

<sup>102</sup> *Ibid*, s 10(3).

<sup>103</sup> *Ibid*, s 10(2).

<sup>104</sup> *Ibid*, s 10(4).

of the Act establish that contraventions of the aforementioned recordkeeping obligations constitute an offence subject to punishment.

Note that this section imposes record keeping obligations for lien claimants but does not impose record-keeping requirements on trustees in respect of the administration of trust funds. This oversight should be corrected.

When asked during consultations whether the record-keeping obligations contained in the Act should be modified for industry purposes and extended to all trustees, Stakeholders were unanimously in favor of this proposal.

Also of interest to the Commission, reference is made in section 10(5) to production of records to an inspector appointed under *The Labour Administration Act*<sup>105</sup>:

**Requirement to produce to inspector**

10(5) A contractor or sub-contractor shall produce the records required to be kept under subsection (1) to any inspector appointed under *The Labour Administration Act*, including a chief inspector, upon his request and make them available for his inspection and shall furnish copies of any part thereof to the inspector upon his written demand.

When asked, Stakeholders advised the Commission that, while they are often called upon by governmental inspectors, including workplace health and safety inspectors, they have never been asked to produce copies of the documents listed in sub-section 10(1). Indications are that this 1981 provision is no longer relevant.

The Department of Growth, Enterprise & Trade, the department currently responsible for administration of *The Labour Administration Act*, confirmed that sub-section 10(5) of *The Builders' Liens Act* has been used in the recent past to allow the Employment Standards Branch to acquire records to verify on which projects certain employees have been engaged. Additionally, the Commission has been advised that this section has been used in the past by the Workplace Safety and Health Branch to obtain records then used to pursue a lien claim for recovery of unpaid fines.

It is appropriate that inspectors designated under *The Labour Administration Act* be statutorily authorized to enter onto work premises and conduct inspections for a number of purposes. In fact, that Act expressly provides that an inspector, or a person authorized under the Act may:

“[...] (a) at any time enter, inspect, and examine, any premises to which any such Act applies or relates; (b) order any employer, employee, manager, or other person, to produce for his or her examination any book, register, notice, certificate, licence, or other document, issued or

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<sup>105</sup> CCSM c L20.



required to be kept under any such Act; and (c) order any employer, employee, manager, or other person to submit to the minister a copy or certified copy of all or part of any book, record, or document, issued or required to be kept under any such Act.”<sup>106</sup>

“Inspectors” authorized under *The Labour Administration Act* to enter, inspect and examine premises and to order an employer or other person to produce documents include employment standards officers.<sup>107</sup> Therefore, the power granted to inspectors of the Employment Standards Branch by s. 10(5) of *The Builders’ Liens Act* is redundant.

It is less clear whether deleting s. 10(5) of the Act would have the effect of removing powers of enforcement from officials under *The Workplace Safety and Health Act*<sup>108</sup>. Section 24(1) of that Act authorizes safety and health officers to enter premises and require documents, books or records to be produced where such documents relate to the safety and health of workers or self-employed persons.<sup>109</sup> The Act also imposes fines for certain offences.<sup>110</sup> It does not, however, provide guidance on how the payment of such fines may be enforced and the power to enter premises and inspect documents under this Act is limited to records relating to the safety and health of employees and self-employed workers. It is likely for this reason that, at least once in the recent past, the Workplace Health and Safety Branch has relied on section 10(5) of *The Builders’ Liens Act* to obtain employer records necessary to register a lien for unpaid fines. The Legislature ought to consider whether additional powers to inspect or obtain records to pursue payment of unpaid fines ought to be added to *The Workplace Safety and Health Act* or whether amendments are necessary to authorize such an inspection under section 7(2) of *The Labour Administration Act*. The Commission is of the opinion that section 10(5) of *The Builders’ Liens Act* is not an appropriate tool for such purposes.

**Recommendation #23: The record-keeping obligations of contractors and sub-contractors in section 10 of the Act should also apply to all trustees in respect of trust funds created by the Act.**

**Recommendation #24: The Act should be amended to remove section 10(5) requiring contractors and sub-contractors to produce records to an inspector under *The Labour Administration Act*.**

<sup>106</sup> *Ibid*, s 7(2).

<sup>107</sup> *Ibid*, s 1(1).

<sup>108</sup> CCSM c W210.

<sup>109</sup> *Ibid*, s 24(1)(i).

<sup>110</sup> *Ibid*, s 55(1).

## 6. Discharge of Trustee's Obligations upon Proper Payment

While not expressly contemplated in the Commission's Consultation Paper, the issue of whether a trustee's obligations ought to be expressly discharged arose during consultations when a national Stakeholder referred the Commission to such a discharging provision in other jurisdictions. For example, section 14 of Saskatchewan's *Builders' Lien Act* provides:

### **When trustee discharged**

14. Subject to the requirement to maintain a holdback, every payment made by a trustee to a person whom he is liable to pay for services or materials provided to an improvement discharges, to the extent of the payment made by him, the trust of that trustee and his obligations and liabilities as trustee to all beneficiaries of the trust.

Ontario has a similar section in its *Construction Act*.<sup>111</sup> The Commission agrees that the Act should explicitly discharge a trustee's obligations for a specific payment once that payment has been made.

**Recommendation #25: The Act should be amended to allow a trustee to expressly discharge the trust for all trust funds duly paid.**

## 7. Permitted Uses of Trust Funds

Currently, section 5(3) sets out the obligations of an owner as trustee under the Act relating to trust funds:

### **Duties of owner as to trust fund**

5(3) The owner is the trustee of the trust funds created under subsections (1) and (2) and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until

(a) the contractor has been paid all sums justly owed to him in respect of the performance of the contract; and

(b) provision for the payment of other affected beneficiaries of the trust has been made.

Note that, elsewhere in this report, the Commission has recommended that sub-section 5(3)(b) be deleted as well as all other references in the Act that likewise extend trustee obligations, including those of the owner, to beneficiaries of the trust who are not parties to a contract with the trustee in question, i.e. do not share privity.

While section 5(3) of the Act establishes the general duties of the trustee and sets boundaries on how the owner may use such funds, effective operation of the trust remedy requires certain

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<sup>111</sup> *Construction Act*, *supra* note 14, s 10.

exceptions to the general rule. The permitted uses of trust funds by an owner, narrowly defined in section 5(3), are broadened by the exception created by sub-section 5(4) of the Act. That section currently provides:

**Exception**

5(4) Notwithstanding subsection (3), where an owner has himself paid, in whole or in part,

- (a) any sub-contractor or other person who has supplied materials or provided services for the purpose of performing the contract or any sub-contract thereunder;
- (b) any assessment of The Workers Compensation Board arising out of work done in performing the contract or any sub-contract thereunder;
- (c) any worker who has been employed by the contractor or any sub-contractor for the purpose of performing the contract or sub-contract for work done in the performance of the contract or the sub-contract; or
- (d) any other affected beneficiary in respect of a claim arising out of the performance of the contract or any sub-contract thereunder; the retention by the owner of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to or for his own use or to or for any use not authorized by the trust if, prior to the retention, all beneficiaries of the trust entitled under him have been paid in full.

Section 5(4) contemplates the owner making project payments in two specific scenarios: 1) where an owner makes a payment to a player within the construction pyramid, such as a sub-contractor, directly and bypasses the contractor, or 2) where the owner advances monies to a beneficiary of the trust before it is in possession of the trust funds and wishes to recoup these funds from the trust funds. In either scenario, section 5(4) currently allows the owner to retain for itself an amount equal to the amount paid or advanced from the trust funds without breaching its obligations under section 5(3).

One issue with the current section 5(4) is that it limits an owner's ability to recoup from trust funds amounts paid to those down the payment chain until "all beneficiaries of the trust entitled under him have been paid in full". During consultations, it was brought to the Commission's attention by a practicing lawyer that this prerequisite makes the section practically non-functional as it is virtually impossible for an owner to determine whether all of the parties along the payment chains from contractor to sub-contractor and down to the material suppliers has been paid in full.

Additionally, section 5(4) as currently written contemplates the exclusion from the trust fund created by section 5(2) of the Act of *new money* obtained by the owner and used to make payments for work, services or materials.

The Commission has considered the consequences of s. 5(4) as written, particularly given the Commission's recommendation that the Act be amended to limit a trustee's obligations to only those beneficiaries with whom it has privity of contract, and has concluded that substantial changes are required to section 5(4).

### **A. Advances Made Within the Privity Trust Model**

Section 5(4) allows the owner to advance its own funds for a trust payment and recover same from the trust fund without committing a breach of trust. This entitlement is currently limited to owners and is not extended to other trustees. For example, section 5(4) does not enable a contractor to advance payment to its sub-contractor prior to receiving its payment from the owner and recoup the amount from the trust funds once the funds are received.

In contrast, Ontario's legislation, which is based upon the privity trust model, offers a simpler and broader approach than that provided by section 5(4) by allowing *any* trustee to recover trust funds where non-trust monies have been advanced to pay its beneficiary or beneficiaries:

#### **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.<sup>112</sup>

The Commission proposes replacement of section 5(4) with a provision that allows any trustee to advance non-trust money to its beneficiary(ies) while permitting recovery of the advance from trust funds subsequently received on account of the particular payee. The Commission sees no value in limiting such a power to owner trustees.

The Commission considered whether an owner, as trustee, could advance non-trust funds and recoup an equal amount from project trust funds at a later date. This is a tricky issue given that section 5(2) of the Act provides that sums received by the owner or used in the financing of a structure or improvement to land constitute a trust fund for the benefit of trust beneficiaries. Section 5(2) obliges an owner of a project to obtain funds to finance its project and, where such funds are obtained, they are imposed with a trust for the benefit of the beneficiaries under the Act. Therefore, it would require a special set of facts to enable the owner to advance funds to a beneficiary and then retain funds at a later date out of the trust fund. Doing so would effectively create an exception to the principle legislated in section 5(2) that an owner is obliged to finance its project.

**Recommendation #26: Section 5(4) of the Act should be deleted and replaced with a provision enabling any trustee to advance funds to a trust beneficiary and allow the trustee**

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<sup>112</sup> *Construction Act, supra* note 14.

**to recover the advance from trust funds subsequently received on account of that beneficiary without being in breach of trust.**

## **B. Direct Payments Where No Privity of Contract**

The second scenario in which the current section 5(4) applies is where the owner makes a direct payment to a party down the payment chain with whom it has not directly contracted. Flexibility in making payments on a project is required from time to time and it is likely that there will be scenarios where a trustee, specifically an owner or contractor, wishes to make a direct payment to a sub-contractor or supplier down the payment chain with whom they do not have privity under the recommended privity of trust model. Latitude for payers wanting to make such payment should be sustained.

Section 30 of the Act provides a useful discretion to an owner or contractor to make a direct payment to a person with whom it does not have a direct contract. It provides:

### **Payments in good faith without notice of lien**

30 Where an owner or a contractor chooses to make payments to a person referred to in section 13 for or on account of a debt justly due to the person for work done, services provided or materials supplied to be used as mentioned in section 13, and within three days afterwards gives, by letter or otherwise, to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, written notice of the payments, the payments shall, as between the owner and the contractor or as between the contractor and the sub-contractor, as the case may be, be conclusively deemed to be payments to the contractor or sub-contractor, as the case may be, on his contract or sub-contract generally, but not so as to reduce the amount required to be retained by the owner under section 24.

As it is currently drafted, section 30 refers to direct payments entitling the owner or contractor as payer to lien credit where a direct payment is made in good faith to someone who has performed work, provided services, or supplied materials to be used on the project other than the party with whom the payer has contracted. Importantly, it requires that, in order to obtain proper lien credit from the person in the payment chain who ought to have paid the account, written notice must have been provided within 3 days of making such payment. In the Commission's opinion, this same approach should be taken with trust claims for amounts directly paid to a party down the payment chain with whom the owner or contractor does not share privity of trust.

**Recommendation #27: The Act should be amended to include a provision providing that owners and contractors may discharge their trust obligations upon making direct payments in good faith to parties who have performed work, provided services or**

**supplied materials with whom the payer does not have a direct contract upon giving written notice to the party who ought to have paid the account.**

### **C. Borrowed Funds**

Under the curious heading *Protection of money lenders*, section 6(1) of the Act provides that a trustee who has borrowed money and used it to pay a beneficiary of the trust may then use trust money to discharge the loan and that such a use will not be deemed an appropriation or conversion to his own use or for a use not authorized by the trust. Note that the section has nothing to do with lenders who provide funds to a trustee and, therefore, there is no apparent need for reference to protection in that regard.

Some Stakeholders considered that the provision did offer indirect protection to a trustee's lender upon acceptance of trust funds to pay off a loan. Indeed, the SAC representatives advised that, in their experience, the heading for this provision has been relied upon by banks when challenged by sureties for their appropriation of project trust funds to the prejudice of sureties and others attempting to finance completion of failing projects. This is a sufficient reason to dispose of the misleading heading.

Additionally, no statutory guidance is provided in section 6(1) or elsewhere in the Act, as would seem appropriate, to ensure that only the beneficiary(ies) paid with the borrowed funds bear the consequences of the authorized claw-back by the trustee. Proper accounting principles require that sums borrowed and paid to a particular beneficiary should subsequently be recovered only from trust money that would otherwise be due to that particular payee.

It was therefore proposed in the Consultation Paper that any recovery of advances made, whether with borrowed or any other funds, should be limited to trust funds which in the future become payable to the beneficiary who received the advance. Generally, feedback received during the consultation process was in favour of such a permitted exception to the standard requirements for use of trust funds.

Given the inapplicability of the current heading, the Commission recommends that the heading be changed to "Application of trust funds to discharge loan" which would more accurately describe the contents of section 6(1). Certain Stakeholders commented that a provision like section 6(1) is essential to have in the Act.

**Recommendation #28: Section 6(1) of the Act should be renamed "Application of trust funds to discharge loan" and the recovery of advances made should be limited to trust funds that would have become payable to the specific beneficiary who received the payment advance.**

## D. Set-off by Trustee

While terminating current beneficiary status for set-offs by the owner, contractor and subcontractors against trust funds as recommended in this report, it was always contemplated that a legal right to set-off would continue for trustees. The case law in Manitoba has long established that trust funds are subject to reduction by set-off on account of the project.<sup>113</sup> The majority of Stakeholders consulted were adamant that an express provision on this point is required in an updated Act.

In the 2017 amendments to Ontario's legislation, a trustee's right to set off was restricted to the project in question except where the payee becomes insolvent and the right is expanded to any debt. Section 12 of Ontario Act now provides:

### 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 related to the improvement or, if the contractor or subcontractor, as the case may be, becomes insolvent, all outstanding debts, claims or damages whether or not related to the improvement. [emphasis added]

In the interests of inter-jurisdictional consistency, the Commission recommends adopting the language contained in section 12 of Ontario's Act and defining "insolvency" as an aid to its interpretation.

**Recommendation #29: The Act should be amended to include an express right to set-off for trustees similar to section 12 of Ontario's *Construction Act* and the term "insolvency" should be defined.**

## E. Surplus Trust Funds to Revert to Owner

Upon final completion of a project, in the event that any surplus trust funds are remaining, it seems prudent to expressly allow the owner to retake such funds without fear of being in breach of trust. Currently, the Act fails to account for the reversion of excess trust funds to the owner.

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<sup>113</sup> See *PCL Constructors Western Inc. v. Uni-Struct Fabrications Ltd.*, [1989] MJ No 585, *Stuart Olson Dominion Construction Ltd. v. Structural Heavy Steel, division of Canam Group Inc.*, [2013] MJ No 71, reversed on other grounds.

**Recommendation #30: The Act should be amended to expressly provide that, upon final completion of a project, release of any security posted for vacated liens, final settlement of all legal proceedings relating to the project, full payment of all related determinations and judgments against the owner, and final payment of all accounts outstanding to the contractor and sub-contractors, any surplus remaining in the owner's hands for the project trust fund shall revert to the owner for its own use without constituting a breach of trust.**

#### **F. Section 6(2) – Garnishment Prohibited**

Section 6(2) of the current Act prohibits the garnishment of trust funds:

##### **Certain moneys not subject to garnishment**

6(2) Where money owing to a contractor or sub-contractor in respect of the contract price under a contract or sub-contract would, if paid to the contractor or sub-contractor, be subject to a trust under section 4, the money is not subject to garnishment under *The Garnishment Act*.

The existing provision supports the purpose of the legislation - that trust funds should be held for the benefit of those who have provided work, services or materials to a given project and should be protected from outside creditors as much as possible. Therefore, the Commission recommends that section 6(2) should be maintained without amendment.

**Recommendation #31: The prohibition against the garnishment of trust funds in section 6(2) of the Act should be maintained.**

#### **G. Section 6(4) – Assignment Restrictions**

Section 6(4) of the Act provides that where a payee assigns, or purports to assign, a right to payment of moneys that are subject to a trust pursuant to the Act, those moneys continue to be subject to a trust in the hands of the assignee who becomes the trustee.

In practice the assignment of trust funds generally arises when an owner, contractor, or subcontractor acquiesces to the application of trust funds deposited into its account to an overdraft held by a financial institution or where the financial institution is provided with a general assignment of book debts entitling the lender to register the security interest granted and thereby obtain priority over unregistered claimants.

During this review, the Commission considered whether section 6(4) ought to be modified but has determined that the provision provides a valuable protection to trust beneficiaries and therefore



ought to be maintained. Additionally, section 6(4) ought to contemplate the recommended change to a privity trust model and therefore specify which trustee duties flow to the assignee.

A related provision in section 6(3) has been relocated in Part I in the draft legislation located in the Appendices since it contemplates assignment under the Act remaining subject to lien and trust rights and is, therefore, of general application.

The Commission notes that these provisions have not been very effective to date against banks. However, the Act should not now limit the power of the courts to hold financial institutions and other assignees accountable for breaches of trust following the assignment of trust funds.

**Recommendation #32: Sub-sections 6(3) and 6(4) of the Act, which provide for the continuing subjection of assigned funds to lien and trust obligations and for the flow of trustee obligations to the assignee of trust funds should be maintained.**

## **8. Enforcement of Trust Code**

### **A. Directions and Summary Determination of the Trust Remedy**

Section 17 of Saskatchewan's *Builders' Lien Act* provides for summary determination of disputes arising under the trust scheme in that province:

#### **Summary disposition of dispute concerning trust money**

**17(1)** An application for directions may be made to the court where a dispute arises:

- (a) Respecting the claim of a person for whose benefit a trust is constituted under this Part, or
- (b) Respecting the administration of the trust fund.

**(2)** An application under subsection (1) may be made by:

- (a) the person with respect to whose claim the dispute has arise;
- (b) any person for whose benefit the trust fund is created by this Part; or
- (c) the trustee.

Actual contract and statute interpretation with resulting public judgments to stand as precedents are rarely sought or provided for the construction industry due to its preference for private arbitration and mediation over recent decades.

The Commission noted that, while not expressly stated in *The Builders' Liens Act*, trust claimants are entitled to apply for directions of the court pursuant to Manitoba's existing rules. Rule 14 of the Queen's Bench Rules provides that a proceeding may be commenced by application "where

the relief claimed is for the opinion, advice or direction of the court on a question affecting the rights of a person in respect of [...] the execution of a trust.<sup>114</sup>

While unnecessary, it may be of assistance to expressly refer trust claimants and their counsel to Rule 14 where a direction from the court is necessary.

**Recommendation #33: The Act should be amended to expressly authorize parties to apply to the Court of Queen's Bench by Notice of Application for directions respecting disputes relating to the trust provisions under the Act.**

## **B. Civil Right of Action**

Loss or damage caused to beneficiaries by the failure of a trustee to properly discharge its duties gives rise to a civil cause of action for breach of trust. A beneficiary suing in the civil courts for breach of trust has two possible avenues to pursue, namely:

1. an action *in rem* for recovery of the trust property; and/or
2. an action *in personam* against the defaulting trustee personally seeking a money judgment to compensate for damages suffered.

Section 8 of the Act establishes a relatively short time period, 180 days, within which an action can be commenced to assert a claim for trust money. This section has been judicially interpreted to apply only to tracing of funds or the *in rem* trust remedy.<sup>115</sup>

The Act provides no notification to trustees that claimants also have a civil right of action *in personam* entitling them at common law to sue and seek personal judgment for damages resulting from a trustee's breach of trust under the Act. An express reference to potential civil liability for defaulting trustees ought to be included in revisions to the Act.

**Recommendation #34: The Act should be amended to state that trust beneficiaries have a civil right of action against an express or deemed trustee who appropriates or converts any part of the trust fund to or for his/her own use or to or for any use not authorized by the trust where the beneficiary suffers a loss or damages as a result.**

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<sup>114</sup> *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 14.05(2)(c)(i).

<sup>115</sup> *Glenko*, *supra* note 45 at 40-42.

### **C. Breach of Trust by Corporation**

In the Consultation Paper, the Commission raised the possibility of Manitoba adopting Ontario's expansive section 13 describing who might be liable in a civil action for breach of trust. Section 13 of Ontario's *Construction Act* states:

#### **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.

In the absence of any express notice in this regard, Manitoba Courts have found directors and officers of corporate defendants liable for breach of trust provisions in the *Act*.<sup>116</sup> With the exception of one national Stakeholder, who expressed the view that officers and directors of large companies who do not have direct control over project accounts should not be at risk of liability for breaches of trust, the other Stakeholders providing feedback on this issue were supportive of express liability for officers and directors in the *Act*.

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<sup>116</sup> For example, see *Glenko*, *supra* note 45.

Notably, sub-section 13(1) of Ontario's Act restricts liability to those persons who have "assent[ed] to, or acquiesce[d] in conduct that he or she knows or reasonably ought to know amounts to a breach of trust by the corporation" [emphasis added].

**Recommendation #35: Amend the Act to adopt section 13(1) of Ontario's *Construction Act* respecting liability for breach of trust by a corporation and expressly include such enforcement provisions in Manitoba's trust code.**

#### **D. Limitation Period – Breach of Trust**

The Consultation Paper raised the issue of whether the six year limitation period set out in *The Limitation of Actions Act* for commencement of an action against a defaulting party personally is appropriate. The most common suggestion from Stakeholders was to set a two year limitation period for breach of trust proceedings to commence.

Ontario's *Construction Act* does not contain a limitation period for actions for breach of trust against a defaulting party personally. Instead, Ontario's *Limitations Act*<sup>117</sup> provides for a basic limitation period of two years.<sup>118</sup> In support of inter-jurisdictional consistency, it is recommended that the same two-year limitation period for actions for breach of trust against a defaulting party apply in Manitoba as well.

**Recommendation #36: A two-year limitation period should be established for the commencement of civil actions for breach of trust.**

#### **E. Section 8 -Tracing Remedy**

An action to trace trust money must be commenced within 180 days from date that a potential claimant became aware a breach of trust pursuant to section 8 of the Act. While the issue was raised during the consultation process, it elicited little feedback. The Commission has considered that the current deadline may be reasonable as money lost for more than 180 days, approximately six months, is likely out of reach and impossible to recapture. At this time, the Commission is not in a position to recommend an amendment.

**Recommendation #37: The 180 day limitation period for tracing trust money, or actions *in rem*, in section 8 of the Act should be maintained.**

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<sup>117</sup> 2002, SO 2002, c 24, Sched B.

<sup>118</sup> *Ibid*, s 4.

## **F. Section 7 – Offence – Restitution Added**

Section 7 designates a breach of the trust provisions of the Act as a summary conviction offence. The Commission has considered whether to recommend that this section and the penalty provisions be expanded for the benefit of industry victims to allow for an order of restitution in favor of any beneficiary of the trust who has suffered loss as a result of a breach of trust by the convicted offender.

With one exception, Stakeholders agreed with such an amendment. The Commission heard from one Stakeholder opposed to so much as retaining section 7 within the Act and who was of the view that it was unfair for public resources to be used to prosecute this offence while the alleged perpetrator must pay for its own defence costs. Commissioners also considered whether it was appropriate for claimants to have the ability to pursue such a remedy of repayment of funds through a criminal court proceeding without the necessity of suing civilly. Such a remedy is not available under the construction statutes of any other Canadian jurisdictions. However, orders for restitution are available to persons who have suffered a loss under several Manitoba statutes including *The Manitoba Public Insurance Act*, *The Life Leases Act*, *The Consumer Protection Act*, and *The Real Property Act*. Section 410(7) of *The Insurance Act* provides:

### **Restitution**

**410(7)** When a person is convicted of an offence under this Act, the court may, in addition to imposing a fine or imprisonment, order the person to pay compensation or restitution in respect of the offence.

### **Filing restitution order in Court of Queen’s Bench**

**410(8)** The person to whom compensation or restitution is payable under an order made under subsection (7) may file the order in the Court of Queen’s Bench. Once filed, it may be enforced as a judgment of the court in the person’s favor.

Given the lack of feedback on this issue, the Commission will not be making a recommendation on this point. In the future, the Legislature may wish to consider whether allowing for orders of restitution upon conviction under section 7 of the Act is advisable.

**Recommendation #38: The summary conviction offence established by section 7 of the Act should be maintained.**

## **9. Linkages to Other Remedies in Act**

With the lessons of the *Structal* decision in hand respecting failure to provide for the interaction of remedies in the Act, the following new provisions are recommended.

## **A. Prompt Payment**

In the event that Manitoba proceeds with legislating a prompt payment scheme within the Act, and the Trust Code recommended in this chapter, law makers should ensure that the two remedies are coordinated in such a way that the trust provisions assist claimants as well as payers and adjudicators to achieve prompt payment of amounts owing under contract. The Commission is of the view that the Part II Trust Code could offer substantial support and guidance to prompt payment adjudicators.

**Recommendation #39: The Act should be amended to expressly provide that prompt payment adjudicators may take into account the codified trust provisions when rendering decisions.**

## **B. Construction Lien**

### **(a) Section 9 – Lien Registration**

Section 9 of the Act explains that the perishable, time sensitive nature of liens does not affect trust claims which, of course share the same contractual underpinning for payment entitlement as liens:

#### **Registration time limits, etc., do not apply to trusts**

**9** The existence of a trust and a cause of action asserting the existence of a trust or any breach of trust under this Act are not affected by the fact that the time for filing a lien under this Act has expired.

Section 9 should be maintained and the wording expanded to clarify that claims of entitlement to receive trust funds, and not just claims asserting the existence of a trust or breach of trust, are not impacted by the expiration of the time to file a lien.

**Recommendation #40: Section 9 of the Act should be amended to clarify that the expiration of the time for filing a lien does not impact claims asserting the existence of a trust, a breach of trust, or an entitlement to receive trust funds.**

### **(b) Priorities**

The Act does not expressly state the legal reality that a secured interest in property such as a registered lien has priority over unsecured claims such as mere trust claims. In the Commission's view, this is an oversight and a missed opportunity to provide clarity within the Act.

**Recommendation #41: The Act should expressly provide that trust claims arising under the Act are unsecured and, hence, are subordinate in priority to duly registered lien claims or those for which notice has been properly provided pursuant to section 45.**

### **(c) No Power of Attachment – *Structal* Issue**

As discussed in Chapter 4 above, in 1982 Ontario addressed double security problems that arose under its legislation which at the time contained non-privity provisions comparable to those in Manitoba's Act imposing expansive obligations for trustees to make provision for all beneficiaries of the trust. The Commission has recommended reforms to likewise correct that problem in Manitoba.

In the Consultation Paper, it was suggested that a section be included in the Act to expressly prohibit future attempts to stop the flow of contract funds and "stay the hand of the paymaster" on the basis of trust rights. Stakeholders universally approved of inclusion of such a correction in the Act.

**Recommendation #42: The Act should be amended to include a new express provision providing that only by due exercise of lien rights may a party stop the flow of contract funds.**

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## CHAPTER 6 - PROMPT PAYMENT REMEDY

During the review and consultation process, the Commission has considered two issues surrounding the implementation of a prompt payment statutory scheme: 1) whether the legislating of prompt payment is philosophically justified; and 2) whether it is practically implementable. In considering these two questions, the Commission contemplated broad legal doctrines, including freedom of contract and the role of legislatures in regulating private industry, the particular payment issues faced by the construction industry in Manitoba, the national and international context, and the difficulties of implementing a prompt payment statutory scheme in Manitoba specifically.

The Commission commenced this project with an open mind as to whether statutory intrusion into contractual freedom was necessary and advisable or whether modifications to the existing remedies contained in the Act, specifically the lien and trust provisions, would be sufficient to correct the timeliness of payment issue identified during the consultation phase of the project. For the following reasons, the Commission does not believe that modifying the current remedies contained in the Act would sufficiently address the timeliness of payment problem.

### 1. What is Prompt Payment Legislation?

The phrase “prompt payment legislation” is well-used but ill-defined. It describes legislative provisions that set statutory time limits for processing payment applications and the imposition of penalties when such time limits are unmet, such as mandatory interest.<sup>119</sup>

The legislating of prompt payment amounts to a statutory intervention of contracting parties’ autonomy to arrange their affairs and negotiate as they see fit free from interference. Such autonomy is a key tenet of a market economy like Canada’s and is widely known as the legal doctrine of “freedom of contract”.<sup>120</sup>

In the ordinary course, parties to a construction contract typically start with a standard form Canadian construction contract, which sets out a process for submission of monthly progress payment claims and payment certification requirements, and requires owners to make periodic payments to contractors of the amounts certified for payment before the end of the month following the claim submission date. Additionally, the contract sets out the due date for payment, typically 30 days following the invoice date.

Terms in standard form Canadian construction contracts set out a process for submission of monthly progress payment claims and payment certification requirements, as well as oblige owners to make periodic payments to contractors of the amounts certified for payment before the end of

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<sup>119</sup> Reynolds, “Ontario Report”, *supra* note 12 at 152.

<sup>120</sup> *Halsbury's Laws of Canada - Contracts (2017 Reissue)* (Swan, Adamski), IX. *Excuses for Contractual Obligations* 1. Introduction, HCO-140.



the month following the claim submission date. Subcontract terms typically require a contractor to pay its own sub-contractors and suppliers amounts due to each of them within five to seven days of the payer's receipt of payment from higher up the payment chain. While standard form contracts are typically the starting point for contractual negotiations between parties, the terms are often varied through negotiation.

While freedom of contract has occasionally been viewed as the sole tenet of contract law,<sup>121</sup> courts and Legislatures have created limitations to parties' freedom to act as they see fit in contractual negotiations for a number of reasons, including, protection of vulnerable parties and avoiding unjust results.

The Commission has given significant attention to the issue of whether the benefits of legislating a prompt payment statutory scheme outweigh the impact that such a scheme would have on the ability of parties to contract unrestrictedly and free from statutory intervention. The difficulty in fashioning a prompt payment regime was described by the authors of the Ontario Report who observed:

... in attempting to develop legislation that effectively encourages prompt payment, it is necessary to attempt to find the right balance between the legitimate interests of the stakeholders, being the payers and the payees, which is essential to the practical success of legislation and necessary to justify the infringement on freedom of contract that it will represent.<sup>122</sup> [emphasis added]

In the remainder of this chapter, the Commission considers whether legislating prompt payment provisions is advisable in Manitoba.

## **2. Delayed Payment within the Construction Industry and a Culture of Non-Compliance**

As summarized on page 21 herein, the problem with the current contractual and legislative approach to payment disputes arising within the construction industry is that, at each tier of the construction contract pyramid, contractors and sub-contractors must finance their payroll, material supply purchases, and other expenses for the project in advance of being paid. Delays can and do have devastating financial consequences on contractors and sub-contractors.

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<sup>121</sup> *Ibid.* See also, for example, *Printing and Numerical Registering Co. v. Sampson* (1875), LR 19 Eq. 462 at 465, where Jessel M.R. said: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred."

<sup>122</sup> *Ibid.*, at 177.

The scope of the problem of delayed payment within the industry was documented by the authors of the Ontario Report, who cited a 2013 report prepared by Prism Economics and Analysis (the “Prism Report”)<sup>123</sup> stating:

While late payment is not unique to the construction industry, it has [...] been argued that the nature of the construction industry requires greater protection of vulnerable parties. Commentators point out that late payment practices affect employment, cause the reduction of investment in apprenticeships, and force contractors and subcontractors to bid strategically so as to limit the number of projects they take on, resulting in reduced bidding pools.<sup>124</sup>

In the Federal Report, the same authors, again relying on the Prism Report, advised that:

...the Prism Report concludes that a) the average duration of receivables in the construction industry is much higher than other industries; and b) there is an upward trend in the age of receivables over the period from 2002 to 2012. [...] [B]y 2007 the average duration of a receivable in the construction industry was 62.8 days (8.97 weeks). By 2012, the average duration has increased to 71.1 days (10.16 weeks).<sup>125</sup>

Trade or subcontractors across Canada, who are at the bottom of the construction pyramid and who have a particular view of the source of the chronic slow payment problem, have led the movement for legislative relief in the form of prompt payment legislation. In Manitoba, the MCAM identified a need for prompt payment relief in 2011 and established a working group along with a number of other industry associations in 2012 to further consider the issue.<sup>126</sup> Notably, each party down a slow payment chain tends to blame its own particular payer for delays. As a result, some acrimony and contention has developed between contractors and sub-contractors.

During the consultation process, the Commission was presented with a different view of where the slow payment culture begins. The Commission was advised that since the 1980’s, normal 28-30 day payment terms in owner contracts have slipped to at least 60 days, and often to 70 days or more. When owners now use Canadian standard form contracts with 28 day payment terms, they usually modify the standard terms by inserting supplementary conditions to substantially extend the time for payment by the owner. One representative of the CCA reported that, in his experience, it is common for owners and their payment certifiers to further extend payment times by arguing over details in monthly progress claims while withholding *all* payment pending resolution of items questioned or not yet evaluated for necessary certification/approval of the requested payment. One contractor provided the following observation:

*If a contractor can marshal the forces and materials to construct x amount of work in a month in order to meet the agreed completion schedule, it is the owner’s duty to*

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<sup>123</sup> Prism Economics and Analysis, “The Need for Prompt Payment Legislation in the Construction Industry” (Markham: Reed Business Information, 2013) at 3.

<sup>124</sup> *Ibid*, cited in Reynolds, “Ontario Report” *supra* note 12 at 153.

<sup>125</sup> *Ibid*, at 118.

<sup>126</sup> From the Mechanical Contractors Association of Manitoba submission.

*equip itself with the manpower and procedures necessary to evaluate the work done and to pay for it on a timely basis. There is no excuse for owners or their payment certifiers forcing contractors and subcontractors into long delays before they can recoup the monthly cost of work they have already performed at their own expense.*

Further, CCA's representative explained that contractors often face so many variations or extensions of owner payment terms that they resort to inclusion of "pay when paid" clauses in their own forms of subcontract to accommodate all owner payment terms imposed on the contractor at the top of the payment pyramid.

The MAA, whose members often act as payment certifiers, advised that, in its experience, public owners are chronically slow to pay – regardless of the terms in their contracts. The member most familiar with the payment certification function stated that 28 days for owner approvals and payment is achievable even on large, high value civil/vertical building projects.

SAC, speaking from a national perspective, described a *culture of non-compliance* within the construction industry where owners delay in their performance of an admittedly challenging but manageable review and approval processes, disregard whatever payment terms were agreed and the contagion then spreads down through all tiers of the construction contract pyramid.

The feedback received during the Commission's consultation process was overwhelmingly supportive of well-planned legislative intervention to decrease incidents of delayed payment. The Commission heard from one Manitoban general contractor who advised that, while there was initially concern amongst the general contractor community that legislated prompt payment schemes amounted to excessive regulation of the industry, those who were initially not on board have resigned to the inevitability of such changes and have come to agree that quicker payment down the payment chain would benefit the industry as a whole.

### **3. National and International Approaches to Prompt Payment**

#### **A. International Movement**

Over the past number of years, there has been a global movement towards enactment of legislation to minimize delays and accelerate payments down the construction chain.<sup>127</sup> A push for government intervention has developed and is spreading throughout North America as the industry seeks legislation requiring owners, contractors and sub-contractors to more promptly pay amounts due to participants in the construction contract pyramid.

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<sup>127</sup> For excellent commentary on this issue, see pages 160-165 of Reynolds, "Ontario Report", *supra* note 12.

The Ontario Report provides an excellent review of the evolution of prompt payment legislation in North America pointing out that the trade contractors who initiated Canadian efforts to pass stand-alone prompt payment legislation in that province were influenced by the passage of such legislation in most American states. In 1982, Chapter 39 of the United States Code<sup>128</sup> was enacted to ensure that federal government agencies paid all of their service and supply providers on time, or would be liable to pay interest on the overdue balance. In 1988, the Code was amended to include construction contracts and the obligation was expanded to include contractor liability in the event of failure to pay subcontractors on a timely basis. By the early 2000s, 49 of the 50 states had passed prompt payment legislation for the protection of subcontractors with legislation in 34 states applying to private projects as well as public projects.

In addition to the United States, prompt payment statutory schemes also exist in the United Kingdom, Australia, New Zealand, Singapore, Malaysia and Hong Kong.<sup>129</sup>

## **B. Ontario**

As stated earlier in this Report, Ontario was the first Canadian jurisdiction to enact prompt payment legislation when amendments to the then-*Construction Lien Act* received royal assent on December 14, 2017. While many of the new provisions are currently in effect, those on prompt payment and the associated adjudication system are set to be proclaimed into force on October 1, 2019.

## **C. Federal Approach**

At the federal level, Bill S-224 – *An Act to require prompt payment on federal construction projects*<sup>130</sup> was introduced in the Senate in April 2016 and proceeded to the House of Commons in 2017 before failing to pass.

Following Ontario's success, in 2017, Public Services and Procurement Canada, a department of the Federal Government of Canada, retained the same private legal practitioners who prepared the Ontario Report, Bruce Reynolds and Sharon Vogel, to conduct a comprehensive review of the federal statutory scheme and make recommendations to accelerate payment within the construction industry on federal government projects. Once again, the authors conducted a comprehensive review, this time of national issues involving the demand for prompt payment legislation. On August 2, 2018, the Department of Public Services and Procurement Canada released the report, titled *Building a Better Framework for Prompt Payment and Adjudication in Canada*<sup>131</sup> (the "Federal Report").

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<sup>128</sup> *Prompt Payment Act*, 31 USC 39 (1982).

<sup>129</sup> For a detailed analysis of the prompt payment legislative provisions of these jurisdictions see Appendix B of Reynolds, "Ontario Report" *supra* note 12.

<sup>130</sup> 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2017 (third reading in Senate 4 May 2017).

<sup>131</sup> Reynolds, Bruce & Sharon Vogel. Prepared 8 June 2018 [Reynolds, "Federal Report"].

The main recommendations contained in the Federal Report include the following:

- The Government of Canada should enact legislation introducing prompt payment and adjudication on federal construction projects.
- The preferred model for prompt payment legislation is that adopted by Ontario as opposed the model which to date has found its way into various stand-alone Bills, including Bill S-224 previously introduced in the Senate.
- The consequences of a failure to pay should be modelled after Ontario's legislation. Specifically, where a party fails to pay, the following consequences should be legislatively available: the right to commence an adjudication, mandatory interest accrued, the right to suspend work without breach of the claimant's contract where the adjudicator's determination isn't paid within a period of time, and resumption of work contingent on payment of the determination amount, interest, and costs incurred as a result of the suspension.
- Prompt payment and adjudication legislation should apply to all federal departments and federal Crown corporations that do federal construction work under their own contracting authority.
- The federal government should consider adding a trust regime to the current legislation to provide additional protection or, in the alternative, mandatory bonding requirements.

The Federal Report also included useful commentary and recommendations on how a prompt payment adjudication system could be established that would be suitable to the geographic challenges of federal government construction disputes and possibly those of smaller provinces and territories, such as Manitoba. This will be discussed further below.

#### **D. Other Canadian Jurisdictions**

Manitoba is not alone in closely following the trajectory of prompt payment legislation in Ontario and federally. New Brunswick's Legislative Services Branch has recently expressed plans to modernize its *Mechanics; Lien Act* and potentially introduce a prompt payment scheme along with an adjudication process.<sup>132</sup> Additionally, Quebec has implemented a pilot project to adopt prompt payment provisions within certain public contracts prior to a full application of such provisions to

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<sup>132</sup> Legislative Services Branch, Office of the Attorney General, Government of New Brunswick, "Law Reform Notes (#41)" issued May 2018, available online at: <<http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes41.pdf>>

all public contracts.<sup>133</sup> Lastly, while Alberta's government has yet to introduce legislation, it has added prompt payment provisions to its standard Department of Infrastructure construction contracts.<sup>134</sup>

#### **4. Addressing Manitoba's Delay of Payment Problem**

As part of this review, the Commission has considered a number of reform options to resolve the delay in payment issue including maintaining the *status quo*, increasing the use of the courts to enforce contractual payment terms, and legislating prompt payment in some form.

##### **A. Enforcement of Contractual Terms through Litigation**

At the onset, consideration was given to whether the combination of existing legal remedies already available to parties under their contracts and enhancements to the trust and lien provisions recommended in this report would be sufficient to resolve delays in payment in Manitoba's construction industry.

One local representative of a national construction association with experience performing highway work under contract with the Manitoba Department of Infrastructure and less experience with Canadian Construction Documents Committee (CCDC) documents or the Act posed the following question to the Commission: "why don't we just sue to enforce the terms in our contracts?" Industry-wide, the answer to that question seems to be that, for at least 25 years, associations such as the CCA and most members of the industry have avoided court proceedings, preferring to resolve payment disputes through arbitration or other alternative dispute resolution (ADR) options. In fact, arbitration or ADR clauses are typically included in Canadian standard forms of construction contracts. The Commission was advised by industry Stakeholders that normal civil litigation procedures are seen, in general, to be too complex, time consuming and costly. Hence, there have been few reported cases in Canada in recent decades involving construction contract interpretation and enforcement by the courts.

When considering the problem of how to efficiently resolve payment delays as they arise during the month-to-month payment application process while a construction project is ongoing, the ponderous pace of litigation is anything but appealing. Stakeholders participating in this review were generally not supportive of a prompt payment remedy that relied on the courts in the first instance for resolution of their slow payment problem.

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<sup>133</sup> Bill 108 - *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*, 2017, chapitre 27.

<sup>134</sup> Alberta Construction Association, "Alberta Infrastructure Introduces Prompt Payment in Contracts" published April 19, 2016, available online at: <<http://albertaconstruction.net/?p=1184>>.

## **B. Enhancements to Trust and Lien Provisions**

The Commission also considered whether the enhancements to the trust and lien provisions in the Act recommended in this Final Report, including increased transparency of the certification process and enhancements to trustee's obligations, would be sufficient to diminish delayed payments. It considered the option of the Legislature enacting such amendments and taking a "wait and see" approach to determine whether delayed payments in the industry are reduced.

When considered further, however, it was clear that construction contracts provide no remedy or effective recourse for payment delays. The trust and lien provisions in the Act address misappropriation of project funds and provide some lien relief in the event of payment defaults (such as upon insolvency of a payer). However, even if reformed as recommended, the Act provides no relief in respect of payment delays. For this reason, it is unlikely that the expanded lien and trust provisions alone would have any significant impact on the culture of non-compliance.

## **C. Stand-alone Prompt Payment Legislation**

Often proponents of prompt payment legislation seek passage of free-standing legislation rather than undertaking the more daunting task of justifying incorporation of such provisions in existing remedial statutes for the benefit of the construction industry.

In April 2018, a private member's bill was introduced in the Manitoba Legislature as Bill 218 - *The Prompt Payments in the Construction Industry Act* (Bill 218). This Bill was supported by the Manitoba Prompt Payment Coalition - an alliance of trade contractor associations, unions, suppliers, pension trust funds and others who claim a particular interest in seeing prompt payment legislation enacted in the province of Manitoba. While the Commission was not involved in any way in the drafting of Bill 218, during its consultations for this project, it heard substantial opposition to the Bill and encourages the provincial government to continue to broadly consult with industry Stakeholders given the fact that this remedial legislation is necessary for the general benefit of all factions of the industry.

Some might argue that, where the goal is achieving some degree of inter-jurisdictional consistency, it would be simpler to enact uniform prompt payment legislation throughout the country with each jurisdiction thereafter integrating this legislation with their own lien and trust statutory schemes than to have each province and territory standardize their existing trust and liens legislation. Most Stakeholders consulted by the Commission, however, argued that any benefits to stand-alone legislation, even if developed with a broad industry consensus, would be dwarfed by the procedural difficulties caused by the operation of two distinct pieces of construction legislation and the failure of the Legislature to purposively integrate each of the remedies available under the separate statutory schemes. The Commission agrees with this assessment.

#### **D. Inclusion of a Prompt Payment Remedy and Adjudication Process in *The Builders' Liens Act***

The majority of Stakeholders who participated in the Commission's consultation process expressed the view that any new remedy intended to address delays in payment ought to be incorporated into the same statute as trust and lien remedies in such a way that linkages, overlaps and sequential use of remedies can be planned and provided for.

There is logic to adding a prompt payment remedy, if there is to be one, to the current Act. As a new remedy within the current scheme, it should be compatible with existing trust and lien remedies being for the benefit of the same special user group and, just as with trusts and liens, a prompt payment scheme would serve to supplement ineffective common law aspects of the very same contracts and subcontracts at the root of the parties' relationships.

In the Commission's opinion, the reliance in Bill 218 upon certain definitions and other provisions found in the Act illustrates the close connection of prompt payment with the remedial schemes already in place. Therefore, it is the recommendation of the Commission that any new prompt payment process ought to be incorporated within *The Builders' Liens Act* and not legislated as a stand-alone statute.

#### **E. Commission Recommendations for Adoption in Manitoba**

The problem that Manitoba's industry members seek to address through prompt payment legislation is correction of a non-compliant, slow payment culture. During the consultation process, one local general contractor analogized that the industry required some tool, or collection of tools, as impactful as the introduction of the "five game suspension rule" implemented by the National Hockey League. In other words, where a payer flouts the timeline for payment, there should be an immediate and punitive consequence. Other industry players would learn of the decision and comply with the timeline to avoid the consequence.

Given the culture of non-compliance with contractual payment terms and slow payment, the Commission is convinced that legislative reform is necessary to change Manitoba's payment culture. It may well be that the best method for looping owners, their payment certifiers, and offending contractors and sub-contractors into a culture of compliance is by falling in with what has been described as a national movement to pass prompt payment legislation.

**Recommendation #43: The Act should be amended to incorporate a new remedy imposing statutory timelines and processes requiring prompt payment of amounts owed under contracts and sub-contracts as well as penalties for failure to adhere to the prescribed timelines.**



## **5. Inter-jurisdictional Consistency versus Distinctly Manitoban Provisions**

Throughout the consultation process, the Commission heard overwhelmingly that significant differences between the legislation enacted by different Canadian jurisdictions create unnecessary complexities for both the construction industry and the legal profession.

Many of those who provided feedback to the Commission were supportive of Ontario's legislative reforms introducing a prompt payment scheme, if not entirely, then at least in principle.<sup>135</sup> There was strong and consistent certainty expressed by industry Stakeholders that the time-consuming consultations and consensus achieved after long and contentious dealings in Ontario produced most if not all of what they believed necessary to reset the payment culture.

While inter-jurisdictional consistency is a valid goal, the Commission is aware of the need to ensure that any changes to the legislative scheme are compatible with the realities of this province. This same concern was expressed by the MHCA in its submission. While alive to the benefit of consistency across Canada, MHCA supports a vigorous consultation process in Manitoba akin to that pursued in Ontario to ensure that the regime will work with existing laws and industry realities and that direct contractual arrangements are taken into consideration.

The Commission acknowledges that if Manitoba follows Ontario's lead, inter-jurisdictional consistency will be promoted. However, where appropriate, Manitoba's legislation must respond to the particular realities of this province.

### **A. Key Elements of Ontario Prompt Payment Scheme Recommended for Adoption in Manitoba**

The prompt payment regime introduced by recent amendments to Ontario's construction legislation is reasonably straightforward. In addition to the requirements that the provisions be universally applicable to both public and private construction projects and apply to all levels of the construction pyramid, it includes just seven key elements.

#### **(a) Proper Invoice**

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<sup>135</sup> For example, the CCA advised that, by participating in consultations held in Ontario prior to their legislative reforms, they came to believe that prompt payment legislation is necessary and were supportive of the balance achieved through the amendments to Ontario's *Construction Act*. They are actively seeking alignment of key elements of construction legislation throughout the country. The Surety Association of Canada, having participated in the Advisory Committee for the development of the Ontario Report stated that Ontario's regime provides a "sound working model" on which Manitoba ought to emulate. In its submission, the WCA recommended to the Commission that Manitoba follow Ontario's prompt payment model with consideration for Manitoba-specific issues. The GC Alliance of Canada also came to support the prompt payment initiative in Ontario where they played a very active role in the Ontario review helping to formulate recommendations made to that government.

The trigger event that starts the clock on payment deadlines from the top of the construction contract pyramid and down is the contractor providing a proper invoice to the owner requesting periodic payment on account of the contract price. Details of what constitutes a “proper” or adequate invoice are prescribed and include documents adequate to support the payment amount requested.<sup>136</sup>

### **(b) Time for Giving Invoice**

Under Ontario’s new legislation, unless the contract provides otherwise, invoices are to be provided to the payer on a monthly basis.<sup>137</sup> Although the majority of civil construction contracts provide for monthly payments on the account, there are circumstances in which owners and contractors have good reason to agree to different payment terms. For example, this commonly occurs on large engineered projects involving design and installation of complex equipment where payment terms are frequently tied to successful installation or completion of specific milestones including testing or commissioning of high value equipment.

Ontario’s decision to maintain parties’ freedom to contract by enabling parties to contract out of the monthly invoice requirement is a point of continuing contention, perhaps with those whose work is never subject to special circumstances such as those referenced above. In the Commission’s view, if a prompt payment regime is to have universal application, it must accommodate a diverse range of contracts and commercial realities by allowing parties to contract out of the monthly invoice requirement.

### **(c) Deadlines for Payment**

From the date a proper invoice is received, the payment deadline for the owner is specified in Ontario’s new legislation. From the date payments are received down the chain, payment deadlines are specified for each payee, as follows:

- owner to contractor – 28 days;<sup>138</sup>
- contractor to sub-contractor – 7 days;<sup>139</sup> and
- sub-contractor to sub-sub-contractor – 7 days.<sup>140</sup>

These payment deadlines are very similar to those set out in standard form construction contracts which typically do not contain provisions for enforcement of such agreed terms.

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<sup>136</sup> *Construction Act*, *supra* note 14, s. 6(1).

<sup>137</sup> *Ibid*, s 6(3).

<sup>138</sup> *Ibid*, s. 6(4)(1).

<sup>139</sup> *Ibid*, s. 6(5)(1).

<sup>140</sup> *Ibid*, s. 6(6)(1).

The Commission received varying feedback on whether the timelines for payment legislated in Ontario and set out above were manageable. Manitoba Hydro, for example, which has a complex process for payment of contracts and sub-contracts, was hesitant to agree that it could meet such short timelines on its more complex, high value projects.<sup>141</sup> However, in the Commission's opinion, it is reasonable to expect that owners can and will provide the resources required to ensure that those businesses and individuals who have been contracted to provide work, services or materials are compensated in a timely basis and that such appropriate resources ought to be considered part of the cost of doing business.

In the Commission's opinion, the payment deadlines set out above are appropriate.

#### **(d) Notice of Non-payment**

Ontario's legislated prompt payment regime creates new rights of transparency and full disclosure with associated deadlines for the benefit of all payees. Where an owner determines that it disputes any part of an invoiced payment claim, it must issue a written Notice of Non-Payment setting out the amount disputed with reasons for the dispute within 14 days of receiving the invoice.<sup>142</sup>

The contractor is similarly required to provide written notice of an intention to not pay a sub-contractor amounts claimed as due. This requirement is duplicated down the payment chain.

These provisions are at the heart of this remedy. Without such a legislative scheme, back-charges and alleged rights of set-off can be exercised by every payer in the chain without any imperative to provide reasonable notice or reasons for the self-help exercised.

#### **(e) Contractor Response to Non-payment Notice**

Upon receipt of an owner's notice of non-payment, the contractor who stays silent remains obliged to nevertheless fully pay its sub-contractors not later than 35 days from the date of invoice.<sup>143</sup>

However, if the contractor advises of the owner's notice of non-payment, giving notice to its sub-contractors of the problem, and undertakes to seek adjudication of the issue within 21 days of notifying the sub-contractors, the contractor's payment obligations are suspended pending determination of the matter.<sup>144</sup> Similar processes apply down the payment chain.

The prompt payment regime provides a statutory remedy allowing payees to shift the onus of proof to the party refusing to pay and provides a timely procedure for resolving such incursions which

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<sup>141</sup> Specifically, Manitoba Hydro expressed concern above the 7 day period for the rejection of invoices proposed in Bill 218.

<sup>142</sup> *Construction Act*, *supra* note 14, s 6.4(2).

<sup>143</sup> *Ibid*, s 6.5(4).

<sup>144</sup> *Ibid*, s 6.5(5)(iii).

currently disrupt the ordinary flow of project payments without any ready procedure for a payee to oppose the non-payment. The Commission is supportive of this approach.

#### **(f) Rules for Distribution of Partial Payments**

When a payer disputes making full payment and specifies who in the payment chain it considers responsible for the set-off or back charge to be taken, the rules for distribution of a partial payment require the specified payee to take the brunt of non-payment. Sub-sections 6.5(2) & (3) of Ontario's Act provide:

##### **Partial payment, paid amount**

(2) Subject to the giving of a notice of non-payment under subsection (6), if the payment received by the contractor from the owner is only for a portion of the amount payable under a proper invoice, the contractor shall, no later than seven days after receiving payment, pay each subcontractor who supplied services or materials under a subcontract with the contractor that were included in the proper invoice from the amount paid by the owner.

##### **Same**

(3) For the purposes of subsection (2), if more than one subcontractor is entitled to payment, payment shall be made in accordance with the following rules:

1. If the amount not paid by the owner is specific to services or materials supplied by a particular subcontractor or subcontractors, the remaining subcontractors shall be paid, with any amount paid by the owner in respect of the subcontractor or subcontractors who are implicated in the dispute payable to them on a rateable basis, as applicable.
2. In any other case, subcontractors shall be paid on a rateable basis.

Sub-contractors are similarly required to pay their own sub-contractors who supply services or materials under a subcontract between them for amounts properly invoiced despite the fact that full payment was not received by the contractor.<sup>145</sup>

Where the payer does not make clear who it considers responsible for the payment deduction at issue, the Ontario rules specify that the partial payment shall be distributed rateably to affected payees.<sup>146</sup>

#### **(g) Interest on Payments Delayed**

Any legislative reform aimed at improving payment times and decreasing delays must contain an appropriately prohibitive penalty for non-compliance with payment terms. The Ontario Act imposes interest at the greater of the interest rate provided in the contract or sub-contract at issue

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<sup>145</sup> *Ibid*, s. 6.6(2).

<sup>146</sup> *Ibid*, ss. 6.5(3) & 6.6(3).

and the pre-judgment interest rate under the *Courts of Justice Act* of Ontario accruing from the date the late payment was due.<sup>147</sup> The Commission agrees that the imposition of interest on delayed payments is an appropriate penalty and again supports the parties' ability to contractually agree to a rate of interest other than that contained in Manitoba's Queen's Bench Rules.

**Recommendation #44: The Act should be amended to incorporate similar provisions to sections 6.1-6.9 of Ontario's *Construction Act* with the modifications set out in recommendation #45.**

## **B. Recommendations for Legislation Unique to Manitoba**

As stated above, it is necessary to ensure that any prompt payment scheme adopted in Manitoba is responsive to Manitoba's unique legislative history and the character of its industry. While the Commission believes that recent amendments to Ontario's legislation establishing a statutory prompt payment scheme in that province would broadly meet the needs of Manitoba's industry, some deviations from the statutory law of the neighbouring province are recommended.

### **(a) Statement of Purpose**

In this Report, certain revisions to the Act are recommended to modernize the structure of the Act and make it more user friendly'. One such recommendation is to set out clear Parts for each remedy, to use ample headings to guide the reader, and for each remedy to set out a statement of purpose for the remedy. The statement drafted for a new prompt payment remedy is illustrated in Appendices A & B.

### **(b) Description of Work**

The remedial statutes of Ontario and Manitoba have long and distinct legislative histories. Elementary terms were statutorily defined long ago and have been subject to decades of judicial interpretation. Therefore, should Manitoba adopt a prompt payment remedy similar to the one statutorily imposed in Ontario, care should be taken to preserve ingrained differences in language.

One example is the different language used in the statutes to describe the basket of work upon which the Acts apply. In Ontario, definitions of *service and materials* are comprehensive. The equivalent in Manitoba is *work, services and materials*.

### **(c) Requested versus Payable**

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<sup>147</sup> *Ibid*, s. 6(9).

Sections 6.1 to 6.9 of Ontario's Act, which will establish the new prompt payment remedy upon proclamation on October 1, 2019, reference amounts "payable" when describing entitlements to payment and information requirements for proper invoices.

In Manitoba, the word "payable" is often used to describe a claim amount less the payer's set-off amount. Section 55(2) applications for the vacation of registered liens require consideration of "money payable... but not yet paid". In their affidavits in support of the application, applicants frequently state their position on what this amount will ultimately be found to be. With such practice history in mind, it is advisable to avoid use of the phrase "amounts payable" if Ontario legislation is to be adopted for use in this province.

Should Manitoba adopt prompt payment provisions similar to those enacted in sections 6.1-6.9 of the Ontario Act, entitlements to payment and information requirements should make reference to amounts *requested* instead of amounts *payable* to avoid any confusion respecting the differing meaning the latter phrase carries in the two provinces. (See Part III in Appendices A & B).

**Recommendation #45: In adopting sub-sections 6.1-6.9 of Ontario's *Construction Act* into Manitoba's Act, the following modifications should be made: (a) a statement of purpose should be added for the new remedy, (b) the phrase "work, services or materials" should be referenced in a manner consistent with the Act, and (c) the Act should call for payment of amounts "requested" instead of amounts "payable".**

## **6. Adjudication of Prompt Payment Disputes**

Based on a wide ranging review of prompt payment regimes in the United States and around the world, the Ontario Report concluded that to be effective, a prompt payment regime requires a nimble adjudication process under which payment delays, refusals to pay and assertions of rights to set off for all manner of performance defaults could be addressed during the course of the work.<sup>148</sup>

A representative of SAC advised that he was persuaded during the Ontario consultation process that only if parties know that they will face judgment day through some manner of adjudication will their impugned behavior be corrected. This Stakeholder was convinced that a prompt payment regime can only succeed if implemented in tandem with a practical, well-articulated system of adjudication.

The Commission agrees that a series of short legislated timelines and consequences for contravening the legislation are ineffectual without a means of obtaining a determination in a very short period of time. In exploring options for implementing a system of swift decision-making,

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<sup>148</sup> Reynolds, "Ontario Report", *supra* note 12.

the Commission considered two options: (i) integration with the current court process with identifiable responsibilities allocated to Court of Queen's Bench Masters and the Small Claims Division of the Court of Queen's Bench, or (ii) creation of a private system of adjudication akin to the system currently being established in Ontario. Both options are considered below.

### **A. Expanding Court Systems & Processes**

In considering an appropriate and proportionate option for the adjudication of prompt payment disputes, the Commission is cognizant of the fact that Manitoba has much lower volumes of construction and construction payment disputes than Ontario. Additionally, the Commission also acknowledges that the number of experienced construction lawyers and other industry specialists available to facilitate the resolution of disputes in Manitoba is significantly lower. Given these differences, the Commission considered whether the expansion and use of existing resources would be appropriate.

One option raised in the Commission's Consultation Paper was the appointment of a specialized Master of the Court of Queen's Bench to hear and provide judgments on payment disputes on an expedited basis. *The Builders' Liens Act* of Manitoba currently provides for a judge of the Court of Queen's Bench to refer a lien action to a master for the preparation of a report and recommendations.<sup>149</sup> It remains the exclusive jurisdiction of the judge to provide judgment in the action based on the findings and recommendations of the master.<sup>150</sup>

In Ontario, section 58 of the *Construction Act* provides that, after the delivery of statements of defence or statements of defence to cross claims, counterclaims or third party claims, a judge may refer a whole action or any part of it for trial to either a master assigned to the geographic area or a case management master.<sup>151</sup> While a party is not entitled at law to have an action referred, it is common practice for a lien action to be referred to a master in the City of Toronto "which reflects the expertise and processes employed by masters in adjudicating such references in a flexible, summary and inexpensive manner".<sup>152</sup>

Ontario's scheme withstood a constitutional challenge in *Snowmount Investments Corp. v. Elliott*<sup>153</sup> where the Superior Court of Ontario held that the *Construction Lien Act* provided that lien actions are within the exclusive jurisdiction of judges appointed pursuant to section 96 of the *Constitution Act*, although it gives those judges the power to refer the entire action to a master. The court concluded that, as the master's report is subject to the approval of a judge, the procedure was constitutionally valid.

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<sup>149</sup> *Builders' Liens Act*, *supra* note 1, s. 78(1)&(2).

<sup>150</sup> *Ibid*, s 78(3).

<sup>151</sup> *Construction Act*, *supra* note 14, ss 58(1)(a)&(a.1).

<sup>152</sup> Bristow, *supra* note 18, p. 11-58.

<sup>153</sup> (1997), 36 CLR (2d) 240.

The potential increased role of masters in construction disputes raises the question of constitutionality. While lien issues clearly fall within the jurisdiction of provincial legislatures granted by the *Constitution Act*, 1867, provincial legislation in several other areas of property and civil rights have been declared to be *ultra vires* when attempting to confer jurisdiction upon masters/referees.<sup>154</sup>

The Manitoba Court of Appeal held in *C. Huebert Ltd. v. Sharman*<sup>155</sup> that section 56 of *The Mechanics' Lien Act*, the precursor to Manitoba's current Act, which provided for the referral for hearing and disposition of lien actions to a "referee in chambers", was *ultra vires* the power of the provincial Legislature.

Ontario has conferred a role on masters under first the *Construction Lien Act* and now the *Construction Act*.<sup>156</sup> Previously, Ontario's legislation provided for lien actions to be tried by a judge of the County or District Court with the exception of the County of York, where a lien action would be tried by a master or assistant master of the Supreme Court.<sup>157</sup> In 1960, the Supreme Court of Canada held that that provision was *ultra vires* the province and that this assignment of the power of final adjudication on lien matters was beyond the assignment of mere matters of procedure and amounted to an unconstitutional appointment pursuant to section 96 of the *Constitution Act*.<sup>158</sup> Following this decision, the relevant sections of Ontario's Act were amended to provide that actions were to be tried by a judge of the Supreme Court but that, on motion, a judge may refer the action to the master for trial or may direct a reference to the master.

While the powers conferred on masters under Ontario's legislation are for the determination of liens and not prompt payment, the same constitutional issues would arise from the conferral of a judge's section 96 jurisdiction to masters for determination of payment disputes.

The constitutional issues raised above are not insurmountable. Provisions could be drafted to maintain a judge's final adjudication authority while allowing references to masters on lien issues as in Ontario. In addition to the potential constitutional issues noted above, however, responses received to this option were overwhelmingly negative. From the industry perspective, the prospect of obtaining a quick court date and decision that would be useful for ongoing payment delays was

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<sup>154</sup> See *Ontario (Attorney General) v. Victoria Medical Bldg. Ltd.*, [1959] SCJ No 70, [1960] SCR 32 (SCC); *Reference re Adoption Act (Ontario)*, [1938] SCJ No. 21, [1938] SCR 398 (SCC); *Saskatchewan (Labour Relations Board) v. John East Iron Workers Ltd.*, [1949] JCJ No. 5, [1949] AC 134 (PC); *Reference re: Supreme Court Act Amendment Act, 1964 (British Columbia)*, [1965] SCJ No. 21, [1965] SCR 490 (SCC); *Colonial Investment & Loan Co. v. Grady* (1915), 8 Alta LR 496 (ABCA).

<sup>155</sup> [1950] MJ No 40, [1950] 1 WWR 682 (MBCA).

<sup>156</sup> See Bristow, *supra* note 18, p. 1-28, the author raises the question of whether Ontario's legislated use of Masters in lien disputes is indeed constitutional in view of the decision of the Manitoba Court of Appeal in *C. Huebert Ltd. v. Sharman* above. The author indicates that Ontario's provision may be *ultra vires* of the province since the master will appear to exercise final adjudication.

<sup>157</sup> *Mechanics' Lien Act*, RSO 1950, c 227, s 31(1).

<sup>158</sup> *AG Ont and Display Services Ltd. v. Victoria Medical Bldg. Ltd.*, [1960] SCR 32, affirming [1958] OR 759.



doubtful. Additionally, concern was expressed by the judiciary that this would require either increased personnel or, at the very least, reallocation of existing resources within an already overburdened court system. An increase in court personnel was viewed as highly unlikely and the reallocation of resources as unfair to other litigants also waiting in line for limited court resources to speed along their matters. The judiciary further saw little opportunity to undertake the implementation of an unconventional form of construction adjudication and fit this within its long list of current priorities.

Another option raised by the Commission in its Consultation paper was the possibility of having delayed payment disputes under a new set of prompt payment rules adjudicated by specialized hearing officers in the Small Claims Division of the Court of Queen's Bench where the amount of the payment in dispute does not exceed that court's jurisdiction.<sup>159</sup> This potential option was met with the same reservations as the use of the master of the Court of Queen's Bench.

## **B. Private Adjudication**

The other option considered by the Commission was the creation of a private adjudication system akin to that currently being created in Ontario. This system was recommended by the authors of the Ontario Report and based on a similar system utilized in the United Kingdom.<sup>160</sup> It should be noted that builders' lien and trust regimes have never been part of the legal landscape in that jurisdiction.<sup>161</sup>

The establishment of an entirely new adjudication system for quick determination of payment disputes in the course of construction is a bold and ambitious pursuit. However, given the scarcity of court resources and considering the concerns expressed by Stakeholders as to the ability of the courts to render decisions at a speed that would promote and enforce the resolution of ongoing payment disputes during in the ordinary course of a project, the Commission agrees with the writers of the Ontario Report that a private adjudication system shaped by regulatory requirements and oversight would best respond to the needs of the industry in Manitoba.

Based on the recommendations contained in the Ontario Report, Ontario amended its legislation to incorporate an adjudication system characterized by the following main provisions<sup>162</sup>:

- Parties to a contract or subcontract may refer a dispute to adjudication under the Act prior to the completion of the contract/sub-contractor (unless the parties agree otherwise) and

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<sup>159</sup> Pursuant to s. 3(1)(a) of *The Court of Queen's Bench Small Claims Practices Act*, CCSM c C285, a person may file a claim under this Act for an amount of money not exceeding \$10,000, which may include general damages in an amount not exceeding \$2,000.

<sup>160</sup> Ontario Report, Chapter 8- Adjudication.

<sup>161</sup> Wallace, I.N. Duncan, *Hudson's Building and Engineering Contracts*, loose-leaf, 11<sup>th</sup> ed (London: Sweet & Maxwell, 1995), ch 11.063 at 1239.

<sup>162</sup> Part II.1 of *The Construction Act* titled "Construction Dispute Interim Adjudication" establishes the new adjudication system under the Act. Part II.1 is not currently in effect and will take effect on October 1, 2019, the date fixed by proclamation.

where the dispute relates to: valuation of services or materials provided, payment under the contract, disputes that are the subject of a notice of non-payment, amounts retained for set-off by a trustee or under a lien, payment or non-payment of a holdback, and any other matter that the parties agree to or that is prescribed in the legislation.<sup>163</sup>

- The adjudication system is based on very short and ambitious procedural timelines. For example, under the Act, once a party is served with a written notice of adjudication, the parties have four days to retain an adjudicator or request that one be appointed.<sup>164</sup> Where an adjudicator is appointed, the appointment must occur within seven days. Once the adjudicator agrees or is appointed, the party who initiated the adjudication has five days to provide the adjudicator a copy of all documents it intends to rely upon along with a copy of the contractor subcontract.<sup>165</sup> The adjudicator then has 30 days to render a determination subject to an extension.<sup>166</sup>
- Unless the parties and adjudicator agree otherwise, an adjudication may address only one matter.<sup>167</sup>
- Adjudication may be commenced even where a matter is the subject of an ongoing court action or arbitration.<sup>168</sup>
- Adjudications in accordance with the Act may only be conducted by an adjudicator listed in the publicly available registry of adjudicators established by the Authorized Nominating Authority and meeting the requirements for adjudicators set out in the Act and regulations.<sup>169</sup>
- To be included on the public registry, an adjudicator must hold a certificate of qualification to adjudicate issued by the Authority and meet the requirements prescribed under the regulations, namely: that the individual has at least 10 years of relevant working experience in the construction industry, has successfully completed the requisite training programs and paid the requisite fees, is not an undischarged bankrupt and has not been convicted of an indictable offence in Canada or of a comparable offence outside Canada, and agrees in writing to abide by the requirements for holders of certificates of qualification to adjudicate also set out in the regulation.<sup>170</sup>

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<sup>163</sup> *Ibid*, s 13.5(1) & 13.5(3).

<sup>164</sup> *Ibid*, s 13.9(4).

<sup>165</sup> *Ibid*, s 13.11.

<sup>166</sup> *Ibid*, ss 13(1) & (2).

<sup>167</sup> *Ibid*, s 13.5(4).

<sup>168</sup> *Ibid*, s 13.5(5).

<sup>169</sup> *Ibid*, s 13.9(1).

<sup>170</sup> O Reg 306/18: Adjudications under Part II.1 of the Act under *Construction Act*, RSO 1990, c C30, s 3(2).

- Ontario's Ministry of the Attorney General is tasked with designating an entity to serve as an Authorized Nominating Authority (the Authority) which is tasked with: developing and overseeing programs for the training of adjudicators, qualifying and appointing adjudicators to the public registry which it will establish and maintain, and perform any other duties prescribed under the Act.<sup>171</sup> The Authority may also set and collect fees for the training and qualification of adjudicators.<sup>172</sup>
- Parties may select an adjudicator or, where they cannot agree, request that the Authority appoint an adjudicator for them.<sup>173</sup>
- Adjudicators' fees are paid by the parties and are equally apportioned to the parties unless they agree otherwise and subject to determination by the adjudicator that a party acted frivolously, vexaciously, or in such a manner that constitutes an abuse of process warranting a determination that the offending party ought to pay a greater proportion of the costs.<sup>174</sup>
- The adjudicator is empowered to: issue directions respecting the conduct of the adjudication, initiate the ascertaining of relevant facts and law, draw inferences based on the conduct of the parties, conduct on-site inspections with the prior consent of the owner of the premises or others with the legal authority to exclude others from the property, obtain assistance from professional, make a determination, or use any other powers prescribed by the legislation.<sup>175</sup>
- The adjudicator's determination is provided to the parties in writing and include reasons for the determination and the reasons of the adjudicator are admissible as evidence in later court proceedings.<sup>176</sup>
- An adjudicator's determination of a matter is binding on the parties until a determination of the matter is made by a court, an arbitrator pursuant to Ontario's Arbitration Act, or the parties enter into a written agreement.<sup>177</sup>
- A party may make an application for judicial review of an adjudicator's determination but only with leave of Ontario's Divisional Court and cannot be filed more than 30 days after the determination is communicated to the parties. Additionally, upon an application

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<sup>171</sup> *Ibid*, ss 13.2(1) & 13.3(1).

<sup>172</sup> *Ibid*, s 13.3(2)(a).

<sup>173</sup> *Ibid*, s. 13.9(1).

<sup>174</sup> *Ibid*, ss. 13.10 & 13.17.

<sup>175</sup> *Construction Act*, *supra* note 14, s 13.12(1).

<sup>176</sup> *Ibid*, s 13.13(6) & (7).

<sup>177</sup> *Ibid*, s 13.15(1).

for judicial review, an adjudicator's determination may only be set aside under enumerated grounds.<sup>178</sup>

- Where a party does not make a payment payable under an adjudicator's determination within the amount of time set out by the adjudicator for payment, the contractor or subcontractor may suspend work under the contract or subcontract until the party pays the full amount of the determination, any interest accrued in accordance with the Act, and any reasonable costs incurred by the contractor or subcontractor as a result of the suspension of work.<sup>179</sup>
- Within a specified time, a party to an adjudication may file a certified copy of the adjudicator's determination with the court and, upon the filing, the determination is enforceable as if it was a court order.<sup>180</sup>

After considering the options, the Commission believes that the Ontario model for prompt payment adjudication is the most suitable and perhaps only option for the enforcement of a prompt payment remedy. The remaining question is, therefore, how to customize such a system to Manitoba's legislative and construction environments.

**Recommendation #46: A private adjudication system should be developed and implemented akin to the adjudication system established by Part II.1 of Ontario's *Construction Act* with such modifications as are necessary to synchronize its contents with other remedies in the Act.**

### C. The Challenges of Implementing an Adjudication Process in Manitoba

Lawyers who provided valuable feedback during the Commission's consultation process were generally skeptical that a more expedient adjudication system could be implemented in Manitoba. Of particular concern was the very short procedural timelines imposed on both parties to the contract and on the adjudicator under Ontario's legislative scheme. This is an understandable concern given the rules of court currently governing most dispute resolution and the lengthy timelines that are common in court proceedings. Adding to this challenge is the fact that Ontario's legislated process has yet to be tested as the relevant provisions of Ontario's *Construction Act* will not be in force until October 1, 2019. The Commission notes, however, that without the tight timelines like those imposed under Ontario's Act, any legislative reform is unlikely to remedy the problems arising with day-to-day payment disputes during the ongoing construction process.

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<sup>178</sup> *Ibid*, s 13.18(1)-(5).

<sup>179</sup> *Ibid*, s 13.19(5).

<sup>180</sup> *Ibid*, s 13.20(1).

Additionally, many Stakeholders shared the Commission's concern that there be an insufficient number of qualified individuals in Manitoba to address the need. Additionally, the Commission was advised that the industry sought criteria for adjudicators like the criteria imposed under Ontario's legislation and recommendations. When asked, the WCA estimated that there could be as many as 500 prompt payment adjudications in the first year that such a system was implemented. Another issue may be locating impartial professionals given the relatively small size of the construction and related industries in the province. A Manitoba representative for the CCA advised that his general contract business has never been able to find an experienced Manitoba construction lawyer to act as an arbitrator for a dispute as those who practice in area are also subject to conflicts of interest.

The design and staffing of a new adjudication system is not within the skill set or experience of many involved in this review. Given the difficulties created by Manitoba's small and interconnected industry and legal profession, the Commission believes that creative solutions are necessary in the development and implementation of an adjudication system.

#### **D. Adjudication in Manitoba**

One possible solution to a small number of potential adjudicators with a high likelihood of conflict of interest would be for the Commission to take advantage of the national push for legislative reform in this area and explore options for bi-provincial or national agreements for the establishment of larger and broadly based adjudicator pools. As noted in the Federal Report, Manitoba is not the only Canadian jurisdiction that would likely struggle to establish a sufficient pool of experienced adjudicators to avoid conflicts of interest.

The issue arose during consultations on the Federal Report. The authors of that report state:

In relation to the availability of adjudicators nationally, a number of stakeholders commented on their concern that in smaller jurisdictions there may be significant conflicts of interest and/or a smaller pool of adjudicators to draw from. We note that it would be necessary to create a national pool of adjudicators to draw from in order to have sufficient ability for a stakeholder to find an adjudicator in any part of the country. In stakeholder engagement sessions, it was discussed that, given that many adjudications will take place in writing, by telephone, or by video conference, the need for geographic proximity is not strictly necessary. Others, however, stressed the need for specialized knowledge, for example the need for winter construction experience in relation to disputes in the Northern parts of Canada.<sup>181</sup>

With respect to legislative alignment and the development of an adjudication system, the Federal Report recommends that the federal government explore three options:

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<sup>181</sup> Reynolds, "Federal Report", *supra* note 131, 197.

1. The new federal legislation provide that part of the federal statute does not apply if the Governor in Council is satisfied that provincial legislation is “substantially similar” and makes an order exempting the party from the relevant part of the Act;
2. The federal government create a uniform or “model law” to address prompt payment and adjudication potentially with the assistance of the Uniform Law Conference of Canada; or
3. The federal government initiate an alignment initiative to attempt to negotiate an inter-governmental agreement on prompt payment and adjudication legislation be utilized as a "best practices" model.<sup>182</sup>

This last two recommendations are very interesting. The Commission agrees with the authors of the Federal Report that an intergovernmental agreement on prompt payment and adjudication would be beneficial. Such an approach would be particularly valuable in Manitoba given the challenges of establishing a local adjudication system akin to Ontario’s in a smaller jurisdiction with fewer professionals with sufficient expertise to adjudicate construction disputes effectively. The Commission recommends that Manitoba position itself for participation in any future developments respecting provision of a national or inter-provincial prompt payment adjudication system by working immediately toward adoption of a model akin to Ontario’s adjudication model.

**Recommendation #47: The Government of Manitoba ought to seek out opportunities to enter into extra-provincial agreements with other provinces and/or the federal government for the creation and implementation of extra-provincial adjudicator pools.**

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<sup>182</sup> *Ibid*, 237.

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## CHAPTER 7 - REFORMS OF THE CONSTRUCTION LIEN REMEDY

During the consultation process, there was much support for recommendations intending to clarify, update and preserve the powerful lien remedy contained in the Act. Members of the Construction Section of the Manitoba Bar Association stressed the importance of simplifying language and organization of the Act while minimizing changes to familiar elements of the remedy in order to aid unrepresented lien claimants in their frequent efforts to use liens without the aid of counsel.

In addition to those matters raised by the Commission in its Consultation Paper, the consultation process raised further issues respecting the nature and characteristics of Manitoba's statutory lien. Additionally, Stakeholders identified several useful provisions prescribed by statute in other jurisdictions.

The majority of the provisions contained in the current Act establish the nature of the lien and the processes by which the lien remedy is to be exercised, many of which include detailed technical requirements. In this Chapter, the Commission's analysis and recommendations for reform respecting liens will be provided under the following headings:

- 1. Structural Improvements to the Act**
- 2. The Fundamental Characteristics of Construction Liens**
- 3. Most Significant Lien Remedy Reforms Recommended**
- 4. Modernizing Lien Provisions in the Act**
- 5. Linkages with Other Remedies**

### **1. Structural Improvements to the Act**

#### **A. Purpose of the Remedy**

As an aid to readers ranging from claimants to the judiciary, a statement of purpose for this remedy is recommended for inclusion in the liens section of the Act (See Appendix A, Part IV). Legislated statements of purpose typically take one (or both) of the following forms: (i) they set out the goals the Legislature hopes to achieve, or (ii) they set out the policies and principles that are to guide any discretion conferred on officials, tribunals or courts in applying the legislation.<sup>183</sup> With respect to the statutory lien provisions, an express statement of purpose would fulfill both requirements.

The Commission recommends that the Act include a statement of purpose that describes key stages in the creation and exercise of lien rights through to their enforcement and makes use of common terms essential to understanding how and when to use the remedy including *fixed charge*, and *stay the hand of the paymaster*.

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<sup>183</sup> Sullivan, Ruth, *Construction of Statutes* (5<sup>th</sup> ed.), Markham: LexisNexus Canada Inc. (2008), at 271.

The Commission proposes the following statement of purpose be included in the amended legislation:

***Purpose of lien remedy***

*This Part provides a time-limited statutory right whereby the unproven claim of a contractor or sub-contractor for the value of work, services and materials provided from time to time under a contract or sub-contract to improve the value of an owner's land, may become a fixed charge against the owner's estate in the land, against holdback retained and against amounts then payable and thereby at least temporarily stay the hand of the paymaster. Procedures are provided to vacate such fixed charges, to restore orderly payment processes on continuing construction projects and allow each claimant to proceed to prove and enforce its unresolved lien claim by further legal action.*

<b>Recommendation #48: The Act should be amended to incorporate an express statement of purpose for the lien remedy.</b>
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**B. Chronological Order and Use of Headings**

A frequent criticism of the Act is that its many sections are scattered or arranged in a confusing sequence. During the consultation process, both lawyers and industry members implored the Commission to recommend a more comprehensible and “user-friendly” scheme.

The Commission agrees that a restructuring of the legislation and, specifically, the lien provisions, is past due and supports a chronological re-ordering of such provisions that would take a lien holder and/or counsel through the steps required to exercise and dispose of lien rights. It recommends that these provisions be sequenced under the following headings:

1. Origin and Nature of a Lien
2. Transmission of a Lien
3. Priorities
4. Holdbacks
5. Registration of a Lien against Land
6. Time for Registration of Liens
7. Written Notice of Lien- Section 16 Lands
8. Substantial Performance
9. Expiry and Discharge
10. Vacation of Lien
11. Action to Enforce Lien



As illustrated in the draft Act attached in Appendix B, the Commission recommends that existing sections of the Act be re-located under the headings listed above. Doing so will provide a comprehensible guide to users of the Act including the legal profession and industry players.

**Recommendation #49: The lien provisions contained in the Act should be restructured under the following 11 headings: Origin and Nature of a Lien, Transmission of a Lien, Priorities, Holdbacks, Registration of a Lien against Land, Time for Registration of Liens, Written Notice of Lien- Section 16 Lands, Substantial Performance, Expiry and Discharge, Vacation of Lien & Action to Enforce Lien.**

### C. Use of Plain Language where Appropriate

As stated above, feedback received during consultations included strong support for a more intelligible and accessible statute. In addition to restructuring the Act as a whole, the Commission also recommends that, where the language is unnecessary, archaic legalese be removed and replaced with plain language.

An example of terminology that could be replaced with more accessible language without sacrificing meaning is the phrase “*pari passu*” which, in plain language, means “without preference” in respect to the priority of liens.

In contrast, some words, often of Latin origin, are so ingrained in law that past interpretation and historical meaning would be lost should the wording be removed. The phrase “*pro rata*”, meaning “proportionately” is an example. Other statutory terms are useful in assisting a reader of one statute to interpret another.

**Recommendation #50: The Act should be amended to replace unnecessary legalise and Latin terminology with more accessible plain language.**

### D. Filling Legislative Gaps

In several sections, the current Act does not distinguish an unregistered lien from one where the charge has been fixed.<sup>184</sup> Additionally, in certain sections, it is necessary to clarify that not only liens that have been registered but also liens against Crown lands are at issue if written notice has been given to fix the charge that they entail.<sup>185</sup>

<sup>184</sup> See for example, *Builders' Liens Act*, *supra* note 1, ss 20(1),(2), 21, 49(1), 60, 68(1),(2), 69(1),(2).

<sup>185</sup> *Ibid*, ss 40(1), 14, 27(4), 30(1), 33, 51(b), 54(2),(3), & 75(30).

Procedural gaps are also apparent in the current Act and ought to be filled including, for example, express contemplation of withdrawal of a written notice of claim for lien. Additionally, an appropriate form of withdrawal of lien ought to be prescribed by the regulations.

**Recommendation #51: Legislative gaps in the Act should be resolved including: distinguishing unregistered and registered liens, adding provisions regarding withdrawal of written notice of a claim for lien, and drafting a withdrawal of lien form to be prescribed by regulation.**

## **2. The Fundamental Characteristics of Construction Liens**

Given the rich legal history of the statutory lien in Manitoba, the Commission is cognizant of the need to maintain its most fundamental qualities while modernizing the provisions that establish and characterize the remedy. In this section of the Report, a number of issues are addressed to make the lien remedy easier to understand and exercise, even by unrepresented claimants.

### **A. Origin and Nature of Lien**

#### **(a) Value of Lien Claim – New Sub-section 13(3)**

Currently, section 13 of the Act states that a lien arises in performance of a contract or sub-contract “for the value of the work, services or materials” provided. Liability may result if a person registers a claim for lien “for an amount grossly in excess of the amount due to him or which he expects to become due to him”.<sup>186</sup> The Act, however, does not provide any guidance as to how the value of the work, services or materials should be quantified.

One of the issues that has arisen is what, if any, damages ought to be included in the value of the lien claim. The courts in Manitoba have determined that damages in the nature of off-site concrete batch plant charges and winter operating costs are not to be included in such calculations.<sup>187</sup> It might be argued that the damages excluded in this particular case were direct damages being extra costs of performing the work which resulted from an extension of time.

In the Consultation Paper, the Commission suggested that “value” for liens be defined to exclude all damages caused by others. There is a general consensus among Stakeholders that such damages should be expressly excluded from the lien value and, more specifically, both direct and indirect costs arising from a delay in the project.

Associations including the WCA and the GCAC advised the Commission that a definition of “value” for liens that expressly excludes indirect costs arising from delay while including direct costs would be acceptable. This is the approach taken in Ontario where the value of a lien is set

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<sup>186</sup> *Ibid*, s 40(a).

<sup>187</sup> See *Gardon Construction Ltd. v. McConnell (c.o.b. J.R.S. Contracting Services)*, [1993] MJ No 378.

for the “price” of the services or materials and includes “any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor, as the case may be, is not responsible”.<sup>188</sup>

Direct damages for unanticipated costs of completing on-site work in the face of time extensions or other interferences are often the legitimate subject of contract amendments and change order requests. Accordingly, the Commission recommends that a definition of “value” for liens be added to allow lien claimants to include in the amount of a lien claim legitimate direct damages that they have reason to anticipate will become payable and exclude indirect damages as expressly defined.

Inter-jurisdictional consistency is one intended benefit of this recommendation. There would be advantages for industry members dealing with consistent provisions on these fundamental aspects of the remedies included in this Act in at least two Canadian jurisdictions.

**Recommendation #52: The Act should be amended to provide that the value of a lien created under section 13 is the value of the work, services or materials but does not include claims respecting indirect damages suffered as a result of a delay in the project, such as head office overhead costs, or loss of profit, productivity or opportunity.**

#### **(b) Grossly Exaggerated Lien Value- Section 40**

Section 40 of the Act provides a caution to lien claimants and their counsel to exercise due restraint when fixing the amount of a lien charge against property to avoid overstating probable entitlement. It provides:

**40** In addition to any other ground on which he may be liable, any person who registers a claim for lien

(a) for an amount grossly in excess of the amount due to him or which he expects to become due to him; or

(b) where he knows or ought to know that he does not have a lien;

is liable to any person who suffers damage as a result unless he satisfies the court that the registration of the claim for lien was made, and the amount for which the lien was claimed was calculated, in good faith and without negligence.

Section 40 has seldom been used to penalize parties who grossly exaggerate lien claims. In fact, the Commission located only one reported decision where the court considered whether this section ought to be applied to hold a lienholder liable for an exaggerated lien claim and, because no damages were proven, the case was dismissed.<sup>189</sup> Prior to the 2017 amendments, Ontario’s *Construction Lien Act*, as it then was, also referred to claims “grossly in excess”<sup>190</sup> of the amount which was owed. In its 2017 amendments, Ontario lowered the statutory threshold for liability

<sup>188</sup> *Construction Act*, *supra* note 14, ss 1.1(2) and 14(1).

<sup>189</sup> *Lafreniere v. Barr-Jones et al.*, 2011 MBQB 322 (CanLII), 273 Man R (2d) 216.

<sup>190</sup> *Construction Lien Act*, *supra* note 11, s 35.

under the section from “grossly in excess” to “wilfully exaggerated”- adopting this term from New York’s lien statute.<sup>191</sup> This language has been criticized as the “wilfully exaggerated” threshold places the burden on the owner to prove through evidence that the lien claimant’s exaggeration was conducted with intention.<sup>192</sup> Of greater importance, however, is whether Manitoba should introduce additional remedies to respond to exaggerated lien amounts. In 2017, Ontario’s Act was amended to insert the following provision:

**Reduction of lien amount**

**35(2)** In the circumstances described in paragraph 1 of subsection (1), the court may, on motion, order that the lien amount be reduced by the exaggerated portion, as determined in accordance with section 17, if it finds that the person has acted in good faith.

The Commission proposes that the requirement of a reasonable expectation of the lien holder (in lieu of wilful exaggeration) be added to expressly pair the standard for the offence with the guidance recommended in a new sub-section 13(3) above, and that Manitoba follow Ontario’s lead to provide a new express power allowing the court to vacate or reduce a grossly exaggerated lien either on application or in an action.

**Recommendation #53: Section 40 of the Act should be amended to state that: (i) a person who registers a claim in an amount that is either grossly in excess of the amount due or which the person reasonably expects to become due, or (ii) where the person knows or ought to know that he does not have a lien, is liable for damages to those who suffer damages as a result.**

**Recommendation #54: The Act should be amended to allow for the vacation or reduction of a grossly exaggerated lien claim either on application or in an action.**

**(c) Minimum Value of Registrable Lien**

Currently, section 14 of the Act sets the minimum amount for lien registration at \$300.00. This value was set based on a recommendation contained in the Commission’s 1979 Report, to increase the minimum value which, at that time, was set at \$20.00.<sup>193</sup> The minimum lien value has not changed since the current Act was enacted in 1981.

In the 1979 report, the Commission considered the need to reconcile two competing interests: (1) the wish to not exclude those persons who most need the protection and security provided by

<sup>191</sup> N.Y. Lien Law § 39.

<sup>192</sup> For discussion on this point, see Brady, Michael, “It Is Time to Create a Remedy to Quickly Discharge Exaggerated Mechanic’s Liens in New York” (2016-17) 61 N.Y.L. Sch. L. Rev. 493, 503.

<sup>193</sup> Manitoba Report, 1979, *supra* note 3 at 103.

a registered lien; and (2) the need to ensure the legislation is workable when considering the high cost to enforce or challenge the validity of a petty lien claim.<sup>194</sup> These two opposing concerns remain.

When asked whether the \$300.00 minimum lien value should be revised, the feedback received by the Commission ranged from recommendations that the minimum limit be removed entirely to a limit of \$10,000. Neither of these options is being recommended by the Commission.

For comparison purposes, builders' lien legislation in some provinces, including Ontario, does not include a minimum lien value. Of those that do, Saskatchewan's minimum value is set at \$100.00 while British Columbia and New Brunswick allow lien claims where one claim or an aggregate of joint claims is \$200.00 or more<sup>195</sup>. In Alberta, one or an aggregate of joint claims must be at least \$300.00.<sup>196</sup> Interestingly, Prince Edward Island's statutory minimum lien value is set at a mere \$32.00.<sup>197</sup>

The WCA, like many Stakeholders, expressed sympathy for the small players but even they commented that liens of modest value from \$25,000 to \$100,000 should be subject to a simplified procedure for ease of final resolution.

If the legislative changes recommended in this Final Report are adopted, accountability in the payment chain and the timeliness of payment of amounts earned on construction projects could substantially improve. Under an enhanced trust code and prompt payment provisions, liens, while continuing to provide a powerful remedy, should increasingly be the collection method of last resort for use only when severe payment defaults arising from *bad faith* dealings or insolvency of an owner or contractor cannot otherwise be resolved on a given project.

**Recommendation #55: Section 14 of the Act should be amended to increase the minimum value for a registrable lien from \$300 to \$2,000.**

## **B. Disposition of Liens on Crown Lands, Crown Agency Lands, and Municipal Lands**

Generally, the lien remedy provides for fixing the charge which arises under section 13 of the Act against the owner's land title. Such liens are registered against title to the property in the appropriate land titles office. Where, however, the owner of the fee simple estate in the land is the provincial Crown, a Crown agency or a municipality, liens do not attach to the owner's interest in the land but are instead restricted to encumbering *only* the holdback and, as provided in section 27(7), "amounts payable to the contractor or sub-contractor under whom the lien derived." In

<sup>194</sup> *Ibid*, 102.

<sup>195</sup> Saskatchewan Act, *supra* note 50 at s 24; BC Act, *supra* note 50 at s 17; New Brunswick Act, *supra* note 77 at s 4(4).

<sup>196</sup> Alberta Act, *supra* note 83, s 35(3).

<sup>197</sup> *Mechanics' Lien Act*, RSPEI 1988, c M-4, s 3(3) [PEI Act].

other words, liens in these cases attach *only* specified project trust funds. The claimant is required to give written notice of a claim for lien to the Crown, Crown agency or municipality in accordance with section 45 of the Act rather than registering the lien in a land titles office.

The Act, as it is currently written, offers no guidance on how the Crown, Crown agency or municipality is to resolve a “fixed lien claim” or restore the flow of project funds. Section 55(2) of the Act establishes the process for vacation of liens upon the posting of security but this provision only applies to liens registered against land. The Legislature’s reasons for excluding section 16 owners from section 55(2) relief is unknown. In fact, the Commission heard from one Crown agency owner that has, nevertheless, been making use of the section 55(2) vacation procedure in the absence of any express alternative in the Act.

The Commission recommends that this gap be addressed and that a vacation process be established for Crown, Crown agency, and municipal owners for disposition by the owner of liens which charge project monies under section 16(1). Through negotiation and payment, the owner might cease to retain the attached funds as provided in section 27(7) upon obtaining a withdrawal of the lien from the claimant.

Additionally, the Commission considered that, where there is a dispute respecting the enforceability of a particular lien, the section 16 owner ought to have access to section 55 lien vacation procedures in order to be relieved of the ‘stay the hand of the paymaster’ effect of section 27(7).

**Recommendation #56: An express lien vacation procedure for owners including the Crown, Crown agencies, and municipalities for disposition by the public owner of liens which charge monies under section 16(1) should be created. Specifically:**

- a) amend sections 16 & 55 of the Act to expressly provide that Crown, Crown agency and municipal owners may either negotiate withdrawal of a lien given or have it vacated.
- b) relocate the essence of section 27(7) to section 16.
- c) add an express provision be made for the giving of a form of withdrawal of liens charging monies under section 16(1) with a new withdrawal form prescribed by regulation.

### **C. Determining the Amount Payable for Set-off Against Lien Claim**

Manitoba lawyers and judges have long had to consider the meaning of the phrase “amount payable” in section 55(2) and elsewhere in the Act in the absence of legislative guidance on what the phrase is intended to include. The questions arising deal with back-charges, set-offs and counterclaims asserted against the payee.

Section 27(6) of the Act expressly prohibits set-offs against holdback charged with a lien. Other lien claim amounts do not enjoy such express statutory protection. Other than section 27(6), the Act includes no reference to set-offs against lien claim amounts.

The feedback received during consultations was clear. In the opinion of those who expressed a view, commercial realities *require* statutory acknowledgement and some guidance in the exercise of set-off or back-charge rights relative to the remedies provided in the Act.

Ontario has long had an express statutory right to set-off. Prior to the 2017 amendments, section 17(3) of *The Construction Lien Act* authorized a payer pursuant to a lien to set-off outstanding debts, claims or improvements with no limitation to the specific improvement giving rise to the payment. Ontario's amended Act introduced a limit allowing set-offs to those arising on the specific project subject to an exception where the debtor becomes insolvent and the payer is then entitled to set-off against debts, claims and damages that are not related to the specific improvement.<sup>198</sup> In Chapter 5 of this report, the Commission recommends that Manitoba adopt Ontario's trustee set-off provision, and likewise here recommends adoption of its lien set-off provision as well.

**Recommendation #57: The Act should be amended to expressly enable a payer pursuant to a lien to set-off an amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages related to the project, or, if the contractor or sub-contractor payee becomes insolvent, all outstanding debts, claims or damages whether or not related to the project.**

#### **D. Registration Against Leasehold**

Section 18 of the Act permits claims for liens to attach leasehold interests in land but provides no direction as to how to effect registration or notice of such lien claims.

While it is possible for a landlord or tenant to register a lease in the local land titles office and obtain a title for such an interest in land, this does not often occur. Notice of such interests in land can also be registered as a caveat on the landlord's title, but this does not always happen. Most often, even in the case of long-term commercial leases, there is no public record to be found which clearly identifies the existence and particulars of a lease arrangement.

The Commission has been advised that lawyers faced with this dilemma have been known to register a notice of claim for lien on a leasehold interest against the landlord's fee simple title in the relevant land titles office. The standard form is sometimes embellished by expressly stating the claimant's intention to lien not only the landlord's title or fee simple estate but also the leasehold interest or estate of the tenant in the same land.

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<sup>198</sup> *Construction Act*, *supra* note 14, s 17(3).

The WLTO has confirmed that such a registration against a suspected leasehold estate is the best that can be done currently. Accordingly, it is recommended that section 18(1) be revised along with appropriate reforms to section 38(1) and section 45(5) and the relevant lien forms to direct lien claimants to register or give written notice of the claim for lien against a leasehold interest in accordance with the requirements of the Act which apply to the fee simple estate of the improved lands.

**Recommendation #58: Section 18 should be amended to direct how a lien claimant may register a lien attaching a leasehold interest in land and revise sub-sections 38(1) & 45(5), and the relevant lien forms as necessary.**

#### **E. Delete Wage Earners from Lien Claimants**

Section 34 of the Act provides that workers or wage earners employed by a contractor or subcontractor on a construction project are entitled not only to register builders' liens but are also given a priority over all other lien claimants to the extent of 40 days' wages. Similarly, wage earners have priority over other lien claimants in most provinces for between 30 and 40 days' wages.<sup>199</sup>

As discussed in Chapter 5, claims under the Act from wage earners rarely, if ever, occurred as long ago as 1979 when the Act were last the subject of legislative review.<sup>200</sup> As pointed out in the Commission's 1979 Report, Manitoba's labour laws have developed better, faster and more effective remedies for this class of potential trust and lien claimants. This is truer now than it was when that report was published. In contrast, lien provisions are particularly costly, slow and are not geared to the urgency of a worker's situation when wages are not paid and regular living expenses such as food, rent and transportation must be met.

The WLTO reports no experience with registration of lien claims from wage earners in their office. Stakeholders agreed during the consultation process that it is time to delete wage earners from not only beneficiary status but also from all entitlement to lien rights under the Act. Given the superior processes available under Manitoba's labour laws, the Commission agrees.

**Recommendation #59: Wage earners should be removed from the list of lien claimants pursuant to section 34 and sub-section 43(5) of the Act and all associated references.**

<sup>199</sup> Only Newfoundland, Prince Edward Island, Quebec and Nunavut do not allow for a wage earner's claim for a certain number of days to take priority over other lien claimants.

<sup>200</sup> Manitoba Report, 1979 *supra* note 3 at 27.



## F. Time for Registration of Liens

Sections 43 and 44 of the Act establish the time period from certain listed events within which claimants must register (or give written notice) of valid and enforceable liens at forty days. Under the scheme for the lien remedy in the Act this time period also dictates the earliest date for release of holdback after substantial performance has been certified.<sup>201</sup>

Consideration has been given to whether forty days is an appropriate period of time to register a lien. In the Ontario Report, the writers explain that the mean time for registration of liens in Canada is currently 44 days compared to 120 days in the United States.<sup>202</sup> Ontario's legislation formerly provided 45 days for the registration of a lien but the period has now been extended to 60 days.<sup>203</sup>

Stakeholders agreed that Manitoba's forty day timeline has long been inadequate, failing to provide lien claimants enough time to assess whether late payments will be made down the payment chain. Stakeholders consistently expressed the view that Manitoba should adopt the same 60 day lien period as Ontario. The Commission agrees. Further, adoption in Manitoba of a prompt payment regime based on the Ontario model and timelines as recommended would mean that critical time periods in the two remedies have already been co-ordinated.

**Recommendation #60: The time limit for the registration of liens in sections 43 and 44 of the Act should be extended from 40 days to 60 days from specified events.**

## G. Termination of a Contract/Subcontract as a Triggering Event

Pursuant to the Act, holdback amounts must be retained and may only be released 40 days from the earliest of: (i) a certificate of substantial performance being given, (ii) the completion or abandonment of the work to be completed, services to be provided or materials to be supplied under contract, or (iii) the abandonment of the work to be done, services to be provided or the materials to be supplied under the contract.<sup>204</sup> Additional direction on the retainage and release of holdback is found in sections 24 and 25 of the Act.

Sections 43 and 44 of the Act establish events from which to mark time for registration or giving written notice of a claim for lien. Such events include substantial performance or abandonment

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<sup>201</sup> *Builders' Liens Act*, *supra* note 1 at s 25(1).

<sup>202</sup> Mark Adrian de Jong, "Ontario's Construction Lien Act: Examining Preservation and Perfection Deadlines in Geographical, Inter-Jurisdictional, and Commercial Contexts – The Case for Extended Deadlines", *Journal of the Canadian College of Construction Lawyers*, 2013 J. Can. C. Construction Law 133, cited in the Ontario Report *supra* note 3 at p 35.

<sup>203</sup> *Construction Act*, *supra* note 14, s 31(2).

<sup>204</sup> *Builders' Liens Act*, *supra* note 1, s 24(1).

of the contract or subcontract, the supplying of the last materials, the completion of the provision of services, the last work done or the last services provided, as well as a number of other events.

Neither the provisions establishing a timeline for the retention and release of holdback or requirements for registering or providing notice of a lien claim are triggered by the *termination* of a contract or subcontract.<sup>205</sup> The Commission views this omission as a likely oversight on the part of legislators. Stakeholders agreed that this event should be included as a trigger to the 40 day timelines in the sections of the Act referenced above.

**Recommendation #61: The list of events marking the commencement of time for lien registration in sections 43 and 44 and for holdback release in sections 24 and 25 should include “termination” of a contract and “termination” of a subcontract.**

#### **H. Expiry and Discharge - 90 Days to Sue**

The Act provides that a duly registered claim for lien expires unless the claimant commences an action and registers a pending litigation order against title to the land within two years of the date the lien was registered.<sup>206</sup> The same two year limitation period applies where written notice of a claim for lien is given to the owner of a project where the owner is the Crown, a Crown agency, or a municipality, and is, therefore, not subject to registration of lien on the land.<sup>207</sup>

A claimant who registers a lien in good faith and is serious about pursuing enforcement gains no advantage from sitting on his rights for up to two years before suing. In Ontario, the equivalent limitation period has now been extended from forty-five days from lien registration as the time for issuing a statement of claim to 90 days.<sup>208</sup> Stakeholders agreed that a decrease in the time period was warranted and encouraged the Commission to recommend adoption of the same time period as Ontario for suing to enforce a registered claim for lien.

**Recommendation #62: Commencement of an action should be required within 90 days from the date of lien registration failing which the lien right expires.**

#### **I. Action to Enforce Lien – Queen’s Bench Rules Apply**

When the trust and lien remedial legislative schemes for the construction industry were carried forward in a single statute in 1981, both the County Court and the Court of Queen’s Bench

<sup>205</sup> Recent amendments to Ontario’s Act include the addition of “termination” to the list of events from which time for retainage and release of holdback is counted at s 31(2).

<sup>206</sup> *Builders’ Liens Act*, *supra* note 1, s 49(2).

<sup>207</sup> *Ibid*, s 49(4).

<sup>208</sup> *Construction Act*, *supra* note 14, s 36(2).

operated in Manitoba. Lien enforcement continued to be within the sole jurisdiction of the County Court.

Prior to 1981, lien enforcement under *The Mechanics' Liens Act*<sup>209</sup> called for mini class action suits to address the rights of multiple unsatisfied lien claimants who were allowed to join an action, shelter under previously existing claims and participate in actions commenced by others seeking an order for sale of an owner's improved land.<sup>210</sup> Vestiges of these antiquated court procedures were carried forward in the Act and have not been updated to respond to changed circumstances.

The jurisdiction of the County Court was absorbed into that of the Court of Queen's Bench in 1984.<sup>211</sup> The much improved lien vacation proceedings, included as section 55(2) of the Act in 1981, have dramatically changed the practice for enforcement of builders' liens. The Commission is not aware of any case proceeding to a judgment resulting in an order requiring the sale of land under the Act in the past 30 years. Instead registered liens are typically vacated upon security being posted under section 55(2) and one or more affected lien claimants then proceed with an action to enforce their liens against the security that stands in place of the land.

The remedial schemes in the Act are no more challenging to interpret and enforce than other statutory provisions and common law remedies that are being administered according to comprehensive litigation procedures set out in the Court of Queen's Bench Rules.

The archaic lien enforcement procedures carried forward from the former County Court system, largely in sections 61 to 67 of the Act,<sup>212</sup> set out procedural directives that run parallel, and sometimes contrary, to the generally applicable Court of Queen's Bench Rules.

A rationale no longer exists for separate rules governing: provision of notice of trial to other lienholders;<sup>213</sup> allowing any number of lienholders to join in an action;<sup>214</sup> requiring a judge to direct any discontinuance of an action commenced;<sup>215</sup> setting out default judgment provisions specific to a lien enforcement proceedings;<sup>216</sup> providing an opportunity for lienholders who have not commenced their own lien enforcement action to prove their claim within the action commenced;<sup>217</sup> providing for appealable directions for management of the proceeding;<sup>218</sup> setting

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<sup>209</sup> RSM 2970 c M80.

<sup>210</sup> *Ibid*, s 35.

<sup>211</sup> See *An Act to Amend The Queen's Bench Act and to repeal The County Courts Act, The Surrogate Courts Act and The County Court Judges Courts Act and to amend The Municipal Boundaries Act*, RSM 1982-83-84, c 82.

<sup>212</sup> These sections of the Act establish the procedural steps for and rules governing a civil action to enforce a lien in the Court of Queen's Bench.

<sup>213</sup> *Builders' Liens Act*, *supra*, note 1, s 63(b).

<sup>214</sup> *Ibid*, s 61(2).

<sup>215</sup> *Ibid*, s 61(3).

<sup>216</sup> *Ibid*, s 62.

<sup>217</sup> *Ibid*, s 64.

<sup>218</sup> *Ibid*, s 65(1)&(2).

out a lien proceeding-specific rule for consolidation of actions;<sup>219</sup> providing for a judge to direct a party to have carriage of the action;<sup>220</sup> or providing lien enforcement proceeding specific rules respecting third party proceedings.<sup>221</sup>

The Act does provide special powers to Queen's Bench judges which can be of assistance and need not be disturbed. For example section 24(4), section 25(8) and section 46(3) empower a judge to issue certificates of substantial performance upon an application being made; and section 58(6) authorizes a judge to order production of documents from a wide group of persons as required to enforce a lien in an action commenced under the Act.

Despite the redundancy and archaic nature of many of the procedural sections of the Act noted above, the Act also provides special powers which should be preserved such as section 69(1) and (2), which authorize appointment of a receiver or a trustee to gather revenue from property at issue and assist in liquidation in aid of an enforcement proceeding under the Act. Under section 78, a judge is also expressly empowered to refer aspects of a lien action to a Master of the Court to assist in resolving issues, take accounts, etc.

**Recommendation #63: An action to enforce a lien shall proceed in accordance with procedures under the Court of Queen's Bench Rules except where varied by the Act and sections 60-80 of the Act should be amended accordingly.**

### **3. Most Significant Lien Remedy Reforms Recommended**

As a result of this review, the Commission recommends substantial fundamental reforms in certain areas which would significantly improve central aspects of the construction lien remedy in Manitoba, namely changes to holdback provisions and lien vacation procedures.

#### **A. Fundamental Changes to Holdback Provisions**

Under the construction lien remedy, deduction by the owner of 7.5% from each advance on the contract price serves two important purposes:

- 1) The holdback fund provides a reserve against which lien claimants may have recourse in the event that project funds are misspent or are otherwise no longer available to satisfy their claims; and
- 2) If properly maintained, the holdback account acts as a shield, helping to limit owner liability to registered lien claimants.

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<sup>219</sup> *Ibid*, s 67(1).

<sup>220</sup> *Ibid*, s 67(2).

<sup>221</sup> *Ibid*, s 67(4).

In the Consultation Paper, the Commission posed questions to Stakeholders respecting some options for possibly modifying established holdback terminology and procedures. Overall, the feedback received was not supportive of widespread unnecessary change in this area. Reforms recommended below, however, did garner general Stakeholder support.

#### **(a) The 7.5% Holdback Rate**

Prior to the Commission's Review in 1979, owners were required to retain holdbacks in the amount of 15% and 20%, depending upon the contract price under the former *Mechanics Liens Act*. Stakeholders lobbied for a reduction in these amounts to something closer to their profit margin to free up sums they required to pay for work completed. The result was a holdback of 7.5% which is set out in section 24 of the Act and has continued to present day.

This review offered an opportunity for consideration of the 7.5% holdback rate which is one of the lowest in Canada. The applicable legislation of Alberta<sup>222</sup>, British Columbia<sup>223</sup>, Ontario<sup>224</sup>, Newfoundland<sup>225</sup>, Nova Scotia<sup>226</sup>, Saskatchewan<sup>227</sup>, as well as the Northwest Territories<sup>228</sup> and Yukon<sup>229</sup> establish a holdback of 10% of the contract price. Both New Brunswick<sup>230</sup> and Prince Edward Island<sup>231</sup> have a tiered scheme under which a holdback of 20% applies where the value of work and materials is less than \$15,000 and, where the value exceeds \$15,000, the holdback is set at 15%.

Some lawyers and out-of-province Stakeholders suggested an increase to 10% to be on par with Ontario and most other provinces. However, players in the local construction industry were unequivocal. Its members do not want the 7.5% holdback to be increased.

In this case, the objective of increasing inter-jurisdictional consistency should, in the Commission's view, give way to local industry requests that the holdback rate of 7.5%, which has been in place for over 30 years, ought to be maintained.

**Recommendation #64: The current holdback rate of 7.5% provided in section 24(1) of the Act should remain unchanged.**

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<sup>222</sup> Alberta Act *supra* note 83 at s 18.

<sup>223</sup> BC Act *supra* note 50 at s 4.

<sup>224</sup> Construction Act, *supra* note 14 at s 22(1).

<sup>225</sup> Mechanics' Lien Act, RSNL 1990, c M-3, s 12.

<sup>226</sup> Nova Scotia Act *supra* note 50 at s 13(2).

<sup>227</sup> Saskatchewan Act *supra* note 50 at s 34.

<sup>228</sup> Mechanics Lien Act, RSNWT 1988, c M-7, s 6.

<sup>229</sup> Builders Lien Act, RSY 2002, c 18, s 6.

<sup>230</sup> New Brunswick Act *supra* note 78 at ss 15(1)&(3).

<sup>231</sup> PEI Act, *supra* note 197, s 14.

## (b) Publication of Certificates of Substantial Performance

The lien remedy requires a payment certifier or, where there is no payment certifier, an alternative, to issue a certificate near the end of the project announcing to the owner and contractor that substantial performance has been achieved.<sup>232</sup> The delivery of the certificate also commences the time period within which a claimant may register a claim for lien for its costs incurred prior to the date of substantial performance.<sup>233</sup> Where no liens are then registered, 40 days after the certificate is provided to the contractor and owner, the accrued holdback is to be released.<sup>234</sup>

Unlike some Canadian jurisdictions, the Act does not require public notice of the date or fact that a certificate of substantial performance has been given.<sup>235</sup> Access to this information is critical to the timely exercise of lien rights for every lien claimant on each project. In other jurisdictions, a variety of methods are used to publish the date on which a certificate of substantial performance has been issued. For example, the new Ontario *Construction Act* requires notice of the certificate to be published in a construction trade newspaper as defined in the regulations.<sup>236</sup> Alternatively, in Alberta, a person issuing a certificate of substantial performance is required to post a copy of the signed certificate on a worksite within three days from the date it was issued.<sup>237</sup>

The WLTO suggested that the ability to register certificates on the title of the project lands may be a beneficial way to provide notice of its issuance, however, there are many types of liens that cannot be registered under Manitoba's land titles registry, which would require separate solutions.<sup>238</sup>

Stakeholders were eager for introduction of a cost-free, convenient method of publication. The WCA advised that it currently publishes such notices free of charge on its public website, usually at the request of out-of-province payment certifiers who are accustomed to providing such general notices. It may therefore be appropriate for the WCA or another industry association to manage a publicly accessible online space where notice of issuance of certificates of substantial performance can be published. Another option would be for the government to take on this role.

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<sup>232</sup> *Builders' Liens Act*, *supra* note 1, ss 24 & 25.

<sup>233</sup> *Ibid*, ss 43 & 44.

<sup>234</sup> Note that the Commission has recommended on page 98 of this report that the time for registering a lien claim after a certificate of substantial performance has been provided should be increased to 60 days.

<sup>235</sup> Section 20(1) of the Alberta Act, *supra* note 75 requires a person issuing a certificate of substantial performance to post a signed copy of it on the job site within 3 days from the date the certificate was issued. Sub-section 20(2) imposes liability for legal and other costs for failure to post the certificate within the time requirement. The Ontario Act now requires notice of the certificate to be published in the manner set out in the regulations. (Ontario Act, *supra* note 57 at s 32(1)).

<sup>236</sup> *Construction Act*, *supra* note 14, s. 32(1)(5) and Reg 304/18, ss. 1 & 9.

<sup>237</sup> Alberta Act, *supra* note 82, s 20(1).

<sup>238</sup> For example, ss. 37(4)-37(6) of *The Builders' Liens Act* provide that liens made upon a mineral location, under a disposition of oil, gas, helium or oil shale rights owned by the Crown, and where made upon an interest or estate in Crown land shall be registered in the office of the recorder of the mining district, the office of the registrar under *The Oil and Gas Act*, and the office of the Director of Crown lands, respectively.

**Recommendation #65: The Act should be amended to require persons issuing certificates of substantial performance to provide public notice of the issuance of the certificate in a prescribed form and manner.**

### **(c) Interest on Holdback**

When interest rates are low, provisions in the Act requiring payment of interest on holdback are less important. When interest rates significantly increase, however, this issue will regain prominence.

The term *holdback* is defined in section 1(1) of the Act to include interest “where the holdback is deposited in a holdback account”. *Holdback account* is defined to mean “an interest-bearing account in a bank, trust company or credit union in the joint names of the owner and contractor”.

Section 24(3) provides that holdback retained by the person primarily liable on the contract (i.e. the owner) is to be deposited into a holdback account only “where the contract price exceeds an amount prescribed by regulation”. The prescribed amount is currently set at \$200,000.<sup>239</sup> Stakeholders confirmed that many owners simply retain holdback without setting up an interest-bearing account jointly with the contractor. This failure to comply with the Act was not a significant source of concern amongst those who provided feedback on the issue. Industry Stakeholders want flexibility in the enforcement of the requirement. Instead, the Commission is of the view that there seems little reason to continue any joint account requirement. The position of Stakeholders is, however clear on the point that interest should always be payable on holdback, and there should not be a threshold provided by regulations exempting any owners from this universal obligation.

**Recommendation #66: The requirements that holdback funds must be deposited into a joint account in the names of the owner and contractor jointly and that all owners must pay interest on the holdback at the higher of either the rate actually accrued or a commercially attainable prescribed rate should be removed from the Act.**

### **(d) Annual & Phased Release of Holdback/Mega-Projects**

Extremely high value, long duration mega-projects that fall under the Act incur significant extra costs when the owner is required to deduct and retain 7.5% of the contract value until substantial performance can be achieved. The contractor and the sub-contractors can be denied access to large value holdbacks accruing for several years on lengthy projects. Costs to the owner increase accordingly.

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<sup>239</sup> Man Reg 127/1989, s 2.

The Act offers no accommodation for such projects which could influence Crown decisions on which infrastructure projects are to be excluded from the Act to avoid extra project costs associated with retention of holdback. Exclusion denies the construction industry access to the full range of benefits and payment protections included in the Act.

In its 2017 amendments, Ontario introduced exceptions to its payment terms for holdback for large projects allowing for the payment of accrued holdback on an annual basis or phased release where the price of the contract is in excess of \$10,000,000 and where additional other criteria are met.<sup>240</sup>

Stakeholders were invited to suggest possible modifications to Manitoba's Act which would address the concern set out above. Most were supportive of legislating exceptions for long-term or high value projects in a manner akin to Ontario's reforms described above.

Notably, Ontario did not include any requirement for advance publication of the intended holdback release date in its provisions. This is in contrast to Saskatchewan's legislation which provides that, for large contracts in excess of one year and a contract price greater than \$25,000,000 and where no claim of lien has been registered, accrued holdback can be released annually but only where notice of early release of holdback is given and posted in accordance with the Act.<sup>241</sup>

Manitoba Stakeholders considered length of the project to be the most important criteria for annual holdback release and not project value, explaining that any project known at the time of signing the contract to require 18 months or longer to complete should be allowed to release holdback on an annual basis.

With respect to phased release of accrued holdback, projects which proceed in phases and provide for milestone payments would be well-suited. In this case, Stakeholders considered that a threshold contract price of \$10 million was appropriate.

**Recommendation #67: Manitoba should adopt section 26.1 of Ontario's *Construction Act* which allows for annual release of accrued holdback on the following conditions: (i) the contract provides for a completion schedule greater than 18 months, (ii) the contractor publishes notice of the annual payment/holdback release date in the manner prescribed at least 60 days prior to the release date, and, (iii) upon the payment date, no registered lien claim is in effect and no notice has been given of a lien claim**

<sup>240</sup> For annual release, pursuant to s. 26(1) of the *Construction Act*, *supra* note 14, a contract must expressly provide for a project timeline longer than one year and the contract must expressly provide for annual payment of holdback. For phased release of the holdback, the contract must provide that the holdback will be paid out in phases and each phase of the improvement must be identified in the contract, s. 26.2. Neither phased or annual release of the accrued holdback is available unless, as of the applicable payment date, there are no preserved or perfected liens in respect of the contract, or all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the Act, ss. 26.1(2)(d) & 26(2)(2)(c).

<sup>241</sup> Saskatchewan Act, *supra* note 50, s 46(1).



**Recommendation #68:** Manitoba should adopt section 26.2 of Ontario's *Construction Act* allowing for phased release of accrued holdback on the following conditions: (i) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase, (ii) the contract price at the time the contract is entered into exceeds the prescribed amount, (iii) the contractor publishes notice of the expected holdback release dates in the manner prescribed at least 60 days prior to each such date; and (iv) upon the payment date, no registered lien claim is in effect and no notice has been given of a lien claim.

**Recommendation #69:** A minimum contract value for phased release of holdback should be set at \$10,000,000 and prescribed in the regulations.

## **B. Changes to Section 55(2) Lien Vacation Procedures**

Traditionally, trust claimants have been victimized in the lien vacation process because trust money has been taken out of the normal trust money payment stream to secure the vacated lien. Rethinking the interaction between lien and trust remedies within the same statute should make it possible to avoid this result.

The Commission's review of the facts in the *Structal* decision highlights certain gaps in the scheme in the Act for disposition of liens which do not attach land pursuant to section 16 (Crown, Crown agency and municipal lands). The section 16 process ends by calling upon the owner given notice of a claim for lien to retain the value of the lien without making any provision for disposing of such a lien claim. As discussed above, such owners and lien claimants have been excluded from the relief provided by section 55(2) for no apparent reason. Currently, section 55(2) only allows for vacation of a lien upon payment into court where for a lien charges land.

Further, it has been observed that, to date, owners have received a pass in terms of the cost and inconvenience of vacating liens which were, after all, created to give claimants rights against the owner. Owners usually require the contractor to make an application and post security at the contractor's own cost to vacate liens arising below it in the payment chain. Only if the contractor is one of the lien claimants in question will an owner bring an application under section 55(2) to vacate a lien. It seems possible and appropriate to shift the balance in this regard by bringing the owner in as an essential participant in the processes for lien vacation and enforcement. It is the owner who requires the project, who funds the project and who is the most appropriate party to bear the cost of vacating liens, even if incurring such unwanted costs may require project scope adjustments in order to complete the project within an unyielding total budget.

There is no apparent justification for imposing lien vacation costs on the contractor instead of the owner. Where accounts in the construction contract pyramid require adjustment after determination of a vacated lien claimant's entitlement against security posted, there is no one in a more appropriate position than the owner to make such adjustments. A series of specific reforms will be discussed in turn below.

### (a) The Application Process

The legal effect of section 55(2), allowing a party to vacate a lien, essentially provides a safety valve for diffusing the “stay the hand of the paymaster” effect of a registered lien. The impact of section 55(2) operates at the very heart of the lien remedy. Currently, section 55(2) provides:

**55(2)** Upon application, a judge may order security or payment into court in an amount equal to the holdback required under the Act as it applies to a particular contract and any additional money payable with respect to that contract but not yet paid but not exceeding the total amount of the claims for liens then registered against a parcel of land and may then order that the registration of those liens be vacated.

The section does not specify who is to make the application to court. It is recommended that the Act specify that the applicant shall be the owner or its representative. In circumstances where the owner is insolvent or otherwise incapable of proceeding, it could be represented by a lender, successor to title, a surety or receiver acting on behalf of the owner and on the lender’s account.

Section 44(1) of Ontario’s Act allows for the application for vacation of the lien upon payment into court to be made without notice to any other person or on an *ex parte* basis. An *ex parte* order is considered an extraordinary remedy and is only available where the circumstances make it impracticable or unnecessary to serve notice on the opposing party.<sup>242</sup> The Commission believes that such an order would be appropriate for vacation proceedings as the serving of notice would be unnecessary provided that certain requirements were met. Such applications must be standardized to avoid contentious variations in the process and based upon prescribed rules requiring that adequate security be posted as recommended in the next section of this report. By enabling section 55(2) applications to be made on an *ex parte* basis, the lien vacation process can be expedited allowing construction projects to promptly proceed while properly securing the lien claimant’s claim. Additionally, the risks typically associated with the issuance of an *ex parte* order are nullified because the lien claimant will be adequately protected by its fixed charge against land and/or trust funds being transferred to charge the prescribed security of another form.

Additionally, section 55(2), as in the Ontario’s Act, should make issuance of an order mandatory upon compliance with all specified requirements, stating that the court *shall* make an order vacating the lien.

Lastly, it is strongly recommended that the section should be amended to provide that such applications apply not only to vacation of liens registered against land but also against notices of claim for liens given under section 45 which do not attach land.

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<sup>242</sup> *Court of Queen’s Bench Rules*, Man Reg 553/88, Rule 37.06(2).

**Recommendation #70: Sub-section 55(2) of the Act should be amended to:**

- (a) provide that an *ex parte* application to vacate a lien shall be made by the owner or its representative.**
- (b) make the issuance of an order by the court mandatory upon the applicant's compliance with the security requirements contained in the Act; and**
- (c) provide that applications under that section may be brought to vacate notices of claims for liens issued under section 45 which do not attach to land in addition to vacating liens registered against land.**

**(b) Security Requirements**

Currently, to vacate a lien, a party is only required to pay into court security in an amount equal to the holdback and any additional money payable under the contract to a maximum of the total amounts of the registered lien claims. This requirement ought to be revised to protect the ordinary flow of project trust funds while requiring that the amount of security to be posted for the vacation of a lien be for the full amount of the lien(s) to be vacated, subject to taking the duplicated value of any umbrella liens into proper account. The term “umbrella lien” will be discussed later in this chapter.

Security should also include an amount for interest and costs, with the claimant's entitlement to same depending upon a future judgment respecting the validity and enforceability of its lien. In Ontario, the lesser of \$50,000 or 25% of the security amount must be posted as security for costs. In Manitoba, considering the lower court rates and legal costs which prevail, it is recommended that the lesser of \$20,000 and 20% of the security amount be included in the order as security for interest and toward costs.

The security providing adequate protection for the claimant and minimizing costs for the applicant could be in the permitted form of

- a) a lien bond issued in a prescribed form by a duly registered Canadian surety company;
- b) an irrevocable letter of credit in a prescribed form issued by a listed financial institution carrying on business in Manitoba; and/or
- c) cash, provided that it not be drawn from project trust funds including holdback amounts which are subject to rights of other participants on the project.

The above provisions should neutralize most of the current issues respecting need for proper interaction of trust and lien remedies which arise on section 55(2) lien vacation applications.

**Recommendation #71:** The Act should set the amount of security required to be paid into court for the vacation of a lien as the full, unduplicated amount of the value of the liens to be vacated plus interest and costs. The Act should also expressly provide that acceptable forms of security shall include: lien bonds issued in a prescribed form by a duly registered Canadian surety company, an irrevocable letter of credit in prescribed form issued by a permitted financial institution, or cash, provided that it not be drawn from project trust funds including holdback amounts subject to rights of other project participants.

### (c) Evidence Supporting an Application

Should it be determined that section 55(2) applications may be heard on an *ex parte* basis, specific evidentiary requirements, particularly the requirement to provide particulars for all liens subject to the application, would be extremely important.

Where liens involve more than one tier of the construction contract pyramid, the applicant should be required to file affidavit evidence from the upper tier lien claimant accounting for the amounts, if any, included in the value of its lien under the *umbrella effect* to ensure that security is not provided for duplicated lien amounts. A new definition should be added to Part I – General Provisions, section 1(1) as follows:

“**umbrella lien**” means a lien registered by a contractor or sub-contractor which includes in its value amounts that are also claimed in liens registered by persons whose lien claims arose at a lower level of the same construction contract payment chain.

Additional evidentiary requirements may include a sworn affidavit including:

- confirmation that any cash to be posted is not subject to trust claims by other participants on the project; and
- particulars assuring the court that the surety companies and financial institutions providing security as well as the forms used to obtain the security meet the requirements set out in the statute or regulations.

**Recommendation #72:** The Act should establish requirements for evidence to be filed in support of an application under section 55(2) including evidence that: (i) all liens currently registered against the land or under written notice have been included in the application; (ii) any upper tier lien claimant has accounted for the duplicated value, if any, included in its umbrella lien claim; (iii) any money to be posted to stand as security for the vacated lien(s) does not include accrued holdback or other project trust funds which are subject to the rights of other participants on the project; and (iv) demonstrates that the form and intended providers of any form of security other than cash are those permitted by regulation. The term “umbrella lien” should be added to the definitions section under Part I – General Provisions.

#### **(d) Action to Enforce Vacated Lien – Parties Required**

Both counsel and the judiciary have struggled to determine who should be named as parties in an action brought by a lien claimant to prove its entitlement to a judgment on its vacated lien against the security posted. Lien actions should always include the claimant as plaintiff and the party with whom the claimant has a direct contract and payment right as a named defendant. A lien claimant's rights against the owner have been somewhat unclear, especially once its lien has been vacated. With the recommended reforms requiring the owner or its representative to apply for the section 55(2) lien vacation and to provide, in whatever form, security from its own sources outside the project trust fund, the owner would more clearly have a continuing interest in the necessary proceedings and should expressly be required to be named as a party defendant in the action. Determination of the limit of an owner's liability under any fixed lien would continue to be a relevant issue for determination under the Act. Section 55(2) currently includes no provision to prevent owners from walking away, free of the obligation to be a party in such proceedings. In the Commission's view, this procedural gap should be expressly filled.

As indicated above, it will also be necessary for the party in privity with the lien claimant to be named as a defendant in a lien enforcement action. Additional parties can be joined where appropriate pursuant to the Queen's Bench Rules.

**Recommendation #73: Section 55(2) of the Act should provide that, upon the vacation of a lien, the claimant of the vacated lien shall be the named plaintiff in an action commenced to enforce its claim against security posted and the defendants shall include the owner and any other party or parties essential to the claimant proving its entitlement to be paid the amount of its lien claim.**

#### **(e) Priority of Entitlements on Payment Out**

The security posted on an application made under section 55(2) of the Act to obtain an order vacating one or more registered liens from title to the land is subject to priorities set out in section 56(1) of the Act.

Section 56(1) states:

##### ***Money paid into court, etc., in place of land***

**56(1)** Any money paid into court or any security given under subsection 55(2) stands in place of the land against which the lien was registered and is subject to the claims of

- (a) the persons whose liens have been vacated; and
- (b) every person who
  - (i) both at the time of filing the application under subsection 55(2) and at the time of filing application for payment out under subsection (3), has a subsisting claim for lien, and

- (ii) (ii) has registered a claim for lien prior to the time of filing the application for payment out under subsection (3);

but the persons whose liens have been ordered vacated have a first charge on the money or security to the extent of any amount, including costs, found by the judge to be owing to them.

The logic behind the original drafting of section 56(1)(b) is unknown. No other provision in the Act explains what the original intention of the provision might have been. The Commission is unable to imagine a justification for sustaining this second hypothetical class of potential claimants. During consultations, Stakeholders concurred with the conclusion that section 56(1) serves no useful purpose and should be deleted.

The Commission has also identified that the heading and language in section 56(1) should be revised to consider liens that have been vacated in respect of section 16 projects and for any changes that are made to section 55(2) based on the Commission's above recommendations.

**Recommendation #74: Section 56(1) of the Act should be amended to remove those persons listed in sub-section 56(1)(b) from the list of persons with an interest in security posted on a section 55(2) application for vacation of a lien.**

## **4. Modernizing Lien Provisions in the Act**

### **A. Extent of Lienable Estates and Interests in Land**

Section 13 of the Act provides for the creation and attachment of liens, but does not limit the nature or type of estates or interests in land under which a construction lien may arise.

Section 37 expressly provides for various registration processes. What constitutes the appropriate process is dependent upon whether the claim for lien attaches a disposition of mineral rights, a disposition of oil, gas, helium or oil shale rights, or, under sub-section 37(6), an estate or interest in Crown land under sub-section 37(6). The Commission has been advised by the Crown Lands Registry that it records various dispositions of interests in Crown lands which may be subject to lien rights including: general permits, licences of occupation, vacation home leases, vacation home permits, miscellaneous leases, easement agreements, and more.

Section 18 of the Act establishes when liens attach to leasehold estates or interests or that of the fee simple owner or landlord of leased land. The prominence of these specific provisions may mislead readers into thinking that, other than full ownership of the fee simple title in land, only a leasehold lessor's interest or estate is subject to charge by liens. As discussed above, the Act is not so restrictive.

In order to modernize and clarify the wide scope of interests in land subject to disposition by the fee simple holder of title which might be improved and therefore give rise to lien rights, revisions

should be made to various sections of the Act. In particular, the Act should provide greater guidance on the impact of the forfeiture or termination of a lease on a lien registered against the leasehold estate.

**Recommendation #75: Section 18 of the Act should be amended to clearly establish the effect of the forfeiture or termination of a lease by an owner's landlord on a claimant's lien to the owner's leasehold interest or estate both where the forfeiture or termination is caused by the owner's non-payment of rent or otherwise. Subsections 58(1)&(2) (rights to information), 38(1)(b) (contents of a claim for lien), and 45(5)(contents of notice of claim for lien) should be revised to expressly contemplate liens attaching not only leases but also to other lienable interests in land.**

## **B. Materials Supplied**

The Act contains three separate sections relating to when materials should be deemed to have been “supplied” thereby giving rise to lien rights.

These sections state:

### **Supplying materials**

**2(3)** For the purposes of this Act, materials shall be deemed to have been supplied to be used in the performance of a contract or a sub-contract

(a) if they are delivered to land in respect of which the contract or sub-contract is to be performed; or

(b) if they are delivered to some other land which is in the immediate vicinity of the land in respect of which the contract or sub-contract is to be performed and which has been designated by the owner or his agent as the land to which the materials are to be delivered; or

(c) if the materials were made to specifications set out in the contract or sub-contract and were delivered to the contractor or sub-contractor for the purpose of being used in the performance of the contract or sub-contract;

but delivery of materials on land designated under clause (b) does not make the land so designated subject to a lien in respect of the supplying of the materials.

[...]

### **Where materials incorporated**

**17** Notwithstanding the materials supplied to be used in the performance of a contract or sub-contract have not been supplied in strict accordance with subsection 2(3), if the materials are incorporated or used in the construction or the improvement of land to which the contract or sub-contract relates, subject to section 16, the lien created under section 13 attaches to the land or structure. [emphasis added]

[...]

### **Removal of materials during lien**

**35(1)** During the continuance of a lien, no portion of the materials affected by it shall be removed to the prejudice of the lien and any attempts at such removal may be restrained on application to a judge.

#### **Costs**

**35(2)** A judge to whom an application is made under subsection (1) may make such order as to costs of, and incidental to, the application and order as he deems just.

#### **Certain materials not subject to execution**

**35(3)** Where any materials are actually placed and furnished to be used in the performance of a contract or sub-contract the materials are subject to a lien in favour of the person supplying them until incorporated in the structure or land under the contract.

It is the position of the Commission that sections 17 and 35 should be amended to give uncontradicted effect to section 2(3) as the sole source of rules determining what actions constitute the supply of materials and, therefore, entitlement to lien rights. Stakeholders consulted agreed with this assessment. Section 17, which provides that incorporation of materials in the construction or improvement is a required event for supply and attachment, should be deleted. Additionally, section 35, which sets out certain protections from other creditors, should be amended to mirror the language used in section 2(3).

**Recommendation #76: Section 17 of the Act should be deleted entirely and section 35 should be modified to coincide with the force and effect of section 2(3).**

### **C. Condominium Common Element Lien Registrations**

Members of the Construction and Infrastructure Section of the Manitoba Bar Association raised a new issue for consideration in this review during the consultation process. It was identified that an issue arises when work is performed on the common elements of a condominium project since they are owned by all unit owners based on the percentages set out on their titles. Where a potential lien claimant wishes to register a lien for work performed or materials supplied, it must search each unit title and make a claim against all current unit titles. This is an extremely onerous, time-consuming and costly process. Members of the Bar described condominium buildings with as many as 200 units. Search and lien registration fees in such instances could run over \$2000. Removal of lien registrations can duplicate the initial costs.

Ontario has attempted to resolve the issue of prohibitive expenses arising from registering builders liens for work performed or materials supplied for common elements in a condominium. In 2010, Ontario passed the *Open for Business Act*<sup>243</sup> which added new section 33.1 to the *Construction Lien Act* requiring developers of condominium projects to publish a notice of the intended registration in a construction trade newspaper between 5-15 days before the registration of the

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<sup>243</sup> SO 2010, c 16.



condominium declaration. Contractors may then preserve their liens before the declaration is registered when it would become prohibitively expensive and cumbersome to do so. While interesting, the notice of intended registration only resolves the issue as it relates to new developments and is unhelpful when work is performed on common elements after the declaration is registered.

Alberta's *Condominium Property Act* enables a statement of lien to be registered on a Condominium Plan and allows for it to be deemed to be registered against the title for each unit in the plan.<sup>244</sup> This is a unique approach to the issue. One problem with the Alberta approach brought to the attention of the Commission by staff of the WLTO is that one could end up with a significant number of endorsements on the Condominium Plan which could be confusing for a party receiving a copy of the plan. Currently in Manitoba, only those endorsements that directly affect the specific Condominium Plan are permitted to be registered on it.

Staff of the WLTO acknowledge that this is an issue and suggest the following strategies to overcome the issue:

- Order a copy of the Condominium Declaration to see how many units are in the project. If the project is a phased development, order a copy of the Amending Declaration as well. Once the current total number of units is known, one can use the Land Titles Survey Books to search for the current title number for each unit. This is a free service unless you order a copy of the title; or
- Conduct a search of unit 1 of the project and determine whether there is a utility or municipal caveat for a zoning or development agreement. If its registration date is either before or at the same time the condominium was registered, the encumbrance is likely registered on all unit titles. If so, you can order a record of that instrument which will provide you with all the titles which can be compared with the total number of titles listed in the Condominium Declaration.

The Commission's review of the legislation of these jurisdictions does not provide a simple or clear solution to resolve the issue in Manitoba. Resolving the issue would likely require changes not only to the Act but also to *The Real Property Act* and *The Condominium Act*. Some variation on Alberta's approach of allowing such liens to charge the condominium plan rather than every unit title holds some promise of a more workable solution. At this time, the Commission is not recommending any changes in this regard but does suggest that the Department of Justice engage in discussions with WLTO and Property Registry staff as well as the legal professional practising in the area to attempt to identify a workable legislative solution.

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<sup>244</sup> *Condominium Property Act*, RSA 2000, Ch c22, s. 78(1)(b) & 78(2).

#### **D. Section 39 – Number of Claimants per Lien Form**

Section 39 of the Act provides procedural guidance where a lien claim includes multiple parcels of land or multiple lien claimants:

##### **What may be included in claim**

**39** A claim for lien may include claims against any number of parcels of land and any number of persons claiming liens upon the same land may unite in a claim for lien, but where more than one lien is included in one claim for lien, each lien shall be verified by affidavit as provided by subsection 38(2).

This provision can unnecessarily complicate lien vacation and enforcement proceedings. Often a construction project will involve multiple titles to land and, therefore, it is appropriate for lien claimants to register a claim on multiple parcels of land in a single form. There is, however, no apparent advantage and many undesirable complications that could arise from allowing multiple separate claimants to be named in a single form of lien. For example, lien claimants do not share in each other's lien rights and each party is at liberty to independently withdraw or settle its lien claim. Each lien claimant must, in any event, commence an action to pursue and enforce its own lien claim without regard to others and a combination of multiple claims in a single lien registration form could complicate such proceedings unnecessarily.

**Recommendation #77: Section 39 of the Act should be revised to remove the ability of multiple lien claimants to register their claims on the same claim for lien form.**

#### **E. Lien Claim Form Revisions**

The required information to be included in the lien claim form is listed in section 38(1) for liens registered against land and in section 45(5) for liens subject to section 16 of the Act where the land cannot be attached. Both provisions require updating as itemized below:

##### **(a) No Prospective Lien Right**

The lien rights created under section 13 arise for the value of work, services and materials *provided*. There is no authorization in the Act for a lien claimant to register or give written notice of a lien which has not yet arisen for values which it *may* potentially earn under its contract or subcontract in the future. In other words, there is no prospective lien right.

Oddly, sections 38(1)(a), (b) and (c) as well as section 45(5)(a), (b) and (c) of the Act require that a lien claimant provide information on not only work, services and materials already done or provided, but also for work which is “to be done”, services which are “to be provided” and

materials which are “to be supplied”. The origin or intention behind such prospective lien right references is unknown. Regardless, they tend to mislead and should be deleted.

In the Commission’s opinion, any statutory language contained in the Act that suggests the existence of prospective lien rights for work, services or materials not yet provided should be deleted.

**Recommendation #78: The requirement that a lien holder must provide information pertaining to work “to be done”, services “to be provided” and materials “to be supplied” in sub-sections 38(1) & 45(5) of the Act should be removed.**

#### **(b) Delete References to Period of Credit**

Sub-section 38(1)(f) and sub-section 45(5)(f) of the Act require that the prescribed claim for lien form must include “...(f) where credit has been given by the lien claimant for payment for his work or services or materials, the date of expiry of the period of credit”. The requirement that the notice of lien form must include the expiration date for a period of credit seems to be a vestige of the past, which is not relevant to consideration of the validity, enforceability or proper time for registration of any lien. Staff of the WLTO agree that this information serves no practical purpose. Therefore, the Commission recommends that it be removed

**Recommendation #79: The requirement that a claim for lien form must contain the date of expiry of the period of credit where credit has been given by the lien claimant for payment for work, services, or materials should be removed and sub-sections 38(1)(f) and 45(5)(f) should be deleted.**

#### **F. Bargains Involving Registered Liens – Section 57**

The Act contemplates the holder of a registered builders’ lien negotiating with an owner or perhaps others to extend time for payment, taking a promissory note or taking additional forms of security for the lien.<sup>245</sup> The Act provides that such dealings do not destroy the effect of the registered lien unless the lienholder agrees and that a lienholder accepting additional security retains the lien for the benefit of the security holder.<sup>246</sup>

<sup>245</sup> Section 57(1) provides that a registered claim for lien/notice of lien is not merged, discharged, paid, satisfied, prejudiced or destroyed by (a) the taking of any security for the claim; or (b) the acceptance of any promissory note for the claim; or (c) the taking of any other acknowledgement of the claim; or (d) the giving or extending of time for payment of the claim; or (e) the taking of any proceedings for recovery of the claim; or (f) the recovery of any personal judgment for the claim; unless the lienholder agrees in writing that it shall have that effect.

<sup>246</sup> *Builders’ Liens Act*, *supra*, note 1, s 57(2).

Perhaps such marketability of registered liens existed in 1981, but it is safe to say it no longer does. It is difficult to imagine circumstances where a holder of a duly registered claim for lien would bargain to extend time for payment or seek a form of security other than the land itself.

Section 57(3) goes on to contemplate the effect of having bargained away a registered lien claimant's entitlement to immediate payment. Where such a bargain has been struck, the lien claimant is directed to commence an action to enforce its lien in time and to register a pending litigation order, but to then stay all further proceedings within that action until agreed terms of extended credit have expired.

Finally, section 57(4) provides that if another lien claimant advances a separate action to enforce its lien against the same land, the claimant, who has agreed not to pursue its rights within its own action, may prove its lien claim in the other claimant's action. This procedure hints of sheltering one lien right under another which practice is not permitted by the Act.<sup>247</sup>

This review affords the opportunity to have such irrelevant provisions deleted from the Act.

**Recommendation #80: Section 57(2) - 57(4) of the Act should be deleted.**

### **G. Section 59(3) Deletions – Family Residences**

As a general rule, the Act directs that owners are required, on request, to provide a true copy of a certificate of substantial performance to potential lien claimants within ten days of the owner's receipt of the certificate.<sup>248</sup> However, where an individual "orders work, services or materials for construction of a structure or for improving land owned and occupied by the individual or his or her spouse or common-law partner for single family residential purposes"<sup>249</sup> and where the contract price does not exceed \$75,000<sup>250</sup>, that individual is exempt from the above requirements. Under the Act, the definitions of both "common-law partner" and "registered common-law relationship" require the relationship to be registered under *The Vital Statistics Act*<sup>251</sup>. Such intrusive, personal details respecting the personal living arrangements of an individual owner engaged in a construction project seem out of place in the Act.

Manitoba's Act is the only lien legislation in Canada that includes such an exception for single family residences and it was proposed in the Consultation Paper that the exception contemplated

<sup>247</sup> *South Westman*, *supra* note 27, at para 47.

<sup>248</sup> *Builders' Liens Act*, *supra* note 1, ss 59(1); the potential lien claimants entitled to a true copy of the certificate of substantial performance are limited to "...all persons doing work, providing services or supplying materials in the performance of the contract who have requested the owner, in writing by personal service with a return address, to give them a copy of the certificate".

<sup>249</sup> *Ibid*, ss 59(3).

<sup>250</sup> Man Reg 127/89, s 3.

<sup>251</sup> RSM 1987, c. V60.

by section 59(3) be updated. No feedback was received during the consultation process on this issue.

The Commission recommends that the Act be revised to require that notice of certificates of substantial performance be published in some manner. This would negate the need to request or provide copies to individuals as contemplated in section 59(3).

**Recommendation #81: Section 59(3) of the Act should be amended to contemplate the publishing of notice of the issuance of the certificate of substantial performance and to retain the exception to the notice requirement in section 59(1) for single family residences where the contract price is less than the prescribed amount, currently \$75,000. Delete the definitions of “common-law partner” in sub-section 1(1) and “registration of common-law relationship” in sub-section 1(2).**

## **H. Outdated Sheltering References**

Since 1981, Manitoba’s Act has required each claimant to register, sue on and enforce its own lien rights. In contrast, some provinces allow lien claimants to instead rely upon or shelter under and thereby take advantage of liens registered on a given project by another lien claimant.

Manitoba’s Court of Appeal has expressly found that the sheltering concept is not available under Manitoba’s Act.<sup>252</sup> However, the Act continues to contain various provisions that hint at the availability of sheltering lien claims. For example, section 57(4) provides:

### **Proving claim in another action**

57(4) Notwithstanding that a person has given or extended time for payment of any claim for which he has a lien, he may, where an action is commenced by another person to enforce a lien against the same land, prove and obtain payment of his claim in the action as if no time had been given for payment of the claim.

Other suggestions of the availability of sheltering can be found in sections 61(1), 74 and 77 of the Act.

**Recommendation #82: All references contained in the Act suggesting a right to shelter under the registered liens of others should be removed from the Act.**

## **I. Pending Litigation Orders**

A recommendation was made by staff at the WLTO during the consultation process that consideration be given to the possibility of removing from the Act the requirement for lien claimants suing to enforce a lien against land to coincidentally obtain and register a pending

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<sup>252</sup> *South Westman*, *supra* note 27, at para 47.

litigation order (“PLO”) in the appropriate land titles office. Under the current legislation, failure to do so within the time allowed for commencing an action results in expiry of the lien right.<sup>253</sup> Staff at the WLTO advised that, in their opinion, the registration of a PLO seems an unnecessary step in the lien enforcement procedure which adds needless costs, delays and complexity to the lien enforcement process. The court at one time allowed a court Registrar to issue such PLO’s without any other appearance or court filings required. A plaintiff must now make a motion and appear before a Master or judge to obtain a PLO. Upon completion or discontinuance of an action, the PLO must be removed from title with more associated court and land titles fees and costs resulting.

The purpose of a PLO and its registration against land titles is to give notice to all persons with an interest in the land of the fact that a proceeding has been commenced which could affect not only the registered owner’s interest, but that of any mortgage company, prospective lender or purchaser of the land. The requirement for registration of a PLO only arises, however, if and when the lien is still charging the title, and, in such cases, the lien itself gives notice of the existence of the charge and potential problem if not the status of enforcement proceedings.

The number of lien actions commenced against land as opposed to security posted in court pursuant to section 55(2) vacation proceedings is reported to be very low. Civil actions commenced tend to resolve in settlement prior to trials. Orders in a lien action for the sale of land have rarely, if ever, occurred in recent decades. In these circumstances, it seems reasonable to delete the requirement for obtaining and registering a PLO to preserve and enforce liens charging land.

**Recommendation #83: The requirement to obtain and register a pending litigation order as notice that an action has been commenced to enforce a lien against land should be removed from the Act.**

## 5. Linkages with Other Remedies

A central theme for all the recommendations for reform featured in this Report is that every remedy to be included in the Act should function well with the others.

Proposed universal application of the Act with no Crown carve outs, specific provisions with certain accommodations for mega projects including P3’s, EPC forms of contract, new provisions for annual and phased release of holdback, filling of gaps in the procedures arising when liens do not attach to land pursuant to section 16, and development of an express trust code with a simpler, privity trust model are intended to work smoothly in concert. Where appropriate, the distinction between trust and lien claimants has been minimized (i.e. Section 58 Rights to Information). Where the differences between the rights and powers of these two remedies call for clarification,

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<sup>253</sup> *Builders’ Liens Act*, *supra* note 1, s 49(2)

revisions have also been recommended. (i.e. new section clarifying that trust claims have no power of attachment)

Prompt payment provisions are intended to be supported by and consistent with the trust code's transparency and full disclosure principles respecting the payment certification process. Claimants should be able to bring payment delay disputes to a head well within the extended lien period of 60 days with increased time to assess when and whether exercise of lien rights may be required. Interim adjudication decisions obtained under the recommended Ontario model do not interfere with or delay lien proceedings, court actions or party agreements for arbitration of disputes.

Significant reforms are recommended to modernize and improve the efficiency and effectiveness of the section 55(2) lien vacation process. A new pathway has been drawn to shift the balance, increase owner responsibilities for dealing with lien issues when they arise, all while protecting and promptly restoring the normal flow of project trust funds on incomplete projects. Antiquated lien enforcement court procedures have been identified for replacement with standard Court of Queen's Bench Rules while retaining any special procedural sections that may be useful to resolving collection issues under the Act.

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## CHAPTER 8 - SURETY BONDS

### 1. Bonding as a Source of New Funds

An issue that arose during consultations but was not addressed in the Consultation Paper was the possibility of mandating the use of bonding on either all or some Manitoba construction projects. Doing so would mean following Ontario's lead.

As a remedy, upon default by a contractor, surety bonds protect against non-performance and non-payment risks and provide a source of new funds, which can supplement the value of the original trust fund created by the owner for purposes of completing the project. The two types of surety bonds commonly used for these purposes are:

- Performance bond: a special class of contract signed by a contractor and a surety in which the contractor and surety guarantee to a third party (often a project owner) that the contractor will perform a specific construction contract. If the contractor fails to perform, then the project owner may look to the surety under the bond for the costs of completing the contract and additional related costs, up to a maximum value specified.
- Labour and material payment bond ("L & M bond"): a related class of bond, signed by a contractor and its surety which guarantees that the contractor will pay its subcontractors, suppliers and labourers on a specific project. If the contractor fails to honour its payment obligations then subcontractors, suppliers and labourers may look to the surety for payment under the bond up to the maximum value guaranteed.<sup>254</sup>

Currently, bonding is not contemplated in the Manitoba Act nor, until Ontario amended its former *Construction Lien Act* in 2017, were bonds referred to in such legislation anywhere in Canada although, as the authors of the Ontario Report acknowledge, mandatory surety bonding has been in place in the United States in one form or another since 1894.<sup>255</sup>

### 2. Ontario Amendments

As a result of consultations in Ontario with the construction industry, surety providers and others, a new statutory remedy was added to the revised *Construction Act* in that province requiring that, on entering into a public contract with a contract price in excess of \$500,000, a contractor must obtain and provide to the owner: (1) an L & M bond with a coverage limit of at least 50 percent of the contract price that extends protection to subcontractors and persons supplying labour or material to the improvement; and (2) a performance bond with a coverage

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<sup>254</sup> The definitions of "performance bonds" and "labour and material bonds" are those found in the Canadian Centre for Economic Analysis' report *The Economic Value of Surety Bonding in Canada: A networked agent-based economic assessment*, August 2017.

<sup>255</sup> See Reynolds, "Ontario Report", *supra* note 12 at 149.



limit of at least 50% of the contract price.<sup>256</sup> The exception is Alternative Financing and Procurement projects<sup>257</sup> (known as public-private partnerships or P3 projects in Manitoba) which may have less than 50% bonding where the construction contract price is \$100 million or more provided that adequate security is otherwise provided.<sup>258</sup>

SAC was extensively involved in the Ontario reform process and has since worked closely with the government of that province to develop standard form bonds for use under Ontario's legislation, which closely align with Ontario's new prompt payment regime and adjudication process.<sup>259</sup> The prescribed bond forms include a new claim protocol, which imposes rigid, short processing timeframes on the bonding companies to produce claim approvals with payment or notice of disputed claims on a basis similar to time frames in the prompt payment regime. In Ontario, it will no longer be necessary to issue a statement of claim to pursue the rights of beneficiaries under such bonds. Disputed claims may still, however, lead to litigation.

When a contractor defaults in its obligations to perform its contract with the owner or defaults by ceasing to pay its subcontractors, calls can be made on the bonds. Typically, such contractor defaults arise upon insolvency. A significant benefit of surety bonds in such circumstances is that the bond proceeds are only available to the beneficiaries identified in each bond. The performance bond is solely for the benefit of the owner. The L & M bonds developed for use in Ontario contemplate all sub-contractors and suppliers on the project below the contractor. Third party creditors such as the Federal government pursuing unpaid taxes or source deductions, and financial institutions seeking recovery of contractor indebtedness are not entitled to access bond proceeds. Instead, the use of bond proceeds is limited to salvaging the project for the owner and payment of sub-contractor and supplier accounts left unpaid by the contractor.

Under Ontario's Act, in determining whether a contract is subject to the bonding requirements, a "public contract" includes a contract where the owner is the Crown, a municipality or a "broader public sector organization". The definition of "broader section organization" is adopted from Ontario's *Broader Public Sector Accountability Act*<sup>260</sup>, and includes organizations such as every hospital, school board, university, college, post-secondary institution, community health facility, children's aid societies, and various other publicly funded organizations. In other words, Ontario's bonding requirements for public contracts apply broadly. Manitoba does not have an equivalent statute or any existing definition of "public contracts" or "broader public sector owners".

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<sup>256</sup> *Construction Act*, *supra* note 14, s 85.1(4)&(5).

<sup>257</sup> The phrase "Alternate Financing and Procurement" is used by Ontario's Department of Infrastructure to describe an approach to financing and procuring large, complex public infrastructure projects. The department's website states:

"Under AFP, provincial ministries and/or project owners establish the scope and purpose of a project, while design and construction work is financed and carried out by the private sector. Typically, only after a project is completed will the province complete payment to the private-sector company. In some cases, the private sector will also be responsible for the maintenance of a physical building or roadway." Available online at: <http://www.infrastructureontario.ca/AFP-FAQs/>.

<sup>258</sup> *Construction Act*, *supra* note 14 at s 1.1(4). See also Regulation 304/18: General at s 3.

<sup>259</sup> See Forms 5, 30, 31 & 32 under Regulation 303/18: Forms.

<sup>260</sup> SO 2010, c 25.

Private projects might benefit even more from mandatory bonding than public projects; however, Ontario chose not to deny private owners their freedom to contract into or out of bonding requirements. In contrast, public owners have a responsibility to protect the public monies used to finance projects. In the Ontario Report, the writers acknowledge that there is currently no precedent for imposing mandatory bonding requirements on private owners.<sup>261</sup>

### **3. Stakeholder Comments**

Some Stakeholders raised the issue of bonding as one important to consider in this review. An experienced commercial lawyer observed that increased involvement of sureties under appropriate bond forms and broad requirements for use of performance bonds and L & M bonds would provide an extra source of project funds as well as added protection for owners and industry participants that would justify the resulting increase in capital costs.

CCA representatives favoured legislated bonding requirements and observed that, over recent decades, reliance on surety bonds has decreased within the industry. They estimated that performance bonds together with L & M bonds are requested approximately 10-25% of the time in Manitoba.

The GCAC indicated that it would support mandatory surety bonding requirements in Manitoba provided that care is taken to set the threshold contract price requirement high enough that smaller contractors are not entirely excluded from public contract work and are provided a chance to develop the qualifications required by the surety companies to obtain bonding.<sup>262</sup> This Stakeholder also expressed some uncertainty about the consequences for the contractor of multi-tier claim entitlement under the L & M bond form developed for use in Ontario, perhaps not considering that a contractor in such circumstances is in default and unlikely to continue operating.

The MHCA is also supportive of mandatory bonding of public contracts and suggested a threshold of \$200,000 to \$500,000. MHCA observed that any consistent practice would be an improvement as, while many of Manitoba's public owners currently require bonding, they do so according to a variety of bond forms and other criteria. MHCA hoped that multi-tier L & M bonds could be developed for standard use in Manitoba.

The MSA favoured mandatory bonds for contract prices of \$500,000 or more and the MCAM is supportive of mandatory bonding of contractors that protects those downstream, including the subcontractors, as well as the owner.

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<sup>261</sup> Reynolds, "Ontario Report", *supra* note 12, p 248.

<sup>262</sup> Contractors must pre-qualify for bonding and surety companies undertake a comprehensive and ongoing review of contractors to ensure that the contractor is capable of fulfilling the financial and performance obligations under its contracts.

Those supportive of mandatory bonding requirements suggested a minimum contract limit between \$300,000 and \$500,000.

SAC urged the Commission to follow the Ontario lead and recommend introduction of statutory requirements for bonding of public projects suggesting that such requirements are the only certain way to address the effect of insolvency and non-industry creditor priorities. They pointed out that, in order for contractors to qualify for provision of performance and L & M bonds, the surety conducts a rigorous qualification process investigating the contractor's books, financial strength and business practices. Companies deemed weak in this qualification process fail to obtain surety approval and, therefore, cannot provide required bonds or compete for award of the contract at issue. The public owners and the public taxpayers, therefore, gain a tremendous advantage from a pre-procurement culling by surety companies which substantially reduces the risk of contractor defaults on bonded projects.

If Manitoba does follow Ontario's lead, SAC has indicated a willingness to work with Manitoba law makers and the industry to create surety products that are responsive to the industry's needs and to assist in the creation of timely processes and solutions as they have done in Ontario.

In the interest of advancing inter-jurisdictional consistency, acknowledging the benefit of mandatory bonding on public contracts, and acknowledging the willingness of Canada's organized surety industry to improve bond coverage while simplifying claim protocols in concert with prompt payment legislation, the Commission recommends that Manitoba implement mandatory bonding requirements on all public contracts.

**Recommendation #84: Mandatory bonding requirements should be adopted on public contracts within the Province of Manitoba for contracts in excess of \$500,000 and contractors should be required to obtain and provide to the public owner:**

- (a) a performance bond with a coverage limit of at least 50% of the contract price; and**
- (b) a labour & material bond with a coverage limit of at least 50% of the contract price that extends protection to subcontractors and persons supplying labour and material for the improvement.**

**Recommendation #85: A comprehensive claim protocol should be established for bonding and uniform bonding forms should be prescribed by regulation.**

**Recommendation #86: The Act should include a broad and inclusive definition of "public contract" for the imposition of mandatory bonding requirements.**

**Recommendation #87: Statutory bonding requirements should allow for some latitude on extremely high value public-private partnership projects.**

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## CHAPTER 9 - RECOMMENDATIONS

**Recommendation #1:** The Act should be amended to replace the term “builders’ lien” in the Act, forms, and regulations with the term “construction lien”. (p. 22)

**Recommendation #2:** The title of *The Builders’ Liens Act* should be changed to *The Construction Contract Remedies Act*. (p. 23)

**Recommendation #3:** Sub-sections 3(2) and (3) of *The Builders’ Liens Act* should be deleted to remove carve-outs for Crown entities and certain Crown works. (p. 24)

**Recommendation #4:** *The Highways and Transportation Construction Contracts Disbursement Act* should be repealed. (p.24)

**Recommendation #5:** The Act should be amended to address public-private partnerships by:

- a) defining the term “public-private partnership” in the Act;
- b) revising section 16 to include all P3 projects that meet prescribed criteria establishing that liens on such projects do not attach to land;
- c) excluding the public partner from the obligations of an owner related to the administration of remedies under the Act;
- d) defining “capital repairs” for P3 projects and thereby stating which maintenance obligations of a private partner under a P3 agreement give rise to lien rights under the Act; and
- e) providing that any mandatory bonding requirements apply to P3 projects with appropriate modification. (p. 27)

**Recommendation #6:** The Act should be amended to enable parties to contractual arrangements where an owner enters into an EPC contract with a non-Canadian contractor to design, engineer, procure and manufacture materials and/or install equipment to expressly provide in the contract that the Act does not apply to those portions of the contract price to be paid to the contractor in respect of services provided or materials procured, manufactured or assembled outside of Canada and the costs associated with the delivery of such materials or equipment to their place of installation in Manitoba. (p. 28)

**Recommendation #7:** The exclusion of professional architects and engineers from the lien provisions in the Act should be maintained and extended to all remedies available under the Act. (p. 29)

**Recommendation #8:** Sub-section 2(1)(b) of the Act should be revised to provide that a certificate of substantial performance may be issued if the cost to complete the contract or

subcontract is no more than: 3% of the first \$1,000,000, 2% of the next \$1,000,000 and 1% of the balance of the contract price. (p. 30)

**Recommendation #9:** Section 58 of the Act should be revised to grant the current rights to information of lien claimants to trust beneficiaries and relocate section 58 to the *General Provisions* section of the Act. (p. 31)

**Recommendation #10:** Sections 11, 12, 29, and sub-section 6(3) of the Act should be relocated to Part I of the Act containing the provisions of general application. (p.31)

**Recommendation #11:** The terms “construction contract pyramid”, “improvement”, “joint venture”, “project”, and “sub-contract price” should be defined in the Act and the current definitions of “contract price”, “contract”, “sub-contract”, “contractor” and “sub-contractor” should be revised. (p. 32)

**Recommendation #12:** The Act should be amended to include a complete codification of the rights and obligations imposed by the statutory trust on parties to contracts and sub-contracts to which the Act applies in Manitoba. (p. 35)

**Recommendation #13:** The Act should be amended to add an express statement of purpose for the trust remedy. (p. 36)

**Recommendation #14:** Section 5(2) of the Act should be amended to clarify the owner’s obligations to settle money to establish and/or increase the trust fund and contemplate additions to the fund from insurance and sale proceeds as well as surety bond payments. (p. 37)

**Recommendation #15:** The Act should be amended to modify the obligations of the contractors and payment certifiers during the payment certification process by imposing mandatory minimum disclosure requirements in the schedule of values and by establishing a statutory duty of good faith on owners and their payment certifiers in the payment certification process. (p. 40)

**Recommendation #16:** The Workers’ Compensation Board should be removed as a trust beneficiary in sub-sections 4(1), 4(2) and 5(1) of the Act. (p. 42)

**Recommendation #17:** Wage earners should be removed as a trust beneficiary in sub-sections 4(1), 4(2) and 5(1) of the Act. (p. 43)

**Recommendation #18:** References to set-offs and counterclaims by the owner, contractor and sub-contractor should be removed from the list of trust beneficiaries in sections 4(1) or 4(2) of the Act. (p. 44)

**Recommendation #19:** The Act should be amended to expressly provide that the contractor and subcontractor as trustees are entitled to appropriate trust funds to recoup approved costs expended for their own forces' work. (p. 44)

**Recommendation #20:** The Act should be amended to consolidate provisions respecting the appointment of deemed trustees, being sections 6(4) and section 7, with those respecting non-deemed trustees. (p. 44)

**Recommendation #21:** The Act should be amended to:

1. convert sections 4 & 5 of the Act to a privity of trust model, limiting trustee payment obligations to those with whom the trustee has directly contracted;
2. delete sub-sections 4(3)(d) and 4(4)(d) which currently oblige the contractor and a subcontractor as trustees "to make provision for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received"; and
3. delete sub-section 5(3)(b), which currently obliges the owner, as trustee, after duly paying the contractor, "to make provision for the payment of other affected beneficiaries of the trust". (p. 48)

**Recommendation #22:** The Act should be amended to allow trustees to deposit trust funds into a general account provided the trustee maintains detailed records on a per project basis. Provided that where the record keeping requirements have been maintained, the act of co-mingling the trust funds should not constitute a breach of trust pursuant to the Act and the trust funds are deemed to be traceable. (p. 51)

**Recommendation #23:** The record-keeping obligations of contractors and sub-contractors in section 10 of the Act should also apply to all trustees in respect of trust funds created by the Act. (p. 53)

**Recommendation #24:** The Act should be amended to remove section 10(5) requiring contractors and sub-contractors to produce records to an inspector under *The Labour Administration Act*. (p. 53)

**Recommendation #25:** The Act should be amended to allow a trustee to expressly discharge the trust for all trust funds duly paid. (p. 54)

**Recommendation #26:** Section 5(4) of the Act should be deleted and replaced with a provision enabling any trustee to advance funds to a trust beneficiary and allow the trustee to recover the advance from trust funds subsequently received on account of that beneficiary without being in breach of trust. (p. 56)

**Recommendation #27:** The Act should be amended to include a provision providing that owners and contractors may discharge their trust obligations upon making direct payments in good faith to parties who have performed work, provided services or supplied materials with whom the payer does not have a direct contract upon giving written notice to the party who ought to have paid the account. (p. 57)

**Recommendation #28:** Section 6(1) of the Act should be renamed “Application of trust funds to discharge loan” and the recovery of advances made should be limited to trust funds that would have become payable to the specific beneficiary who received the payment advance. (p. 58)

**Recommendation #29:** The Act should be amended to include an express right to set-off for trustees similar to section 12 of Ontario’s *Construction Act* and the term “insolvency” should be defined. (p. 59)

**Recommendation #30:** The Act should be amended to expressly provide that, upon final completion of a project, release of any security posted for vacated liens, final settlement of all legal proceedings relating to the project, full payment of all related determinations and judgments against the owner, and final payment of all accounts outstanding to the contractor and sub-contractors, any surplus remaining in the owner’s hands for the project trust fund shall revert to the owner for its own use without constituting a breach of trust. (p. 60)

**Recommendation #31:** The prohibition against the garnishment of trust funds in section 6(2) of the Act should be maintained. (p. 60)

**Recommendation #32:** Sub-sections 6(3) and 6(4) of the Act, which provide for the continuing subjection of assigned funds to lien and trust obligations and for the flow of trustee obligations to the assignee of trust funds should be maintained. (p. 61)

**Recommendation #33:** The Act should be amended to expressly authorize parties to apply to the Court of Queen’s Bench by Notice of Application for directions respecting disputes relating to the trust provisions under the Act. (p. 62)

**Recommendation #34:** The Act should be amended to state that trust beneficiaries have a civil right of action against an express or deemed trustee who appropriates or converts any

part of the trust fund to or for his/her own use or to or for any use not authorized by the trust where the beneficiary suffers a loss or damages as a result. (p. 62)

**Recommendation #35:** Amend the Act to adopt section 13(1) of Ontario's *Construction Act* respecting liability for breach of trust by a corporation and expressly include such enforcement provisions in Manitoba's trust code. (p. 64)

**Recommendation #36:** A two-year limitation period should be established for the commencement of civil actions for breach of trust. (p. 64)

**Recommendation #37:** The 180 day limitation period for tracing trust money, or actions *in rem*, in section 8 of the Act should be maintained. (p. 64)

**Recommendation #38:** The summary conviction offence established by section 7 of the Act should be maintained. (p. 65)

**Recommendation #39:** The Act should be amended to expressly provide that prompt payment adjudicators may take into account the codified trust provisions when rendering decisions. (p. 66)

**Recommendation #40:** Section 9 of the Act should be amended to clarify that the expiration of the time for filing a lien does not impact claims asserting the existence of a trust, a breach of trust, or an entitlement to receive trust funds. (p. 66)

**Recommendation #41:** The Act should expressly provide that trust claims arising under the Act are unsecured and, hence, are subordinate in priority to duly registered lien claims or those for which notice has been properly provided pursuant to section 45. (p. 67)

**Recommendation #42:** The Act should be amended to include a new express provision providing that only by due exercise of lien rights may a party stop the flow of contract funds. (p. 67)

**Recommendation #43:** The Act should be amended to incorporate a new remedy imposing statutory timelines and processes requiring prompt payment of amounts owed under contracts and sub-contracts as well as penalties for failure to adhere to the prescribed timelines. (p. 76)

**Recommendation #44:** The Act should be amended to incorporate similar provisions to sections 6.1-6.9 of Ontario's *Construction Act* with the modifications set out in recommendation #45. (p. 81)



**Recommendation #45:** In adopting sub-sections 6.1-6.9 of Ontario’s *Construction Act* into Manitoba’s Act, the following modifications should be made: (a) a statement of purpose should be added for the new remedy, (b) the phrase “work, services or materials” should be referenced in a manner consistent with the Act, and (c) the Act should call for payment of amounts “requested” instead of amounts “payable”. (p. 82)

**Recommendation #46:** A private adjudication system should be developed and implemented akin to the adjudication system established by Part II.1 of Ontario’s *Construction Act* with such modifications as are necessary to synchronize its contents with other remedies in the Act. (p. 88)

**Recommendation #47:** The Government of Manitoba ought to seek out opportunities to enter into extra-provincial agreements with other provinces and/or the federal government for the creation and implementation of extra-provincial adjudicator pools. (p. 90)

**Recommendation #48:** The Act should be amended to incorporate an express statement of purpose for the lien remedy. (p. 92)

**Recommendation #49:** The lien provisions contained in the Act should be restructured under the following 11 headings: Origin and Nature of a Lien, Transmission of a Lien, Priorities, Holdbacks, Registration of a Lien against Land, Time for Registration of Liens, Written Notice of Lien- Section 16 Lands, Substantial Performance, Expiry and Discharge, Vacation of Lien & Action to Enforce Lien. (p. 93)

**Recommendation #50:** The Act should be amended to replace unnecessary legalese and Latin terminology with more accessible plain language. (p. 93)

**Recommendation #51:** Legislative gaps in the Act should be resolved including: distinguishing unregistered and registered liens, adding provisions regarding withdrawal of written notice of a claim for lien, and drafting a withdrawal of lien form to be prescribed by regulation. (p. 94)

**Recommendation #52:** The Act should be amended to provide that the value of a lien created under section 13 is the value of the work, services or materials but does not include claims respecting indirect damages suffered as a result of a delay in the project, such as head office overhead costs, or loss of profit, productivity or opportunity. (p. 95)

**Recommendation #53:** Section 40 of the Act should be amended to state that: (i) a person who registers a claim in an amount that is either grossly in excess of the amount due or which the person reasonably expects to become due, or (ii) where the person knows or ought to know that he does not have a lien, is liable for damages to those who suffer damages as a result. (p. 96)

**Recommendation #54:** The Act should be amended to allow for the vacation or reduction of a grossly exaggerated lien claim either on application or in an action. (p. 96)

**Recommendation #55:** Section 14 of the Act should be amended to increase the minimum value for a registrable lien from \$300 to \$2,000. (p. 97)

**Recommendation #56:** An express lien vacation procedure for owners including the Crown, Crown agencies, and municipalities for disposition by the public owner of liens which charge monies under section 16(1) should be created. Specifically:

- (a) amend sections 16 & 55 of the Act to expressly provide that Crown, Crown agency and municipal owners may either negotiate withdrawal of a lien given or have it vacated.
- (b) relocate the essence of section 27(7) to section 16.
- (c) add an express provision be made for the giving of a form of withdrawal of liens charging monies under section 16(1) with a new withdrawal form prescribed by regulation. (p. 98)

**Recommendation #57:** The Act should be amended to expressly enable a payer pursuant to a lien to set-off an amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages related to the project, or, if the contractor or sub-contractor payee becomes insolvent, all outstanding debts, claims or damages whether or not related to the project. (p. 99)

**Recommendation #58:** Section 18 should be amended to direct how a lien claimant may register a lien attaching a leasehold interest in land and revise sub-sections 38(1) & 45(5), and the relevant lien forms as necessary. (p. 100)

**Recommendation #59:** Wage earners should be removed from the list of lien claimants pursuant to section 34 and sub-section 43(5) of the Act and all associated references. (p.100)

**Recommendation #60:** The time limit for the registration of liens in sections 43 and 44 of the Act should be extended from 40 days to 60 days from specified events. (p. 101)

**Recommendation #61:** The list of events marking the commencement of time for lien registration in sections 43 and 44 and for holdback release in sections 24 and 25 should include "termination" of a contract and "termination" of a subcontract. (p. 102)

**Recommendation #62:** Commencement of an action should be required within 90 days from the date of lien registration failing which the lien right expires. (p. 102)

**Recommendation #63:** An action to enforce a lien shall proceed in accordance with procedures under the Court of Queen's Bench Rules except where varied by the Act and sections 60-80 of the Act should be amended accordingly. (p. 104)

**Recommendation #64:** The current holdback rate of 7.5% provided in section 24(1) of the Act should remain unchanged. (p. 105)

**Recommendation #65:** The Act should be amended to require persons issuing certificates of substantial performance to provide public notice of the issuance of the certificate in a prescribed form and manner. (p. 107)

**Recommendation #66:** The requirements that holdback funds must be deposited into a joint account in the names of the owner and contractor jointly and that all owners must pay interest on the holdback at the higher of either the rate actually accrued or a commercially attainable prescribed rate should be removed from the Act. (p. 107)

**Recommendation #67:** Manitoba should adopt section 26.1 of Ontario's *Construction Act* which allows for annual release of accrued holdback on the following conditions: (i) the contract provides for a completion schedule greater than 18 months, (ii) the contractor publishes notice of the annual payment/holdback release date in the manner prescribed at least 60 days prior to the release date, and, (iii) upon the payment date, no registered lien claim is in effect and no notice has been given of a lien claim. (p. 108)

**Recommendation #68:** Manitoba should adopt section 26.2 of Ontario's *Construction Act* allowing for phased release of accrued holdback on the following conditions: (i) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase, (ii) the contract price at the time the contract is entered into exceeds the prescribed amount, (iii) the contractor publishes notice of the expected holdback release dates in the manner prescribed at least 60 days prior to each such date; and (iv) upon the payment date, no registered lien claim is in effect and no notice has been given of a lien claim. (p. 109)

**Recommendation #69:** A minimum contract value for phased release of holdback should be set at \$10,000,000 and prescribed in the regulations. (p. 109)

**Recommendation #70:** Sub-section 55(2) of the Act should be amended to:

- (a) provide that an *ex parte* application to vacate a lien shall be made by the owner or its representative.
- (b) make the issuance of an order by the court mandatory upon the applicant's compliance with the security requirements contained in the Act; and
- (c) provide that applications under that section may be brought to vacate notices of claims for liens issued under section 45 which do not attach to land in addition to vacating liens registered against land. (p. 111)

**Recommendation #71:** The Act should set the amount of security required to be paid into court for the vacation of a lien as the full, unduplicated amount of the value of the liens to be vacated plus interest and costs. The Act should also expressly provide that acceptable forms of security shall include: lien bonds issued in a prescribed form by a duly registered Canadian surety company, an irrevocable letter of credit in prescribed form issued by a permitted financial institution, or cash, provided that it not be drawn from project trust funds including holdback amounts subject to rights of other project participants. (p. 112)

**Recommendation #72:** The Act should establish requirements for evidence to be filed in support of an application under section 55(2) including evidence that: (i) all liens currently registered against the land or under written notice have been included in the application; (ii) any upper tier lien claimant has accounted for the duplicated value, if any, included in its umbrella lien claim; (iii) any money to be posted to stand as security for the vacated lien(s) does not include accrued holdback or other project trust funds which are subject to the rights of other participants on the project; and (iv) demonstrates that the form and intended providers of any form of security other than cash are those permitted by regulation. The term ‘umbrella lien’ should be added to the definitions section under Part I – General Provisions. (p. 112)

**Recommendation #73:** Section 55(2) of the Act should provide that, upon the vacation of a lien, the claimant of the vacated lien shall be the named plaintiff in an action commenced to enforce its claim against security posted and the defendants shall include the owner and any other party or parties essential to the claimant proving its entitlement to be paid the amount of its lien claim. (p. 113)

**Recommendation #74:** Section 56(1) of the Act should be amended to remove those persons listed in sub-section 56(1)(b) from the list of persons with an interest in security posted on a section 55(2) application for vacation of a lien. (p. 114)

**Recommendation #75:** Section 18 of the Act should be amended to clearly establish the effect of the forfeiture or termination of a lease by an owner’s landlord on a claimant’s lien to the owner’s leasehold interest or estate both where the forfeiture or termination is caused by the owner’s non-payment of rent or otherwise. Subsections 58(1)&(2) (rights to information), 38(1)(b) (contents of a claim for lien), and 45(5)(contents of notice of claim for lien) should be revised to expressly contemplate liens attaching not only leases but also to other lienable interests in land. (p. 115)

**Recommendation #76:** Section 17 of the Act should be deleted entirely and section 35 should be modified to coincide with the force and effect of section 2(3). (p. 116)

**Recommendation #77:** Section 39 of the Act should be revised to remove the ability of multiple lien claimants to register their claims on the same claim for lien form. (p. 118)

**Recommendation #78:** The requirement that a lien holder must provide information pertaining to work “to be done”, services “to be provided” and materials “to be supplied” in sub-sections 38(1) & 45(5) of the Act should be removed. (p. 119)

**Recommendation #79:** The requirement that a claim for lien form must contain the date of expiry of the period of credit where credit has been given by the lien claimant for payment for work, services, or materials should be removed and sub-sections 38(1)(f) and 45(5)(f) should be deleted. (p. 119)

**Recommendation #80:** Section 57(2) - 57(4) of the Act should be deleted. (p. 120)

**Recommendation #81:** Section 59(3) of the Act should be amended to contemplate the publishing of notice of the issuance of the certificate of substantial performance and to retain the exception to the notice requirement in section 59(1) for single family residences where the contract price is less than the prescribed amount, currently \$75,000. Delete the definitions of “common-law partner” in sub-section 1(1) and “registration of common-law relationship” in sub-section 1(2). (p. 121)

**Recommendation #82:** All references contained in the Act suggesting a right to shelter under the registered liens of others should be removed from the Act. (p. 121)

**Recommendation #83:** The requirement to obtain and register a pending litigation order as notice that an action has been commenced to enforce a lien against land should be removed from the Act. (p. 122)

**Recommendation #84:** Mandatory bonding requirements should be adopted on public contracts within the Province of Manitoba for contracts in excess of \$500,000 and contractors should be required to obtain and provide to the public owner:

- (a) a performance bond with a coverage limit of at least 50% of the contract price; and
- (b) a labour & material bond with a coverage limit of at least 50% of the contract price that extends protection to subcontractors and persons supplying labour and material for the improvement. (p. 127)

**Recommendation #85:** A comprehensive claim protocol should be established for bonding and uniform bonding forms should be prescribed by regulation. (p. 127)

**Recommendation #86:** The Act should include a broad and inclusive definition of “public contract” for the imposition of mandatory bonding requirements. (p. 127)

**Recommendation #87:** Statutory bonding requirements should allow for some latitude on extremely high value public-private partnership projects. (p. 127)

This is a report pursuant to section 15 of the *Law Reform Commission Act*, C.C.S.M. c. L95, signed this 15th day of October, 2018.

**“Original Signed by”**

Cameron Harvey, President

**“Original Signed by”**

Hon. Lori Spivak, Commissioner

**“Original Signed by”**

Jacqueline Collins, Commissioner

**“Original Signed by”**

Michelle Gallant, Commissioner

**“Original Signed by”**

Myrna Phillips, Commissioner

**“Original Signed by”**

Sacha Paul, Commissioner

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## APPENDIX A - DRAFT LEGISLATION (TRACKED CHANGES)

**Note:** This preliminary draft legislation has been prepared exclusively to serve as a guide for readers of this Final Report to assist in demonstrating the implementation of the reforms recommended in this report.

### The Construction Contract Remedies ~~Builders' Liens~~ Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

#### PART I - GENERAL

##### INTERPRETATION

###### Definitions

**1(1)** In this Act,

~~"common-law partner" of a person means a person who, not being married to the other person, is cohabiting with him or her in a conjugal relationship of some permanence; (« conjoint de fait »)~~

**"construction"** means the making, building, construction, erection, fitting, placing, alteration, improvement or repair of a structure; (« construction »)

**"construction contract pyramid"** means all of the construction contracts issued on a given project from owner to a contractor, and from that contractor to sub-contractors and from sub-contractors to other sub-contractors;

**"contract"** means a contract entered into with the owner or his agent , as amended from time to time,

(a) for construction, or

(b) for improving land, or

(c) for the doing of any work or the providing of any services in construction or in improving land, or

(d) for the supplying of any materials to be used in construction or in improving land,

but does not include a contract of employment; (« contrat »)

**"contractor"** means a person who , or a joint venture which, has entered into a contract with the owner or his agent; (« entrepreneur »)

**"contract price"** means the price to be paid under a contract ~~or sub-contract~~ for performance of the contract ~~or sub-contract~~; (« prix contractuel »)

**"court"** means Her Majesty's Court of Queen's Bench for Manitoba; (« tribunal »)

**"Crown"** means Her Majesty, The Queen in Right of Manitoba; (« Couronne »)

**"Crown agency"** means

(a) Manitoba Agricultural Services Corporation,

(b) The Manitoba Public Insurance Corporation,

(c) Manitoba Development Corporation,

(d) [repealed] S.M. 1992, c. 35, s. 58,

(e) The Manitoba Housing and Renewal Corporation,

(f) Manitoba Hydro,

(g) Manitoba Liquor and Lotteries Corporation,

(h) [repealed] S.M. 1996, c. 79, s. 30,

(i) The Manitoba Water Services Board; (« organisme gouvernemental »)

**“duty of good faith”** means the obligation under this Act to exercise a discretionary power with honesty, integrity and due regard to the legitimate contractual and statutory interests of affected parties in a timely manner;

**“encumbrance”** means any mortgage of or charge or lien on land and includes an hypothecation of a mortgage of or charge or lien on land; (« charge »)

**“holdback”** means the amount required under this Act to be deducted from payments to be made under a contract and retained for a period prescribed under this Act and, ~~where the hold back is deposited in a hold back account,~~ includes any interest accruing thereon as prescribed; (« retenue »)

**“holdback account”** means an interest bearing account in a bank, trust company or credit union in the name of the owner ~~joint names of the owner and the contractor;~~ (« compte de dépôt des retenues »)

**“improvement”** means any construction or improving land as each is defined in this Act;

**“improving land”** means the doing of any work which improves the character of the land and without limiting the generality of the foregoing includes

- (a) clearing the land of timber or scrub,
- (b) landscaping the land,
- (c) fencing the land, and
- (d) demolishing structures on the land,

but does not include tilling, seeding, cultivating or mowing the land for agricultural or forest production or the harvesting of a crop from the land or the cutting of timber from the land for sale; (« amélioration d'un bien-fonds »)

**“insolvent”**, as used in set-off provisions in the Act, means a contractor or sub-contractor adjudged bankrupt, who has made a general assignment for its creditors, is subject to the appointment of a receiver or a company creditor arrangement order;

**“joint venture”** means an association of persons who agree by contract to contribute money, effort, knowledge or other assets to a common undertaking for joint profit where the relationship formed does not constitute a trust, partnership or corporation;

**“judge”** means a judge of the court; (« juge »)

**“lien”** means a lien created under this Act; (« privilège »)

**“materials”** includes every kind of movable property; (« matériaux »)

**“municipality”** includes a local government district and “clerk of the municipality” includes the resident administrator of a local government district; (« municipalité »)

**“owner”** means any person having any estate or interest in the structure and the land occupied thereby or enjoyed therewith, or in the land upon or in respect of which work is done or services are provided or materials are supplied, at whose request and

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

the work is done or the services are provided or the materials are supplied, and all persons claiming under or through him whose rights are acquired after the work or services were commenced or after the materials were supplied; (« propriétaire »)

**“payment certifier”** means an architect, engineer or other person upon whose certificate payments are made under a contract; (« certificateur »)

**“person”** includes the Crown; (« personne »)

**“prescribed”** means prescribed in the regulations; (« prescrit »)



“project” means a specific development, construction of structure and/or land improvement by an owner involving a contract under which any number of sub-contracts issue for the performance of work, the provision of services or the supply of materials;

“public-private-partnership” or “P3” is a project delivery model whereby a government body (prescribed by regulation) obtains long-extended payment terms for cost of construction upon entering into a development agreement with one or more private entities which undertake, in whole or in part, to finance, design, build and, over an extended term (often 30 years), to operate and maintain a structure or land improvement before handing it back to the government body on certain terms in a specified condition;

**“registrar”** includes

- (a) a district registrar,
- (b) with respect to a lien registered in the office of a recorder of a mining district, the recorder,
- (c) with respect to a claim registered under subsection 37(5), the registrar under *The Oil and Gas Act*,
- (d) with respect to a lien registered in the office of the Director of Crown Lands, the Director of Crown Lands; (« registraire »)

**“registry office”** includes a land titles office and **“land titles office”** includes

- (a) a registry office,
- (b) with respect to a lien registered in the office of a recorder of a mining district, the office of the recorder,
- (c) with respect to a claim registered under subsection 37(5), the office of the registrar under *The Oil and Gas Act*,
- (d) with respect to a lien registered in the office of the Director of Crown Lands, the office of the Director of Crown Lands; (« bureau du registre foncier »)

**“services”** includes

- (a) the preparation of specifications, drawings and other documents used or to be used in construction,
- (b) administration of a contract or sub-contract,
- (c) inspection or supervision of work done under a contract or a sub-contract, or
- (d) renting of equipment with or without an operator to an owner, contractor or sub-contractor to be used in the performance of a contract or a sub-contract,

but does not include the preparation of specifications, drawings and other documents by, or the administration of a contract or sub-contract by, or inspection or supervision of work done under a contract or sub-contract by, a professional architect or engineer who is not an employee of the contractor or sub-contractor; (« services »)

“schedule of values” means a written breakdown, as amended from time to time, of a contract price or a sub-contract price which identifies the sum within that price to be earned by the contractor or particular sub-contractor for its own forces work together with the value of each sub-contract price making up the balance;

**“structure”** means anything built or made on and affixed to or imbedded in land or affixed to or imbedded in land after being built or made elsewhere, and appurtenances thereto, and, without limiting the generality of the foregoing, includes

- (a) any building, structure, erection, wharf, pier, bulkhead, bridge, trestlework, vault, sidewalk, road, roadbed, lane, paving, pipeline, fountain, fishpond, drain, sewer, canal, or aqueduct, built or made on and affixed to or imbedded in land or affixed to or imbedded in land after being built or made elsewhere, and appurtenances thereto, and
- (b) any well, mine or excavation drilled, sunk or made in or on land and any appurtenances thereto,

and a reference to a structure on land includes a structure in or beneath the surface of the land; (« ouvrage »)

**“sub-contract”** means a binding agreement, as amended from time to time, between a sub-contractor and a contractor or between a sub-contractor and another sub-contractor

- (a) for construction, or
- (b) for improving land, or
- (c) for the doing of any work or the providing of any services in construction or in improving land, or

(d) for the supplying of any materials to be used in construction or in improving land; (« contrat de sous-traitance »)

“sub-contract price” means the price to be paid under a sub-contract for performance of the sub-contract;

“sub-contractor” means a person or joint venture other than a contractor, who or which has entered into a sub-contract but ~~who~~ does not have a contract directly with the owner or his agent; (« sous-traitant »)

“wages” means money earned by a worker for work or services done, whether upon a time or piece work basis; (« salaires »)

“worker” means an employee. (« ouvrier »)

“umbrella lien” means a lien registered by a contractor or sub-contractor which includes in its value amounts that are also claimed in liens registered by persons whose lien claims arose at a lower level of the same construction contract payment chain.

### **Registered common-law relationship**

1(2) For the purposes of this Act, while they are cohabiting, persons who have registered their common-law relationship under section 13.1 of The Vital Statistics Act are deemed to be cohabiting in a conjugal relationship of some permanence.

### **Substantial performance**

2(1) For the purposes of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when

- (a) the structure to be constructed under the contract or sub-contract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
- (b) the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than
  - (i) 3% of the first ~~\$250,000~~ \$1,000,000 of the contract price,
  - (ii) 2% of the next ~~\$250,000~~ \$1,000,000 of the contract price, and
  - (iii) 1% of the balance of the contract price.

### **Where work cannot be completed**

2(2) For the purposes of this Act, where a structure or a substantial part thereof or the improved land or a substantial part thereof is ready for use or is being used for the purpose intended, and the work to be done under the contract or sub-contract relating to the construction or the improvement of the land cannot be completed expeditiously for reasons beyond the control of the contractor or sub-contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

### **Supplying materials**

2(3) For the purposes of this Act, materials shall be deemed to have been supplied to be used in the performance of a contract or a sub-contract and give rise to lien rights

- (a) if they are delivered to land in respect of which the contract or sub-contract is to be performed; or
- (b) if they are delivered to some other land which is in the immediate vicinity of the land in respect of which the contract or sub-contract is to be performed and which has been designated by the owner or his agent as the land to which the materials are to be delivered; or
- (c) if the materials were made to specifications set out in the contract or sub-contract and were delivered to the contractor or sub-contractor for the purpose of being used in the performance of the contract or sub-contract;

but delivery of materials on land designated under clause (b) does not make the land so designated subject to a lien in respect of the supplying of the materials.

### **Meaning of "agent" in subsection (3)**

**2(4)** For the purposes of subsection (3), "agent" includes a contractor, or sub-contractor for whom, or on whose direction, the materials are supplied unless the person supplying the materials has had actual notice from the owner to the contrary.

## APPLICATION OF THE ACT

### **Crown, etc. bound**

**3(1)** ~~Subject to subsection (2),~~ The Crown, all Crown agencies, and all boards, commissions and bodies performing any duties or functions under an Act of the Legislature on behalf of the Crown, are bound by this Act.

### ~~Act not to apply to provincial highways, etc.~~

~~3(2) This Act does not apply to or in respect of work relating to or contracts of the Crown with respect to the construction, repair or maintenance of highways, bridges, air strips, docks and ferry terminals under the control and management of the Crown.~~

### ~~Act not to apply to certain Manitoba Hydro contracts~~

~~3(3) This Act does not apply to contracts, or work related to contracts, entered into by Manitoba Hydro with respect to or in any way associated with the construction, repair or maintenance of hydro-electric generating stations or facilities, and plant appurtenant thereto.~~

### Public-private partnerships – P3 projects

#..... The Act applies to the construction aspect of all P3 projects for which the public partner is a government body prescribed for purposes of this section and such projects shall be subject to the following rules:

- a. Any development agreement among the public and private partners shall be confidential and not subject to disclosure, in the ordinary course, under section 58 – Rights to Information;
- b. Neither the land interest of the public partner, nor any interest in the project lands granted to a private partner shall be subject to attachment by a lien under Part IV;
- c. P3 projects meeting criteria prescribed shall be subject to lien rights not attaching land as set out in section 16 in Part IV of the Act;
- d. The public partner shall not be considered to be an owner for purposes of the Act;
- e. In a contract for construction of a P3 project, a signatory representing the private partner shall be deemed for all purposes under the Act to be the owner of the project;
- f. Subsequent to the construction phase of a P3 project, provisions of the Act shall apply to any capital repairs defined for purposes of this section as:

“capital repair” means a repair to land or to a structure intended to extend its normal life, improve its value or productivity and does not include work, services or materials provided to prevent deterioration or to maintain the land or structure in a normal functional state;

- g. For purposes of Part V – Surety Bonds, the public partner may require a coverage limit other than the one prescribed in section 85.1(3)(b) or (4)(b), provided that such prescribed limit meets or exceeds any coverage limit that may be prescribed for purposes of this paragraph; and
- h. Sub-section g. above does not apply unless the bonds required under sub-sections 85.1(3) and (4) and any other security required by the public partner, taken together, reflect an appropriate balance between the adequacy of security required to ensure payment of persons supplying work, services or materials under the public contract on the one hand and the cost of the security on the other.

### EPC contract exception

#----- Where an owner enters into an EPC (engineering, procurement and construction) contract requiring an off-shore contractor to design, engineer, procure and manufacture materials and/or equipment required for installation on a Manitoba project, the owner and contractor may expressly provide in the contract that this Act shall not apply to those portions of the contract price which are to be paid to the contractor in respect of

- (a) services provided by the contractor outside of Canada including design, engineering, procurement, manufacture and testing of materials and/or equipment to be manufactured outside of Canada for supply to the project; and
- (b) the cost to transport and deliver such contractor-supplied materials and/or equipment to the site of an improvement within Manitoba.

#### **Architects and engineers to have no lien** **Exclusion of professional architects and engineers**

36 ~~Notwithstanding any other provision of this Act, a~~ An architect or engineer retained by an owner, contractor or sub-contractor under an agreement, which does not create a relationship of employer and employee, to provide architectural or engineering services in respect of construction or improving land

(a) is not a beneficiary of the trust created in Part II;

~~(a)(b)~~ does not have a lien or claim for lien against or in respect of the structure ~~or land~~ or land improved on which the structure is constructed for his professional fees and charges; and

~~(b)(c)~~ is not a contractor, or sub-contractor ~~or worker~~ for the purposes of this Act;

and no other remedy provided in this Act ~~does not apply~~ applies to the agreement under which the architect or engineer is retained or to the recovery of his professional fees or charges.

### **GENERAL PROVISIONS**

#### **ATTEMPTS TO CIRCUMVENT ACT**

#### **Devices to defeat remedies void - Waivers, etc., against public policy**

**11** Every device, payment or agreement, oral or written, express or implied, on the part of any person

(a) that provides or purports to provide that any remedy under this Act does not apply to him; or

(b) that provides or purports to provide that remedies available under this Act are not to be available for his benefit; and, in particular,

(c) that waives or purports to waive any lien or right of lien under this Act;

is against public policy and void.

#### **Devices to defeat liens and trusts**

~~Every device by a person and every payment made for the purpose of defeating or impairing a lien or a trust created under this Act is against public policy and void.~~

#### **Amendment of contracts to conform**

**29** Every contract and sub-contract to which this Act applies ~~under which a lien may arise~~ shall be conclusively deemed to be amended in so far as is necessary to bring it into conformity with this Act.

#### **Assignment not valid against lien or trust**

**6(3)** No assignment by the contractor or sub-contractor of any moneys due or to become due on account of the contract price under a contract or sub-contract is valid as against any lien or trust created under this Act.

### **RIGHTS TO INFORMATION**

#### **Rights to information** ~~Particulars of contract, etc.~~

**58(1)** Any person entitled to a lien under Part IV or who is a beneficiary of the trust under Part II of the Act in respect of work done or to be done, services provided or to be provided, or materials supplied or to be supplied in the performance of a contract may, in writing, at any time demand information be provided within fourteen (14) days as follows:

**#----- f From the owner or his agent and the or contractor or his agent:**

- (a) names of the parties to the contract;
- (b) the contract price;
- (c) a copy of the general payment terms in the contract between the owner and the contractor  
if the contract is in writing and if the contract is not in writing, a statement of the  
payment terms agreed between the parties to of the contract;
- (d) a copy of specific contract terms, if any, providing for payment (including release of  
holdback) based on the completion of specified phases or the achievement of specific  
milestones;
- (e) a statement of the state of accounts as provided in subsection (2) as between the owner  
and the contractor;
- (f) the name and address of the bank, trust company or credit union in which a hold back  
account has been opened, the name of the account holder where  
required in accordance with this Act and the account number thereof; and
- (g) a statement as to the particulars of credits to and payments from the hold back account  
required in accordance with this Act including the dates of the credits and payments,  
the accrued interest and the present balance a copy of any labour and material  
payment bond issued under the contract.

**#----- From contractor or sub-contractor Particulars of sub-contract, etc.**

~~58(2)~~ Any person entitled to a lien in respect of work done or to be done, services provided or to be provided, or materials supplied or to be supplied in the performance of a sub-contract may, in writing, at any time, demand of the contractor or his agent and the sub-contractor and his agent

- (a) a copy of the payment terms in the sub-contract between the contractor and the sub-contractor and or between  
any the sub-contractor and another sub-contractor, under which the claimant's lien or trust rights arise , if the  
sub-contract is in writing and, if the sub-contract is not in writing, a statement of the payment terms of the sub-  
contract or sub-contracts; and
- (b) a statement of the state of accounts as provided in subsection (2) between the contractor and the sub-contractor  
or between the sub-contractor and the other sub-contractor, as the case may be;
- (c) a statement of whether there is provision in the contract or in any applicable sub-contract providing for certification  
of substantial performance of a relevant sub-contract or for the annual or phased release of holdback; and
- (d) a copy of any labour and material payment bond under which the claimant may have rights of recovery on its sub-  
contract account.

**#----- From holder of fee simple in land**

- (a) the name and address of the party to a permit, licence, lease, or other document conferring an estate or  
interest in project lands pursuant to which an improvement has been made;
- (b) relevant particulars respecting the fee simple holder's consent or requirements for improvements;  
and
- (c) the state of accounts between the fee simple holder and the interest holder containing the information in  
subsection (2).

**#----- Information f From mortgagee or unpaid vendor of the improvement**

~~58(3)~~ Any person entitled to a lien in respect of work done or to be done, services provided or to be provided, or materials supplied or to be supplied in the performance of a contract or sub-contract in respect of any land may, in writing, at any time, demand of any mortgagee or any unpaid vendor of the land or his agent,

- (a) the terms of the mortgage on the land or the agreement for the purchase of the land; and
- (b) a statement showing the amounts advanced under the mortgage for purchase of the land and for the improvement,  
the dates of those advances, particulars of any arrears outstanding from the mortgagor including arrears for  
payment of interest; and or the amount owing on the agreement, as the case may be.

(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.

#### State of accounts

58(2) For purposes of this section, a state of accounts shall contain the following information as of a specified date:

- (a) the price of the work, services or materials that have been supplied under the contract or subcontract.
- (b) excerpts relevant to the demand from the contractor's progress payment requests and schedule of values submitted, approved or certified, and details respecting claim amounts rejected with particulars.
- (c) the dates and amounts paid under the contract or subcontract.
- (d) in the case of a fee simple holder's state of accounts under paragraph 4 of subsection (1), indicate which of the amounts paid under the contract or subcontract constitute any part of the a payment or obligation referred to in subsection 18 (1) in respect of a lease or other lienable interest in land.
- \_\_\_\_\_ (e) The amount of the applicable holdbacks, a statement as to the particulars of credits to and payments from the hold back account required in accordance with this Act including the dates of the credits and payments, the interest payable on the present balance.
- (f) the balance owed under the contract or subcontract.
- (g) any amount retained under Part II section (#) (set-off by trustee) or under Part IV subsection # (lien set-off).
- (h) any other information that may be prescribed.

#### Costs of ~~copies etc.~~ compliance with demand

58(3) Where, under this section, a demand for information is made of an owner, contractor, sub-contractor, mortgagee or unpaid vendor, or an agent of any of them, for a copy of any document or a statement of any accounts, he may require the person making the demand may be required to pay the reasonable costs of making the copies or of preparing the statement before the requested information is provided.~~producing the copy of the document or the statement.~~

#### Failure to respond to demand

58(4) Where, under this section, a demand is made of an owner, contractor, sub-contractor, landlord, mortgagee or unpaid vendor, or an agent of any of them, and he

- (a) does not, within a reasonable time after receiving the demand and after payment of any reasonable costs required to be paid under subsection (3), if any, produce or deliver the copy of the document or the statement or information demanded; or
- (b) knowingly, falsely states the terms of any documents; or
- (c) knowingly gives any false statement or false information;

to the person making the demand and the person making the demand sustains any loss by reason of the failure, false statement, or false information, he is liable to the person making the demand for the amount of the loss in any action therefor, or in any action under this Act for the realization of the lien.

#### Order to produce

58(5) On application at any time before or after an action is commenced for any relief under this Act, for the realization of a lien, a judge may make an order requiring the owner, ~~or the~~ contractor, landlord, ~~or a~~ mortgagee, ~~or~~ an unpaid vendor, or a sub-contractor or the agent of any of them, as the case may be, to produce the information demanded under section 58(1) to any person who may be entitled to a lien in respect of work done or to be done, or services provided or to be provided, or materials supplied or to be supplied in the performance of a contract or sub-contract in respect of land, and permit ~~that~~ the person making demand to inspect the contract or sub-contract, lease, ~~or~~ the mortgage or agreement for sale of the land, or the accounts, or the hold back account pass book, or any other relevant documents and he may make such order as to costs of the application and order as he deems just.

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## PART II - TRUST PROVISIONS CODE

### Purpose of statutory trust

#----- The codified trust remedy in this Part II creates a trust, designates trust funds, appoints trustees and designates beneficiaries who are entitled to payment from project-specific funds as they flow down the contractual payment chains which make up each project's construction contract pyramid pursuant to express terms of the trust and also provides for legal recourse where a beneficiary suffers loss, costs or damage upon trust funds being misappropriated or converted to a use not authorized by the terms of the trust set out in this Part.

### CREATION OF TRUST FUND

#### Advances on mortgages, etc. Receipts and moneys of owner constitute trust fund

- **5(2)** All sums received or appropriated by an owner for use that are to be used in the financing of a project structure or improving land, including the purchase price of the land and payment for the discharge or withdrawal of prior encumbrances against the land, constitute, subject to the less the amount, if any, used for payment of the purchase price and of payments for the discharge or withdrawal of prior encumbrances against the land, constitute a trust fund for the benefit of the persons mentioned in subsection (1). use as authorized by this Act.

#### Additional sources for trust fund

#----- Insurance moneys as contemplated by section 21 and sale proceeds received by the owner for the improvement and, subject to terms of the bond, payments made under a performance bond, labour and material payment bond or other surety bonds for the project, may, on their terms and conditions, also contribute to the trust fund under this Part.

### TRUSTEES

#### Appointment of trustees

#----- The owner, contractor and sub-contractors within each project construction contract pyramid become and shall each be a trustee of all trust funds settled or received in their respective hands.

#### Deemed trustees

#----- Third parties who knew or ought to have known that they acquired trust funds to the prejudice of intended beneficiaries under this Part may be deemed by the court to be a trustee, held to account and ordered to pay over such funds and/or pay damages in an action for breach of trust.

#### Duties of contractor respecting trust fund

~~4(3)~~ A contractor receiving a sum mentioned in subsection (1) is the trustee of the trust fund and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until

- ~~(a) all sub-contractors who have entered into a sub-contract with him and all persons who have supplied materials or provided services to him for the purpose of performing the contract have been paid all amounts then owing to them out of the sum received;~~
- ~~(b) the Workers' Compensation Board has been paid all assessments which the contractor could reasonably anticipate as arising out of work done by workers employed by him in performing the contract to the extent for which the sum was received;~~
- ~~(c) all workers who have been employed by him for the purpose of performing the contract have been paid all amounts then owing to them out of the sum received for work done in performing the contract; and~~
- ~~(d) provision has been made for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received.~~

#### Duties of sub-contractor re trust



~~4(4) — A sub-contractor receiving a sum mentioned in subsection (2) is the trustee of the trust fund and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until~~

- ~~(a) all sub-contractors who have sub-contracted with him and all persons who have supplied materials or provided services for the purpose of performing the sub-contract have been paid all amounts then owing to them out of the sum received;~~
- ~~(b) the Workers' Compensation Board has been paid all assessments which the sub-contractor could reasonably anticipate as arising out of work done by workers employed by him in performing the sub-contract to the extent for which the sum was received;~~
- ~~(c) all workers who have been employed by him for the purpose of performing the sub-contract have been paid all amounts then owing to them out of the sum received for work done in performing the sub-contract; and~~
- ~~(d) provision has been made for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received.~~

#### **Duties of owner as to trust fund**

~~5(3) — The owner is the trustee of the trust funds created under subsections (1) and (2) and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until~~

- ~~(a) the contractor has been paid all sums justly owed to him in respect of the performance of the contract; and~~
- ~~(b) provision for the payment of other affected beneficiaries of the trust has been made.~~

### PAYMENT CERTIFICATION PROCESS

#### Schedule of values

~~#---~~ Prior to a contractor's first request for payment on account of the contract price, the contractor shall provide to the owner and to any payment certifier for the project for use in the payment approval process, a schedule of values for the contract price.

#### Duty of good faith

~~# ----~~ The owner as trustee of the trust fund for the project and any owner's agent or other payment certifier responsible for review, approval and/or certification of contractor payment requests, shall at all times exercise a *duty of good faith* in response to such requests.

### BENEFICIARIES OF THE TRUST

#### ~~Receipts and moneys of owner constitute trust fund~~ Amounts certified as payable

**5(1)** Where, under a contract, sums become payable to the contractor by the owner on the basis of the owner's approval or a certificate of a payment certifier, any amount, up to the aggregate of the sums so approved or certified, ~~that is~~ in the hands of the owner or received by him at any time thereafter for payment under the contract constitutes, until paid to the contractor, a trust fund for payment to the benefit of the contractor.

- ~~(a) the contractor, and all sub-contractors and other persons who have supplied materials or provided services for the purposes of performing the contract or any sub-contract under the contract;~~
- ~~(b) The Workers Compensation Board; and~~
- (c) workers who have been employed for the purpose of performing the contract or any sub-contract under the contract.

#### ~~Receipts of contractor constitute trust fund~~ Payments received by contractor in trust

**4(1)** All sums, including ~~any interest on the holdback~~, received by a contractor on account of a its contract price constitute a trust fund for the benefit of

- (a) the contractor to the extent that the sum includes an amount approved or certified on the contractor's own account;  
and
- (b) sub-contractors who have sub-contracted with the contractor ~~and other persons~~ who have worked, supplied materials or provided services to the contractor for the purpose of performing the contract to the extent of the



amount requested, approved or certified and paid to the contractor as trustee on each such sub-contractor's account;

~~(b) the Workers' Compensation Board;~~

~~(c) workers who have been employed by the contractor for the purpose of performing the contract; and~~

~~(d) the owner for any set-off or counterclaim relating to the performance of the contract.~~

#### **Receipts of sub-contractor constitute trust fund Payments received by sub-contractor in trust**

**4(2)** All sums, including any interest on the holdback, received by a sub-contractor on account of ~~a contract~~ its sub-contract price ~~in the sub-contract~~, constitute a trust fund for the benefit of

~~(a) the sub-contractor to the extent that the sum includes an amount requested and approved or certified on the sub-contractor's own account; and~~

~~(b) sub-contractors who have sub-contracted with the sub-contractor and other persons who have worked, supplied materials or provided services to the sub-contractor for the purpose of performing the sub-contract, to the extent of the amounts requested, approved or certified and paid to the sub-contractor as trustee on behalf of each such sub-contractor's account.~~

~~(b) the Workers' Compensation Board;~~

~~(c) workers who have been employed by the sub-contractor for the purpose of performing the sub-contract; and~~

~~(d) the contractor or any sub-contractor for any set-off or counterclaim relating to the performance of the sub-contract.~~

### **TRUSTEE OBLIGATIONS**

#### **Duty of Loyalty**

~~#-----~~ **No** trustee shall appropriate or convert any part of the trust fund to or for his own use or for any use not authorized by terms of the trust.

#### **Deposit of trust funds**

~~#-----~~ Every person who is a trustee under this Part shall comply with the following deposit and record keeping requirements respecting trust funds of which he or she is trustee:

~~(a) project trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the funds in hand, the funds shall be deposited into a bank account in the name of all such trustees.~~

~~(b) the trustee shall maintain written records respecting trust funds received on each project detailing the amounts that are received into and paid out of the project trust funds, any transfers made for purposes of the trust, and any other prescribed information.~~

~~(c) if a person is trustee of more than one project trust under this Part, such trust funds may be deposited together into a single bank account, as long as the trustee maintains specific project records as required under paragraph (b) above, separately in respect of each project trust.~~

#### **Multiple trust funds in a single account**

~~#-----~~ Trust funds from separate projects that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust.

#### **Project Records keeping by trustees contractors and sub-contractors**

**10(1)** Every ~~trustee contractor and sub-contractor~~ shall maintain in his principal place of business in the province a true and correct record ~~in the English or French language~~ of the following particulars ~~of in respect of~~ each contract and sub-contract ~~which he enters into respecting an improvement to which this Act applies: under or by virtue of which a lien may arise under this Act:~~

~~(a) (a) The whole or essential terms of the contract or sub-contract.~~

~~(b) The name, last known address and business names of the parties to the contract and to each direct sub-contract.~~

- ~~(c) A copy of the schedule of values under a contract or sub-contract as prepared and updated by the party responsible for requesting payment under the contract or sub-contract.~~
- ~~(d) A copy of each request for payment submitted with supporting materials.~~
- ~~(e) A copy of the response(s) to each request for payment and a copy of all communications and proceedings resulting from each request.~~
- ~~(f) (b) The amounts of payments, particulars and date times of each for payments received by the payment requesting party under the contract or and each sub-contract.~~
- ~~(g) Trust fund deposit records in compliance with section [#] above.~~
- ~~(e) The name, last known address and business of the parties to the contract or sub-contract.~~
- ~~(d) The dates upon which payments are made under the contract or sub-contract and the amount of each payment.~~
- ~~(eh) The amount of each deduction made from each payment under the contract or sub-contract and the particulars thereof.~~
- ~~(fi) The date of commencement of work undertaken in the performance of the contract or sub-contract.~~
- ~~(gi) The date and particulars of any certificate given by a payment certifier as to the substantial performance or completion of the contract or sub-contract or of any part thereof and the name and address of the payment certifier.~~
- ~~(hk) The date of substantial performance of the contract or sub-contract and the date of the completion of the contract or sub-contract.~~

#### Records to be current

**10(2)** The records required to be maintained under subsection (1) shall be kept up-to-date not less frequently than monthly.

#### Records to be kept after completion

**10(3)** The records required to be maintained under subsection (1) in respect of a contract or sub-contract shall be maintained and preserved by the owner, contractor or sub-contractor, as the case may be, for a period of not less than one year after the date of the completion of the improvement construction or the improving of the land with respect to which the contract or sub-contract relates.

#### Separate records for each project

**10(4)** A separate record shall be maintained by owners, contractors and sub-contractors under subsection (1) in respect of each separate contract and sub-contract to which they are a direct party on a project.

#### Proper payment discharges trust and trustee

#----- Every payment by a trustee to a person the trustee is liable to pay under this Part for work, services or materials provided under a contract or sub-contract discharges the trust and discharges the trustee from its obligations and potential liability as trustee to the extent of the payment made.

#### PERMITTED USES OF TRUST FUNDS

#### **Exception**

**5(4)** ~~Notwithstanding subsection (3), where an owner has himself paid, in whole or in part,~~

- ~~(a) any sub-contractor or other person who has supplied materials or provided services for the purpose of performing the contract or any sub-contract thereunder;~~
- ~~(b) any assessment of The Workers Compensation Board arising out of work done in performing the contract or any sub-contract thereunder;~~
- ~~(c) any worker who has been employed by the contractor or any sub-contractor for the purpose of performing the contract or sub-contract for work done in the performance of the contract or the sub-contract; or~~
- ~~(d) any other affected beneficiary in respect of a claim arising out of the performance of the contract or any sub-contract thereunder;~~

~~the retention by the owner of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to or for his own use or to or for any use not authorized by the trust if, prior to the retention, all beneficiaries of the trust entitled under him have been paid in full.~~

#### Direct payment

#----- Upon compliance with requirements set out in section 30, an owner or contractor may directly pay an amount due to a sub-contractor even though the payor is not a party to the particular sub-contract.

#### Advance payment to beneficiary

#----- Subject to compliance with Part IV - Holdbacks, where a trustee pays in whole or in part for work, services or materials provided on a project out of money that is not subject to the trust under this Part, the trustee may retain from trust funds subsequently received on the payee's account an amount equal to that paid by the trustee without being in breach of trust.

#### Protection of money lenders

6(1) — Notwithstanding sections 4 and 5, where money is lent to a person upon whom, in respect of a contract or sub-contract, a trust is imposed by those sections, and is used by him to pay in whole or in part

- (a) any sub-contractor engaged for the purposes of performing the contract or sub-contract;
- (b) any assessment of The Workers Compensation Board arising out of work done in performing the contract or sub-contract;
- (c) any workers who have been employed for the purposes of performing the contract or sub-contract; or
- (d) any persons who have supplied materials or provided services for the purposes of the contract or sub-contract;

~~trust moneys may be applied to discharge the loan to the extent that the lender's money was so used by the trustee and any sum so applied shall be deemed not to be an appropriation or conversion thereof to or for his own use or to or for any use not authorized by the trust.~~

#### Application of trust funds to discharge loan

# ----- Subject to compliance with Part IV - Holdbacks, where a trustee pays in whole or in part for work, services or materials provided on a project out of money loaned to the trustee, trust funds subsequently received on account of such payee(s) may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and such specific recovery from trust money otherwise payable to the subject payee(s) does not constitute a breach of trust.

#### Set-off by trustee

#----- Subject to section 27(6), a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and a person the trustee is liable to pay under a contract or sub-contract related to a project, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages related to the project or, if the contractor or sub-contractor payee, as the case may be, becomes insolvent, all outstanding debts, claims or damages whether or not related to the project.

#### Surplus trust funds revert to owner

# ----- Upon final completion of a project, release of any security posted for vacated liens, final settlement of all legal proceedings related to the project, full payment of all related determinations and judgments against the owner and final payment of all accounts outstanding to the contractor and sub-contractors, any surplus remaining in the owner's hands for the project trust fund shall revert to the owner for its own use, not as a breach of trust.

#### Certain moneys not subject to g **Garnishment prohibited**

6(2) Where money owing to a contractor or sub-contractor in respect of ~~the a~~ contract price ~~under a contract~~ or sub-contract ~~price~~ -would, if paid to the contractor or sub-contractor, be subject to a trust under this Part section 4, the money is not subject to garnishment under *The Garnishment Act*.

## Assignment subject to trust

**6(4)** Further to section 6(3) in Part I, where a right to payment of moneys, which upon receipt by the assignor would be subject to a trust under this Act, is assigned, or purported to be assigned, all moneys received by the assignee under the assignment or purported assignment are subject to the trust and the assignee is deemed to be the trustee in place of the assignor.

## TRUST CODE ENFORCEMENT

### Application for directions

# (1) An application for directions under this Part II may be made to the court where a dispute arises:

- (a) respecting the claim of a person for whose benefit a trust is constituted under this Part, or
- (b) respecting the administration of the trust fund.

### Who may apply

#(2) An application under subsection (1) may be made by:

- (a) the person with respect to whose claim the dispute has arisen;
- (b) any person for whose benefit the trust fund is created by this Part; or
- (a)(c) a trustee appointed under this Part.

### Civil right of action

# (1) A trustee appointed or deemed to be trustee under this Part who appropriates or converts any part of the trust fund to or for his own use or to or for any use not authorized by the trust may be sued for breach of trust by any beneficiary of the trust who suffers loss, costs or damages as a result.

### Liability for breach of trust

#### **Breach by corporation**

# (2) 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 under this Part is liable for the breach of trust.

#### **Effective control of corporation**

# (3) 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.

#### **Joint and several liability**

#(4) 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.

#### **Contribution**

# (5) 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.

### Limitation period for breach of trust action

# ---- An action for breach of trust under this Part shall commence within two (2) years of the date the person bringing the action first became aware of the breach of trust.

#### **Limit of time for asserting claims to trace trust moneys**

8 No action to assert any claim to trace and seek recovery of moneys constituting a trust under this Part section 4 or 5 shall be commenced after the expiry of 180 days after the date upon which the person bringing the action first became aware of the breach of trust.

#### **Offence and penalty**

Z Every person upon whom a trust is imposed by section 4, 5 or 6 this Part who knowingly appropriates or converts any moneys constituting a trust under those sections to or for his own use or to or for any use not authorized by the trust is guilty of an offence and liable, on summary conviction,

- (a) to a fine of not more than \$50,000.
- (b) or to imprisonment for a term of not more than two years.
- (c) or to both (a) and (b) above, and
- (d) restitution of trust money mis-appropriated or converted may be ordered for beneficiaries suffering loss, costs or damages, and
- (e) every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this ~~section~~Part is, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to a similar penaltiesy.

#### LINKAGE TO OTHER REMEDIES

#### Interaction with Prompt Payment remedy

# ----- Terms of trust codified in this Part may be taken into account by an adjudicator under Part III – Prompt Payment.

#### Interaction with lien remedy

#### **Registration time limits, etc., do not apply to trusts**

9 The existence of a trust and a cause of action asserting a claim of entitlement to receive trust funds ~~the existence of a trust~~ or asserting any breach of trust under this Act Part ~~is are~~ not affected by the fact that the time has expired for registering or giving notice of a claim for filing a lien under this Act or for enforcement of a lien under Part IV ~~has expired.~~

#### Secured versus unsecured claims

# ---- Trust claims arising under this Part are unsecured and hence are subordinated in priority to duly registered lien claims and lien claims for which notice has been properly given pursuant to section 45.

#### Trust claim provides no power to attach

# ----- The statutory trust created in this Part does not entitle a claimant before judgment to attach or charge land or trust funds or to 'stop the hand of a paymaster' and only through due exercise of any lien rights such claimant may have under Part IV - is there a right under this Act to attach or charge property with the value of an unproven claim for payment and thereby possibly impede the flow of project funds.

#### **RECORDS**

#### Requirement to produce to inspector

10(5) — A contractor or sub-contractor shall produce the records required to be kept under subsection (1) to any inspector appointed under The Labour Administration Act, including a chief inspector, upon his request and make them available for his inspection and shall furnish copies of any part thereof to the inspector upon his written demand.

#### **Offence**

10(6) — Every person who contravenes or fails to comply with a provision of this section is guilty of an offence and liable, on summary conviction, to a fine of not more than \$500. or to imprisonment for a term of not more than three months, or

~~to both and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this section is, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to a similar penalty.~~

#### **Continuing offence**

~~10(7) — Where a person contravenes or fails to comply with a provision of this section for a period of more than one day, he is guilty of a separate offence for each day that the contravention or failure to comply continues.~~

### **PART III - PROMPT PAYMENT**

**NOTE:** S. 6.1- 6.9 and 13.1-13.23 below are from Ontario Act. MB modifications shown as tracked changes.  
Re-numbering in MB Act will be required.

#### **Purpose of prompt payment remedy**

~~#-----~~ Provisions in this Part III require timely payment of amounts earned, requested and approved under a contract or sub-contract for work completed, services provided or materials supplied to improve the value of land; payers are required to give timely notice of reasons for rejection of payment requests; an adjudication process allows interim determination of payment disputes that arise in the ordinary course of projects to which this Act applies and such determinations are subject to judicial review on limited grounds, with final determination made either by settlement, in a legal action or arbitration.

#### **Definition, “proper invoice”**

**6.1** In this Part,

“proper invoice” means a written bill or other request for payment for work, services or materials provided in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor’s name and address.
2. The date of the proper invoice and the period during which the work, services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the work, services or materials were supplied.
4. A description, including quantity where appropriate, of the work, services or materials that were supplied.
5. The amount requested payable broken down within a schedule of values for the work, services or materials that were supplied by the contractor’s own forces and by each of its sub-contractors during the period for which payment is requested, and the payment terms.
6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
7. Any other information that may be prescribed.

#### **Subject to holdback requirements**

**6.2** A requirement to pay an amount in accordance with this Part is subject to any requirement to retain a holdback in accordance with Part IV.

#### **Giving of proper invoices**

**6.3** (1) Proper invoices shall be given to an owner on a monthly basis, unless the contract provides otherwise.

#### **Restriction on conditions**

(2) A provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner’s prior approval is of no force or effect.

### **Same**

(3) For greater certainty, subsection (2) has no application to a provision in a contract that provides for the certification of a payment certifier or the owner's approval after a proper invoice is given.

### **Exception**

(4) Subsection (2) does not apply to a provision in a contract that provides for the testing and commissioning of the ~~improvement or of~~ work, services or materials supplied under the contract.

### **Revisions**

(5) A proper invoice may be revised by the contractor after the contractor has given it to the owner, if,

- (a) the owner agrees in advance to the revision;
- (b) the date of the proper invoice is not changed; and
- (c) the proper invoice continues to meet the requirements referred to in the definition of "proper invoice" in section 6.1.

### **Payment deadline, owner to contractor**

**6.4** (1) Subject to the giving of a notice of non-payment under subsection (2), an owner shall pay the amount requested payable under a proper invoice no later than 28 days after receiving the proper invoice from the contractor.

### **Exception, notice of non-payment if dispute**

(2) An owner who disputes a proper invoice may refuse to pay all or any portion of the amount payable requested under the proper invoice within the time specified in subsection (1) if, no later than 14 days after receiving the proper invoice from the contractor, the owner gives to the contractor a notice of non-payment, in the prescribed form and manner, specifying the amount of the proper invoice that is not being paid and detailing all of the reasons for non-payment.

### **Requirement to pay remaining amount**

(3) Subsection (1) continues to apply to any amount requested payable under the proper invoice that is not the subject of a notice under subsection (2).

### **Payment deadlines, contractor to subcontractor**

#### **Full payment**

**6.5** (1) Subject to the giving of a notice of non-payment under subsection (6), a contractor who receives full payment of a proper invoice within the time specified in subsection 6.4 (1) shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract with the contractor the amount that ~~was~~ included in the proper invoice for each respective ~~the amount payable to the~~ subcontractor.

#### **Partial payment, paid amount**

(2) Subject to the giving of a notice of non-payment under subsection (6), if the payment received by the contractor from the owner is only for a portion of the amount requested payable under a proper invoice, the contractor shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract with the contractor that ~~was~~ included for that sub-contractor in the proper invoice and in from the amount paid by the owner.

### **Same**

(3) For the purposes of subsection (2), if more than one subcontractor is entitled to payment, payment shall be made in accordance with the following rules:

1. If the amount not paid by the owner is specific to work, services or materials supplied by a particular subcontractor or subcontractors, the remaining subcontractors shall be paid, with any amount paid by the owner in respect of the subcontractor or subcontractors who are implicated in the dispute payable to them on a rateable basis, as applicable.
2. In any other case, subcontractors shall be paid on a rateable basis.

### **Non or partial payment, unpaid amount**

(4) Subject to the giving of a notice of non-payment under subsection (5) or (6), if the owner does not pay some or all of a proper invoice within the time specified in subsection 6.4 (1), the contractor shall, no later than 35 days after giving the proper invoice to the owner, pay each subcontractor who supplied work, services or materials under a subcontract



with the contractor that were included in the proper invoice the amount ~~payable to~~ requested for the subcontractor, to the extent that he or she was not paid fully under subsection (2).

**Exception, notice of non-payment if owner does not pay**

(5) Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (7), the contractor gives to the subcontractor, in the prescribed manner,

- (a) a notice of non-payment, in the prescribed form,
  - (i) stating that some or all of the amount ~~payable requested for to~~ the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the owner,
  - (ii) specifying the amount not being paid, and
  - (iii) providing an undertaking to refer the matter to adjudication under ~~this~~ Part 4.4 no later than 21 days after giving the notice to the subcontractor; and
- (b) a copy of any notice of non-payment given by the owner under subsection 6.4 (2).

**Exception, notice of non-payment if dispute**

(6) A contractor who disputes, in whole or in part, the entitlement of a subcontractor to payment of an amount under the subcontract may refuse to pay all or any portion of the amount within the time specified in subsection (1), (2) or (4), as the case may be, if, no later than the date specified in subsection (7), the contractor gives to the subcontractor a notice of non-payment, in the prescribed form and manner, specifying the amount that is not being paid and detailing all of the reasons for non-payment.

**Timing of notice**

(7) For the purposes of subsections (5) and (6), the contractor must give notice no later than,

- (a) seven days after receiving a notice of non-payment from the owner under subsection 6.4 (2); or
- (b) if no notice was given by the owner, before the expiry of the period referred to in subsection (4).

**Payment deadline once payment received from owner**

(8) Subsections (1) and (2) apply, with necessary modifications, in respect of any amount that is the subject of a notice under subsection (5), once the amount is paid by the owner.

**Payment deadlines, subcontractor to subcontractor**

**Full payment**

**6.6** (1) Subject to the giving of a notice of non-payment under subsection (7), a subcontractor who receives full payment from a contractor in respect of a proper invoice within the time specified in subsection 6.5 (1) shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract between them that were included in the proper invoice the amount payable to the subcontractor.

**Partial payment, paid amount**

(2) Subject to the giving of a notice of non-payment under subsection (7), if the payment received by the subcontractor from the contractor is only for a portion of the amount payable to the subcontractor in respect of a proper invoice, the subcontractor shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract between them the amount that was ~~also~~ included in the proper invoice and in ~~from~~ the amount paid by the contractor.

**Same**

(3) For the purposes of subsection (2), if more than one subcontractor is entitled to payment, payment shall be made in accordance with the following rules:

1. If the amount not paid by the contractor is specific to work, services or materials supplied by a particular subcontractor or subcontractors, the remaining subcontractors shall be paid, with any amount paid by the contractor in respect of the subcontractor or subcontractors who are implicated in the dispute payable to them on a rateable basis, as applicable.
2. In any other case, subcontractors shall be paid on a rateable basis.

**Non or partial payment, unpaid amount**

(4) Subject to the giving of a notice of non-payment under subsection (6) or (7), if the contractor does not pay some or all of the amount ~~requested for payable to~~ a subcontractor in ~~respect of~~ a proper invoice within the time specified in section 6.5, the subcontractor shall, no later than the date specified in subsection (5), pay each subcontractor who



supplied work, services or materials under a subcontract between them that ~~was~~<sup>are</sup> included in the proper invoice the amount requested for payable to the subcontractor, to the extent that he or she was not paid fully under subsection (2).

#### **Same, payment deadline**

(5) For the purposes of subsection (4), the subcontractor shall pay the amounts no later than,

- (a) seven days after the subcontractor receives payment from the contractor; or
- (b) if no payment is made by the contractor to the subcontractor, 42 days after the proper invoice was given to the owner.

#### **Exception, notice of non-payment if contractor does not pay**

(6) Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (8), the subcontractor required to pay under subsection (4) gives to the other subcontractor, in the prescribed manner,

- (a) a notice of non-payment, in the prescribed form,
  - (i) stating that some or all of the amount requested for payable to the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the contractor,
  - (ii) specifying the amount not being paid, and
  - (iii) unless the failure of the contractor to pay is as a result of non-payment by the owner, providing and the contractor has provided an undertaking to refer the matter to adjudication under this Part 4.4 no later than 21 days after giving the notice to the subcontractor; and
- (b) a copy of any notices of non-payment received by the subcontractor in relation to the proper invoice.

#### **Exception, notice of non-payment if dispute**

(7) A subcontractor who disputes, in whole or in part, the entitlement of another subcontractor to payment of an amount under the subcontract may refuse to pay all or any portion of the amount within the time specified in subsection (1), (2) or (4), as the case may be, if, no later than the date specified in subsection (8), the subcontractor gives to the other subcontractor a notice of non-payment, in the prescribed form and manner, specifying the amount that is not being paid and detailing all of the reasons for non-payment.

#### **Timing of notice**

(8) For the purposes of subsections (6) and (7), the subcontractor must give notice no later than,

- (a) seven days after receiving a notice of non-payment from the contractor under subsection 6.5 (5) or (6); or
- (b) if no notice was given by the contractor, before the expiry of the period referred to in clause (5) (b).

#### **Payment deadline once payment received from contractor**

(9) Subsections (1) and (2) apply, with necessary modifications, in respect of any amount that is the subject of a notice under subsection (6), once the amount is paid by the contractor.

#### **Date proper invoice was given**

(10) On the request of a subcontractor who is required to make payments in accordance with this section, a contractor shall, as soon as possible, provide to the subcontractor confirmation of the date on which the contractor gave a proper invoice to the owner.

#### **Further application**

(11) This section applies, with necessary modifications, in respect of a subcontractor who is entitled to payment in accordance with this section and any amounts payable by that subcontractor to any other subcontractor under a subcontract in respect of the improvement.

#### **Reasons for non-payment**

**6.7** Reasons for non-payment in accordance with this Part may include the retention of amounts ~~under~~<sup>under Part II</sup> section ..... (set-off by trustee) or under Part IV subsection ..... (lien set-off).

#### **No effect on wages**

**6.8** Nothing in this Part in any way reduces, derogates from or alters the obligations of a contractor or subcontractor to pay wages to an employee as provided for by statute, contract or collective bargaining agreement.

## **Interest on late payments**

**6.9** Interest begins to accrue on an amount that is not paid when it is due to be paid under this Part, at the prejudgment interest rate determined under [Part XIV of The Court of Queen's Bench Act subsection 127 \(2\) of the Courts of Justice Act](#) or, if the contract or subcontract specifies a different interest rate for the purpose, the greater of the prejudgment interest rate and the interest rate specified in the contract or subcontract.

## **CONSTRUCTION DISPUTE INTERIM ADJUDICATION**

### **Definitions**

**13.1** In this Part,

“adjudication” means construction dispute interim adjudication under this Part with respect to a matter referred to in section 13.5; (“arbitrage intérimaire”)

“adjudicator” means a person who is qualified by the Authority as an adjudicator; (“arbitre intérimaire”)

“Authority” means the Authorized Nominating Authority designated under section 13.2; (“Autorité”)

“notice of adjudication” means a notice that meets the requirements of section 13.7. (“avis d’arbitrage intérimaire”)

### **Authorized Nominating Authority**

**13.2** (1) The Minister responsible for the administration of this Act may designate an entity to act as Authorized Nominating Authority for the purposes of this Part.

### **Criteria**

(2) An entity may not be designated under subsection (1), or act as Authorized Nominating Authority, unless it meets the prescribed criteria, if any.

### **Duties and powers of Authority**

#### **Duties**

**13.3** (1) The Authority shall,

- (a) develop and oversee programs for the training of persons as adjudicators;
- (b) qualify persons who meet the prescribed requirements as adjudicators;
- (c) establish and maintain a publicly available registry of adjudicators;
- (d) appoint adjudicators for the purposes of subsection 13.9 (5); and
- (e) perform any other duties of the Authority set out in this Part or that may be prescribed for the purposes of this Part.

#### **Powers**

(2) The Authority may,

- (a) subject to the regulations, set fees for the training and qualification of persons as adjudicators and for the appointment of adjudicators, and require their payment; and
- (b) exercise any other power of the Authority set out in this Part or that may be prescribed for the purposes of this Part.

### **Minister as interim Authority**

**13.4** (1) The Minister responsible for the administration of this Act may act as Authorized Nominating Authority in accordance with subsection (2) on an interim basis, for any period during which an entity is not designated under section 13.2.

#### **Same**

- (2) If the Minister responsible for the administration of this Act acts as Authorized Nominating Authority, the Minister,
- (a) shall, subject to subsection (3), perform the duties of the Authority, other than the duty set out in clause 13.3 (1) (a); and
  - (b) may exercise the powers of the Authority, other than the power set out in clause 13.3 (2) (a).

#### **Same**

(3) A duty of the Authority that is set out in the regulations for the purposes of clause 13.3 (1) (e) must only be performed by the Minister if the regulations prescribed for the purposes of this section so provide.

#### **Availability of adjudication**

##### **Contract**

**13.5** (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under [this Part](#) ~~4.1~~.
4. Amounts retained under [Part II](#) section ~~42~~.... (set-off by trustee) or under [Part IV](#) subsection ~~47 (3)~~..... (lien set-off).
5. Payment of a holdback ~~under under~~ [Part IV](#) section ~~26.1 or 26.2~~.
6. Non-payment of holdback under [Part IV](#) section ~~27.1~~.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

##### **Subcontract**

(2) Subject to subsection (3), a party to a subcontract may refer to adjudication a dispute with the other party to the subcontract respecting any of the matters referred to in subsection (1), with necessary modifications.

#### **Expiry of adjudication period**

(3) An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise.

#### **Multiple matters**

(4) An adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise.

#### **Application despite other proceeding**

(5) A party may refer a matter to adjudication under this Part even if the matter is the subject of a court action or of an arbitration under ~~the~~ [The Arbitration Act](#), [1994 S.M. 1997, c. 4](#), unless the action or arbitration has been finally determined.

#### **Adjudication procedures**

**13.6** (1) Subject to subsection (2), an adjudication is subject to the adjudication procedures set out in the contract or subcontract, if they comply with the requirements of this Part.

#### **Same**

(2) If the contract or subcontract does not address adjudication procedures, or if the adjudication procedures set out in the contract or subcontract do not comply with the requirements of this Part, the adjudication is subject to the adjudication procedures set out in this Part and in the regulations.

#### **Notice of adjudication**

**13.7** (1) A party to a contract or subcontract who wishes to refer a dispute to adjudication shall give to the other party a written notice of adjudication that includes,

- (a) the names and addresses of the parties;

- (b) the nature and a brief description of the dispute, including details respecting how and when it arose;
- (c) the nature of the redress sought; and
- (d) the name of a proposed adjudicator to conduct the adjudication.

#### **Copies**

(2) If the regulations so provide, a party who gives notice under subsection (1) shall give a copy of the notice, in the prescribed manner, to the prescribed persons or entities.

#### **Consolidated adjudications**

**13.8** (1) If the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 13.5 (1) and (2), the parties to each of the adjudications may agree to the adjudication of the disputes together by a single adjudicator as a consolidated adjudication.

#### **May be required by contractor**

(2) If the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 13.5 (1) and (2) but the parties to each of the adjudications do not agree to consolidated adjudication, the contractor may, in accordance with the regulations, nevertheless require the consolidation of the adjudications.

#### **Application**

(3) This Part applies with the following and any other necessary modifications to a consolidated adjudication:

1. Subsection 13.10 (3) does not apply, and the adjudicator may determine how the adjudication fee is to be apportioned between the parties.
2. The reference in subsection 13.12 (3) to either or both parties to an adjudication shall be read as a reference to any or all of the parties to the consolidated adjudication.
3. The references in section 13.17 to the other party to the adjudication shall be read as a reference to any party to the consolidated adjudication.

#### **Multiple matters permitted**

(4) This section applies despite subsection 13.5 (4).

#### **Adjudicator**

**13.9** (1) An adjudication may only be conducted by an adjudicator listed in the registry established under clause 13.3 (1) (c).

#### **Selection of adjudicator**

(2) The parties to the adjudication may agree to an adjudicator, or may request that the Authority appoint an adjudicator.

#### **Contract, subcontract may not name adjudicator**

(3) A provision in a contract or subcontract that purports to name a person to act as an adjudicator in the event of an adjudication is of no force or effect.

#### **Requirement to request appointment**

(4) If an adjudicator does not consent to conduct the adjudication within four days after the notice of adjudication is given, the party who gave the notice shall request that the Authority appoint an adjudicator.

#### **Appointment**

(5) The Authority shall appoint an adjudicator, subject to his or her prior consent, to conduct an adjudication no later than seven days after receiving a request for the appointment.

#### **No requirement to act**

(6) Nothing in this Part or the regulations shall be read as requiring an adjudicator to agree to conduct an adjudication or to accept an appointment by the Authority to conduct an adjudication.

**Adjudicator fee**

**13.10** (1) An adjudicator shall be paid a fee for conducting the adjudication, which shall be determined in accordance with subsection (2) before the adjudication commences.

**Fee amount**

(2) The fee payable to an adjudicator is,

- (a) the fee agreed to by the parties to the adjudication and the adjudicator; or
- (b) if the parties and the adjudicator do not agree to a fee amount, the amount determined by the Authority, in accordance with the regulations, if any, on the adjudicator's request.

**Equal apportionment**

(3) The parties to the adjudication shall split payment of the adjudication fee equally, subject to a different determination under section 13.17.

**Documents for adjudication**

**13.11** No later than five days after an adjudicator agrees or is appointed to conduct the adjudication, the party who gave the notice of adjudication shall give to the adjudicator a copy of the notice, together with,

- (a) a copy of the contract or subcontract; and
- (b) any documents the party intends to rely on during the adjudication.

**Conduct of adjudication****Powers of adjudicator**

**13.12** (1) In conducting an adjudication, an adjudicator may exercise the following powers and any other power of an adjudicator that may be specified in the contract or subcontract:

1. Issuing directions respecting the conduct of the adjudication.
2. Taking the initiative in ascertaining the relevant facts and law.
3. Drawing inferences based on the conduct of the parties to adjudication.
4. Subject to subsection (2), conducting an on-site inspection of the improvement that is the subject of the contract or subcontract.
5. Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question.
6. Making a determination in the adjudication.
7. Any other power that may be prescribed.

**On-site inspection**

(2) The exercise of the power to conduct an on-site inspection under paragraph 4 of subsection (1) is subject to the prior consent of,

- (a) the owner of the premises if,
  - (i) the premises is a home in which the owner resides, or
  - (ii) the owner is not a party to the adjudication; and
- (b) any other person who has the legal authority to exclude others from the premises.

**Costs of assistance**

(3) If the adjudicator obtains the assistance of a person under paragraph 5 of subsection (1), the adjudicator may fix the remuneration of the person as is reasonable and proportionate to the dispute and direct payment of the remuneration by either or both of the parties to the adjudication.

## **Conduct**

(4) Subject to this section, the adjudicator may conduct the adjudication in the manner he or she determines appropriate in the circumstances.

## **Impartiality**

(5) An adjudicator shall conduct an adjudication in an impartial manner.

## **~~Statutory Powers Procedure Act~~**

~~(6) The Statutory Powers Procedure Act does not apply to adjudications.~~

## **Determination**

**13.13** (1) Subject to subsection (2), an adjudicator shall make a determination of the matter that is the subject of an adjudication no later than 30 days after receiving the documents required by section 13.11.

## **Extension**

(2) The deadline for an adjudicator's determination may be extended, at any time before its expiry and after the giving of documents to the adjudicator under section 13.11,

- (a) on the adjudicator's request, with the written consent of the parties to the adjudication, for a period of no more than 14 days; or
- (b) on the written agreement of the parties to the adjudication, subject to the adjudicator's consent, for the period specified in the agreement.

## **Notice of extension**

(3) If the party who gave the notice of adjudication also gave a notice of non-payment under [this](#) Part ~~1.4~~ in relation to the matter that is the subject of the adjudication, the party shall give notice of an extension under clause (2) (b), specifying the period of the extension, to the person to whom he or she gave the notice of non-payment.

## **Same**

(4) A person who receives notice of an extension under subsection (3) or under this subsection shall give notice of the extension, specifying the period of the extension, to any person to whom he or she gave notice of non-payment under [this](#) Part ~~1.4~~ in relation to the matter that is the subject of the adjudication.

## **Delayed determination**

(5) A determination made by an adjudicator after the date determined under subsection (1) or (2) is of no force or effect.

## **Written reasons**

(6) The adjudicator's determination shall be in writing and shall include reasons for the determination.

## **Admissibility**

(7) The determination and reasons of an adjudicator are admissible as evidence in court.

## **Termination of adjudication**

**13.14** At any time after the notice of adjudication is given and before the adjudicator makes his or her determination, the parties to the adjudication may agree to terminate the adjudication, on notice to the adjudicator and subject to the payment of the adjudicator's fee.

## **Effect of determination**

**13.15** (1) The determination of a matter by an adjudicator is binding on the parties to the adjudication until a determination of the matter by a court, a determination of the matter by way of an arbitration conducted under ~~the~~ [The Arbitration Act, S.M. 1997, c. 4-1994](#), or a written agreement between the parties respecting the matter.

## **Authority of court, arbitrator**

(2) Subject to section 13.18, nothing in this Part restricts the authority of a court or of an arbitrator acting under ~~the~~ [The Arbitration Act, S.M. 1997, c. 4-1994](#) to consider the merits of a matter determined by an adjudicator.

## **Costs**

**13.16** Subject to section 13.17, the parties to an adjudication shall bear their own costs of the adjudication.

**Frivolous, vexatious, etc.**

**13.17** If an adjudicator determines that a party to the adjudication has acted in respect of the improvement in a manner that is frivolous, vexatious, an abuse of process or other than in good faith, the adjudicator may provide, as part of his or her determination of the matter, that the party be required to pay some or all of the other party's costs, any part of the fee amount determined under section 13.10 that would otherwise be payable by the other party, or both.

**Setting aside on judicial review****Leave required**

**13.18** (1) An application for judicial review of a determination of an adjudicator may only be made with leave of the Divisional Court in accordance with this section and the rules of court.

**Timing**

(2) A motion for leave to bring an application for judicial review of a determination of an adjudicator shall be filed, with proof of service, in accordance with the rules of court no later than 30 days after the determination is communicated to the parties.

**Dismissal without reasons**

(3) A motion for leave to bring an application for judicial review may be dismissed without reasons.

**No appeal**

(4) No appeal lies from an order on a motion for leave to bring an application for judicial review.

**Setting aside only for specified reasons**

(5) The determination of an adjudicator may only be set aside on an application for judicial review if the applicant establishes one or more of the following grounds:

1. The applicant participated in the adjudication while under a legal incapacity.
2. The contract or subcontract is invalid or has ceased to exist.
3. The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication.
4. The adjudication was conducted by someone other than an adjudicator.
5. The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject under this Part, and the failure to comply prejudiced the applicant's right to a fair adjudication.
6. There is a reasonable apprehension of bias on the part of the adjudicator.
7. The determination was made as a result of fraud.

**Amounts paid**

(6) If the [Divisional](#) Court sets aside the decision of an adjudicator, the Court may require that any or all amounts paid in compliance with the determination be returned.

**No stay**

(7) An application for judicial review of a decision of an adjudicator does not operate as a stay of the operation of the determination unless the [Divisional](#) Court orders otherwise.

**Amounts payable****Subject to holdback**

**13.19** (1) A requirement to pay an amount in accordance with this section is subject to any requirement to retain a holdback in accordance with Part IV.

**Enforcement of amounts payable**

(2) A party who is required under the determination of an adjudicator to pay an amount to another person shall pay the amount no later than 10 days after the determination has been communicated to the parties to the adjudication.

**Interest on late payments**

(3) Interest begins to accrue on an amount that is not paid when it is due to be paid under this Part, at the prejudgment interest rate determined under [Part XIV subsection 127\(2\)](#) of ~~the The Courts of Queen's Bench Justice Act~~ [C.C.S.M.](#).

[c. C280](#) or, if the contract or subcontract specifies a different interest rate for the purpose, the greater of the prejudgment interest rate and the interest rate specified in the contract or subcontract.

#### **No interest on interest**

(4) Subsection (3) does not apply in respect of any amount payable under section 6.9.

#### **Suspension of work**

(5) If an amount payable to a contractor or subcontractor under a determination is not paid by the party when it is due under this section, the contractor or subcontractor may suspend further work under the contract or subcontract until the party pays the following amounts:

1. The amount required to be paid under the determination.
2. Any interest accrued on that amount under subsection (3).
3. Any reasonable costs incurred by the contractor or subcontractor as a result of the suspension of work.

#### **Same, costs of resumption**

(6) A contractor or subcontractor who suspends work under subsection (5) is entitled to payment, by the party, of any reasonable costs incurred by him or her as a result of the resumption of work following the payment of the amounts referred to in that subsection.

#### **Enforcement by court**

**13.20** (1) A party to an adjudication may, no later than the date referred to in subsection (2), file a certified copy of the determination of an adjudicator with the court and, on filing, the determination is enforceable as if it were an order of the court.

#### **Deadline**

(2) The filing of a determination under subsection (1) may not be made after the later of,

- (a) the second anniversary of the communication of the determination to the parties; and
- (b) if a party makes a motion under section 13.18 for leave to bring an application for judicial review of a determination of an adjudicator, the second anniversary of the dismissal of the motion or, if the motion was not dismissed, the final determination of the application, if it did not result in the adjudicator's determination being set aside.

#### **Notice of filing**

(3) A party shall, no later than 10 days after filing a determination under subsection (1), notify the other party of the filing.

#### **Effect on requirement to make payments**

(4) If a determination requiring that an amount be paid to a contractor or subcontractor is filed under subsection (1), any related requirement of the contractor or subcontractor, as the case may be, to make payment to a subcontractor is deferred pending the outcome of the enforcement.

#### **Immunity**

**13.21** No action or other proceeding shall be commenced against an adjudicator or his or her employees for any act done in good faith in the execution or intended execution of any duty or power under this Part or the regulations, or for any alleged neglect or default in the execution in good faith of that duty or power.

#### **Testimonial immunity**

**13.22** An adjudicator shall not be compelled to give evidence in any action or other proceeding in respect of a matter that was the subject of an adjudication that he or she conducted.

#### **Application of Part to surety bonds (Part [XI.4 V](#))**

**13.23** If the regulations so provide, this Part applies, with such modifications as the regulations specify, to disputes in respect of such surety bonds to which Part [V XI.4](#) applies as are specified by the regulations.



## **PART IV – CONSTRUCTION LIEN**

### ORIGIN AND NATURE OF LIEN

#### **Purpose of lien remedy**

#----- This Part IV provides a time-limited statutory right whereby the unproven claim of a contractor or sub-contractor for the value of work, services or materials provided from time to time under a contract or sub-contract to improve the value of an owner's land, may become a fixed charge against the owner's estate in the land, against holdback retained and against amounts then payable and thereby at least temporarily 'stay the hand of the paymaster' whereafter procedures are provided to vacate such fixed charges, to restore orderly payment processes on continuing construction projects and allow each claimant to proceed to prove and enforce its unresolved lien claim by further legal action.

#### **Creation of lien**

**13 (1)** Any person who does any work or provides any services or supplies any materials to be used

—(a) ~~does any work; or~~

(b) ~~provides any services; or~~

(c) ~~supplies any materials to be used;~~

in performance of a contract or sub-contract for any owner, contractor or sub-contractor has, by virtue thereof, a lien for the value of the work, services or materials which, subject to section 16, attaches upon the estate or interest of the owner in the land or structure upon or in respect of which the work was done or the services were provided or the materials were supplied, and the land occupied thereby or enjoyed therewith.

#### **Lienholders c Charge on holdback**

**26 / 13(2)** Each lienholder who has a lien arising under a contract or sub-contract has a charge upon that part of the holdback to which the person through whom the lien is derived is entitled.

#### **Value of lien claim**

**13(3)** The value of a lien at a given point in time includes the amount then due or reasonably expected by the claimant to become due under its contract or sub-contract for work done, services provided and materials supplied, and shall not include claims respecting indirect damages suffered such as head office overhead costs, lost profit, lost opportunity or lost productivity.

#### **Liability for grossly exaggerated claims**

**40 (1)** In addition to any other ground on which he may be liable, any person who registers or gives written notice of a claim for lien

(a) for an amount grossly in excess of the amount due to him or which he reasonably expects to become due to him; or

(b) where he knows or ought to know that he does not have a lien;

is liable to any person who suffers damage as a result unless he satisfies the court that the registration or written notice given of the claim for lien was made, and the amount for which the lien was claimed was calculated, in good faith and without negligence.

#### **Vacation or reduction of lien amount**

**(2)** In the circumstances described in sub-section (1), having found that the lien claimant acted in bad faith, the court may, on application or within an action, order either that the lien be wholly vacated or reduced by the exaggerated amount.

#### **Small liens—Minimum value of lien claims**

**14** No ~~effective notice of a claim for~~ lien ~~may be served or registered for an amount less than \$2,000. exists under this Act for a claim of less than \$300.~~

#### **Commencement of lien**

**15** As against owners, chargees or mortgagees under or through instruments, registered or unregistered, a lien, upon registration as hereinafter provided, arises and takes effect from the date of the commencement of the work or services or from the date the materials were first supplied.

#### **Liens against Crown, ~~etc.~~ Crown agency or municipality**

**16 (1)** Where the owner of the land or structure upon or in respect of which any work is done, or services are provided, or materials are supplied, is the Crown, a Crown agency, or a municipality, the lien created by section 13 does not attach to the interest of the Crown, the Crown agency or the municipality, in the land or structure but constitutes a charge on

- (a) amounts required to be retained ~~as holdback~~ under section 24; and
- (b) ~~Charge on further amounts payable by Crown or municipality 27(7) — Where a lien does not attach to land by reason of section 16, and a person claiming the lien gives to the owner or the contractor or a sub-contractor notice in writing of the lien, the owner, contractor or sub-contractor so notified shall retain out of~~ amounts payable to the contractor or sub-contractor under whom the lien is derived

up ~~an amount equal~~ to the amount claimed in the notice.

#### **Written notice required**

**16(2)** ~~s~~Subject to section 45, this Act applies to lien claims under subsection (1), with such modifications as the circumstances require, and shall be construed to have effect in the enforcement of the charge on the amounts retained without the requirement of registration of the ~~lien or a~~ claim for lien against title to the land or structure.

#### **Disposition by owner of such notices given**

**16(3)** Upon being given a written notice of claim for lien under section 45, the owner shall retain amounts charged up to the amount claimed in the notice pending the earlier of withdrawal of the notice under section ..... on terms agreed or vacation of a disputed lien under section 55.

#### **Where materials incorporated**

**17** ~~Notwithstanding the materials supplied to be used in the performance of a contract or sub-contract have not been supplied in strict accordance with subsection 2(3), if the materials are incorporated or used in the construction or the improvement of land to which the contract or sub-contract relates, subject to section 16, the lien created under section 13 attaches to the land or structure.~~

#### **Limit of owner's liability**

**22(1)** Subject to subsection 27(2), a lien does not attach so as to make an owner liable for a greater amount than the amount payable by the owner to the contractor.

#### **Liability of municipality with respect to certain roads, etc.**

**22(2)** Notwithstanding subsection (1), where land is dedicated as a public road, roadbed, lane or sidewalk, and an improvement is made to the public road, roadbed, lane or sidewalk at the request of, or under agreement with, a municipality, and

- (a) to the specifications of the municipality; or
- (b) under the supervision of the municipality; but not at the expense of the municipality, the municipality is, nevertheless, on default of payment by the proper payer, liable to the value of the holdbacks required under section 24 that would have been required if the improvement had been made at the expense of the municipality.

#### **Limit of lien ~~claimed~~ recoverable by person other than contractor**

**23** Subject to subsection 27(2), where a lien is claimed by a person other than a contractor, the amount that may be ~~claimed recovered in respect thereof~~ is limited to the amount payable to the contractor or sub-contractor or other person for whom the lienholder did work, provided services or supplied the materials.

#### Set –off against lien claim – determining ‘amount payable’

~~#-----~~ Subject to section 27(6), in determining the amount payable under a lien, there may be taken into account the amount that is, as between a payor and the person the payor is liable to pay, equal to the balance in the payor's favour of all outstanding debts, claims or damages related to the project, or, if the contractor or sub-contractor payee becomes insolvent, all outstanding debts, claims or damages whether or not related to the project.

#### **Where estate attached is leasehold**

**18(1)** Where the estate or interest of the owner upon which the lien attaches is a leasehold estate or interest, the estate or interest of that owner's landlord and, where the estate or interest of the owner's landlord is leasehold, the estate in fee simple, as well are subject to the lien if

- (a) the person entitled to the estate in fee simple or the owner's landlord, or both, consented to the work, services or materials giving rise to the lien being done, provided or supplied, and the work, services or materials giving rise to the lien were done, provided or supplied for the direct benefit of the person entitled to the estate in fee simple or the owner's landlord; or
- (b) the owner is required, by his lease or other agreement with his landlord, or other person entitled to the estate in fee simple to do the work, provide the services, or supply the materials giving rise to the lien; and
- (c) the claim for lien or written notice of claim for lien against the leasehold estate shall, as the case may be, be registered or given in accordance with the requirements of this Act which apply to the fee simple estate of the project lands.

#### **Limit of ~~lien~~ landlord liability**

**18(2)** A lien created under subsection (1) on the estate or interest of an owner's landlord, or on an estate in fee simple is limited to, and does not attach so as to make the owner's landlord or the holder of the estate in fee simple liable for more than the value of the holdbacks that the owner was required to make.

#### **Forfeiture or termination of lease, effect of**

**18(3)** ~~Where the estate or interest of the owner upon which a lien attaches is leasehold, no forfeiture of a lease to, or cancellation, or attempted forfeiture or cancellation, termination of the lease by, on the part of the owner's landlord, except for non-payment of rent, deprives the any person entitled to the lien against the leasehold estate of the benefit of the person's lien, and the person entitled to the lien may pay any rent accruing after he becomes entitled to the lien and the amount so paid may be added to his claim for lien but that part of the claim for lien represented by moneys paid by him for rent accruing is limited to the leasehold estate or interest of the owner and does not create any addition to the claim for lien against the estate or interest of the owner's landlord or against the estate in fee simple.~~ No forfeiture of a lease to, or cancellation, or attempted forfeiture or cancellation, termination of the lease by, on the part of the owner's landlord, except for non-payment of rent, deprives the any person entitled to the lien against the leasehold estate of the benefit of the person's lien, and the person entitled to the lien may pay any rent accruing after he becomes entitled to the lien and the amount so paid may be added to his claim for lien but that part of the claim for lien represented by moneys paid by him for rent accruing is limited to the leasehold estate or interest of the owner and does not create any addition to the claim for lien against the estate or interest of the owner's landlord or against the estate in fee simple.

#### **Notice to lien claimants**

**18(4)** Where a landlord intends to enforce forfeiture or terminate a lease because of non-payment of rent, and there is a claim for lien registered against the leasehold estate in the proper land registry office or a written notice of claim for lien has been given under section 45, the landlord shall give notice in writing of the intention to enforce forfeiture or terminate the lease and of the amount of the unpaid rent to each person who has registered a claim for lien against the leasehold interest.

#### **Payment of unpaid rent**

**18(5)** A person receiving notice under subsection (4) may, within ten days thereafter, pay to the landlord the amount of the unpaid rent, and the amount so paid may be added by that person to the person's claim for lien against the leasehold estate.

#### **Application of this section by analogy**

**18(6)** Where a fee simple holder has conferred an estate or interest in project lands on an owner who has made an improvement giving rise to lien rights, provisions of sub-sections 18(1) through 18(5) shall apply, as appropriate, by analogy.

## TRANSMISSION OF LIEN

### Death of lienholder

**53** Where a lienholder dies, his right of lien survives in his personal representative.

### Assignment of lien

**54(1)** The rights of a lienholder may be assigned by an instrument in writing.

### Assignee registering lien

**54(2)** Where a lien right is assigned before registration or a written notice being given, the assignee may register or give written notice of the claim for lien.

### Assignee registering assignment

**54(3)** Where a lien right is assigned after registration or a written notice has been given, the assignee may register the assignment thereof in the registry office in which the claim for lien was registered or provide a copy of the assignment to the owner of the lands in accordance with section 45.

## PRIORITIES

### Prior encumbrances, ~~etc.~~

**20(1)** If the land upon or in respect of which work is done, services are provided or materials are supplied, is encumbered by an encumbrance existing or created before the commencement of the construction or improvement ~~in respect of which the work is done, the services are provided or the materials are supplied,~~ the encumbrance has priority over a lien arising under this Act to the extent of the actual value of the land at the time of the commencement of the construction or improvement. ~~in respect of which the work is done, the services are provided or the materials are supplied.~~

### Future advances

**20(2)** A mortgage or charge against land which existed or was created before ~~a lien right arose work, services or material giving rise to a lien~~ upon the land ~~were begun or begun to be supplied,~~ may, subject to section 31, secure future advances.

### Insurance moneys when lien attaches

**21** Where a structure ~~subject to upon which~~ a lien ~~has been created~~ is wholly or partly destroyed by fire or other peril, any money received, by reason of any insurance on the structure, by the owner or prior encumbrancer takes the place of the structure so destroyed and is, after satisfying any prior encumbrance to the extent necessary to give effect to the priority established under section 20, subject to the claims of all lien holders to the limit of their proven interest in the land with any balance remaining available for trust claims persons for liens to the same extent as if the moneys were realized by the sale of the land in an action to enforce the liens.

### Priority of lien

**31** A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments duly made to trust claimants under Part II or on account of a conveyance or mortgage before registration of a claim for lien, have priority over the lien.

### Agreements for purchase

**32** Where the purchase money under an agreement for the purchase of land, or part thereof, is unpaid and no conveyance has been made to the purchaser, the purchaser shall, for the purposes of this Act, be conclusively deemed to be a mortgagor and the seller to be a mortgagee of the land to the extent of the unpaid portion of the purchase money.

### Priority among lienholders

**33** Subject to ~~section 34 and~~ subsections ~~35(3) and~~ 56(1),

- (a) no person ~~entitled to who has a registered~~ a lien on land or ~~has given notice under section 45 as to~~ a charge on moneys under this Act is entitled to any priority or preference over another person ~~likewise~~ entitled to a lien on that land or to a charge on those moneys under this Act;
- (b) all ~~such~~ lienholders rank ~~proportionately pari-passu without preference~~ for the amounts of their several liens; and
- (c) the proceeds of any sale shall be distributed as may be directed by the court.

#### **Liens for wages**

~~34(1) — Every worker who has a lien for wages for work done or services provided under a contract or sub-contract has, to the extent of 40 days wages, priority over all liens that are not for wages and that are derived through the same contractor or sub-contractor to the extent of, and on, the holdback and to which the contractor or sub-contractor through whom the lien is derived is entitled and all workers whose liens have priority under this section rank pari passu for the amounts of their several liens.~~

#### **Enforcing lien for wages when contract not fulfilled**

~~34(2) — Every worker is entitled to enforce a lien in respect of a contract or sub-contract not completely fulfilled and, notwithstanding anything in this Act to the contrary, may serve a notice of motion on the proper persons, returnable in four days after service before a judge asking for judgment on his claim or lien, particulars of which shall accompany the notice of motion, duly verified by affidavit.~~

#### **Calculating percentage in certain cases**

~~34(3) — Where the contract or sub-contract has not been completely fulfilled when a lien is claimed by a worker, the holdback shall be calculated on the work done, the services provided or the materials supplied by the contractor or sub-contractor by whom the worker was employed.~~

#### **Devices to defeat priority**

~~34(4) — Every device adopted by an owner, contractor or sub-contractor to defeat or which, if valid, would defeat the priority given under this section to workers for their wages is, as against those workers, void.~~

#### **Removal of materials during lien**

**35(1)** During the continuance of a lien, no portion of the materials affected by it shall be removed from any supply location contemplated by section 2(3) to the prejudice of the lien claimant and any attempts at such removal may be restrained on application of by a judge.

#### **Costs**

**35(2)** A judge to whom an application is made under subsection (1) may make such order as to costs of, and incidental to, the application and order as he deems just.

#### **Certain materials may not be subject to exempt from execution**

**35(3)** Where any materials ~~are actually placed and furnished to be used in the performance of a contract or sub-contract the materials have been supplied in accordance with section 2(3), and remain — are~~ subject to a lien in favour of the person supplying them, ~~whether they have been until~~ incorporated in the structure or land under the contract or not, a judge may find such materials to be exempt from execution by others.

#### **Lienholder a purchaser pro tanto**

**42** Where a claim for lien is registered, the person entitled to the lien shall be deemed a purchaser pro tanto, and within the provisions of *The Registry Act* but, except as otherwise provided in this Act, *The Registry Act* does not apply to a lien.

#### **Certain acts not prejudicial to lien**

**57(1)** A registered claim for lien or a notice of lien is not merged, discharged, paid, satisfied, prejudiced or destroyed by

- (a) the taking of any security for the claim; or

- (b) the acceptance of any promissory note for the claim; or
- (c) the taking of any other acknowledgement of the claim; or
- (d) the giving or extending of time for payment of the claim; or
- (e) the taking of any proceedings for recovery of the claim; or
- (f) the recovery of any personal judgment for the claim;

unless the lienholder agrees in writing that it shall have that effect.

#### **Dealing with promissory note**

~~57(2) — Subject to subsections (3) and (4), the discounting or negotiation of a promissory note or other security taken or accepted for a claim for lien does not waive, pay, satisfy, prejudice or destroy the lien but the lienholder taking or accepting the promissory note or other security shall retain his lien for the benefit of the holder of the promissory note or other security.~~

#### **Action to be begun**

~~57(3) — A person who has given or extended time for payment of any claim for which he has a lien shall, in order to obtain the benefit of this section, commence an action to enforce the lien within the time limited by this Act, and register a pending litigation order as required by this Act but no further proceedings shall be taken in the action until the expiration of time for payment of the claim.~~

#### **Proving claim in another action**

~~57(4) — Notwithstanding that a person has given or extended time for payment of any claim for which he has a lien, he may, where an action is commenced by another person to enforce a lien against the same land, prove and obtain payment of his claim in the action as if no time had been given for payment of the claim.~~

### HOLDBACKS

#### **Holdback prior to substantial performance**

**24(1)** The person primarily liable for payment under a contract under or by virtue of which a lien may arise shall, as the work is done or the services are provided or the materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the contract, and retain that amount for at least 40 60 days after

- (a) a certificate of substantial performance is given under section 46; or
- (b) the contract has been terminated in writing; or
- (c) work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied; or
- (d) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, so that the total holdback shall be equal to 7.5% of the contract price for the whole contract, or if there is no specific contract price, 7.5% of the total value of the work, services and materials done, provided or supplied in the performance of the contract.

#### **Holdback after substantial performance**

**24(2)** Upon substantial performance of a contract, the person primarily liable for payment under the contract under which there remains work or services to be done or materials to be supplied and under or by virtue of which a lien may arise, shall, as the remaining work is done or the remaining services are provided or the remaining materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the remaining work, services or materials, and retain that amount for at least 40 60 days after

- (a) ~~(a)~~ the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;

- (b) The contract has been [terminated in writing](#); or
- (c) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, so that the total holdback for the work, services and materials remaining to be done, provided or supplied, as the same are actually done, provided or supplied shall be 7.5% of the value thereof calculated,

- (d) as the amount that bears the same proportion to the total contract price for the contract that the work, services and materials remaining to be done, provided or supplied bears to the total work, services and materials to be done, provided or supplied under the contract; or
- (e) if there is no specific contract price, on the basis of the actual value of the work, services and materials remaining to be done, provided or supplied.

#### **Payment into holdback account**

~~24(3) Where the total price of work to be done, services to be provided and materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section, or, if there is no specific contract price, the actual value of the work to be done, the services to be provided and the materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section, the owner shall, as the work is done, the services provided and the materials supplied under the contract, pay the holdback into a holdback account to earn interest at a commercially reasonable rate.~~

#### **Payments into holdback account on order of judge**

~~24(4) Where the price of the work to be done, the services to be provided and the materials to be supplied under a contract is the amount prescribed in the regulations for the purpose of this section or less, or if there is no specific contract price, the actual value of the work to be done, services to be provided and materials to be supplied under a contract is the amount prescribed in the regulations for the purpose of this section or less, a judge may, upon application of the contractor or any person who has a right of lien derived under the contract, order the owner to pay the holdback into a holdback account together with such interest as should by then have accrued at the rate prescribed for holdback accounts in the regulations.~~

#### **Order to pay into holdback account**

~~24(5) Where an owner fails to pay money into a holdback account as required under subsection (3), a judge shall, upon the application of the contractor or any person who has a right of lien derived under the contract, order the owner to pay into a holdback account the holdback, together with interest thereon at the rate prescribed for the purposes of subsection (6) calculated from the date the owner should have paid the holdback into a holdback account in compliance with subsection (3).~~

#### **Holdback under Crown contracts etc.**

~~24(6) Where the owner of the land or structure upon or in respect of which the work is done, the services are provided or the materials are supplied, is the Crown, a Crown agency or a municipality, subsections (3), (4) and (5) do not apply but, where the total price of the work to be done, services to be provided and materials to be supplied under the contract exceeds the amount prescribed in the regulations for the purposes of this section, or, if there is no specific contract price, the actual value of the work to be done, the services to be provided and the materials to be supplied under the contract exceeds the amount prescribed in the regulations for the purposes of this section, the Crown, the Crown agency or the municipality, as the case may be, shall pay interest on the holdback required under subsection (1) or (2) calculated from the day on which the payment was made of the amount from which the holdback was required to be held back to the date the holdback is actually paid at a rate, and compounded, as prescribed in the regulations.~~

#### **When holdback may be reduced**

**25(1)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 24(1) and ~~40~~ 60 days have expired after

- (a) a certificate of substantial performance of the contract has been given under section 46; or
- (b) the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;
- (c) the [contract has been terminated in writing](#); or



- (d) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, the holdback under subsection 24(1) shall be reduced

- (e) by 7.5% of the contract price for the contract less the amount of the holdback required under subsection 24(2) and less the aggregate of payments made under subsection (2); or
- (f) if there is no specific contract price for the contract, by 7.5% of the value of the work done, the services provided and the materials supplied under the contract, less the amount of the holdback required under subsection 24(2) and less the amount of the aggregate of payments made under subsection (2);

plus the pro rata share of ~~any accrued~~ interest ~~on~~ the holdback account applicable to the amount by which the holdback is reduced but this subsection does not apply while the registration of a lien arising under the contract continues in effect under section 49.

#### **Reduction of holdback on substantial performance of sub-contract**

**25(2)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 24(1) and ~~40~~ 60 days have expired after

- (a) a certificate of substantial performance of a sub-contract under the contract has been given under subsection (5), (6) or (7);
- (b) ~~the~~ work to be done under the sub-contract has been completed, the services to be provided under the sub-contract have been completely provided and the materials to be supplied under the sub-contract have been completely supplied;
- (c) the contract or sub-contract has been terminated in writing; or
- (d) the work to be done under the sub-contract, the services to be provided under the sub-contract and the supplying of materials to be supplied under the sub-contract have been abandoned;

whichever first occurs, the holdback under subsection 24(1) shall be reduced

- (e) by 7.5% of the contract price for the sub-contract, less the amount of the holdback required under subsection 24(2) applicable to the sub-contract; or
- (f) if there is no specific contract price for the sub-contract by 7.5% of the value of the work done, the services provided and the materials supplied under the sub-contract, less the amount of the holdback required under subsection 24(2);

plus the pro rata share of ~~any accrued~~ interest ~~on~~ the holdback account applicable to the amount by which the holdback is being reduced, but this subsection does not apply while the registration of any lien arising under the sub-contract continues in effect under section 49.

#### **Payment of holdback under subsection 24(2)**

**25(3)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 24(2) and ~~40~~ 60 days have expired after

- (a) ~~(a)~~ the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;
- (b) The contract has been terminated in writing; or
- (c) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, the holdback plus ~~any accrued~~ interest ~~on~~ the holdback account, remaining after any payments made under subsection (4), may be paid out in accordance with the contract, but this subsection does not apply while the registration of a lien arising out of the contract continues in effect under section 49.

#### **Payment of holdback under subsection 24(2) respecting sub-contract**

**25(4)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 24(2) and ~~40~~ 60 days have expired after



- (a) the work to be done under a sub-contract under the contract has been completed, the services to be provided under the sub-contract have been completely provided and the materials to be supplied under the sub-contract have been completely supplied;
- (b) The contract or sub-contract has been terminated in writing; or
- (c) the work to be done under the sub-contract, the services to be provided under the sub-contract and the supplying of materials to be supplied under the sub-contract have been abandoned;

whichever first occurs, the holdback may be reduced

- (d) by 7.5% of the contract price for the sub-contract; or
- (e) if there is no specific contract price for the sub-contract, by 7.5% of the value of the work done, the services provided and the materials supplied under the sub-contract;

plus the pro rata share of any accrued interest on the holdback account applicable to the sub-contract, but this subsection does not apply while the registration of a lien arising under the sub-contract continues in effect under section 49.

#### **Payment certifiers certificate as to of substantial performance of sub-contract and publication**

**25(5)** Where a contract requires a payment to be made upon a certificate of a payment certifier, the payment certifier, upon application by a sub-contractor with respect to a sub-contract and upon being satisfied that the sub-contract has been substantially performed, shall, within seven days after he receives the application or after the sub-contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed Form 8 of the Schedule to the sub-contractor, the contractor and the owner and the payment certifier shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed.

#### **Certificate and publication where no payment certifier**

**25(6)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, the contractor, upon application by a sub-contractor with respect to a sub-contract and upon being satisfied that the sub-contract has been substantially performed, shall, within seven days after he receives the application or after the sub-contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed Form 8 of the Schedule to the sub-contractor and the owner and the contractor shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed.

#### **Certificate of substantial performance and publication by sub-contractor**

**25(7)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, any sub-contractor under that contract on request of any of his sub-contractors shall, within seven days after he receives the application or after the sub-contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed Form 8 in the Schedule to the contractor and the owner and the issuing sub-contractor shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed.

#### **Judge's order for certificate and publication**

**25(8)** Where a person required to give a certificate of substantial performance under subsection (5), (6) or (7) fails or refuses to do so, the sub-contractor who has applied for the certificate or any person entitled to a lien in respect of work done, services provided or materials supplied under the sub-contract of the sub-contractor may apply to a judge who, upon being satisfied that the sub-contract has been substantially performed and that the certificate of substantial performance of the sub-contract should have been given, may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the sub-contract has been substantially performed, and the order has the same force and effect as if a certificate of substantial performance of the sub-contract had been issued under subsection (5), (6) or (7) as the case may be and the applicant shall publish notice of the effect of the order issued within two business days at the location and in the manner prescribed.

#### **Interest payable to sub-contractor**

**25(9)** Where, under subsection (1), (2), (3) or (4), a holdback under a contract is reduced or paid out and the reduction or payment out includes accrued interest in the holdback account or pro rata share thereof, any sub-contractors who are entitled under sub-contracts to payment from the holdback or from the amount by which the holdback is reduced are entitled also to a pro rata share of the accrued interest on the holdback account.

### Release of holdback on annual basis

**26.1 (1)** Notwithstanding standard holdback release requirements set out in section 24 and section 25, if the conditions in subsection (2) are met, the owner a-payer may make payment of the accrued holdback ~~he or she is required to retain~~ under subsection 24 (1) together with interest on an annual basis, for work, services or materials provided supplied during the applicable annual period.

#### **Conditions**

(2) Subsection (1) applies if,

- (a) the contract provides for a completion schedule that is longer than eighteen months ~~one year~~;
- (b) the contract provides for the payment of accrued holdback on an annual basis;
- (c) ~~the contract price at the time the contract is entered into exceeds the prescribed amount; the contractor publishes notice of the annual payment/holdback release date in the manner prescribed at least 60 days prior to the release date; and~~
- (d) as of the applicable payment date,
  - ~~— (i) there are no liens registered nor any notices of claim for lien in effect preserved or perfected liens in respect of under the contract, ~~or~~~~
  - (ii) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act.

### Release of holdback on a phased basis

**26.2 (1)** Notwithstanding standard holdback release requirements set out in section 24 and section 25, if the conditions in subsection (2) are met, the owner a-payer may make payment of the accrued holdback ~~he or she is required to retain~~ under subsection 24 (1) together with interest on the completion of phases of an improvement, in relation to the work, services or materials ~~supplied provided~~ during each phase.

#### **Conditions**

(2) Subsection (1) applies if,

- (a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;
- ~~—~~ (b) the contract price at the time the contract is entered into exceeds the prescribed amount;
- (c) the contractor publishes notice of the expected holdback release dates in the manner prescribed at least 60 days prior to each such date; and
- (d) as of the applicable payment date,
  - (i) there are no ~~preserved or perfected~~ liens registered nor any notices of claim for lien in effect under in respect of the contract, ~~or~~
  - ~~(ii) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act.~~

### **Effect of payments made with holdback**

**27(1)** Where the person primarily liable for payment under a contract has deducted and retained the holdback in accordance with this Act, all payments under the contract in excess of the holdback, made in good faith by the person primarily liable for the payment, before the registration of a lien by a person claiming a lien as against the owner, and payments permitted under ~~section~~ sections 25, 26.1 and 26.2, operate as a discharge of the lien to that extent.

### **Effect of payments without holdback**

**27(2)** Where the person primarily liable for payment under a contract has not deducted and retained the holdback in accordance with this Act, all payments under the contract made in good faith by the person primarily liable for the payment, before the registration of a lien or the giving of notice under section 45 by a person claiming a lien as against the owner, operate as a discharge of the lien, but only to the extent of the amount of the payment in excess of the holdback which should have been deducted and retained, and the person primarily liable for the payment continues to be liable to the lienholder for the amount which should have been deducted and retained as holdback in respect of the contract.

### **Payment of holdback where no liens**

**27(3)** Payment of the holdback retained under this Act in respect of a contract may be validly made after the expiration of 40- 60 days mentioned in subsection 24(1) or (2), in section 26.1 for annual release, and in section 26.2 for phased

~~release as the case may be~~ if, at the time the holdback is paid, there are no liens registered against the land or in effect under a notice of claim for lien on the project to which the contract relates.

#### **Payment of holdback where liens are registered or in effect under a notice**

**27(4)** Where, on the expiration of the 49 60 days mentioned in subsection 24(1) or (2), ~~or when holdback is due for release under section 26.1 or section 26.2,~~ as the case may be, there are liens registered against the land to which a contract relates, or a notice of claim for lien has been given and is in effect under section 45, the holdback retained under this Act in respect of the contract may be validly paid for the purpose of obtaining discharges of all of those registered liens unless before the payment of the holdback an action has been commenced under this Act to enforce one or more of those liens.

#### **Liability of corporation directors**

**27(5)** Where the person primarily liable for payment under a contract is a corporation, and that person makes payment under the contract without deducting and retaining the holdback in accordance with this Act, if the corporation is unable to satisfy the liability under subsection (2), the directors and officers of the corporation who knowingly assented or acquiesced in the failure to deduct or retain the holdback are jointly and severally liable for the amount for which the corporation is liable under subsection (2) and which the corporation fails to satisfy.

#### **Where holdback not to be applied**

**27(6)** Where the contractor or sub-contractor defaults in performing his contract or sub-contract, the holdback shall not, as against the lien claimant who by virtue of section 26 13(2) has a charge thereon, be subject to set-off or be applied by the owner or contractor

- (a) to complete the contract or sub-contract; or
- (b) in payment of damages for non completion of the contract or sub-contract by the contractor or sub-contractor; or
- (c) in payment or satisfaction of any claim against the contractor or sub-contractor; or
- (d) for any other purpose to remedy the default.

#### **Interest required on holdback account**

**28** ~~Nothing in this Act obliges an owner or a contractor to obtain a higher interest rate for sums deposited in a holdback account than the rates prevailing and offered by the bank, trust company or credit union in which the holdback account is opened. Whether the holdback has been deposited and interest has accrued in a holdback account or not, the owner shall be liable to pay interest on all holdback at the greater of that which has actually accrued and that calculated at the rate and compounded as prescribed by regulation.~~

#### **~~Payments in good faith without notice of lien~~ Direct payment made on account**

**30(1)** Where no registered lien or notice of claim given under section 45(2) is in effect, and holdback is retained in accordance with section 24, an owner or a contractor may choose, in good faith, to make a direct payments to a person entitled to payment on its account under a sub-contract for work, services or materials provided to the improvement.

#### **Notice required for credit to result**

**30(2)** Where a direct payment is made under subsection (1),

referred to in section 13 for or on account of a debt justly due to the person for work done, services provided or materials supplied to be used as mentioned in section 13, and within three days afterwards the payor gives, by letter or otherwise, written notice to the contractor or sub-contractor contractually bound to make payment to the payee, then the direct payment shall be accounted for

- (a) to discharge the payor's trust obligations to that extent under Part II- Trust Code; and
- (b) the value of all affected lien claims under this Part shall be reduced by the amount of the direct payment made.

~~his agent, or to the sub-contractor or his agent, as the case may be, written notice of the payments, the payments shall, as between the owner and the contractor or as between the contractor and the sub-contractor, as the case may be, be conclusively deemed to be payments to the contractor or sub-contractor, as the case may be, on his contract or sub-contract generally, but not so as to reduce the amount required to be retained by the owner under section 24.~~

## REGISTRATION OF LIEN AGAINST LAND

### **Registration**

**37(1)** Upon presentation of a claim for lien at a registry office for the land titles district in which the land against which the lien is claimed is situated, and upon payment of the fee prescribed for registration, the registrar shall, if the claim for lien conforms with the appropriate form and with section 38, register the claim for lien so that it appears as an encumbrance against the land described in the claim for lien.

### **Registration of two copies of claim**

**37(2)** Where a part of the land subject to a lien is under *The Real Property Act* and a part is under *The Registry Act*, two copies of the claim for lien may be registered but if only one copy is registered, the person claiming the lien shall cause to be endorsed on the copy a notation showing whether it is to be registered under *The Real Property Act*, or *The Registry Act*, and it shall be registered accordingly.

### **Registration under both systems**

**37(3)** Where two copies of a claim for lien are registered in a land titles office, one shall be registered under *The Real Property Act* and one under *The Registry Act*, and that part of the land described in each copy which falls either under *The Real Property Act* or under *The Registry Act* shall be affected by the claim for lien.

### **Lien on mineral location for mining**

**37(4)** Where a claim for a lien is made upon a mineral location as defined in *The Mines and Minerals Act*, in respect of which the Crown has given to any person a disposition of mineral rights other than oil and natural gas rights, and for which no certificate of title has been issued under *The Real Property Act* and no grant has been registered under *The Registry Act*, the claim for lien and any pending litigation order, judgment, order or other document issued from the court in respect thereof, and any other document relating thereto, shall be registered in the office of the recorder of the mining district in which the land is situated.

### **Registration of claim document re disposition**

**37(5)** Where a claim for lien is made upon a disposition under *The Oil and Gas Act* of oil, gas, helium or oil shale rights owned by the Crown, the claim for lien, any judgment, pending litigation order or other order or document issued from the court in respect of the claim, and any other document relating to the claim, shall be registered in the office of the registrar under *The Oil and Gas Act*.

### **Registration in respect of Crown lands**

**37(6)** Where a claim for lien is made upon an interest or estate which entitles a person to use or occupy and make improvements on Crown land that is not a mineral location, if no fee simple grant of the land has been made by the Crown, the claim for lien and any pending litigation order, judgment, order or other document issued from a court in respect thereof, and any other document relating thereto shall be registered in the office of the director of Crown lands.

### **Contents of claim for lien form**

**38(1)** A claim for lien shall state

- (a) ~~(a) the name and residence address~~ of the person claiming the lien;
- (b) ~~the name and address and of each person alleged to be an owner of the project lands with direction as to which said interests are to be charged with the lien, clearly identifying the nature of the estate or interest held by each alleged owner; the owner of the land to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land to be charged); and~~
- (c) ~~the of the person for whom and upon whose credit the contract or sub-contract was performed ;work was or is to be done, the services were or are to be provided or the materials were or are to be supplied;~~
- (d) the time or period within which the work was ~~or is to be~~ done, the services were ~~or are to be~~ provided or the materials were ~~or are to be~~ supplied;
- (e) a short description of the work done ~~or to be done~~ or the services provided or ~~to be provided~~ or the materials supplied ~~or to be supplied~~;

- (f) the sum claimed as due or reasonably expected by the claimant to become due;
- (g) a description of the land and of any leasehold or other interest to be charged, sufficient for the purpose of registration; ~~and~~
- (f) ~~where credit has been given by the lien claimant for payment for his work or services of materials, the date of expiry of the period of credit.~~

#### **Verification by affidavit Form of claim**

**38(2)** The claim for lien may be in the form prescribed Form 1, 2 or 3 in the Schedule, and shall be verified by the affidavit in the prescribed form Form 4 in the Schedule, of the person claiming the lien or his agent or assignee.

#### **Address for service to be shown on claim for lien form**

**38(3)** Every claim for lien form shall show, below the signature thereon of the person claiming the lien, or his agent or assignee, an address for service upon the lien claimant, which address shall, after the registration of the lien be the place at or to which service may be made or notice to the claimant may be sent under this Act, ~~upon or to the lien claimant.~~

#### **What may be included in claim for lien form**

**39** A claim for lien form may include claims against any number of parcels of land provided that the information for and description of each parcel conforms to requirements set out in section 38(1). ~~and any number of persons claiming liens upon the same land may unite in a claim for lien, but where more than one lien is included in one claim for lien, each lien shall be verified by affidavit as provided by subsection 38(2).~~

#### **Claims not invalidated for informality**

**41(1)** Substantial compliance only with sections 38 and 39 is sufficient and no lien is invalidated by reason of failure to comply with any of the requirements of those sections unless, in the opinion of a judge, the owner, contractor, sub-contractor, mortgagee or other person is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure.

#### **Liens must be registered**

**41(2)** Nothing in this section dispenses with the registration of the lien required by this Act.

#### **Action must be based on registered lien**

**41(3)** No action may be commenced under this Act to enforce a lien against land unless a claim for lien with respect to the lien is registered under this Act.

### TIME FOR REGISTRATION OF LIENS ATTACHING LAND

#### Time for registration of lien attaching land :

##### **Time within which claim may be registered bBy contractor**

**43(1)** Except as provided in section 44, a claim for lien by a contractor may be registered ~~before or during the performance of the contract or~~ within the earliest of 40 60 days after the substantial performance, termination or abandonment of the contract, ~~as the case may be.~~

##### **~~Time within which claim may be registered bBy~~ sub-contractor**

**43(2)** Except as provided in section 44, a claim for lien by a sub-contractor may be registered ~~before or during the performance of the sub-contract or,~~

- (a) within 40 60 days after the substantial performance, termination or abandonment of the contract; or
- (b) within 40 60 days after the substantial performance, termination or abandonment of the sub-contract;

whichever first occurs.

**Time within which claim for By supplier of materials may be registered**

**43(3)** Except as provided in section 44, a claim for lien for materials may be registered ~~before or during the supplying of the materials or~~

- (a) within 40 60 days after substantial performance, termination or abandonment of the contract or sub-contract under which the supply arose; or
- (b) within 40 60 days after the supplying of the last supply of materials ~~so supplied~~;

whichever first occurs.

**Time within which claim for By provider of services may be registered**

**43(4)** Except as provided in section 44, a claim for lien for services may be registered ~~at any time before or during the provision of the services or~~

- (a) within 40 60 days after the substantial performance, termination or abandonment of the contract or sub-contract under which the services were provided; or
- (b) within 40 60 days after the completion of the provision of the services;

whichever first occurs.

**Time within which claim for wages may be registered**

**43(5)** ~~Except as provided in section 44, a claim for lien for wages may be registered at any time before or during the doing of the work or the provision of the services for which the wages are claimed or~~

- ~~(a) within 40 days after the substantial performance or abandonment of the contract; or~~
- ~~(b) within 40 days after the last work was done or the last services were provided;~~

~~whichever first occurs.~~

**Meaning of substantial performance**

**43(6)** For the purposes of this section and section 44, substantial performance of a contract or a sub-contract means the date on which notice of a certificate of substantial performance having issued thereof is published given to the owner under section 25 or 46, as the case may be.

**Registration of lien attaching land s for work after substantial performance**

**44** Where a contract or sub-contract has been substantially performed and the owner, contractor or sub-contractor proceeds to complete it,

- (a) a claim for lien by a contractor arising after substantial performance ~~with respect to any work, services or materials remaining to be done, provided or supplied to complete the contract~~ may be registered ~~before or during the doing of the work, the provision of the services or the supplying of the materials, or~~ within 40 60 days after the earliest of completion, termination or abandonment of the contract;
- (b) a claim for lien by a sub-contractor arising after substantial performance ~~with respect to any work, services or materials remaining to be done, provided or supplied to complete the sub-contract~~ may be registered ~~before or during the doing of the work, the provision of the services or the supplying of the materials, or~~ within the earliest of 40 60 days after the completion, termination or abandonment of the contract or its sub-contract;
- (c) a claim for lien for materials supplied after substantial performance ~~remaining to be supplied to complete the contract~~ may be registered ~~before or during the supplying of the materials or~~ within 40 60 days after ~~the~~ supply of the last materials ~~so supplied~~ to complete the contract; and
- (d) a claim for lien for services ~~remaining to be~~ provided to complete the contract or a sub-contract may be registered ~~before or during the provision of the services or~~ within 40 days after the completion, termination or abandonment of the contract or sub-contract under which the services were provided;



- (e) ~~a claim for lien for wages with respect to any work or services remaining to be done or provided to complete the contract may be registered before or during the doing of the work or the provision of the services or within 40 days after the last work was done or the last services were provided; and~~
- (f) ~~the provisions of this Act apply with respect to the lien wherever applicable.~~

#### WRITTEN NOTICE OF LIEN – SECTION 16 LANDS

##### **Where lien does not attach to land**

**45(1)** Where a lien does not attach to land by reason of section 16, sections 37, 38 and 39 do not apply.

##### **Written Notice of claim for lien to holdback**

**45(2)** Where a lien does not attach to land by reason of section 16, a person who is claiming the lien shall give notice thereof in writing to the owner in the manner provided by this Act and, subject to subsection (1), the notice shall, for the purposes of this Act be the equivalent of registration of a lien under this Act and this Act shall apply ~~ies~~ to the lien, the lienholder and the owner, with such modifications as the circumstances require as though the giving of the written notice were registration of the lien under this Act.

##### **Give ing notice of claim to Crown, Crown agency or municipal on Crown, etc. owner**

**45(3)** The notice required under subsection (2) shall be given

- (a) where the owner of the land or structure is the Crown, to the office prescribed by regulations;
- (b) where the owner of the land or structure is a Crown agency, to an officer of the Crown agency; and
- (c) where the owner of the land or structure is a municipality, to the clerk of the municipality.

##### **Time for giving notice**

**45(4)** A notice given under subsection (2) shall be given within the times allowed for registration of claim for lien under sections 43 and 44.

##### **Contents of written notice of claim for lien**

**45(5)** Every notice given under subsection (2) shall set out

- (a) ~~(a) the name and residence address of the person making the claim;~~
- (b) ~~the name of the Crown, Crown agency or municipal owner of the subject land;~~
- (c) ~~the name, address of any other alleged owner of a relevant interest in the land, including but not limited to a leasehold interest in the land; and~~
- (d) ~~the name and address of the person for whom and upon whose credit the work was or is to be done, the services were or are to be provided or the materials were or are to be supplied;~~
- (e) ~~the time or period within which the work was or is to be done, or the services were or are to be provided, or the materials were or are to be supplied;~~
- (f) ~~a short description of the work done or to be done or the services provided or to be provided or the materials supplied or to be supplied;~~
- (g) ~~the sum claimed as due or reasonably expected by the claimant to become due; and~~
- (h) ~~the address or description of the land or location of any leasehold or other interest in the project lands to be charged, sufficient for the purpose of giving notice on or in respect of which the work was or is to be done, the services were or are to be provided or the materials were or are to be supplied; and~~
- (f) ~~where credit has been given, by the lien claimant for payment for his work or services or material, the date of expiry of the period of credit.~~

##### **Verification by affidavit**

**45(6)** A notice given under subsection (2) ~~is to~~ may be in the form prescribed Form 5, 6 or 7 in the Schedule and shall be verified by an affidavit in the prescribed form, in Form 4 in the Schedule, of the person claiming the lien, or his agent or assignee.

#### **Address for service to be shown on notice**

**45(7)** Every notice given under subsection (2) shall show below the signature thereon of the person claiming the lien, or his agent or assignee, an address for service upon the lien claimant, which address shall, after the notice is given, be the place at or to which service may be made or notice [to the lien claimant](#) may be sent under this Act. ~~upon or to the lien claimant.~~

#### **Claims not invalidated for informality**

**45(8)** Subject to subsection (9) substantial compliance with this section is sufficient and no lien is invalidated by reason of failure to comply with any requirement of this section unless, in the opinion of a judge, the owner, contractor, sub-contractor or other person is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure.

#### **Notice must be given**

**45(9)** Nothing in subsection (8) dispenses with the giving of notice required under subsection (2).

### **SUBSTANTIAL PERFORMANCE**

#### **Certificate of substantial performance [of contract](#) by payment certifier [and publication](#)**

**46(1)** Where a contract requires a payment to be made upon a certificate of a payment certifier, the payment certifier, upon application by the contractor and upon being satisfied that the contract has been substantially performed, shall, within seven days after he receives the application or after the contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the contract in [the form prescribed Form 8 of the Schedule](#) to the contractor and the owner [and the payment certifier shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed.](#)

#### **Certificate of substantial performance by owner [and publication](#)**

**46(2)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, the contractor may, and on request of any of his sub-contractors shall apply to the owner for a certificate of substantial performance and the owner shall, within seven days after he receives the application or after the contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the contract in [the form prescribed Form 8 in the Schedule](#) to the contractor [and the owner shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed.](#)

#### **Judge's order for substantial performance [and publication](#)**

**46(3)** Where a person required to give a certificate of substantial performance under subsection (1) or (2) fails or refuses to do so, the owner or the contractor or any sub-contractor under the contractor or any person entitled to a lien in respect of the work under the contract may apply to a judge who, upon being satisfied that the contract has been substantially performed and that the certificate of substantial performance of the contract should have been given, may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the contract has been substantially performed, and the order has the same force and effect as if a certificate of substantial performance had been issued in respect thereof under subsection (1) or (2), as the case may be. [and the applicant shall publish notice of the effect of the order issued within two business days at the location and in the manner prescribed.](#)

#### **No appeal**

**46(4)** No appeal lies from an order made by a judge under subsection (3) or under subsection 25(8).

#### **Offence to give certificate of substantial performance fraudulently**

**46(5)** Every person who is required under subsection (1) or (2) or under subsection 25(5), (6) or (7) to give a certificate of substantial performance and who wilfully gives or causes to be given a certificate of substantial performance that is fraudulent is guilty of an offence and liable, on summary conviction, to a fine of not more than \$10,000. or to imprisonment for a term of not more than two years or to both and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by a corporation under this section is, in addition to the corporation, guilty of the same offence and liable, on summary conviction to a fine of not more than \$5,000. or to imprisonment for a term of not more than two years, or to both.



## Contents of certificate of substantial performance

**46(6)** A certificate of substantial performance shall set out

- (a) the name and residence of the owner, the contractor, and where applicable the sub-contractor;
- (b) a short description of the work ~~done~~ ~~done or to be done~~, the services provided ~~or to be provided~~ and the materials supplied ~~or to be supplied~~ under the contract or sub-contract;
- (c) the date of publication respecting substantial performance of the contract or sub-contract;
- (d) a brief description of the land on or in respect of which the contract or sub-contract was ~~to be~~ performed;
- (e) the name and residence of the person giving the certificate of substantial performance; ~~and~~
- (f) a statement certifying that the person giving the certificate of substantial performance is a person required or authorized to do so under this Act; ~~and~~
- (g) the name of the person responsible for publishing notice that the certificate has been issued.

## Manner of giving certificate and publishing notice of substantial performance

**47** A certificate of substantial performance is not effective unless it is given to the contractor and the owner and, where it relates to a sub-contract, to the sub-contractor and is published at the location and in the manner prescribed in accordance with section 25 or section 46, as the case may be, ~~but where the certificate of substantial performance is given by an owner, a contractor, or a sub-contractor, it shall be deemed to have been given to him.~~

## Form of ~~C~~certificate not invalidated for informality

**48 (1)** Substantial compliance with section 46(6) is sufficient and no certificate of substantial performance is invalidated by reason of failure to comply with any of the requirements of that sub- section unless, in the opinion of a judge, the owner, contractor, sub-contractor, encumbrancer or other person, as the case may be, is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure but nothing in this section dispenses with the requirement of giving the certificate of substantial performance as required under section 47.

## Failure or refusal to publish notice of certificate

**48(2)** Any person who innocently, negligently or willfully fails or refuses to publish notice that a certificate of substantial performance has issued as required by section 25 or section 46 may be found civilly liable on an application or action commenced by any person prejudiced by that failure to the extent of the loss, costs and damages suffered.

## Giving certificate of substantial performance

**59(1)** ~~Except as provided in subsection (3), within 10 days after the date that a certificate of substantial performance of a contract is given to the owner, the owner shall give a true copy of the certificate to all persons doing work, providing services or supplying materials in the performance of the contract who have requested the owner, in writing by personal service with a return address, to give them a copy of the certificate.~~

## False certificate of substantial performance

**59(2)** ~~Where a person is entitled to be given a copy of a certificate of substantial performance under subsection (1), if the owner fails to give a copy of the certificate within the time therein set out or gives a copy of a certificate of substantial performance which he knows to be false, and the person requesting the certificate sustains loss because of the failure or because of the false certificate, the owner is liable to the person requesting the certificate for the amount of the loss in an action therefor or in an action under this Act for the realization of a lien.~~

## Residential property ~~E~~exceptions to subsection (1)

**59(3)** ~~Subsection (1) The requirements in section 25 and section 46 for giving and publishing notice of the issuance of a certificate of substantial performance does not apply to an individual who orders work, services or materials for construction of a structure or for improving land owned and occupied by the individual or his or her spouse or common-law partner for are not mandatory for construction or improvements to single family residences~~ if the contract price for the work, services and materials does not exceed the amount prescribed in the regulations for the purpose of this section or, where there is no specific contract price, where the value of the work, services and materials does not exceed the amount prescribed in the regulations for the purpose of this section. [currently set at \$75,000]

## EXPIRY AND DISCHARGE

### Lien right expires if not registered against land within time

**49(1)** Every lien arising with respect to land that is not duly registered under this Act ceases to exist on the expiration of the 60 day time period allowed for registration under sections 43 and 44.

### Registered ~~Lien~~ against land expires if ~~registered and~~ not proceeded upon

**49(2)** Every lien that has been duly registered under this Act against land ceases to exist after the expiration of ~~two years~~ 90 days after the date of registration unless in the meantime an action is commenced to realize the claim for lien under this Act or an action is commenced in which the claim may be realized under this Act, ~~and a pending litigation order in Form 9 in the Schedule, in respect of the action, issued from the court in which the action is brought, is registered in the proper land titles office.~~

### Liens not attaching ~~to~~ land expire ~~cease~~ if no notice given within time

**49(3)** Every lien which does not attach to land by reason of section 16 and for which no written notice is given as required by section 45, ceases to exist on the expiration of the 60 day time period allowed for giving written notice under section 45.

### Expiry of ~~liens~~ subject to section 16 ~~not attaching~~ expire if ~~to land and~~ not proceeded with

**49(4)** Every lien which does not attach to land by reason of section 16 ~~and for which notice has been given as required under section 45,~~ ceases to exist on the expiration of ~~two years~~ 90 ~~after days after~~ the date the written notice was given as required under section 45, unless in the meantime an action is commenced to realize the claim under this Act, ~~or an action is commenced in which the claim may be realized under this Act.~~

### Clarification Application of subsecs. (1) and (2) to liens not attaching to land

**49(5)** Subsections (1) and (2) do not apply to liens which, by reason of section 16, do not attach to land.

### Notice to lienholder to commence action

**50(1)** Any person having or claiming a mortgage or charge upon, or claiming any right, title or interest in or to any land in respect of which a claim for lien is registered under this Act may at any time after the registration of the lien, require the registrar to give the lienholder a notice in writing in the form prescribed Form 10 in the Schedule, that the lien shall cease to exist 30 days after the mailing of the notice unless, within that period,

- ~~(a) an action to realize the claim for lien, or in which the claim for lien may be realized, is commenced; and~~
- (b) a pending litigation order in ~~Form 9 in the Schedule in respect of the action, signed by the clerk of the court in which the action is commenced, is registered in the proper registry office.~~

### Loss of lien

**50(2)** Where an action is not commenced ~~and a pending litigation order registered~~ within 30 days after the date of mailing of the notice under subsection (1), the lien ceases to exist and the registrar shall vacate the registration of the lien unless, prior to the expiration of the 30 days, there is registered in the registry office an order of a judge extending the time for commencing the action.

### Application of sections 50 and 51 to liens not attaching to land

### Clarification

~~52~~**50(3)** This section ~~Sections 50 and 51~~ does not apply to liens which, by reason of section 16, do not attach to land.

### Effect of order to vacate lien under section 55

**51** ~~Notwithstanding sections 49 and 50, if~~ the court orders that a lien be vacated under subsection 55(2) or (3), ~~(a) the lien, as a charge against the money paid into court or against any security given, does not cease to exist because a pending litigation order is not registered; but~~

~~(b) the lien ceases to exist if no action is commenced to enforce the lien against security posted within 90 days of the date the lien was registered or written notice of claim for lien was given, as the case may be, time allowed for bringing an action under section 49 or 50.~~

### Registration of discharge

**55(4....)** A lien against land may be discharged by the registration in the proper registry office of a discharge of the lien in the form prescribed signed by the lienholder or his agent duly authorized in writing and the payment of the any prescribed fee for ~~the~~ registration of the discharge. [MB s. 55(1)]

### Withdrawal of a written notice of claim for lien

# ---- Written notice of a claim for lien that is subject to section 16 may be withdrawn by delivery to the office of the Crown, Crown agent or municipality that received notice of the claim under sub- section 45(3) of withdrawal in the form prescribed, duly signed by the lien claimant or its agent.

## ~~VACATION DISCHARGE OF LIEN~~

### Vacating lien upon posting security on payment into court, etc.

**55(2)** Upon application without notice by the owner or its representative, a judge ~~may order security or payment into court in an amount equal to the holdback required under this Act as it applies to a particular contract and any additional money payable with respect to that contract but not yet paid but not exceeding the total amount of the claims for liens then registered against a parcel of land and may then order that the registration of those liens be vacated.~~ shall make an order vacating

- (a) registration of a lien attaching land; or, as the case may be,
- (b) notice of a claim for lien given under section 45 which does not attach land where the owner pays into court or posts security in an amount equal to
- (c) the unduplicated value of liens subject to the application; and
- (d) the lesser of \$20,000 and 20% of the value described in (c) as security for interest and toward costs.

### Evidence supporting application

**55(3)** The applicant shall file evidence in support of its application under sub-section 55(2) showing that

- (a) all liens currently registered against the subject land or under written notice given pertaining to the contract or sub-contract under which the liens arose have been included in the application;
- (b) any upper tier lien claimant has accounted by affidavit for the value, if any, included in its umbrella lien claim which is duplicated by a current lien also subject to the application;
- (c) any money to be posted to stand as security for the vacated lien(s) does not include accrued holdback or other project trust funds which are subject to the rights of other participants on the project; and
- (d) the form and intended providers of any form of security other than cash including a lien bond or letter of credit complies with forms and providers permitted by regulations.

### Vacating registration liens on other grounds

**55(4)** Upon application by any interested party, with notice to all affected parties, a judge may order that the registration of a lien or written notice given for a lien that does not attach land may be vacated upon any grounds other than those mentioned in subsection (2), subject to terms which the judge deems just in the circumstances.

### Vacating registration of pending litigation order

**55(1)** ~~Upon application, a judge may, upon proper grounds, order that the registration of a pending litigation order registered under this Act be vacated.~~

### Registration of order

**55(1)** ~~Upon registration in the proper registry office of an order made under subsection (2), (4) or (5), the claim for lien or the pending litigation order to which the order relates shall be discharged.~~

### Vacating pending litigation order Court certificate provided to land registry

**55(7)** Where an action to realize a lien attaching land has been discontinued or dismissed, a certificate of the registrar of the court or any deputy registrar of the court may shall be registered in the appropriate land registry by or on behalf of the lien claimant, and where registered, the certificate to discharge and vacates the registered lien pending litigation order relating to the action.

#### Enforcement of vacated liens

**55(8)** Unless the vacated lien claimant commences an action to enforce its lien against the security posted under section 55(2) within 90 days of registration or giving of written notice of the lien which was vacated, the lien expires and ceases to exist, whereupon the court shall return of the security posted upon a motion for payment out by the applicant.

#### Parties to actions on vacated liens

**55(9)** The vacated lien claimant shall be plaintiff in the action it commences to enforce its claim against security posted under section 55(2), and the owner/applicant shall be named as a defendant as well as any other party or parties essential to the claimant proving its entitlement to be paid the vacated lien amount.

#### **Priorities against security posted under section 55(2) Money paid into court, etc., in place of land**

**56(1)** Any money paid into court or any other security given posted by order of the court under subsection 55(2) stands in place of the land against which the lien was registered or the money charged by a written notice of claim for lien that does not attach land and is subject to the claims of

(a) the persons whose liens have been vacated; and

(b) every person the applicant who posted the security

(i) both at the time of filing the application under subsection 55(2) and at the time of filing application for payment out under subsection (3), has a subsisting claim for lien, and

(ii) has registered a claim for lien prior to the time of filing the application for payment out under subsection (3);

but the persons whose liens have been ordered vacated have a first charge on the money or security to the extent of any amount, including interest and costs, found by the judge to be owing to them.

#### **No reduction of holdback**

**56(2)** Money paid into court or security given posted under subsection 55(2) does not reduce the amount required to be deducted and retained by the owner under section 24.

#### **Order for payment out of court**

**56(3)** Where money has been paid into court or security has been given posted under subsection 55(2), the court may, upon application and upon notice to every person affected, order the money to be paid out or the security to be delivered, as the case may be, to the person entitled thereto.

### **ACTION TO ENFORCEMENT OF LIEN**

#### **Action to realize lien**

**60** A lien for any amount which has not expired and continues to charge land, holdback, project funds or security posted in their place, may be realized or enforced by an action in the court and the ordinary procedure Rules of the court, except where varied by this Act, applies to the action.

#### **Action for benefit of all lienholders**

**61(1)** It is not necessary for a lienholder commencing an action to realize his lien to make other lienholders parties to the action but all lienholders required to be served with a notice of trial under section 63 shall, for all purposes, be treated as if they were parties to the action.

#### **Lienholders may join in actions**

**61(2)** Any number of lienholders claiming liens on the same land may, subject to rules of the court, join in an action,<sup>57</sup> and any action brought by a lienholder or person claiming a lien shall be taken to be brought on behalf of all other lienholders claiming liens on the land.

#### **Discontinuance of action**

**61(3)** ~~—An action to realize a lien shall not be discontinued except on the order of a judge after such notice to lienholders affected as the judge may direct and, where a lienholder who has commenced an action to realize his lien wishes to withdraw from the action but other lienholders who, under subsection (1), are treated as though they were parties to the action, wish to continue the action to realize their liens, the judge may give directions respecting the continuation of the action.~~

#### **Failure to file defence**

**62** ~~—Where a defendant fails to file a defence to an action to realize a lien within the time allowed under the Rules of Court for the filing of a defence, he is, unless allowed to defend by order by a judge upon such terms and conditions as the judge thinks just, precluded from disputing the plaintiff's claim and his right to a lien and the defendant may be noted in default and the plaintiff may proceed to trial in accordance with this Act.~~

#### **Service of notice of trial**

**63** ~~—A party obtaining an appointment for trial for an action to realize a lien shall, in accordance with the rules of the court, serve a notice of trial in Form 11 in the Schedule~~

- ~~(a) upon the solicitors for the parties who appear by solicitors;~~
- ~~(b) upon all lienholders known to him who have registered liens upon the land as provided herein and whose solicitors are not served under clause (a); and~~
- ~~(c) upon all other persons having any registered charges, encumbrances or claims on the land affected by the lien, who are not parties or who, being parties, appear personally in the action.~~

#### **Lienholders who are not parties to file statement**

**64** ~~—Every lienholder who is not already a plaintiff in an action to realize a lien shall, within six days after being served with the notice of trial of the action, file in the office of the court a statement showing the grounds and particulars of his claim and, if he fails to do so, he shall, unless otherwise ordered by the judge, be precluded from asserting his lien.~~

#### **Trial of action**

**65(1)** ~~—Subject to subsection (3), on the trial of an action the judge shall try all questions that arise therein or that are necessary to be tried in order to dispose of the action finally and completely and to adjust the rights and liabilities of, and to give all necessary relief to, the persons appearing before him or upon whom a notice of trial has been served, including all questions of set-off and counterclaim arising under the contract or out of the work done, services provided or materials supplied in respect of the land against which the claim of lien is registered.~~

#### **Disposal of questions and judgment**

**65(2)** ~~—On the trial of an action the judge shall take all accounts, make all inquiries, give all directions, and do all things, necessary to try and to dispose finally and completely of the action and of all matters, questions and accounts arising therein or at the trial as provided in subsection (1) and he shall embody all the results in the judgment.~~

#### **Order for separate trial of certain issues**

**65(3)** ~~—A party to an action to realize a lien, or any other interested persons, may apply to a judge for an order that a certain issue be tried separately and, if the judge is satisfied that the issue cannot be conveniently tried with the action, or if tried with the action would likely cause undue prejudice to other lien claimants or other parties, he may order that the issue be not heard in that trial but be tried separately on terms which he deems just.~~

#### **No appeal**

**65(4)** ~~—No appeal lies from an order made by a judge under subsection (3).~~

## Joining other claims

**66** ~~Subject to subsection 65(3), a~~ Any claim arising from ~~or related to a contract or sub-contract to which this Act applies construction or improving land,~~ including a claim related to ~~any other remedy under the Act a trust fund referred to in section 4 or 5,~~ may be brought or joined with an action to realize a lien, ~~arising from the construction or improving the land~~

~~(a) in the statement of claim of a person claiming lien;~~

~~(b) by way of counterclaim or set-off by the defendant;~~

~~(c) by way of third party procedure by any party to the action against whom any claim is made;~~

~~and a defendant may raise any legal or equitable defence available to him.~~

## Consolidation of actions

~~67(1) — Where more than one action is brought to realize liens in respect of the same land, a judge may, on application of any party to any of the actions or on application of any other interested person, consolidate the actions into one action.~~

## Carriage of proceedings

~~67(2) — A judge, on application of a lienholder entitled to the benefit of an action, or on an application made under subsection (1), may make an order giving a lienholder the carriage of the proceedings of an action and the lienholder shall thereafter, for all purposes, be deemed to be the plaintiff in the action.~~

## Application for directions

~~67(3) — Any party to an action, or any interested party, may at any time apply to a judge for, and the judge may give, directions as to pleadings, discovery, production or any other matter relating to the action.~~

## No appeal from order respecting third parties

~~67(4) — No appeal lies from an order made by a judge allowing or refusing to allow third party proceedings in an action to realize a lien.~~

## Order for sale of land

**68(1)** In an action to realize a lien [attaching land](#), the judge may order that the estate or interest charged with the lien be sold, and may direct the sale to take place at any time after judgment, but allowing a reasonable time for advertising the sale.

## Sale of materials

**68(2)** In an action to realize a lien [attaching land](#), the judge may order the sale and authorize the removal of any material situated on the land against which the lien attaches.

## Appointment of receiver of rents and profits

**69(1)** In an action to realize a lien [attaching any interest in land](#), the judge may, on application of any lienholder, mortgagee or other interested person, either before or after judgment, and upon such terms, including the giving of security, as the judge deems just, appoint a receiver of the rents and profits of the land against which the lien is registered [or, in the case of a written notice of claim for lien against a leasehold or other interest in lands which are subject to section 16.](#)

## Appointment of trustee

**69(2)** In an action to realize a lien [attaching any interest in land](#), the judge may, on the application of any lienholder, mortgagee or other interested person, either before or after judgment, upon such terms, including the giving of security, as the judge deems just, appoint a trustee with power to manage, mortgage, lease or sell, or any or all of those things, the land [recoverable leasehold improvements](#) and materials against which the claim for lien is registered and in the exercise of those powers the trustee shall be under the supervision and direction of the court and may, when so directed by the court, complete or partially complete any work on the land and, in the event that moneys are advanced to the trustee as the result of any of the powers conferred upon him under this subsection, the rights of the [non-lien claimant](#)

person advancing the moneys to the trustee take priority to the extent of the amount advanced over every claim for lien existing as of the date of the appointment.

#### **Orders for completion of sale, etc.**

**70(1)** Where the sale of land or materials is ordered or authorized under section 68 or 69, or the lease or mortgage of land is authorized under section 69, the judge shall make all necessary orders for the completion of the sale, mortgage or lease.

#### **Sale subject to encumbrances**

**70(2)** Where the sale of land is ordered or authorized under section 68 or 69, it may, if the judge so directs, be offered for sale subject to any encumbrance registered against the land.

#### **Report on sale**

**71(1)** Where the sale of land is ordered or authorized under section 68 or 69, the proceeds of the sale shall be paid into court to the credit of the action and the judge shall make a report on the sale and direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the sale, his reasonable legal fees and actual disbursements incurred in connection therewith and, where sufficient money to satisfy the judgment and costs is not realized from the sale, the judge shall certify the total amount of the deficiency and the proportion thereof falling upon each person entitled to recover under the judgment and the persons required by the judgment to pay the same.

#### **Vesting of title**

**71(2)** Where land is sold pursuant to an order made under section 68 or authority granted under section 69, the judge shall make an order vesting [title to](#) the land in the purchaser and, except where the sale is made subject to a mortgage, charge or encumbrance on the direction of the judge, the order vests the title of the land free from all claims for liens, encumbrances and interests of any kind.

#### **Deficiency recoverable by usual process**

**72** All judgments in favour of lienholders shall adjudge that the person personally liable for the amount of the judgment shall pay any deficiency that may remain after sale of the land ordered to be sold and where on such a sale, sufficient money to satisfy the judgment and costs is not realized ~~therefrom~~[there from](#), the deficiency may be recovered against the property of that person by the usual process of the court.

#### **Personal judgment when lien fails**

**73** Where a person claiming a lien fails for any reason to establish a valid lien, he may nevertheless recover in the action a personal judgment against any party to the action for such sum as may appear to be due to the claimant and which he might recover in an action against the party.

#### ~~Allowing claim to be proved after trial~~

~~74 — Where a lienholder does not prove his claim at the trial, the judge who tried the action may, on application of the lienholder, and upon such terms as to costs and otherwise as the judge deems just, permit the lienholder to prove his claim at any time before the amount realized in the action has been distributed and where the claim is proved and allowed, the judge shall amend the judgment to include the claim therein.~~

#### **Costs at discretion of judge**

**75(1)** Notwithstanding anything in *The Queen's Bench Act* or the rules of the court, the costs of and incidental to all actions, applications and orders commenced or made under this Act are in the discretion of [the trial judge](#) and shall be apportioned and borne as the judge may direct.

#### **Costs for least expensive course**

**75(2)** Where the least expensive course is not taken by a party under this Act, the costs allowed to him shall not exceed what would have been incurred if the least expensive course had been taken by him.

#### **Costs of [vacating exercising lien rights](#)**



**75(3)** Where the registration of a lien ~~or, a written notice of claim for lien or a pending litigation order~~ is ordered to be vacated under section 55(2) or where in an action to realize a lien judgment is given in favour of or against a claim for a lien, the judge may allow a reasonable amount for costs of ~~giving written notice or drawing and~~ registering the lien or for vacating the ~~registration lien and posting any security~~.

#### **No fees on payments out of court**

**76** No fees are payable ~~or costs allowed~~ on any cheques or proceedings to pay money into court or to pay money out of court in respect of a claim for lien.

#### **Where no appeal lies**

~~**77** Where the total amount of the claims of the plaintiff in an action to realize a lien, and all other persons claiming liens in the action, does not exceed \$1,500., the judgment at the trial is final and binding and no appeal lies from the judgment of the judge in the action but, upon application within 14 days after judgment is pronounced, the judge who tried the action may grant a new trial of the action.~~

#### **Reference of lien action to master**

**78(1)** Where an action to realize a lien is commenced in a centre where a master of the court is available, a judge of the court may refer the action to the master, and thereupon the master shall

- (a) make all necessary inquiries with respect thereto;
- (b) take all accounts relating thereto; and
- (c) inquire as to all matters relevant thereto, as fully as if they had been specifically referred;

and the master shall make his report to a judge of the court as to the inquiries made and accounts taken, and the report shall include a statement of his findings and recommendations with respect thereto.

#### **Action of court when report made**

**78(2)** On receipt of the report of a master under subsection (1), the judge may adopt it, or refer it back to the master for further inquiries to be made, or accounts to be taken, or for further consideration, and for further report.

#### **Judgment**

**78(3)** Where a report of a master has been made under subsection (1) and has been adopted under subsection (2), the judge shall give judgment in the action with respect to all matters and questions involved therein and may include as part of the judgment the whole or part of the findings and recommendations set out in the report but he is not bound to adopt, act upon or give judgment in accordance with, any or all of the findings stated or the recommendations made in the report.

#### **How documents ~~etc.~~ given or sent**

**79(1)** Subject to subsection (3) and except as otherwise ordered by the court, a notice or document required to be given or sent under this Act is sufficiently given or sent if given personally to the intended recipient or if sent by registered mail addressed to the intended recipient

- (a) at his address for service, if there is one; or
- (b) at the last known mailing address of the intended recipient according to the records of the person giving or sending the notice or document, where there is no address for service.

#### **Where document ~~etc.~~ sent by registered mail**

**79(2)** A notice or document sent to an intended recipient by registered mail shall, in the absence of evidence to the contrary, be deemed to have been given on the third day, excluding Saturdays and holidays, after the date on which it was mailed.

#### **Where mailing service not permitted**

**79(3)** ~~Except where otherwise ordered by the court,~~



- ~~(a) a written notice of claim for lien required under section 45;~~
- (b) statement of claim;
- ~~(c) notice of trial; and~~
- ~~(d) requests to receive copies of notices of substantial performance;~~

shall not be given or sent by registered mail.

### Evidence of date of mailing

**79(4)** Where a notice or document is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing.

### ~~Old liens and actions~~

~~81(1) — Where, prior to May 26, 1981 an action was commenced in a court to realize a lien under *The Mechanics' Liens Act*, being chapter M80 of the Revised Statutes, all proceedings, procedures and actions to realize the lien or in relation to the action shall be taken, commenced, carried on and continued under and be subject to *The Mechanics' Liens Act*, aforesaid, as though it had continued in force and effect.~~

### ~~Trusts under Builders and Workers Act~~

~~81(2) — Where, on May 26, 1981, a person held moneys as a trustee under *The Builders and Workers Act*, he continues as a trustee under this Act as though he had received the moneys after the Act came into force.~~

### ~~References to Mechanics' Liens Act, etc.~~

~~82 — In any Act of the Legislature or in any regulation or order under an Act of the Legislature or in any contract~~

- ~~(a) a reference to *The Mechanics' Liens Act* or to *The Builders and Workers Act* shall be conclusively deemed to be a reference to this Act;~~
- ~~(b) a reference to a particular provision of *The Mechanics' Liens Act* or to a particular provision of *The Builders and Workers Act* shall be conclusively deemed to be a reference to the provision, if any, of this Act dealing with the same subject matter;~~
- ~~(c) a reference to a mechanics' lien or a lien under *The Mechanics' Liens Act* shall be conclusively deemed to be a reference to a lien under this Act; and~~
- ~~(d) a reference to a trust or trust fund created or required to be established under *The Builders and Workers Act* shall be conclusively deemed to be a reference to a trust or a trust fund created or required to be established under this Act.~~

## **PART V – SURETY BONDS**

### Purpose of remedy

In order to provide security against default in performance and payment by the contractor for the benefit of the owner, in the first case, and for sub-contractors in the second, this Part V mandates provision of Performance Bonds and Labour & Material Payment Bonds on all public projects in Manitoba.

### **Bonds and public contracts**

#### **Definition**

**85.1** (1) In this section,

“public contract” means a contract between an owner and a contractor respecting an improvement, if the owner is the Crown, a Crown agency, a municipality or a broader public sector organization as prescribed.

#### **Application**

(2) Subject to the regulations, this section applies to a public contract if the contract price exceeds the amount prescribed for the applicable owner. ▯

### **Exception**

~~(3) This section does not apply in the case of a contractor who is an architect or an engineer.~~

### **Requirement for labour and material payment bond**

(43) On entering into a public contract, a contractor shall furnish the owner with a labour and material payment bond, in the prescribed form, that,

- (a) is of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance;
- (b) has a coverage limit of at least 50 per cent of the contract price, or such other percentage of the contract price as may be prescribed; and
- (c) extends protection to all subcontractors and persons supplying labour or materials to the improvement other than the contractor.

### **Requirement for performance bond**

(54) On entering into a public contract, a contractor shall furnish the owner with a performance bond, in the prescribed form, that,

- (a) is of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; and
- (b) has a coverage limit of at least 50 per cent of the contract price, or such other percentage of the contract price as may be prescribed.

### **Claims process**

(65) A bond form prescribed for the purposes of subsection (43) or (54) may set out the claims process applicable in respect of the bond.

### **No limitation on other bonds or security**

(76) For greater certainty, this section does not limit the ability of the owner to require the contractor to provide other types of bonds or security.

### ~~Section Amendments with date in force (d/m/y)~~

### **Rights of action**

#### **Default, labour and material payment bond**

**85.2** (1) If a labour and material payment bond is in effect in respect of an improvement and the principal on the bond defaults in making a payment guaranteed by the bond, any person to whom the payment is guaranteed has a right of action to recover the amount of the person's claim, in accordance with the terms and conditions of the bond, against the surety and the principal.

#### **Default, performance bond**

(2) If a performance bond is in effect in respect of an improvement and the contractor defaults in performing the contract guaranteed by the bond, the owner has a right of action to enforce the bond, in accordance with its terms and conditions, against the surety and the contractor.

### **Saving**

(3) Nothing in this section makes the surety liable for an amount in excess of the amount that the surety undertakes to pay under a bond, and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety.

### **Same**

(4) Nothing in this section makes the surety liable as the principal under a bond, or makes the surety a party to any contract.

### **Subrogation**

(5) On satisfaction of its obligation to any person under a bond to which this section applies, the surety shall be subrogated to all the rights of that person.

## **REGULATIONS**

### **Regulations**

**80** For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations ancillary thereto and not inconsistent therewith and every regulation made under, and in accordance with the authority granted by, this section, has the force of law; and without limiting the generality of the foregoing, the Lieutenant Governor in Council may make regulations

~~(a) prescribing fees for registrations made under this Act in registry offices;~~

~~(b) prescribing offices to which a notice of claim for lien may be given under clause 45(3)(a);~~

~~(c) prescribing the rate of interest, and the method of compounding interest, for the purposes of subsection 24(6);~~

~~(d) prescribing an amount for the purpose of section 24 and an amount for the purpose of section 59.~~

~~[scope of required regulations to be detailed here]~~

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## **APPENDIX B – DRAFT LEGISLATION (CLEAN)**

**Note:** This preliminary draft legislation has been prepared exclusively to serve as a guide for readers of this Final Report to assist in demonstrating the implementation of the reforms recommended in this report.

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REGULATIONS

# The Construction Contract Remedies Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

## PART I - GENERAL

### INTERPRETATION

#### Definitions

**1(1)** In this Act,

**"construction"** means the making, building, construction, erection, fitting, placing, alteration, improvement or repair of a structure; (« construction »)

**"construction contract pyramid"** means all of the construction contracts issued on a given project from owner to a contractor, and from that contractor to sub-contractors and from sub-contractors to other sub-contractors;

**"contract"** means a contract entered into with the owner or his agent, as amended from time to time,

(a) for construction, or

(b) for improving land, or

(c) for the doing of any work or the providing of any services in construction or in improving land, or

(d) for the supplying of any materials to be used in construction or in improving land,

but does not include a contract of employment; (« contrat »)

**"contractor"** means a person who, or a joint venture which, has entered into a contract with the owner or his agent; (« entrepreneur »)

**"contract price"** means the price to be paid under a contract for performance of the contract; (« prix contractuel »)

**"court"** means Her Majesty's Court of Queen's Bench for Manitoba; (« tribunal »)

**"Crown"** means Her Majesty, The Queen in Right of Manitoba; (« Couronne »)

**"Crown agency"** means

(a) Manitoba Agricultural Services Corporation,

(b) The Manitoba Public Insurance Corporation,

(c) Manitoba Development Corporation,

(d) [repealed] S.M. 1992, c. 35, s. 58,

(e) The Manitoba Housing and Renewal Corporation,

(f) Manitoba Hydro,

(g) Manitoba Liquor and Lotteries Corporation,

(h) [repealed] S.M. 1996, c. 79, s. 30,

(i) The Manitoba Water Services Board; (« organisme gouvernemental »)

**"duty of good faith"** means the obligation under this Act to exercise a discretionary power with honesty, integrity and due regard to the legitimate contractual and statutory interests of affected parties in a timely manner;

**"encumbrance"** means any mortgage of or charge or lien on land and includes an hypothecation of a mortgage of or charge or lien on land; (« charge »)

**"holdback"** means the amount required under this Act to be deducted from payments to be made under a contract and retained for a period prescribed under this Act and includes interest thereon as prescribed; (« retenue »)

**"holdback account"** means an interest bearing account in a bank, trust company or credit union in the name of the owner ; (« compte de dépôt des retenues »)

**"improvement"** means any construction or improving land as each is defined in this Act;

**"improving land"** means the doing of any work which improves the character of the land and without limiting the generality of the foregoing includes

- (a) clearing the land of timber or scrub,
- (b) landscaping the land,
- (c) fencing the land, and
- (d) demolishing structures on the land,

but does not include tilling, seeding, cultivating or mowing the land for agricultural or forest production or the harvesting of a crop from the land or the cutting of timber from the land for sale; (« amélioration d'un bien-fonds »)

**"insolvent"**, as used in set-off provisions in the Act, means a contractor or sub-contractor adjudged bankrupt, who has made a general assignment for its creditors, is subject to the appointment of a receiver or a company creditor arrangement order;

**"joint venture"** means an association of persons who agree by contract to contribute money, effort, knowledge or other assets to a common undertaking for joint profit where the relationship formed does not constitute a trust, partnership or corporation;

**"judge"** means a judge of the court; (« juge »)

**"lien"** means a lien created under this Act; (« privilège »)

**"materials"** includes every kind of movable property; (« matériaux »)

**"municipality"** includes a local government district and "clerk of the municipality" includes the resident administrator of a local government district; (« municipalité »)

**"owner"** means any person having any estate or interest in the structure and the land occupied thereby or enjoyed therewith, or in the land upon or in respect of which work is done or services are provided or materials are supplied, at whose request and

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

the work is done or the services are provided or the materials are supplied, and all persons claiming under or through him whose rights are acquired after the work or services were commenced or after the materials were supplied; (« propriétaire »)

**"payment certifier"** means an architect, engineer or other person upon whose certificate payments are made under a contract; (« certificateur »)

**"person"** includes the Crown; (« personne »)

**"prescribed"** means prescribed in the regulations; (« prescrit »)

**"project"** means a specific development, construction of structure and/or land improvement by an owner involving a contract under which any number of sub-contracts issue for the performance of work, the provision of services or the supply of materials;

**"public-private-partnership" or "P3"** is a project delivery model whereby a government body (prescribed by regulation) obtains long-extended payment terms for cost of construction upon entering into a development agreement with one or more private entities which undertake, in whole or in part, to finance, design, build and, over an extended term (often 30 years), to operate and maintain a structure or land improvement before handing it back to the government body on certain terms in a specified condition;

**"registrar"** includes

- (a) a district registrar,

- (b) with respect to a lien registered in the office of a recorder of a mining district, the recorder,
- (c) with respect to a claim registered under subsection 37(5), the registrar under *The Oil and Gas Act*,
- (d) with respect to a lien registered in the office of the Director of Crown Lands, the Director of Crown Lands; (« registraire »)

**"registry office"** includes a land titles office and "land titles office" includes

- (a) a registry office,
- (b) with respect to a lien registered in the office of a recorder of a mining district, the office of the recorder,
- (c) with respect to a claim registered under subsection 37(5), the office of the registrar under *The Oil and Gas Act*,
- (d) with respect to a lien registered in the office of the Director of Crown Lands, the office of the Director of Crown Lands; (« bureau du registre foncier »)

**"services"** includes

- (a) the preparation of specifications, drawings and other documents used or to be used in construction,
- (b) administration of a contract or sub-contract,
- (c) inspection or supervision of work done under a contract or a sub-contract, or
- (d) renting of equipment with or without an operator to an owner, contractor or sub-contractor to be used in the performance of a contract or a sub-contract,

but does not include the preparation of specifications, drawings and other documents by, or the administration of a contract or sub-contract by, or inspection or supervision of work done under a contract or sub-contract by, a professional architect or engineer who is not an employee of the contractor or sub-contractor; (« services »)

**"schedule of values"** means a written breakdown, as amended from time to time, of a contract price or a sub-contract price which identifies the sum within that price to be earned by the contractor or particular sub-contractor for its own forces work together with the value of each sub-contract price making up the balance;

**"structure"** means anything built or made on and affixed to or imbedded in land or affixed to or imbedded in land after being built or made elsewhere, and appurtenances thereto, and, without limiting the generality of the foregoing, includes

- (a) any building, structure, erection, wharf, pier, bulkhead, bridge, trestlework, vault, sidewalk, road, roadbed, lane, paving, pipeline, fountain, fishpond, drain, sewer, canal, or aqueduct, built or made on and affixed to or imbedded in land or affixed to or imbedded in land after being built or made elsewhere, and appurtenances thereto, and
- (b) any well, mine or excavation drilled, sunk or made in or on land and any appurtenances thereto,

and a reference to a structure on land includes a structure in or beneath the surface of the land; (« ouvrage »)

**"sub-contract"** means a binding agreement, as amended from time to time, between a sub-contractor and a contractor or between a sub-contractor and another sub-contractor

- (a) for construction, or
- (b) for improving land, or
- (c) for the doing of any work or the providing of any services in construction or in improving land, or
- (d) for the supplying of any materials to be used in construction or in improving land; (« contrat de sous-traitance »)

**"sub-contract price"** means the price to be paid under a sub-contract for performance of the sub-contract;

**"sub-contractor"** means a person or joint venture other than a contractor, who or which has entered into a sub-contract but does not have a contract directly with the owner or his agent; (« sous-traitant »)

**"umbrella lien"** means a lien registered by a contractor or sub-contractor which includes in its value amounts that are also claimed in liens registered by persons whose lien claims arose at a lower level of the same construction contract payment chain;

### **Substantial performance**

**2(1)** For the purposes of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when

- (a) the structure to be constructed under the contract or sub-contract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
- (b) the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than
  - (i) 3% of the first \$1,000,000 of the contract price,
  - (ii) 2% of the next \$1,000,000 of the contract price, and
  - (iii) 1% of the balance of the contract price.

### **Where work cannot be completed**

**2(2)** For the purposes of this Act, where a structure or a substantial part thereof or the improved land or a substantial part thereof is ready for use or is being used for the purpose intended, and the work to be done under the contract or sub-contract relating to the construction or the improvement of the land cannot be completed expeditiously for reasons beyond the control of the contractor or sub-contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

### **Supplying materials**

**2(3)** For the purposes of this Act, materials shall be deemed to have been supplied to be used in the performance of a contract or a sub-contract and give rise to lien rights

- (a) if they are delivered to land in respect of which the contract or sub-contract is to be performed; or
- (b) if they are delivered to some other land which is in the immediate vicinity of the land in respect of which the contract or sub-contract is to be performed and which has been designated by the owner or his agent as the land to which the materials are to be delivered; or
- (c) if the materials were made to specifications set out in the contract or sub-contract and were delivered to the contractor or sub-contractor for the purpose of being used in the performance of the contract or sub-contract;

but delivery of materials on land designated under clause (b) does not make the land so designated subject to a lien in respect of the supplying of the materials.

### **Meaning of "agent" in subsection (3)**

**2(4)** For the purposes of subsection (3), "agent" includes a contractor, or sub-contractor for whom, or on whose direction, the materials are supplied unless the person supplying the materials has had actual notice from the owner to the contrary.

## **APPLICATION OF THE ACT**

### **Crown, etc. bound**

**3** The Crown, all Crown agencies, and all boards, commissions and bodies performing any duties or functions under an Act of the Legislature on behalf of the Crown, are bound by this Act.

### **Public-private partnerships – P3 projects**

**4** The Act applies to the construction aspect of all P3 projects for which the public partner is a government body prescribed for purposes of this section and such projects shall be subject to the following rules:

- (a) Any development agreement among the public and private partners shall be confidential and not subject to disclosure, in the ordinary course, under section 10 – Rights to Information;
- (b) Neither the land interest of the public partner, nor any interest in the project lands granted to a private partner shall be subject to attachment by a lien under Part IV:



- (c) P3 projects meeting criteria prescribed shall be subject to lien rights not attaching land as set out in section 83 in Part IV of the Act;
- (d) The public partner shall not be considered to be an owner for purposes of the Act;
- (e) In a contract for construction of a P3 project, a signatory representing the private partner shall be deemed for all purposes under the Act to be the owner of the project;
- (f) Subsequent to the construction phase of a P3 project, provisions of the Act shall apply to any capital repairs defined for purposes of this section as:  

**“capital repair”** means a repair to land or to a structure intended to extend its normal life, improve its value or productivity and does not include work, services or materials provided to prevent deterioration or to maintain the land or structure in a normal functional state;
- (g) For purposes of Part V – Surety Bonds, the public partner may require a coverage limit other than the one prescribed in section 137(3)(b) or 137(4)(b), provided that such prescribed limit meets or exceeds any coverage limit that may be prescribed for purposes of this paragraph; and
- (h) Sub-section (g) above does not apply unless the bonds required under sub-sections 137(3) and (4) and any other security required by the public partner, taken together, reflect an appropriate balance between the adequacy of security required to ensure payment of persons supplying work, services or materials under the public contract on the one hand and the cost of the security on the other.

#### **EPC contract exception**

**5** Where an owner enters into an EPC (engineering, procurement and construction) contract requiring an off-shore contractor to design, engineer, procure and manufacture materials and/or equipment required for installation on a Manitoba project, the owner and contractor may expressly provide in the contract that this Act shall not apply to those portions of the contract price which are to be paid to the contractor in respect of

- (a) services provided by the contractor outside of Canada including design, engineering, procurement, manufacture and testing of materials and/or equipment to be manufactured outside of Canada for supply to the project; and
- (b) the cost to transport and deliver such contractor-supplied materials and/or equipment to the site of an improvement within Manitoba.

#### **Exclusion of professional architects and engineers**

**6** An architect or engineer retained by an owner, contractor or sub-contractor under an agreement, which does not create a relationship of employer and employee, to provide architectural or engineering services in respect of construction or improving land

- (a) is not a beneficiary of the trust created in Part II;
- (b) does not have a lien or claim for lien against or in respect of the structure or land improved for his professional fees and charges;
- (c) is not a contractor or sub-contractor for the purposes of this Act;

and no other remedy provided in this Act applies to the agreement under which the architect or engineer is retained or to the recovery of his professional fees or charges. (formerly section 36)

### **GENERAL PROVISIONS**

#### **Devices to defeat remedies void - against public policy**

**7** Every device, payment or agreement, oral or written, express or implied, on the part of any person

- (a) that provides or purports to provide that any remedy under this Act does not apply to him; or
- (b) that provides or purports to provide that remedies available under this Act are not to be available for his benefit; and, in particular,
- (c) that waives or purports to waive any lien or right of lien under this Act;

is against public policy and void. (formerly sections 11 and 12)

## **Amendment of contracts to conform**

**8** Every contract and sub-contract to which this Act applies shall be conclusively deemed to be amended in so far as is necessary to bring it into conformity with this Act. (formerly section 29)

## **Assignment not valid against lien or trust**

**9** No assignment by the contractor or sub-contractor of any moneys due or to become due on account of the contract price under a contract or sub-contract is valid as against any lien or trust created under this Act. (formerly section 6(3))

## **RIGHTS TO INFORMATION**

### **Rights to information**

**10(1)** Any person entitled to a lien under Part IV or who is a beneficiary of the trust under Part II of the Act may, in writing, at any time demand information be provided within fourteen (14) days as follows:

#### **10(1.1) From the owner or contractor**

- (a) names of the parties to the contract;
- (b) the contract price;
- (c) copy of the general payment terms in the contract if the contract is in writing and if the contract is not in writing, a statement of the payment terms agreed between the parties to the contract;
- (d) a copy of specific contract terms, if any, providing for payment (including release of holdback) based on the completion of specified phases or the achievement of specific milestones;
- (e) a statement of the state of accounts as provided in subsection (2) as between the owner and the contractor;
- (f) the name and address of the bank, trust company or credit union in which a hold back account has been opened, the name of the account holder and the account number thereof;
- (g) a copy of any labour and material payment bond issued under the contract.

#### **10(1.2) From contractor or sub-contractor**

- (a) a copy of the payment terms in the sub-contract between the contractor and the sub-contractor and between any sub-contractor and another sub-contractor under which the claimant's lien or trust rights arise, if the sub-contract is in writing and, if the sub-contract is not in writing, a statement of the payment terms of the sub-contract or sub-contracts;
- (b) a statement of the state of accounts as provided in subsection (2) between the contractor and the sub-contractor or between the sub-contractor and the other sub-contractor, as the case may be;
- (c) a statement of whether there is provision in the contract or in any applicable sub-contract providing for certification of substantial performance of a relevant sub-contract or for the annual or phased release of holdback; and
- (d) a copy of any labour and material payment bond under which the claimant may have rights of recovery on its sub-contract account.

#### **10(1.3) From holder of fee simple in land**

- (a) the name and address of the party to a permit, licence, lease, or other document conferring an estate or interest in project lands pursuant to which an improvement has been made;
- (b) relevant particulars respecting the fee simple holder's consent or requirements for improvements; and
- (c) the state of accounts between the fee simple holder and the interest holder containing the information in subsection (2).

#### **10(1.4) From mortgagee or unpaid vendor of the improvement**

- (a) the terms of the mortgage on the land or the agreement for the purchase of the land;
- (b) a statement showing the amounts advanced under the mortgage for purchase of the land and for the improvement, the dates of those advances, particulars of any arrears outstanding from the mortgagor including arrears for payment of interest; and

- (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. (formerly section 58(1) and section 58(2))

### **State of accounts**

**10(2)** For purposes of this section, a state of accounts shall contain the following information as of a specified date:

- (a) The price of the work, services or materials that have been supplied under the contract or subcontract.
- (b) Excerpts relevant to the demand from the contractor's progress payment requests and schedule of values submitted, approved or certified, and details respecting claim amounts rejected with particulars.
- (c) The dates and amounts paid under the contract or subcontract.
- (d) In the case of a fee simple holder's state of accounts under subsection (1), indicate which of the amounts paid under the contract or subcontract constitute any part of a payment or obligation referred to in section 87 in respect of a lease or other lienable interest in land.
- (e) A statement as to the particulars of credits to and payments from the holdback account required in accordance with this Act including the dates of the credits and payments, the interest payable on the present balance.
- (f) The balance owed under the contract or subcontract.
- (g) Any amount retained under Part II section 26 (set-off by trustee) or under Part IV section 86 (lien set-off).
- (h) Any other information that may be prescribed. (Ont. s.39(4.1) modified for MB)

### **Costs of compliance with demand**

**10(3)** Where, under this section, a demand for information is made of an owner, contractor, sub-contractor, mortgagee or unpaid vendor, or an agent of any of them, the person making the demand may be required to pay the reasonable costs of making the copies or of preparing the statement before the requested information is provided. (formerly section 58(4))

### **Failure to respond to demand**

**10(4)** Where, under this section, a demand is made of an owner, contractor, sub-contractor, landlord, mortgagee or unpaid vendor, or an agent of any of them, and he

- (a) does not, within a reasonable time after receiving the demand and after payment of any reasonable costs required to be paid under subsection (3), if any, produce or deliver the copy of the document or the statement or information demanded; or
- (b) knowingly, falsely states the terms of any documents; or
- (c) knowingly gives any false statement or false information;

to the person making the demand and the person making the demand sustains any loss by reason of the failure, false statement, or false information, he is liable to the person making the demand for the amount of the loss in any action therefor, or in any action under this Act for the realization of the lien. (formerly section 58(5))

### **Order to produce**

**10(5)** On application at any time before or after an action is commenced for any relief under this Act, a judge may make an order requiring the owner, contractor, landlord, mortgagee, an unpaid vendor, or a sub-contractor or the agent of any of them, as the case may be, to produce the information demanded under section 10(1), and permit the person making demand to inspect the contract or sub-contract, lease, the mortgage or agreement for sale of the land, or the accounts, or the hold back account pass book, or any other relevant documents and he may make such order as to costs of the application and order as he deems just. (formerly section 58(6))

## PART II - TRUST CODE

### Purpose of statutory trust

**11** The codified trust remedy in this Part II creates a trust, designates trust funds, appoints trustees and designates beneficiaries who are entitled to payment from project-specific funds as they flow down the contractual payment chains which make up each project's construction contract pyramid pursuant to express terms of the trust and also provides for legal recourse where a beneficiary suffers loss, costs or damage upon trust funds being misappropriated or converted to a use not authorized by the terms of the trust set out in this Part.

### CREATION OF TRUST FUND

#### Receipts and moneys of owner constitute trust fund

**12(1)** All sums received or appropriated by an owner for use in the financing of a project less the amount, if any, used for payment of the purchase price and the discharge or withdrawal of prior encumbrances against the land, constitute a trust fund for use as authorized by this Act. (formerly section 5(2))

#### Additional sources for trust fund

**12 (2)** Insurance moneys as contemplated by section 91 and sale proceeds received by the owner for the improvement and, subject to terms of the bond, payments made under a performance bond, labour and material payment bond or other surety bonds for the project, may, on their terms and conditions, also contribute to the trust fund under this Part.

### TRUSTEES

#### Appointment of trustees

**13(1)** The owner, contractor and sub-contractors within each project construction contract pyramid become and shall each be a trustee of all trust funds settled or received in their respective hands.

#### Deemed trustees

**13(2)** Third parties who knew or ought to have known that they acquired trust funds to the prejudice of intended beneficiaries under this Part may be deemed by the court to be a trustee, held to account and ordered to pay over such funds and/or pay damages in an action for breach of trust.

### PAYMENT CERTIFICATION PROCESS

#### Schedule of values

**14** Prior to a contractor's first request for payment on account of the contract price, the contractor shall provide to the owner and to any payment certifier for the project for use in the payment approval process, a schedule of values for the contract price.

#### Duty of good faith

**15** The owner as trustee of the trust fund for the project and any owner's agent or other payment certifier responsible for review, approval and/or certification of contractor payment requests, shall at all times exercise a *duty of good faith* in response to such requests.

### BENEFICIARIES OF THE TRUST

#### Amounts certified as payable

**16** Where, under a contract, sums become payable to the contractor by the owner on the basis of the owner's approval or a certificate of a payment certifier, any amount, up to the aggregate of the sums so approved or certified, in the hands

of the owner or received by him at any time thereafter for payment under the contract constitutes, until paid to the contractor, a trust fund for payment to the contractor. (formerly section 5(1))

#### **Payments received by contractor in trust**

**17** All sums, including interest, received by a contractor on account of its contract price constitute a trust fund for the benefit of

- (a) the contractor to the extent that the sum includes an amount approved or certified on the contractor's own account; and
- (b) sub-contractors sub-contracted with the contractor who have worked, supplied materials or provided services to the contractor for the purpose of performing the contract to the extent of the amount requested, approved or certified and paid to the contractor as trustee on each such sub-contractor's account. (formerly section 4(1))

#### **Payments received by sub-contractor in trust**

**18** All sums, including interest, received by a sub-contractor on account of its sub-contract price, constitute a trust fund for the benefit of

- (a) the sub-contractor to the extent that the sum includes an amount requested and approved or certified on the sub-contractor's own account; and
- (b) sub-contractors who have sub-contracted with the sub-contractor who have worked, supplied materials or provided services to the sub-contractor for the purpose of performing the sub-contract, to the extent of the amounts requested, approved or certified and paid to the sub-contractor as trustee on behalf of each such sub-contractor's account. (formerly section 4(2))

### **TRUSTEE OBLIGATIONS**

#### **Duty of Loyalty**

**19** No trustee shall appropriate or convert any part of the trust fund to or for his own use or for any use not authorized by terms of the trust.

#### **Deposit of trust funds**

**20(1)** Every person who is a trustee under this Part shall comply with the following deposit and record keeping requirements respecting trust funds of which he or she is trustee:

- ~~(a)~~(d) \_\_\_\_\_ project trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the funds in hand, the funds shall be deposited into a bank account in the name of all such trustees.
- ~~(b)~~(e) \_\_\_\_\_ the trustee shall maintain written records respecting trust funds received on each project detailing the amounts that are received into and paid out of the project trust funds, any transfers made for purposes of the trust, and any other prescribed information.
- ~~(c)~~(f) \_\_\_\_\_ if a person is trustee of more than one project trust under this Part, such trust funds may be deposited together into a single bank account, as long as the trustee maintains specific project records as required under paragraph (b) above, separately in respect of each project trust.

#### **Multiple trust funds in a single account**

**20(2)** Trust funds from separate projects that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust. (Ont. s. 8.1 modified for MB)

### **Project record keeping by trustees**

**21(1)** Every trustee shall maintain in his principal place of business in the province a true and correct record of the following particulars of each contract and sub-contract he enters into respecting an improvement to which this Act applies:

- (a) the whole or essential terms of the contract or sub-contract.
- (b) the name, last known address and business names of the parties to the contract and to each direct sub-contract.
- (c) a copy of the schedule of values under a contract or sub-contract as prepared and updated by the party responsible for requesting payment under the contract or sub-contract.
- (d) a copy of each request for payment submitted with supporting materials.
- (e) a copy of the response(s) to each request for payment and a copy of all communications and proceedings resulting from each request.
- (f) the amount, particulars and date of each payment received by the payment requesting party under the contract and each sub-contract.
- (g) trust fund deposit records in compliance with section 20(1) above.
- (h) the amount of each deduction made from each payment under the contract or sub-contract and the particulars thereof.
- (i) the date of commencement of work undertaken in the performance of the contract or sub-contract.
- (j) the date and particulars of any certificate given by a payment certifier as to the substantial performance or completion of the contract or sub-contract or of any part thereof and the name and address of the payment certifier.
- (k) the date of substantial performance of the contract or sub-contract and the date of the completion of the contract or sub-contract. (formerly section 10(1))

### **Records to be current**

**21(2)** The records required to be maintained under subsection (1) shall be kept up-to-date not less frequently than monthly. (formerly section 10(2))

### **Records to be kept after completion**

**21(3)** The records required to be maintained under subsection (1) in respect of a contract or sub-contract shall be maintained and preserved by the owner, contractor or sub-contractor, as the case may be, for a period of not less than one year after the date of the completion of the improvement to which the contract or sub-contract relates. (formerly section 10(3))

### **Separate records for each project**

**21(4)** A separate record shall be maintained by owners, contractors and sub-contractors under subsection (1) in respect of each separate contract and sub-contract to which they are a direct party on a project. (formerly section 10(4))

### **Proper payment discharges trust and trustee**

**22** Every payment by a trustee to a person the trustee is liable to pay under this Part for work, services or materials provided under a contract or sub-contract discharges the trust and discharges the trustee from its obligations and potential liability as trustee to the extent of the payment made. (Ont. s. 10 modified for MB)

## **PERMITTED USES OF TRUST FUNDS**

### **Direct payment**

**23** Upon compliance with requirements set out in section 105, an owner or contractor may directly pay an amount due to a sub-contractor even though the payor is not a party to the particular sub-contract.

### **Advance payment to beneficiary**

**24** Subject to compliance with Part IV - Holdbacks, where a trustee pays in whole or in part for work, services or materials provided on a project out of money that is not subject to the trust under this Part, the trustee may retain from

trust funds subsequently received on the payee's account an amount equal to that paid by the trustee without being in breach of trust. (Ont. s. 11(1) modified for MB)

#### **Application of trust funds to discharge loan**

**25** Subject to compliance with Part IV - Holdbacks, where a trustee pays in whole or in part for work, services or materials provided on a project out of money loaned to the trustee, trust funds subsequently received on account of such payee(s) may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and such specific recovery from trust money otherwise payable to the subject payee(s) does not constitute a breach of trust. (formerly section 6(1))

#### **Set-off by trustee**

**26** Subject to section 103(6), a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and a person the trustee is liable to pay under a contract or sub-contract related to a project, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages related to the project or, if the contractor or sub-contractor payee, as the case may be, becomes insolvent, all outstanding debts, claims or damages whether or not related to the project. (Ont. s.12 modified for MB)

#### **Surplus trust funds revert to owner**

**27** Upon final completion of a project, release of any security posted for vacated liens, final settlement of all legal proceedings related to the project, full payment of all related determinations and judgments against the owner and final payment of all accounts outstanding to the contractor and sub-contractors, any surplus remaining in the owner's hands for the project trust fund shall revert to the owner for its own use, not as a breach of trust.

#### **Certain moneys Garnishment prohibited**

**32** Where money owing to a contractor or sub-contractor in respect of a contract price or sub-contract price would, if paid to the contractor or sub-contractor, be subject to a trust under this Part, the money is not subject to garnishment under *The Garnishment Act*. (formerly section 6(2))

#### **Assignment subject to trust**

**28** Further to section 9 in Part I, where a right to payment of moneys, which upon receipt by the assignor would be subject to a trust under this Act, is assigned, or purported to be assigned, all moneys received by the assignee under the assignment or purported assignment are subject to the trust and the assignee is deemed to be the trustee in place of the assignor. (formerly section 6(4))

### **TRUST CODE ENFORCEMENT**

#### **Application for directions**

**29(1)** An application for directions under this Part II may be made to the court where a dispute arises:

- (a) respecting the claim of a person for whose benefit a trust is constituted under this Part, or
- (b) respecting the administration of the trust fund.

#### **Who may apply**

**29(2)** An application under subsection (1) may be made by:

- (a) the person with respect to whose claim the dispute has arisen;
- (b) any person for whose benefit the trust fund is created by this Part; or
- (c) a trustee appointed under this Part. (Sask. s.17 modified for MB)

## **Civil right of action**

**30** A trustee appointed or deemed to be trustee under this Part who appropriates or converts any part of the trust fund to or for his own use or to or for any use not authorized by the trust may be sued for breach of trust by any beneficiary of the trust who suffers loss, costs or damages as a result.

### **Breach by corporation**

**31(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 under this Part is liable for the breach of trust. (Ont. s.13(1) modified for MB)

### **Effective control of corporation**

**31(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. (Ont. s.13(2) modified for MB)]

### **Joint and several liability**

**31(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. (Ont. s. 13(3) modified for MB)

### **Contribution**

**31(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. (Ont. s. 13 (4) modified for MB)

## **Limitation period for breach of trust action**

**32** An action for breach of trust under this Part shall commence within two (2) years of the date the person bringing the action first became aware of the cause of action.

### **Limit of time for asserting claims to trace trust moneys**

**33** No action to assert any claim to trace and seek recovery of moneys constituting a trust under this Part shall be commenced after the expiry of 180 days after the date upon which the person bringing the action first became aware of the breach of trust. (formerly section 8)

### **Offence and penalty**

**34** Every person upon whom a trust is imposed by this Part who knowingly appropriates or converts any moneys constituting a trust to or for his own use or to or for any use not authorized by the trust is guilty of an offence and liable, on summary conviction,

- (a) to a fine of not more than \$50,000.
  - (b) or to imprisonment for a term of not more than two years,
- or to both (a) and (b) above, and
- (c) every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this Part is, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to similar penalties. (formerly section 7)



## LINKAGE TO OTHER REMEDIES

### Interaction with Prompt Payment remedy:

**35(1)** Terms of trust codified in this Part may be taken into account by an adjudicator under Part III – Prompt Payment.

### Interaction with lien remedy:

### Registration time limits, etc., do not apply to trusts

**35(2)** The existence of a trust and a cause of action asserting a claim of entitlement to receive trust funds or asserting any breach of trust under this Part is not affected by the fact that the time has expired for registering or giving notice of a claim for a lien or for enforcement of a lien under Part IV (formerly section 9)

### Secured versus unsecured claims

**35(3)** Trust claims arising under this Part are unsecured and hence are subordinate in priority to duly registered lien claims and lien claims for which notice has been properly given pursuant to section 112(2).

### Trust claim provides no power to attach

**35(4)** The statutory trust created in this Part does not entitle a claimant before judgment to attach or charge land or trust funds or to stop the hand of a paymaster and only through due exercise of any lien rights such claimant may have under Part IV is there a right under this Act to attach or charge property with the value of an unproven claim for payment and thereby possibly impede the flow of project funds.

## PART III - PROMPT PAYMENT

### Purpose of prompt payment remedy

**36** Provisions in this Part III require timely payment of amounts earned, requested and approved under a contract or sub-contract for work completed, services provided or materials supplied to improve the value of land; payers are required to give timely notice of reasons for rejection of payment requests; an adjudication process allows interim determination of payment disputes that arise in the ordinary course of projects to which this Act applies and such determinations are subject to judicial review on limited grounds, with final determination made either by settlement, in a legal action or arbitration.

### Definition, “proper invoice”

**37** In this Part,

“proper invoice” means a written bill or other request for payment for work, services or materials provided in respect of an improvement under a contract, if it contains the following information and, subject to subsection 39(2), meets any other requirements that the contract specifies:

1. The contractor’s name and address.
2. The date of the proper invoice and the period during which the work, services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the work, services or materials were supplied.
4. A description, including quantity where appropriate, of the work, services or materials that were supplied.
5. The amount requested broken down within a schedule of values for the work, services or materials that were supplied by the contractor’s own forces and by each of its sub-contractors during the period for which payment is requested, and the payment terms.
6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
7. Any other information that may be prescribed. (Ont. s.6.1 modified for MB)

### **Subject to holdback requirements**

**38** A requirement to pay an amount in accordance with this Part is subject to any requirement to retain a holdback in accordance with Part IV. (Ont. s.6.2 modified for MB)

### **Giving of proper invoices**

**39 (1)** Proper invoices shall be given to an owner on a monthly basis, unless the contract provides otherwise.

### **Restriction on conditions**

**39(2)** A provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval is of no force or effect.

### **Same**

**39(3)** For greater certainty, subsection (2) has no application to a provision in a contract that provides for the certification of a payment certifier or the owner's approval after a proper invoice is given.

### **Exception**

**39(4)** Subsection (2) does not apply to a provision in a contract that provides for the testing and commissioning of the work, services or materials supplied under the contract.

### **Revisions**

**39(5)** A proper invoice may be revised by the contractor after the contractor has given it to the owner, if,

- (a) the owner agrees in advance to the revision;
- (b) the date of the proper invoice is not changed; and
- (c) the proper invoice continues to meet the requirements referred to in the definition of "proper invoice" in section 37. (formerly Ont. s. 6.3 modified for MB)

### **Payment deadline, owner to contractor**

**40(1)** Subject to the giving of a notice of non-payment under subsection (2), an owner shall pay the amount requested under a proper invoice no later than 28 days after receiving the proper invoice from the contractor.

### **Exception, notice of non-payment if dispute**

**40(2)** An owner who disputes a proper invoice may refuse to pay all or any portion of the amount requested under the proper invoice within the time specified in subsection (1) if, no later than 14 days after receiving the proper invoice from the contractor, the owner gives to the contractor a notice of non-payment, in the prescribed form and manner, specifying the amount of the proper invoice that is not being paid and detailing all of the reasons for non-payment.

### **Requirement to pay remaining amount**

**40(3)** Subsection (1) continues to apply to any amount requested under the proper invoice that is not the subject of a notice under subsection (2). (Ont. s. 6.4 modified for MB)

### **Payment deadlines, contractor to subcontractor**

#### **Full payment**

**41(1)** Subject to the giving of a notice of non-payment under subsection (6), a contractor who receives full payment of a proper invoice within the time specified in subsection 40(1) shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract with the contractor the amount that was included in the proper invoice for each respective subcontractor.

#### **Partial payment, paid amount**

**41(2)** Subject to the giving of a notice of non-payment under subsection (6), if the payment received by the contractor from the owner is only for a portion of the amount requested under a proper invoice, the contractor shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract with the contractor that was included for that sub-contractor in the proper invoice and in the amount paid by the owner.

#### **Same**

**41(3)** For the purposes of subsection (2), if more than one subcontractor is entitled to payment, payment shall be made in accordance with the following rules:

1. If the amount not paid by the owner is specific to work, services or materials supplied by a particular subcontractor or subcontractors, the remaining subcontractors shall be paid, with any amount paid by the owner in respect of the subcontractor or subcontractors who are implicated in the dispute payable to them on a rateable basis, as applicable.
2. In any other case, subcontractors shall be paid on a rateable basis.

#### **Non or partial payment, unpaid amount**

**41(4)** Subject to the giving of a notice of non-payment under subsection (5) or (6), if the owner does not pay some or all of a proper invoice within the time specified in subsection 40(1), the contractor shall, no later than 35 days after giving the proper invoice to the owner, pay each subcontractor who supplied work, services or materials under a subcontract with the contractor that were included in the proper invoice the amount requested for the subcontractor, to the extent that he or she was not paid fully under subsection (2).

#### **Exception, notice of non-payment if owner does not pay**

**41(5)** Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (7), the contractor gives to the subcontractor, in the prescribed manner,

- (a) a notice of non-payment, in the prescribed form,
  - (i) stating that some or all of the amount requested for the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the owner,
  - (ii) specifying the amount not being paid, and
  - (iii) providing an undertaking to refer the matter to adjudication under this Part no later than 21 days after giving the notice to the subcontractor; and
- (b) a copy of any notice of non-payment given by the owner under subsection 40(2).

#### **Exception, notice of non-payment if dispute**

**41(6)** A contractor who disputes, in whole or in part, the entitlement of a subcontractor to payment of an amount under the subcontract may refuse to pay all or any portion of the amount within the time specified in subsection (1), (2) or (4), as the case may be, if, no later than the date specified in subsection (7), the contractor gives to the subcontractor a notice of non-payment, in the prescribed form and manner, specifying the amount that is not being paid and detailing all of the reasons for non-payment.

#### **Timing of notice**

**41(7)** For the purposes of subsections (5) and (6), the contractor must give notice no later than,

- (a) seven days after receiving a notice of non-payment from the owner under subsection 40(2); or
- (b) if no notice was given by the owner, before the expiry of the period referred to in subsection (4).

#### **Payment deadline once payment received from owner**

**41(9)** Subsections (1) and (2) apply, with necessary modifications, in respect of any amount that is the subject of a notice under subsection (5), once the amount is paid by the owner. (Ont. s. 6.5 modified for MB)

#### **Payment deadlines, subcontractor to subcontractor**

##### **Full payment**

**50(1)** Subject to the giving of a notice of non-payment under subsection (7), a subcontractor who receives full payment from a contractor in respect of a proper invoice within the time specified in subsection 41(1) shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract between them that were included in the proper invoice the amount payable to the subcontractor.

##### **Partial payment, paid amount**

**50(2)** Subject to the giving of a notice of non-payment under subsection (7), if the payment received by the subcontractor from the contractor is only for a portion of the amount payable to the subcontractor in respect of a proper invoice, the subcontractor shall, no later than seven days after receiving payment, pay each subcontractor who supplied work, services or materials under a subcontract between them the amount that was included in the proper invoice and in the amount paid by the contractor.

##### **Same**

**50(3)** For the purposes of subsection (2), if more than one subcontractor is entitled to payment, payment shall be made in accordance with the following rules:

1. If the amount not paid by the contractor is specific to work, services or materials supplied by a particular subcontractor or subcontractors, the remaining subcontractors shall be paid, with any amount paid by the contractor in respect of the subcontractor or subcontractors who are implicated in the dispute payable to them on a rateable basis, as applicable.
2. In any other case, subcontractors shall be paid on a rateable basis.

##### **Non or partial payment, unpaid amount**

**50(4)** Subject to the giving of a notice of non-payment under subsection (6) or (7), if the contractor does not pay some or all of the amount requested for a subcontractor in a proper invoice within the time specified in section 6.5, the subcontractor shall, no later than the date specified in subsection (5), pay each subcontractor who supplied work, services or materials under a subcontract between them that was included in the proper invoice the amount requested for the subcontractor, to the extent that he or she was not paid fully under subsection (2).

##### **Same, payment deadline**

**50(5)** For the purposes of subsection (4), the subcontractor shall pay the amounts no later than,

- (a) seven days after the subcontractor receives payment from the contractor; or
- (b) if no payment is made by the contractor to the subcontractor, 42 days after the proper invoice was given to the owner.

##### **Exception, notice of non-payment if contractor does not pay**

**50(6)** Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (8), the subcontractor required to pay under subsection (4) gives to the other subcontractor, in the prescribed manner,

- (a) a notice of non-payment, in the prescribed form,
  - (i) stating that some or all of the amount requested for the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the contractor,

- (ii) specifying the amount not being paid, and
  - (iii) unless the failure of the contractor to pay is as a result of non-payment by the owner, and the contractor has provided an undertaking to refer the matter to adjudication under this Part no later than 21 days after giving the notice to the subcontractor; and
- (b) a copy of any notices of non-payment received by the subcontractor in relation to the proper invoice.

#### **Exception, notice of non-payment if dispute**

**50(7)** A subcontractor who disputes, in whole or in part, the entitlement of another subcontractor to payment of an amount under the subcontract may refuse to pay all or any portion of the amount within the time specified in subsection (1), (2) or (4), as the case may be, if, no later than the date specified in subsection (8), the subcontractor gives to the other subcontractor a notice of non-payment, in the prescribed form and manner, specifying the amount that is not being paid and detailing all of the reasons for non-payment.

#### **Timing of notice**

**50(8)** For the purposes of subsections (6) and (7), the subcontractor must give notice no later than,

- (a) seven days after receiving a notice of non-payment from the contractor under subsection 41(5) or (6); or
- (b) if no notice was given by the contractor, before the expiry of the period referred to in clause (5) (b).

#### **Payment deadline once payment received from contractor**

**50(9)** Subsections (1) and (2) apply, with necessary modifications, in respect of any amount that is the subject of a notice under subsection (6), once the amount is paid by the contractor.

#### **Date proper invoice was given**

**50(10)** On the request of a subcontractor who is required to make payments in accordance with this section, a contractor shall, as soon as possible, provide to the subcontractor confirmation of the date on which the contractor gave a proper invoice to the owner.

#### **Further application**

**50(11)** This section applies, with necessary modifications, in respect of a subcontractor who is entitled to payment in accordance with this section and any amounts payable by that subcontractor to any other subcontractor under a subcontract in respect of the improvement. (Ont. s. 6.6 modified for MB)

#### **Reasons for non-payment**

**51** Reasons for non-payment in accordance with this Part may include the retention of amounts under Part II section 26 (set-off by trustee) or under Part IV section 86 (lien set-off). (Ont. s. 6.7 modified for MB)

#### **No effect on wages**

**52** Nothing in this Part in any way reduces, derogates from or alters the obligations of a contractor or subcontractor to pay wages to an employee as provided for by statute, contract or collective bargaining agreement. (Ont. s. 6.8 modified for MB)

#### **Interest on late payments**

**53** Interest begins to accrue on an amount that is not paid when it is due to be paid under this Part, at the prejudgment interest rate determined under Part XIV of *The Court of Queen's Bench Act* or, if the contract or subcontract specifies a different interest rate for the purpose, the greater of the prejudgment interest rate and the interest rate specified in the contract or subcontract. (Ont. s. 6.9 modified for MB)

## CONSTRUCTION DISPUTE INTERIM ADJUDICATION

### Definitions

**54** In this Part,

“adjudication” means construction dispute interim adjudication under this Part with respect to a matter referred to in section 58; (“arbitrage intérimaire”)

“adjudicator” means a person who is qualified by the Authority as an adjudicator; (“arbitre intérimaire”)

“Authority” means the Authorized Nominating Authority designated under section 55; (“Autorité”)

“notice of adjudication” means a notice that meets the requirements of section 60. (“avis d’arbitrage intérimaire”) (Ont. s. 13.1 modified for MB)

### Authorized Nominating Authority

**55(1)** The Minister responsible for the administration of this Act may designate an entity to act as Authorized Nominating Authority for the purposes of this Part.

### Criteria

**55(2)** An entity may not be designated under subsection (1), or act as Authorized Nominating Authority, unless it meets the prescribed criteria, if any. (Ont. s. 13.2 modified for MB)

### Duties and powers of Authority

#### Duties

**56(1)** The Authority shall,

- (a) develop and oversee programs for the training of persons as adjudicators;
- (b) qualify persons who meet the prescribed requirements as adjudicators;
- (c) establish and maintain a publicly available registry of adjudicators;
- (d) appoint adjudicators for the purposes of subsection 61(5); and
- (e) perform any other duties of the Authority set out in this Part or that may be prescribed for the purposes of this Part.

#### Powers

**56(2)** The Authority may,

- (a) subject to the regulations, set fees for the training and qualification of persons as adjudicators and for the appointment of adjudicators, and require their payment; and
- (b) exercise any other power of the Authority set out in this Part or that may be prescribed for the purposes of this Part. (Ont. s. 13.3 modified for MB)

### Minister as Interim Authority

**57(1)** The Minister responsible for the administration of this Act may act as Authorized Nominating Authority in accordance with subsection (2) on an interim basis, for any period during which an entity is not designated under section 13.2.

### Same

**57(2)** If the Minister responsible for the administration of this Act acts as Authorized Nominating Authority, the Minister,

- (a) shall, subject to subsection (3), perform the duties of the Authority, other than the duty set out in clause 56(1) (a); and
- (b) may exercise the powers of the Authority, other than the power set out in clause 56(2) (a).

## **Same**

**57(3)** A duty of the Authority that is set out in the regulations for the purposes of clause 56(1) (e) must only be performed by the Minister if the regulations prescribed for the purposes of this section so provide. (Ont. s. 13.4 modified for MB)

## **Availability of adjudication**

### **Contract**

**58(1)** Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under this Part.
4. Amounts retained under Part II section 26 (set-off by trustee) or under Part IV section 86 (lien set-off).
5. Payment of a holdback under Part IV.
6. Non-payment of holdback under Part IV.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

### **Subcontract**

**58(2)** Subject to subsection (3), a party to a subcontract may refer to adjudication a dispute with the other party to the subcontract respecting any of the matters referred to in subsection (1), with necessary modifications.

### **Expiry of adjudication period**

**58(3)** An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise.

### **Multiple matters**

**58(4)** An adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise.

### **Application despite other proceeding**

**58(5)** A party may refer a matter to adjudication under this Part even if the matter is the subject of a court action or of an arbitration under *The Arbitration Act, S.M. 1997, c.4*, unless the action or arbitration has been finally determined. (Ont. s. 13.5 modified for MB)

## **Adjudication procedures**

**59(1)** Subject to subsection (2), an adjudication is subject to the adjudication procedures set out in the contract or subcontract, if they comply with the requirements of this Part.

### **Same**

**59(2)** If the contract or subcontract does not address adjudication procedures, or if the adjudication procedures set out in the contract or subcontract do not comply with the requirements of this Part, the adjudication is subject to the adjudication procedures set out in this Part and in the regulations. (Ont. s. 13.6 modified for MB)

## **Notice of adjudication**

**60(1)** A party to a contract or subcontract who wishes to refer a dispute to adjudication shall give to the other party a written notice of adjudication that includes,

- (a) the names and addresses of the parties;
- (b) the nature and a brief description of the dispute, including details respecting how and when it arose;
- (c) the nature of the redress sought; and
- (d) the name of a proposed adjudicator to conduct the adjudication.

## **Copies**

**60(2)** If the regulations so provide, a party who gives notice under subsection (1) shall give a copy of the notice, in the prescribed manner, to the prescribed persons or entities. (Ont. s. 13.7 modified for MB)

## **Consolidated adjudications**

**61(1)** If the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 58(1) and (2), the parties to each of the adjudications may agree to the adjudication of the disputes together by a single adjudicator as a consolidated adjudication.

### **May be required by contractor**

**61(2)** If the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 58(1) and (2) but the parties to each of the adjudications do not agree to consolidated adjudication, the contractor may, in accordance with the regulations, nevertheless require the consolidation of the adjudications.

## **Application**

**61(3)** This Part applies with the following and any other necessary modifications to a consolidated adjudication:

1. Subsection 13.10 (3) does not apply, and the adjudicator may determine how the adjudication fee is to be apportioned between the parties.
2. The reference in subsection 65(3) to either or both parties to an adjudication shall be read as a reference to any or all of the parties to the consolidated adjudication.
3. The references in section 71 to the other party to the adjudication shall be read as a reference to any party to the consolidated adjudication.

## **Multiple matters permitted**

**61(4)** This section applies despite subsection 58(4). (Ont. s. 13.8 modified for MB)

## **Adjudicator**

**62(1)** An adjudication may only be conducted by an adjudicator listed in the registry established under clause 56 (1) (c).

### **Selection of adjudicator**

**62(2)** The parties to the adjudication may agree to an adjudicator, or may request that the Authority appoint an adjudicator.

### **Contract, subcontract may not name adjudicator**

**62(3)** A provision in a contract or subcontract that purports to name a person to act as an adjudicator in the event of an adjudication is of no force or effect.

### **Requirement to request appointment**

**62(4)** If an adjudicator does not consent to conduct the adjudication within four days after the notice of adjudication is given, the party who gave the notice shall request that the Authority appoint an adjudicator.

## **Appointment**

**62(5)** The Authority shall appoint an adjudicator, subject to his or her prior consent, to conduct an adjudication no later than seven days after receiving a request for the appointment.

### **No requirement to act**

**62(6)** Nothing in this Part or the regulations shall be read as requiring an adjudicator to agree to conduct an adjudication or to accept an appointment by the Authority to conduct an adjudication. (Ont. s. 13.9 modified for MB)

## **Adjudicator fee**

**63(1)** An adjudicator shall be paid a fee for conducting the adjudication, which shall be determined in accordance with subsection (2) before the adjudication commences.



**Fee amount**

**63(2)** The fee payable to an adjudicator is,

- (a) the fee agreed to by the parties to the adjudication and the adjudicator; or
- (b) if the parties and the adjudicator do not agree to a fee amount, the amount determined by the Authority, in accordance with the regulations, if any, on the adjudicator's request.

**Equal apportionment**

**63(3)** The parties to the adjudication shall split payment of the adjudication fee equally, subject to a different determination under section 71 (Ont. s. 13.10 modified for MB)

**Documents for adjudication**

**64** No later than five days after an adjudicator agrees or is appointed to conduct the adjudication, the party who gave the notice of adjudication shall give to the adjudicator a copy of the notice, together with,

- (a) a copy of the contract or subcontract; and
- (b) any documents the party intends to rely on during the adjudication. (Ont. s. 13.11 modified for MB)

**Conduct of adjudication****Powers of adjudicator**

**65(1)** In conducting an adjudication, an adjudicator may exercise the following powers and any other power of an adjudicator that may be specified in the contract or subcontract:

1. Issuing directions respecting the conduct of the adjudication.
2. Taking the initiative in ascertaining the relevant facts and law.
3. Drawing inferences based on the conduct of the parties to adjudication.
4. Subject to subsection (2), conducting an on-site inspection of the improvement that is the subject of the contract or subcontract.
5. Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question.
6. Making a determination in the adjudication.
7. Any other power that may be prescribed.

**On-site inspection**

**65(2)** The exercise of the power to conduct an on-site inspection under paragraph 4 of subsection (1) is subject to the prior consent of,

- (a) the owner of the premises if,
  - (i) the premises is a home in which the owner resides, or
  - (ii) the owner is not a party to the adjudication; and
- (b) any other person who has the legal authority to exclude others from the premises.

**Costs of assistance**

**65(3)** If the adjudicator obtains the assistance of a person under paragraph 5 of subsection (1), the adjudicator may fix the remuneration of the person as is reasonable and proportionate to the dispute and direct payment of the remuneration by either or both of the parties to the adjudication.

**Conduct**

**65(4)** Subject to this section, the adjudicator may conduct the adjudication in the manner he or she determines appropriate in the circumstances.

**Impartiality**

**65(5)** An adjudicator shall conduct an adjudication in an impartial manner. (Ont. s. 13.12 modified for MB)

### **Determination**

**66(1)** Subject to subsection (2), an adjudicator shall make a determination of the matter that is the subject of an adjudication no later than 30 days after receiving the documents required by section 64.

### **Extension**

**66(2)** The deadline for an adjudicator's determination may be extended, at any time before its expiry and after the giving of documents to the adjudicator under section 64,

- (a) on the adjudicator's request, with the written consent of the parties to the adjudication, for a period of no more than 14 days; or
- (b) on the written agreement of the parties to the adjudication, subject to the adjudicator's consent, for the period specified in the agreement.

### **Notice of extension**

**66(3)** If the party who gave the notice of adjudication also gave a notice of non-payment under this Part in relation to the matter that is the subject of the adjudication, the party shall give notice of an extension under clause (2) (b), specifying the period of the extension, to the person to whom he or she gave the notice of non-payment.

### **Same**

**66(4)** A person who receives notice of an extension under subsection (3) or under this subsection shall give notice of the extension, specifying the period of the extension, to any person to whom he or she gave notice of non-payment under this Part in relation to the matter that is the subject of the adjudication.

### **Delayed determination**

**66(5)** A determination made by an adjudicator after the date determined under subsection (1) or (2) is of no force or effect.

### **Written reasons**

**66(6)** The adjudicator's determination shall be in writing and shall include reasons for the determination.

### **Admissibility**

**66(7)** The determination and reasons of an adjudicator are admissible as evidence in court. (Ont. s. 13.13 modified for MB)

### **Termination of adjudication**

**68** At any time after the notice of adjudication is given and before the adjudicator makes his or her determination, the parties to the adjudication may agree to terminate the adjudication, on notice to the adjudicator and subject to the payment of the adjudicator's fee. (Ont. s. 13.14 modified for MB)

### **Effect of determination**

**69(1)** The determination of a matter by an adjudicator is binding on the parties to the adjudication until a determination of the matter by a court, a determination of the matter by way of an arbitration conducted under *The Arbitration Act, S.M. 1997, c. 4*, or a written agreement between the parties respecting the matter.

### **Authority of court, arbitrator**

**69(2)** Subject to section 13.18, nothing in this Part restricts the authority of a court or of an arbitrator acting under *The Arbitration Act, S.M. 1997, c. 4* to consider the merits of a matter determined by an adjudicator. (Ont. s. 13.15 modified for MB)

### **Costs**

**70** Subject to section 71, the parties to an adjudication shall bear their own costs of the adjudication. (Ont. s. 13.16 modified for MB)

### **Frivolous, vexatious, etc.**

**71** If an adjudicator determines that a party to the adjudication has acted in respect of the improvement in a manner that is frivolous, vexatious, an abuse of process or other than in good faith, the adjudicator may provide, as

part of his or her determination of the matter, that the party be required to pay some or all of the other party's costs, any part of the fee amount determined under section 62 that would otherwise be payable by the other party, or both. (Ont. s. 13.17 modified for MB)

### **Setting aside on judicial review**

#### **Leave required**

**72(1)** An application for judicial review of a determination of an adjudicator may only be made with leave of the Divisional Court in accordance with this section and the rules of court.

#### **Timing**

**72(2)** A motion for leave to bring an application for judicial review of a determination of an adjudicator shall be filed, with proof of service, in accordance with the rules of court no later than 30 days after the determination is communicated to the parties.

#### **Dismissal without reasons**

**72(3)** A motion for leave to bring an application for judicial review may be dismissed without reasons.

#### **No appeal**

**72(4)** No appeal lies from an order on a motion for leave to bring an application for judicial review.

#### **Setting aside only for specified reasons**

**72(5)** The determination of an adjudicator may only be set aside on an application for judicial review if the applicant establishes one or more of the following grounds:

1. The applicant participated in the adjudication while under a legal incapacity.
2. The contract or subcontract is invalid or has ceased to exist.
3. The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication.
4. The adjudication was conducted by someone other than an adjudicator.
5. The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject under this Part, and the failure to comply prejudiced the applicant's right to a fair adjudication.
6. There is a reasonable apprehension of bias on the part of the adjudicator.
7. The determination was made as a result of fraud.

#### **Amounts paid**

**72(6)** If the Court sets aside the decision of an adjudicator, the Court may require that any or all amounts paid in compliance with the determination be returned with interest.

#### **No stay**

**72(7)** An application for judicial review of a decision of an adjudicator does not operate as a stay of the operation of the determination unless the Court orders otherwise. (Ont. s. 13.18 modified for MB)

#### **Amounts payable**

##### **Subject to holdback**

**73(1)** A requirement to pay an amount in accordance with this section is subject to any requirement to retain a holdback in accordance with Part IV.

##### **Enforcement of amounts payable**

**73(2)** A party who is required under the determination of an adjudicator to pay an amount to another person shall pay the amount no later than 10 days after the determination has been communicated to the parties to the adjudication.

##### **Interest on late payments**

**73(3)** Interest begins to accrue on an amount that is not paid when it is due to be paid under this Part, at the prejudgment interest rate determined under Part XIV of *The Court of Queen's Bench Act, C.C.S.M., c. C280* or, if the

contract or subcontract specifies a different interest rate for the purpose, the greater of the prejudgment interest rate and the interest rate specified in the contract or subcontract.

#### **No interest on interest**

**73(4)** Subsection (3) does not apply in respect of any amount payable under section 53.

#### **Suspension of work**

**73(5)** If an amount payable to a contractor or subcontractor under a determination is not paid by the party when it is due under this section, the contractor or subcontractor may suspend further work under the contract or subcontract until the party pays the following amounts:

1. The amount required to be paid under the determination.
2. Any interest accrued on that amount under subsection (3).
3. Any reasonable costs incurred by the contractor or subcontractor as a result of the suspension of work.

#### **Same, costs of resumption**

**73(6)** A contractor or subcontractor who suspends work under subsection (5) is entitled to payment, by the party, of any reasonable costs incurred by him or her as a result of the resumption of work following the payment of the amounts referred to in that subsection. (Ont. s. 13.19 modified for MB)

#### **Enforcement by court**

**74(1)** A party to an adjudication may, no later than the date referred to in subsection (2), file a certified copy of the determination of an adjudicator with the court and, on filing, the determination is enforceable as if it were an order of the court.

#### **Deadline**

**74(2)** The filing of a determination under subsection (1) may not be made after the later of,

- (a) the second anniversary of the communication of the determination to the parties; and
- (b) if a party makes a motion under section 72 for leave to bring an application for judicial review of a determination of an adjudicator, the second anniversary of the dismissal of the motion or, if the motion was not dismissed, the final determination of the application, if it did not result in the adjudicator's determination being set aside.

#### **Notice of filing**

**74(3)** A party shall, no later than 10 days after filing a determination under subsection (1), notify the other party of the filing.

#### **Effect on requirement to make payments**

**74(4)** If a determination requiring that an amount be paid to a contractor or subcontractor is filed under subsection (1), any related requirement of the contractor or subcontractor, as the case may be, to make payment to a subcontractor is deferred pending the outcome of the enforcement. (Ont. s. 13.20 modified for MB)

#### **Immunity**

**75** No action or other proceeding shall be commenced against an adjudicator or his or her employees for any act done in good faith in the execution or intended execution of any duty or power under this Part or the regulations, or for any alleged neglect or default in the execution in good faith of that duty or power. (Ont. s. 13.21 modified for MB)

#### **Testimonial immunity**

**76** An adjudicator shall not be compelled to give evidence in any action or other proceeding in respect of a matter that was the subject of an adjudication that he or she conducted. (Ont. s. 13.22 modified for MB)

#### **Application of Part to surety bonds (Part V)**

**77** If the regulations so provide, this Part applies, with such modifications as the regulations specify, to disputes in respect of such surety bonds to which Part V applies as are specified by the regulations. (Ont. s. 13.23 modified for MB)

## PART IV – CONSTRUCTION LIEN

### Purpose of lien remedy

**78** This Part IV provides a time-limited statutory right whereby the unproven claim of a contractor or sub-contractor for the value of work, services or materials provided from time to time under a contract or sub-contract to improve the value of an owner's land, may become a fixed charge against the owner's estate in the land, against holdback retained and against amounts then payable and thereby at least temporarily 'stay the hand of the paymaster' whereafter procedures are provided to vacate such fixed charges, to restore orderly payment processes on continuing construction projects and allow each claimant to proceed to prove and enforce its unresolved lien claim by further legal action.

### ORIGIN AND NATURE OF LIEN

#### Creation of lien

**79(1)** Any person who does any work or provides any services or supplies any materials to be used in performance of a contract or sub-contract for any owner, contractor or sub-contractor has, by virtue thereof, a lien for the value of the work, services or materials which, subject to section 83, attaches upon the estate or interest of the owner in the land or structure upon or in respect of which the work was done or the services were provided or the materials were supplied, and the land occupied thereby or enjoyed therewith. (formerly section 13)

#### Charge on holdback

**79(2)** Each lienholder who has a lien arising under a contract or sub-contract has a charge upon that part of the holdback to which the person through whom the lien is derived is entitled. (formerly section 26)

#### Value of lien claim

**79(3)** The value of a lien at a given point in time includes the amount then due or reasonably expected by the claimant to become due under its contract or sub-contract for work done, services provided and materials supplied, and shall not include claims respecting indirect damages suffered such as head office overhead costs, lost profit, lost opportunity or lost productivity.

#### Liability for grossly exaggerated claims

**80(1)** In addition to any other ground on which he may be liable, any person who registers or gives written notice of a claim for lien

(a) for an amount grossly in excess of the amount due to him or which he reasonably expects to become due to him; or

(b) where he knows or ought to know that he does not have a lien;

is liable to any person who suffers damage as a result unless he satisfies the court that the registration or written notice given of the claim for lien was made, and the amount for which the lien was claimed was calculated, in good faith and without negligence. (formerly section 40)

#### Vacation or reduction of lien amount

**80(2)** In the circumstances described in sub-section (1), having found that the lien claimant acted in bad faith, the court may, on application or within an action, order either that the lien be wholly vacated or reduced by the exaggerated amount. (Ont. s.35(2) modified for MB)

#### Minimum value of lien claims

**81** No effective notice of a claim for lien may be served or registered for an amount less than \$2,000. (formerly section 14)

## **Commencement of lien**

**82** As against owners, chargees or mortgagees under or through instruments, registered or unregistered, a lien, upon registration as hereinafter provided, arises and takes effect from the date of the commencement of the work or services or from the date the materials were first supplied. (formerly section 15)

## **Liens against Crown, Crown agency or municipality**

**83(1)** Where the owner of the land or structure upon or in respect of which any work is done, or services are provided, or materials are supplied, is the Crown, a Crown agency, or a municipality, the lien created by section 79 does not attach to the interest of the Crown, the Crown agency or the municipality, in the land or structure but constitutes a charge on

- (a) amounts required to be retained as holdback under section 98; and
- (b) amounts payable to the contractor or sub-contractor under whom the lien is derived (formerly section 27(7))

up to the amount claimed in the notice.

## **Written notice required**

**83(2)** Subject to written notice requirements under section 112, this Act applies to lien claims under subsection (1), with such modifications as the circumstances require, and shall be construed to have effect in the enforcement of the charge on the amounts retained without the requirement of registration of the claim for lien against title to the land or structure. (formerly section 16)

## **Disposition by owner of such notices given**

**83(3)** Upon being given a written notice of claim for lien under section 112, the owner shall retain amounts charged up to the amount claimed in the notice pending the earlier of withdrawal of the notice under section 121 on terms agreed or vacation of a disputed lien under section 122.

## **Limit of owner's liability**

**84(1)** Subject to subsection 103(2), a lien does not attach so as to make an owner liable for a greater amount than the amount payable by the owner to the contractor. (formerly section 22(1))

## **Liability of municipality with respect to certain roads, etc.**

**84(2)** Notwithstanding subsection (1), where land is dedicated as a public road, roadbed, lane or sidewalk, and an improvement is made to the public road, roadbed, lane or sidewalk at the request of, or under agreement with, a municipality, and

(a) to the specifications of the municipality; or

(b) under the supervision of the municipality; but not at the expense of the municipality, the municipality is, nevertheless, on default of payment by the proper payer, liable to the value of the holdbacks required under section 98 that would have been required if the improvement had been made at the expense of the municipality. (formerly section 22(2))

## **Limit of lien recoverable by person other than contractor**

**85** Subject to subsection 103(2), where a lien is claimed by a person other than a contractor, the amount that may be recovered is limited to the amount payable to the contractor or sub-contractor or other person for whom the lienholder did work, provided services or supplied the materials. (formerly section 23)

## **Set-off against lien claim – determining ‘amount payable’**

**86** Subject to section 103(6), in determining the amount payable under a lien, there may be taken into account the amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages related to the project, or, if the contractor or sub-contractor payee becomes insolvent, all outstanding debts, claims or damages whether or not related to the project. (Ont. s.17(3) modified for MB)

### **Where estate attached is leasehold**

**87(1)** Where the estate or interest of the owner upon which the lien attaches is a leasehold estate or interest, the estate or interest of that owner's landlord and, where the estate or interest of the owner's landlord is leasehold, the estate in fee simple, as well are subject to the lien if

- (a) the person entitled to the estate in fee simple or the owner's landlord, or both, consented to the work, services or materials giving rise to the lien being done, provided or supplied, and the work, services or materials giving rise to the lien were done, provided or supplied for the direct benefit of the person entitled to the estate in fee simple or the owner's landlord; or
- (b) the owner is required, by his lease or other agreement with his landlord, or other person entitled to the estate in fee simple to do the work, provide the services, or supply the materials giving rise to the lien; and
- (c) the claim for lien or written notice of claim for lien against the leasehold estate shall, as the case may be, be registered or given in accordance with the requirements of this Act which apply to the fee simple estate of the project lands. (formerly section 18(1))

### **Limit of landlord liability**

**87(2)** A lien created under subsection (1) on the estate or interest of an owner's landlord, or on an estate in fee simple is limited to, and does not attach so as to make the owner's landlord or the holder of the estate in fee simple liable for more than the value of the holdbacks that the owner was required to make. (formerly section 18(2))

### **Forfeiture or termination of lease, effect of**

**87(3)** No forfeiture of a lease to, or termination of a lease by the owner's landlord, except for non-payment of rent, deprives any person entitled to the lien against the leasehold estate of the benefit of the person's lien. (formerly section 19)

### **Notice to lien claimants**

**87(4)** Where a landlord intends to enforce forfeiture or terminate a lease because of non-payment of rent, and there is a claim for lien registered against the leasehold estate in the proper land registry office or a written notice of claim for lien has been given under section 112, the landlord shall give notice in writing of the intention to enforce forfeiture or terminate the lease and of the amount of the unpaid rent to each person who has registered a claim for lien against the leasehold interest. (Ont.s.19(3) modified for MB)

### **Payment of unpaid rent**

**87(5)** A person receiving notice under subsection (4) may, within ten days thereafter, pay to the landlord the amount of the unpaid rent, and the amount so paid may be added by that person to the person's claim for lien against the leasehold estate. (formerly section 19)

### **Application of this section by analogy**

**87(6)** Where a fee simple holder has conferred an estate or interest in project lands on an owner who has made an improvement giving rise to lien rights, provisions of sub-sections 87(1) through 87(5) shall apply, as appropriate, by analogy.

## **TRANSMISSION OF LIEN**

### **Death of lienholder**

**88** Where a lienholder dies, his right of lien survives in his personal representative. (formerly section 53)

### **Assignment of lien**

**89(1)** The rights of a lienholder may be assigned by an instrument in writing. (formerly section 54(1))

### **Assignee registering lien**

**89(2)** Where a lien right is assigned before registration or a written notice being given, the assignee may register or give written notice of the claim for lien. (formerly section 54(2))

### **Assignee registering assignment**

**89(3)** Where a lien right is assigned after registration or a written notice has been given, the assignee may register the assignment thereof in the registry office in which the claim for lien was registered or provide a copy of the assignment to the owner of the lands in accordance with section 112. (formerly section 54(3))

## **PRIORITIES**

### **Prior encumbrances**

**90(1)** If the land upon or in respect of which work is done, services are provided or materials are supplied, is encumbered by an encumbrance existing or created before the commencement of the construction or improvement, the encumbrance has priority over a lien arising under this Act to the extent of the actual value of the land at the time of the commencement of the construction or improvement. (formerly section 20(1))

### **Future advances**

**90(2)** A mortgage or charge against land which existed or was created before a lien right arose upon the land may, subject to section 92, secure future advances. (formerly section 20(2))

### **Insurance moneys when lien attaches**

**91** Where a structure subject to a lien is wholly or partly destroyed by fire or other peril, any money received, by reason of any insurance on the structure, by the owner or prior encumbrancer takes the place of the structure so destroyed and is, after satisfying any prior encumbrance to the extent necessary to give effect to the priority established under section 90, subject to the claims of all lien holders to the limit of their proven interest in the land with any balance remaining available for trust claims to the same extent as if the moneys were realized by the sale of the land in an action to enforce the liens. (formerly section 21)

### **Priority of lien**

**92** A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made or registered in the registry office after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien in accordance with this Act but all payments duly made to trust claimants under Part II or on account of a conveyance or mortgage before registration of a claim for lien, have priority over the lien. (formerly section 31)

### **Agreements for purchase**

**93** Where the purchase money under an agreement for the purchase of land, or part thereof, is unpaid and no conveyance has been made to the purchaser, the purchaser shall, for the purposes of this Act, be conclusively deemed to be a mortgagor and the seller to be a mortgagee of the land to the extent of the unpaid portion of the purchase money. (formerly section 32)

### **Priority among lienholders**

**94** Subject to subsection 123(1),

- (a) no person who has a registered lien on land or has given notice under section 112 as a charge on moneys under this Act is entitled to any priority or preference over another person likewise entitled to a lien on that land or to a charge on those moneys under this Act;
- (b) all such lienholders rank proportionately without preference for the amounts of their several liens; and
- (c) the proceeds of any sale shall be distributed as may be directed by the court. (formerly section 33)

### **Removal of materials during lien**

**95(1)** During the continuance of a lien, no portion of the materials affected by it shall be removed from any supply location contemplated by section 2(3) to the prejudice of the lien claimant and any attempts at such removal may be restrained on application by a judge.



## **Costs**

**95(2)** A judge to whom an application is made under subsection (1) may make such order as to costs of and incidental to the application and order as he deems just. (formerly section 35)

## **Certain materials may be exempt from execution**

**95(3)** Where any materials have been supplied in accordance with section 2(3) and remain subject to a lien in favour of the person supplying them, whether they have been incorporated in the structure or land under the contract or not, a judge may find such materials to be exempt from execution by others. (formerly section 35(3))

## **Lienholder a purchaser pro tanto**

**96** Where a claim for lien is registered, the person entitled to the lien shall be deemed a purchaser pro tanto, and within the provisions of *The Registry Act* but, except as otherwise provided in this Act, *The Registry Act* does not apply to a lien. (formerly section 42)

## **Certain acts not prejudicial to lien**

**97** A registered claim for lien or a notice of lien is not merged, discharged, paid, satisfied, prejudiced or destroyed by

- (a) the taking of any security for the claim; or
- (b) the acceptance of any promissory note for the claim; or
- (c) the taking of any other acknowledgement of the claim; or
- (d) the giving or extending of time for payment of the claim; or
- (e) the taking of any proceedings for recovery of the claim; or
- (f) the recovery of any personal judgment for the claim;

unless the lienholder agrees in writing that it shall have that effect. (formerly section 57(1))

## **HOLDBACKS**

### **Holdback prior to substantial performance**

**98(1)** The person primarily liable for payment under a contract under or by virtue of which a lien may arise shall, as the work is done or the services are provided or the materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the contract, and retain that amount for at least 60 days after

- (a) a certificate of substantial performance is given under section 113; or
- (b) the contract has been terminated in writing; or
- (c) work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied; or
- (d) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, so that the total holdback shall be equal to 7.5% of the contract price for the whole contract, or if there is no specific contract price, 7.5% of the total value of the work, services and materials done, provided or supplied in the performance of the contract. (formerly section 24(1))

### **Holdback after substantial performance**

**98(2)** Upon substantial performance of a contract, the person primarily liable for payment under the contract under which there remains work or services to be done or materials to be supplied and under or by virtue of which a lien may arise, shall, as the remaining work is done or the remaining services are provided or the remaining materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the remaining work, services or materials, and retain that amount for at least 60 days after

- (a) (the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;

- (b) the contract has been terminated in writing; or
  - (c) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;
- whichever first occurs, so that the total holdback for the work, services and materials remaining to be done, provided or supplied, as the same are actually done, provided or supplied shall be 7.5% of the value thereof calculated,
- (d) as the amount that bears the same proportion to the total contract price for the contract that the work, services and materials remaining to be done, provided or supplied bears to the total work, services and materials to be done, provided or supplied under the contract; or
  - (e) if there is no specific contract price, on the basis of the actual value of the work, services and materials remaining to be done, provided or supplied. (formerly section 24(2))

#### **Payment into holdback account**

**98(3)** The owner shall, as the work is done, the services provided and the materials supplied under the contract, pay the holdback into a holdback account to earn interest at a commercially reasonable rate. (formerly section 24(3))

#### **Payments into holdback account on order of judge**

**98(4)** A judge may, upon application of the contractor or any person who has a right of lien derived under the contract, order the owner to pay the holdback into a holdback account together with such interest as should by then have accrued at the rate prescribed for holdback accounts in the regulations. (formerly section 24(4))

#### **When holdback may be reduced**

**99(1)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 98(1) and 60 days have expired after

- (a) a certificate of substantial performance of the contract has been given under section 113; or
- (b) the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;
- (c) the contract has been terminated in writing; or
- (d) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, the holdback under subsection 98(1) shall be reduced

- (e) by 7.5% of the contract price for the contract less the amount of the holdback required under subsection 98(2) and less the aggregate of payments made under subsection (2); or
- (f) if there is no specific contract price for the contract, by 7.5% of the value of the work done, the services provided and the materials supplied under the contract, less the amount of the holdback required under subsection 98(2) and less the amount of the aggregate of payments made under subsection (2);

plus the pro rata share of interest on the holdback account applicable to the amount by which the holdback is reduced but this subsection does not apply while the registration of a lien arising under the contract continues in effect under section 117. (formerly section 25(1))

#### **Reduction of holdback on substantial performance of sub-contract**

**99(2)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 98(1) and 60 days have expired after

- (a) a certificate of substantial performance of a sub-contract under the contract has been given under subsection (5), (6) or (7);
- (b) the work to be done under the sub-contract has been completed, the services to be provided under the sub-contract have been completely provided and the materials to be supplied under the sub-contract have been completely supplied;
- (c) the contract or sub-contract has been terminated in writing; or
- (d) the work to be done under the sub-contract, the services to be provided under the sub-contract and the supplying of materials to be supplied under the sub-contract have been abandoned;

whichever first occurs, the holdback under subsection 98(1) shall be reduced

- (e) by 7.5% of the contract price for the sub-contract, less the amount of the holdback required under subsection 98(2) applicable to the sub-contract; or
- (f) if there is no specific contract price for the sub-contract by 7.5% of the value of the work done, the services provided and the materials supplied under the sub-contract, less the amount of the holdback required under subsection 98(2);

plus the pro rata share of interest on the holdback account applicable to the amount by which the holdback is being reduced, but this subsection does not apply while the registration of any lien arising under the sub-contract continues in effect under section 117. (formerly section 25(2))

#### **Payment of holdback under subsection 24(2)**

**99(3)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 98(2) and 60 days have expired after

- (a) (the work to be done under the contract has been completed, the services to be provided under the contract have been completely provided and the materials to be supplied under the contract have been completely supplied;
- (b) The contract has been terminated in writing; or
- (c) the work to be done under the contract, the services to be provided under the contract and the supplying of materials to be supplied under the contract have been abandoned;

whichever first occurs, the holdback plus interest on the holdback account, remaining after any payments made under subsection (4), may be paid out in accordance with the contract, but this subsection does not apply while the registration of a lien arising out of the contract continues in effect under section 117. (formerly section 25(3))

#### **Payment of holdback under subsection 98(2) respecting sub-contract**

**99(4)** Where the person primarily liable for payment under a contract has deducted and retained the holdback required under subsection 98(2) and 60 days have expired after

- (a) the work to be done under a sub-contract under the contract has been completed, the services to be provided under the sub-contract have been completely provided and the materials to be supplied under the sub-contract have been completely supplied;
- (b) The contract or sub-contract has been terminated in writing; or
- (c) the work to be done under the sub-contract, the services to be provided under the sub-contract and the supplying of materials to be supplied under the sub-contract have been abandoned;

whichever first occurs, the holdback may be reduced

- (d) by 7.5% of the contract price for the sub-contract; or
- (e) if there is no specific contract price for the sub-contract, by 7.5% of the value of the work done, the services provided and the materials supplied under the sub-contract;

plus the pro rata share of interest on the holdback account applicable to the sub-contract, but this subsection does not apply while the registration of a lien arising under the sub-contract continues in effect under section 117. (formerly section 25(4))

#### **Payment certifiers certificate of substantial performance of sub-contract and publication**

**99(5)** Where a contract requires a payment to be made upon a certificate of a payment certifier, the payment certifier, upon application by a sub-contractor with respect to a sub-contract and upon being satisfied that the sub-contract has been substantially performed, shall, within seven days after he receives the application or after the sub-contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed to the sub-contractor, the contractor and the owner and the payment certifier shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed. (formerly section 25(5))

#### **Certificate and publication where no payment certifier**

**99(6)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, the contractor, upon application by a sub-contractor with respect to a sub-contract and upon being satisfied that the sub-contract has been substantially performed, shall, within seven days after he receives the application or after the sub-

contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed to the sub-contractor and the owner and the contractor shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed. (formerly section 25(6))

#### **Certificate of substantial performance and publication by sub-contractor**

**99(7)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, any sub-contractor under that contract on request of any of his sub-contractors shall, within seven days after he receives the application or after the sub-contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the sub-contract in the form prescribed to the contractor and the owner and the issuing sub-contractor shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed. (formerly section 25(7))

#### **Judge's order for certificate and publication**

**99(8)** Where a person required to give a certificate of substantial performance under subsection (5), (6) or (7) fails or refuses to do so, the sub-contractor who has applied for the certificate or any person entitled to a lien in respect of work done, services provided or materials supplied under the sub-contract of the sub-contractor may apply to a judge who, upon being satisfied that the sub-contract has been substantially performed and that the certificate of substantial performance of the sub-contract should have been given, may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the sub-contract has been substantially performed, and the order has the same force and effect as if a certificate of substantial performance of the sub-contract had been issued under subsection (5), (6) or (7) as the case may be and the applicant shall publish notice of the effect of the order issued within two business days at the location and in the manner prescribed. (formerly section 25(8))

#### **Interest payable to sub-contractor**

**100(1)** Where, under subsection (1), (2), (3) or (4), a holdback under a contract is reduced or paid out, any sub-contractors who are entitled under sub-contracts to payment from the holdback or from the amount by which the holdback is reduced are entitled also to a pro rata share of the interest on the holdback account. (formerly section 25(9))

#### **Release of holdback on annual basis**

**101(1)** Notwithstanding standard holdback release requirements set out in section 98 and 99, if the conditions in subsection (2) are met, the owner may make payment of the accrued holdback retained under subsection 98(1) together with interest on an annual basis, for work, services or materials provided during the applicable annual period. (Ont. s. 26.1(1) modified for MB)

##### **Conditions**

- 101(2)** Subsection (1) applies if,
- (a) the contract provides for a completion schedule that is longer than eighteen months ;
  - (b) the contract provides for the payment of accrued holdback on an annual basis;
  - (c) the contractor publishes notice of the annual payment/holdback release date in the manner prescribed at least 60 days prior to the release date; and
  - (d) as of the applicable payment date,
    - (i) there are no liens registered nor any notices of claim for lien in effect under the contract.
    - (ii) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act. (Ont. s. 26.1(2) modified for MB)

#### **Release of holdback on a phased basis**

**102(1)** Notwithstanding standard holdback release requirements set out in section 98 and 99, if the conditions in subsection (2) are met, the owner may make payment of the accrued holdback retained under subsection 98(1) together with interest on the completion of phases of an improvement, in relation to the work, services or materials provided during each phase.

## **Conditions**

**102(2)** Subsection (1) applies if,

- (a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;
- (b) the contract price at the time the contract is entered into exceeds the prescribed amount;
- (c) the contractor publishes notice of the expected holdback release dates in the manner prescribed at least 60 days prior to each such date; and
- (d) as of the applicable payment date,
  - (i) there are no liens registered nor any notices of claim for lien in effect under the contract.

(Ont. s. 26.2 modified for MB)

## **Effect of payments made with holdback**

**103(1)** Where the person primarily liable for payment under a contract has deducted and retained the holdback in accordance with this Act, all payments under the contract in excess of the holdback, made in good faith by the person primarily liable for the payment, before the registration of a lien by a person claiming a lien as against the owner, and payments permitted under sections 99, 101 and 102 operate as a discharge of the lien to that extent. (formerly section 27(1))

## **Effect of payments without holdback**

**103(2)** Where the person primarily liable for payment under a contract has not deducted and retained the holdback in accordance with this Act, all payments under the contract made in good faith by the person primarily liable for the payment, before the registration of a lien or the giving of notice under section 112 by a person claiming a lien as against the owner, operate as a discharge of the lien, but only to the extent of the amount of the payment in excess of the holdback which should have been deducted and retained, and the person primarily liable for the payment continues to be liable to the lienholder for the amount which should have been deducted and retained as holdback in respect of the contract. (formerly section 27(2))

## **Payment of holdback where no liens**

**103(3)** Payment of the holdback retained under this Act in respect of a contract may be validly made after the expiration of 60 days mentioned in subsection 24(1) or (2), in section 101 for annual release, and in section 102 for phased release if, at the time the holdback is paid, there are no liens registered against the land or in effect under a notice of claim for lien on the project to which the contract relates. (formerly section 27(3))

## **Payment of holdback where liens are registered or in effect under a notice**

**103(4)** Where, on the expiration of the 60 days mentioned in subsection 98(1) or (2), or when holdback is due for release under section 101 or 102, as the case may be, there are liens registered against the land to which a contract relates, or a notice of claim for lien has been given and is in effect under section 112, the holdback retained under this Act in respect of the contract may be validly paid for the purpose of obtaining discharges of all of those liens unless before the payment of the holdback an action has been commenced under this Act to enforce one or more of those liens. (formerly section 27(4))

## **Liability of corporation directors**

**103(5)** Where the person primarily liable for payment under a contract is a corporation, and that person makes payment under the contract without deducting and retaining the holdback in accordance with this Act, if the corporation is unable to satisfy the liability under subsection (2), the directors and officers of the corporation who knowingly assented or acquiesced in the failure to deduct or retain the holdback are jointly and severally liable for the amount for which the corporation is liable under subsection (2) and which the corporation fails to satisfy. (formerly section 27(5))

## **Where holdback not to be applied**

**103(6)** Where the contractor or sub-contractor defaults in performing his contract or sub-contract, the holdback shall not, as against the lien claimant who by virtue of section 79(2) has a charge thereon, be subject to set-off or be applied by the owner or contractor

- (a) to complete the contract or sub-contract; or

- (b) in payment of damages for non completion of the contract or sub-contract by the contractor or sub-contractor; or
- (c) in payment or satisfaction of any claim against the contractor or sub-contractor; or
- (d) for any other purpose to remedy the default. (formerly section 27(6))

#### **Interest required on holdback**

**104** Whether the holdback has been deposited and interest has accrued in a holdback account or not, the owner shall be liable to pay interest on all holdback at the greater of that which has actually accrued and that calculated at the rate and compounded as prescribed by regulation. (formerly section 28)

#### **Direct payment made on account**

**105(1)** Where no registered lien or notice of claim given under section 112(2) is in effect, and holdback is retained in accordance with section 98, an owner or a contractor may choose, in good faith, to make a direct payment to a person entitled to payment on its account under a sub-contract for work, services or materials provided to the improvement.

#### **Notice required for credit to result**

**105(2)** Where a direct payment is made under subsection (1), referred to in section and within three days afterwards the payer gives, by letter or otherwise, written notice to the contractor or sub-contractor contractually bound to make payment to the payee, then the direct payment shall be accounted for

- (a) to discharge the payer's trust obligations to that extent under Part II- Trust Code; and
- (b) the value of all affected lien claims under this part shall be reduced by the amount of the direct payment made. (formerly section 30)

### **REGISTRATION OF LIEN AGAINST LAND**

#### **Registration**

**106(1)** Upon presentation of a claim for lien at a registry office for the land titles district in which the land against which the lien is claimed is situated, and upon payment of the fee prescribed for registration, the registrar shall, if the claim for lien conforms with the appropriate form and with section 107, register the claim for lien so that it appears as an encumbrance against the land described in the claim for lien. (formerly section 37(1))

#### **Registration of two copies of claim**

**106(2)** Where a part of the land subject to a lien is under *The Real Property Act* and a part is under *The Registry Act*, two copies of the claim for lien may be registered but if only one copy is registered, the person claiming the lien shall cause to be endorsed on the copy a notation showing whether it is to be registered under *The Real Property Act*, or *The Registry Act*, and it shall be registered accordingly. (formerly section 37(2))

#### **Registration under both systems**

**106(3)** Where two copies of a claim for lien are registered in a land titles office, one shall be registered under *The Real Property Act* and one under *The Registry Act*, and that part of the land described in each copy which falls either under *The Real Property Act* or under *The Registry Act* shall be affected by the claim for lien. (formerly section 37(3))

#### **Lien on mineral location for mining**

**106(4)** Where a claim for a lien is made upon a mineral location as defined in *The Mines and Minerals Act*, in respect of which the Crown has given to any person a disposition of mineral rights other than oil and natural gas rights, and for which no certificate of title has been issued under *The Real Property Act* and no grant has been registered under *The Registry Act*, the claim for lien and any pending litigation order, judgment, order or other document issued from the court in respect thereof, and any other document relating thereto, shall be registered in the office of the recorder of the mining district in which the land is situated. (formerly section 37(4))

### **Registration of claim document re disposition**

**106(5)** Where a claim for lien is made upon a disposition under *The Oil and Gas Act* of oil, gas, helium or oil shale rights owned by the Crown, the claim for lien, any judgment, pending litigation order or other order or document issued from the court in respect of the claim, and any other document relating to the claim, shall be registered in the office of the registrar under *The Oil and Gas Act*. (formerly section 37(5))

### **Registration in respect of Crown lands**

**106(6)** Where a claim for lien is made upon an interest or estate which entitles a person to use or occupy and make improvements on Crown land that is not a mineral location, if no fee simple grant of the land has been made by the Crown, the claim for lien and any pending litigation order, judgment, order or other document issued from a court in respect thereof, and any other document relating thereto shall be registered in the office of the director of Crown lands. (formerly section 37(6))

### **Contents of claim for lien form**

**107(1)** A claim for lien shall state

- (a) the name and address of the person claiming the lien;
- (b) the name and address of each person alleged to be an owner of the project lands with direction as to which said interests are to be charged with the lien, clearly identifying the nature of the estate or interest held by each alleged owner;
- (c) the of the person for whom and upon whose credit the contract or sub-contract was performed ;
- (d) the time or period within which the work was done, the services were provided or the materials were supplied;
- (e) a short description of the work done or the services provided or the materials supplied ;
- (f) the sum claimed as due or reasonably expected by the claimant to become due;
- (g) a description of the land and of any leasehold or other interest to be charged, sufficient for the purpose of registration. (formerly section 38(1))

### **Verification by affidavit**

**107(2)** The claim for lien may be in the form prescribed, and shall be verified by the affidavit in the prescribed form, of the person claiming the lien or his agent or assignee. (formerly section 38(2))

### **Address for service to be shown on claim for lien form**

**107(3)** Every claim for lien form shall show, below the signature thereon of the person claiming the lien, or his agent or assignee, an address for service upon the lien claimant, which address shall, after the registration of the lien be the place at or to which service may be made or notice to the claimant may be sent under this Act. (formerly section 38(3))

### **What may be included in claim for lien form**

**108** A claim for lien form may include claims against any number of parcels of land provided that the information for and description of each parcel conforms to requirements set out in section 107. (formerly section 39)

### **Claims not invalidated for informality**

**109(1)** Substantial compliance only with sections 107 and 108 is sufficient and no lien is invalidated by reason of failure to comply with any of the requirements of those sections unless, in the opinion of a judge, the owner, contractor, sub-contractor, mortgagee or other person is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure. (formerly section 41(1))

### **Liens must be registered**

**109(2)** Nothing in this section dispenses with the registration of the lien against land required by this Act. (formerly section 41(2))

### **Action must be based on registered lien**

**109(3)** No action may be commenced under this Act to enforce a lien against land unless a claim for lien with respect to the lien is registered under this Act. (formerly section 41(3))

## **TIME FOR REGISTRATION OF LIENS ATTACHING LAND**

### **Time within which claim may be registered by contractor**

**110(1)** Except as provided in section 111, a claim for lien by a contractor may be registered within the earliest of 60 days after the substantial performance, termination or abandonment of the contract. (formerly section 43(1))

### **By sub-contractor**

**110(2)** Except as provided in section 111, a claim for lien by a sub-contractor may be registered

- (a) within 60 days after the substantial performance, termination or abandonment of the contract; or
- (b) within 60 days after the substantial performance, termination or abandonment of the sub-contract;

whichever first occurs. (formerly section 43(2))

### **By supplier of materials**

**110(3)** Except as provided in section 111, a claim for lien for materials may be registered

- (a) within 60 days after substantial performance, termination or abandonment of the contract or sub-contract under which the supply arose; or
- (b) within 60 days after the supplying of the last supply of materials;

whichever first occurs. (formerly section 43(3))

### **By provider of services**

**110(4)** Except as provided in section 111, a claim for lien for services may be registered

- (a) within 60 days after the substantial performance, termination or abandonment of the contract or sub-contract under which the services were provided; or
- (b) within 60 days after the completion of the provision of the services;

whichever first occurs. (formerly section 43(4))

### **Meaning of substantial performance**

**110(5)** For the purposes of this section and section 111, substantial performance of a contract or a sub-contract means the date on which notice of a certificate of substantial performance having issued is published under section 99 or 113, as the case may be. (formerly section 43(6))

### **Registration of lien attaching land for work after substantial performance**

**111** Where a contract or sub-contract has been substantially performed and the owner, contractor or sub-contractor proceeds to complete it,

- a) a claim for lien by a contractor arising after substantial performance may be registered within 60 days after the earliest of completion, termination or abandonment of the contract;
- b) a claim for lien by a sub-contractor arising after substantial performance may be registered within the earliest of 60 days after the completion, termination or abandonment of the contract or its sub-contract;
- c) a claim for lien for materials supplied after substantial performance may be registered within 60 days after supply of the last materials to complete the contract; and



- (d) a claim for lien for services provided to complete the contract or a sub-contract may be registered within 40 days after the completion, termination or abandonment of the contract or sub-contract under which the services were provided. (formerly section 44)

## WRITTEN NOTICE OF LIEN – SECTION 83 LANDS

### Where lien does not attach to land

**112(1)** Where a lien does not attach to land by reason of section 83, sections 106, 107 and 108 do not apply. (formerly section 45(1))

### Written notice of claim for lien

**112(2)** Where a lien does not attach to land by reason of section 83, a person who is claiming the lien shall give notice thereof in writing to the owner in the manner provided by this Act and, subject to subsection (1), the notice shall, for the purposes of this Act be the equivalent of registration of a lien under this Act and this Act shall apply to the lien, the lienholder and the owner, with such modifications as the circumstances require as though the giving of the written notice were registration of the lien under this Act. (formerly section 45(2))

### Give notice of claim to Crown, Crown agency or municipal owner

**112(3)** The notice required under subsection (2) shall be given

- (a) where the owner of the land or structure is the Crown, to the office prescribed by regulations;
- (b) where the owner of the land or structure is a Crown agency, to an officer of the Crown agency; and
- (c) where the owner of the land or structure is a municipality, to the clerk of the municipality. (formerly section 45(3))

### Time for giving notice

**112(4)** A notice given under subsection (2) shall be given within the times allowed for registration of claim for lien under sections 110 and 111. (formerly section 45(4))

### Contents of written notice of claim for lien

**112(5)** Every notice given under subsection (2) shall set out

- (a) the name and address of the person making the claim;
- (b) the name of the Crown, Crown agency or municipal owner of the subject land;
- (c) the name, address of any other alleged owner of a relevant interest in the land, including but not limited to a leasehold interest in the land;
- (d) the name and address of the person for whom and upon whose credit the work was done, the services were provided or the materials were supplied;
- (e) the time or period within which the work was done, or the services were provided, or the materials were supplied;
- (f) a short description of the work done or the services provided or the materials supplied ;
- (g) the sum claimed as due or reasonably expected by the claimant to become due; and
- (h) the address or description of the land or location of any leasehold or other interest in the project lands to be charged, sufficient for the purpose of giving notice . (formerly section 45(5))

### Verification by affidavit

**112(6)** A notice given under subsection (2) is to be in the form prescribed and shall be verified by an affidavit in the prescribed form of the person claiming the lien, or his agent or assignee. (formerly section 45(6))

### Address for service to be shown on notice

**112(7)** Every notice given under subsection (2) shall show below the signature thereon of the person claiming the lien, or his agent or assignee, an address for service upon the lien claimant, which address shall, after the notice is given, be the place at or to which service may be made or notice to the lien claimant may be sent under this Act. (formerly section 45(7))

### **Claims not invalidated for informality**

**112(8)** Subject to subsection (9) substantial compliance with this section is sufficient and no lien is invalidated by reason of failure to comply with any requirement of this section unless, in the opinion of a judge, the owner, contractor, sub-contractor or other person is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure. (formerly section 45(8))

### **Notice must be given**

**112(9)** Nothing in subsection (8) dispenses with the giving of notice required under subsection (2). (formerly section 45(9))

## **SUBSTANTIAL PERFORMANCE**

### **Certificate of substantial performance of contract by payment certifier and publication**

**113(1)** Where a contract requires a payment to be made upon a certificate of a payment certifier, the payment certifier, upon application by the contractor and upon being satisfied that the contract has been substantially performed, shall, within seven days after he receives the application or after the contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the contract in the form prescribed to the contractor and the owner and the payment certifier shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed. (formerly section 46(1))

### **Certificate of substantial performance by owner and publication**

**113(2)** Where a contract does not provide for payment to be made upon a certificate of a payment certifier, the contractor may, and on request of any of his sub-contractors shall apply to the owner for a certificate of substantial performance and the owner shall, within seven days after he receives the application or after the contract has, in his opinion, been substantially performed, whichever is the later, give or cause to be given a certificate of substantial performance of the contract in the form prescribed to the contractor and the owner shall publish notice of the certificate issuing within two business days at the location and in the manner prescribed. (formerly section 46(2))

### **Judge's order for substantial performance and publication**

**113(3)** Where a person required to give a certificate of substantial performance under subsection (1) or (2) fails or refuses to do so, the owner or the contractor or any sub-contractor under the contractor or any person entitled to a lien in respect of the work under the contract may apply to a judge who, upon being satisfied that the contract has been substantially performed and that the certificate of substantial performance of the contract should have been given, may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the contract has been substantially performed, and the order has the same force and effect as if a certificate of substantial performance had been issued in respect thereof under subsection (1) or (2), as the case may be and the applicant shall publish notice of the effect of the order issued within two business days at the location and in the manner prescribed. (formerly section 46(3))

### **No appeal**

**113(4)** No appeal lies from an order made by a judge under subsection (3) or under subsection 99(8). (formerly section 46(4))

### **Offence to give certificate of substantial performance fraudulently**

**113(5)** Every person who is required under subsection (1) or (2) or under subsection 99(5), (6) or (7) to give a certificate of substantial performance and who wilfully gives or causes to be given a certificate of substantial performance that is fraudulent is guilty of an offence and liable, on summary conviction, to a fine of not more than \$10,000. or to imprisonment for a term of not more than two years or to both and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by a corporation under this section is, in addition to the corporation, guilty of the same offence and liable, on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years, or to both. (formerly section 46(5))

### **Contents of certificate of substantial performance**

**113(6)** A certificate of substantial performance shall set out

- (a) the name and residence of the owner, the contractor, and where applicable the sub-contractor;
- (b) a short description of the work done, the services provided and the materials supplied under the contract or sub-contract;
- (c) the date of publication respecting substantial performance of the contract or sub-contract;
- (d) a brief description of the land on or in respect of which the contract or sub-contract was performed;
- (e) the name and residence of the person giving the certificate of substantial performance;
- (f) a statement certifying that the person giving the certificate of substantial performance is a person required or authorized to do so under this Act; and
- (g) the name of the person responsible for publishing notice that the certificate has been issued. (formerly section 46(6))

#### **Manner of giving certificate and publishing notice of substantial performance**

**114** A certificate of substantial performance is not effective unless it is given to the contractor and the owner and, where it relates to a sub-contract, to the sub-contractor and is published at the location and in the manner prescribed in accordance with section 99 or section 113, as the case may be. (formerly section 47)

#### **Form of certificate not invalidated for informality**

**115(1)** Substantial compliance with section 46(6) is sufficient and no certificate of substantial performance is invalidated by reason of failure to comply with any of the requirements of that sub-section unless, in the opinion of a judge, the owner, contractor, sub-contractor, encumbrancer or other person, as the case may be, is prejudiced by the failure and then only to the extent to which he is prejudiced by the failure but nothing in this section dispenses with the requirement of giving the certificate of substantial performance as required under section 114. (formerly section 48(1))

#### **Failure or refusal to publish notice of certificate**

**115(2)** Any person who innocently, negligently or willfully fails or refuses to publish notice that a certificate of substantial performance has issued as required by section 99 and section 113 may be found civilly liable on an application or action commenced by any person prejudiced by that failure to the extent of the loss, costs and damages suffered. (formerly section 48(2))

#### **Residential property exception**

**116** The requirements in section 99 and section 113 for giving and publishing notice of the issuance of a certificate of substantial performance are not mandatory for construction or improvements to single family residences if the contract price does not exceed the amount prescribed in the regulations for the purpose of this section or, where there is no specific contract price, where the value of the work, services and materials does not exceed the amount prescribed in the regulations for the purpose of this section. (formerly section 59(3))

### **EXPIRY AND DISCHARGE**

#### **Lien right expires if not registered against land within time**

**117(1)** Every lien arising with respect to land that is not duly registered under this Act ceases to exist on the expiration of the 60 day time period allowed for registration under sections 110 and 111. (formerly section 49(1))

#### **Registered lien against land expires if not proceeded upon**

**117(2)** Every lien that has been duly registered under this Act against land ceases to exist after the expiration of 90 days after the date of registration unless in the meantime an action is commenced to realize the claim for lien under this Act or an action is commenced in which the claim may be realized under this Act. (formerly section 49(2))

#### **Liens not attaching land expire if no notice given within time**

**117(3)** Every lien which does not attach to land by reason of section 83 and for which no written notice is given as required by section 112, ceases to exist on the expiration of the 60 day time period allowed for giving written notice under section 112. (formerly section 49 (3))

### **Expiry of Liens subject to section 83 expire if not proceeded with**

**117(4)** Every lien which does not attach to land by reason of section 83, ceases to exist on the expiration of 90 days after the date the written notice was given as required under section 112, unless in the meantime an action is commenced to realize the claim under this Act. (formerly section 49(4))

### **Clarification**

**117(5)** Subsections (1) and (2) do not apply to liens which, by reason of section 83, do not attach to land. (formerly section 49(5))

### **Notice to lienholder to commence action**

**118(1)** Any person having or claiming a mortgage or charge upon, or claiming any right, title or interest in or to any land in respect of which a claim for lien is registered under this Act may at any time after the registration of the lien, require the registrar to give the lienholder a notice in writing in the form prescribed that the lien shall cease to exist 30 days after the mailing of the notice unless, within that period, an action to realize the claim for lien is commenced. (formerly section 50(1))

### **Loss of lien**

**118(2)** Where an action is not commenced within 30 days after the date of mailing of the notice under subsection (1), the lien ceases to exist and the registrar shall vacate the registration of the lien unless, prior to the expiration of the 30 days, there is registered in the registry office an order of a judge extending the time for commencing the action. (formerly section 50(2))

### **Clarification**

**118(3)** This section 118 does not apply to liens which, by reason of section 83 do not attach to land. (formerly section 50(3))

### **Effect of order to vacate lien under section 122**

**119** If the court orders that a lien be vacated under subsection 122(1) or (3), the lien ceases to exist if no action is commenced to enforce the lien against security posted within 90 days of the date the lien was registered or written notice of claim for lien was given, as the case may be. (formerly section 51)

### **Registration of discharge**

**120** A lien against land may be discharged by the registration in the proper registry office of a discharge of the lien in the form prescribed signed by the lienholder or his agent duly authorized in writing and the payment of any prescribed fee for registration of the discharge. (formerly section 55(1))

### **Withdrawal of a written notice of claim for lien**

**121** Written notice of a claim for lien that is subject to section 83 may be withdrawn by delivery to the office of the Crown, Crown agent or municipality that received notice of the claim under subsection 112(3) of withdrawal in the form prescribed, duly signed by the lien claimant or its agent.

## **VACATION OF LIEN**

### **Vacating lien upon posting security**

**122(1)** Upon application without notice by the owner or its representative, a judge shall make an order vacating

- (a) registration of a lien attaching land; or, as the case may be,
- (b) notice of a claim for lien given under section 112 which does not attach land where the owner pays into court or posts security in an amount equal to
- (c) the unduplicated value of liens subject to the application; and
- (d) the lesser of \$20,000 and 20% of the value described in (c) as security for interest and toward costs. (formerly section 55(2))

### **Evidence supporting application**

**122(2)** The applicant shall file evidence in support of its application under sub-section 122(1) showing that

- (a) all liens currently registered against the subject land or under written notice given pertaining to the contract or sub-contract under which the liens arose have been included in the application;
- (b) any upper tier lien claimant has accounted by affidavit for the value, if any, included in its umbrella lien claim which is duplicated by a current lien also subject to the application;
- (c) any money to be posted to stand as security for the vacated lien(s) does not include accrued holdback or other project trust funds which are subject to the rights of other participants on the project; and
- (d) the form and intended providers of any form of security other than cash including a lien bond or letter of credit complies with forms and providers permitted by regulations. (formerly section 55(3))

#### **Vacating liens on other grounds**

**122(3)** Upon application by any interested party, with notice to all affected parties, a judge may order that the registration of a lien or written notice given for a lien that does not attach land may be vacated upon any grounds other than those mentioned in subsection (2), subject to terms which the judge deems just in the circumstances. (formerly section 55(4))

#### **Court certificate provided to land registry**

**122(4)** Where an action to realize a lien attaching land has been discontinued or dismissed, a certificate of the registrar of the court or any deputy registrar of the court shall be registered in the appropriate land registry by or on behalf of the lien claimant to discharge the registered lien. (formerly section 55(7))

#### **Enforcement of vacated liens**

**122(5)** Unless the vacated lien claimant commences an action to enforce its lien against the security posted under section 122(1) within 90 days of registration or giving of written notice of the lien which was vacated, the lien expires and ceases to exist, whereupon the court shall return of the security posted upon a motion for payment out by the applicant. (formerly section 55(8))

#### **Parties to actions on vacated liens**

**122(6)** The vacated lien claimant shall be plaintiff in the action it commences to enforce its claim against security posted under section 122(1), and the owner/applicant shall be named as a defendant as well as any other party or parties essential to the claimant proving its entitlement to be paid the vacated lien amount. (formerly section 55(9))

#### **Priorities against security posted under section 122(1)**

**123(1)** Any money paid into court or any other security posted by order of the court under subsection 122(1) stands in place of the land against which the lien was registered or the money charged by a written notice of claim for lien that does not attach land and is subject to the claims of

- (a) the persons whose liens have been vacated; and
- (b) the applicant who posted the security

but the persons whose liens have been ordered vacated have a first charge on the money or security to the extent of any amount, including interest and costs, found by the judge to be owing to them. (formerly section 56(1))

#### **No reduction of holdback**

**123(2)** Money paid into court or security posted under subsection 122(1) does not reduce the amount required to be deducted and retained by the owner under section 98. (formerly section 56(2))

#### **Order for payment out of court**

**124** Where money has been paid into court or security has been posted under subsection 122(1), the court may, upon application and upon notice to every person affected, order the money to be paid out or the security to be delivered, as the case may be, to the person entitled thereto. (formerly section 55(4))

## ACTION TO ENFORCE LIEN

### Action to realize lien

**125(1)** A lien which has not expired and continues to charge land, holdback, project funds or security posted in their place, may be realized or enforced by an action in the court and the ordinary rules of the court, except where varied by this Act, apply to the action. (formerly section 60)

### Lienholders may join in actions

**125(2)** Any number of lienholders claiming liens on the same land may, subject to rules of the court, join in an action. (formerly section 61(2))

### Joining other claims

**125(3)** Any claim arising from a contract or sub-contract to which this Act applies, including a claim related to any other remedy under the Act, may be brought or joined with an action to realize a lien. (formerly section 66)

### Order for sale of land

**126(1)** In an action to realize a lien attaching land, the judge may order that the estate or interest charged with the lien be sold, and may direct the sale to take place at any time after judgment, but allowing a reasonable time for advertising the sale. (formerly section 68(1))

### Sale of materials

**126(2)** In an action to realize a lien attaching land, the judge may order the sale and authorize the removal of any material situated on the land against which the lien attaches. (formerly section 68(2))

### Appointment of receiver of rents and profits

**127(1)** In an action to realize a lien attaching any interest in land, the judge may, on application of any lienholder, mortgagee or other interested person, either before or after judgment, and upon such terms, including the giving of security, as the judge deems just, appoint a receiver of the rents and profits of the land against which the lien is registered or, in the case of a written notice of claim for lien against a leasehold or other interest in lands which are subject to section 83. (formerly section 69(1))

### Appointment of trustee

**127(2)** In an action to realize a lien attaching any interest in land, the judge may, on the application of any lienholder, mortgagee or other interested person, either before or after judgment, upon such terms, including the giving of security, as the judge deems just, appoint a trustee with power to manage, mortgage, lease or sell, or any or all of those things, the land, recoverable leasehold improvements subject to charge or levy, and materials against which the claim for lien is registered and in the exercise of those powers the trustee shall be under the supervision and direction of the court and may, when so directed by the court, complete or partially complete any work on the land and, in the event that moneys are advanced to the trustee as the result of any of the powers conferred upon him under this subsection, the rights of the non-lien claimant person advancing the moneys to the trustee take priority to the extent of the amount advanced over every claim for lien existing as of the date of the appointment. (formerly section 69(2))

### Orders for completion of sale, etc.

**128(1)** Where the sale of land or materials is ordered or authorized under section 126 or 127, or the lease or mortgage of land is authorized under section 127, the judge shall make all necessary orders for the completion of the sale, mortgage or lease. (formerly section 70(1))

### Sale subject to encumbrances

**128(2)** Where the sale of land is ordered or authorized under section 126 or 127, it may, if the judge so directs, be offered for sale subject to any encumbrance registered against the land. (formerly section 70(2))

## **Report on sale**

**129(1)** Where the sale of land is ordered or authorized under section 126 or 127, the proceeds of the sale shall be paid into court to the credit of the action and the judge shall make a report on the sale and direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the sale, his reasonable legal fees and actual disbursements incurred in connection therewith and, where sufficient money to satisfy the judgment and costs is not realized from the sale, the judge shall certify the total amount of the deficiency and the proportion thereof falling upon each person entitled to recover under the judgment and the persons required by the judgment to pay the same. (formerly section 71(1))

## **Vesting of title**

**129(2)** Where land is sold pursuant to an order made under section 68 or authority granted under section 127, the judge shall make an order vesting title to the land in the purchaser and, except where the sale is made subject to a mortgage, charge or encumbrance on the direction of the judge, the order vests the title of the land free from all claims for liens, encumbrances and interests of any kind. (formerly section 71(2))

## **Deficiency recoverable by usual process**

**130** All judgments in favour of lienholders shall adjudge that the person personally liable for the amount of the judgment shall pay any deficiency that may remain after sale of the land ordered to be sold and where on such a sale, sufficient money to satisfy the judgment and costs is not realized there from, the deficiency may be recovered against the property of that person by the usual process of the court. (formerly section 72)

## **Personal judgment when lien fails**

**131** Where a person claiming a lien fails for any reason to establish a valid lien, he may nevertheless recover in the action a personal judgment against any party to the action for such sum as may appear to be due to the claimant and which he might recover in an action against the party. (formerly section 73)

## **Costs at discretion of judge**

**132(1)** Notwithstanding anything in *The Queen's Bench Act* or the rules of the court, the costs of and incidental to all actions, applications and orders commenced or made under this Act are in the discretion of and shall be apportioned and borne as the judge may direct. (formerly section 75(1))

## **Costs for least expensive course**

**132(2)** Where the least expensive course is not taken by a party under this Act, the costs allowed to him shall not exceed what would have been incurred if the least expensive course had been taken by him. (formerly section 75(2))

## **Costs of exercising lien rights**

**132(3)** Where the registration of a lien or, a written notice of claim for lien is ordered to be vacated under section 122(1) or where in an action to realize a lien judgment is given in favour of or against a claim for a lien, the judge may allow a reasonable amount for costs of giving written notice or registering the lien or for vacating the lien and posting any security. (formerly section 75(3))

## **No fees on payments out of court**

**133** No fees are payable or costs allowed on any cheques or proceedings to pay money into court or to pay money out of court in respect of a claim for lien. (formerly section 76)

## **Reference of lien action to master**

**134(1)** Where an action to realize a lien is commenced in a centre where a master of the court is available, a judge of the court may refer the action to the master, and thereupon the master shall

- (a) make all necessary inquiries with respect thereto;
- (b) take all accounts relating thereto; and
- (c) inquire as to all matters relevant thereto, as fully as if they had been specifically referred;

and the master shall make his report to a judge of the court as to the inquiries made and accounts taken, and the report shall include a statement of his findings and recommendations with respect thereto. (formerly section 78(1))

#### **Action of court when report made**

**134(2)** On receipt of the report of a master under subsection (1), the judge may adopt it, or refer it back to the master for further inquiries to be made, or accounts to be taken, or for further consideration, and for further report. (formerly section 78(2))

#### **Judgment**

**134(3)** Where a report of a master has been made under subsection (1) and has been adopted under subsection (2), the judge shall give judgment in the action with respect to all matters and questions involved therein and may include as part of the judgment the whole or part of the findings and recommendations set out in the report but he is not bound to adopt, act upon or give judgment in accordance with, any or all of the findings stated or the recommendations made in the report. (formerly section 78(3))

#### **How documents given or sent**

**135(1)** Subject to subsection (3) and except as otherwise ordered by the court, a notice or document required to be given or sent under this Act is sufficiently given or sent if given personally to the intended recipient or if sent by registered mail addressed to the intended recipient

(a) at his address for service, if there is one; or

(b) at the last known mailing address of the intended recipient according to the records of the person giving or sending the notice or document, where there is no address for service. (formerly section 79(1))

#### **Where document sent by registered mail**

**135(2)** A notice or document sent to an intended recipient by registered mail shall, in the absence of evidence to the contrary, be deemed to have been given on the third day, excluding Saturdays and holidays, after the date on which it was mailed. (formerly section 79(2))

#### **Where mailing service not permitted**

**135(3)** A written notice of claim for lien required under section 112 shall not be given or sent by registered mail. (formerly section 79(3))

#### **Evidence of date of mailing**

**135(4)** Where a notice or document is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing. (formerly section 79(4))

## **PART V – SURETY BONDS**

#### **Purpose of remedy**

**136** In order to provide security against default in performance and payment by the contractor for the benefit of the owner, in the first case, and for sub-contractors in the second, this Part V mandates provision of Performance Bonds and Labour & Material Payment Bonds on all public projects in Manitoba.

#### **Bonds and public contracts**

##### **Definition**

**137(1)** In this section,

“public contract” means a contract between an owner and a contractor respecting an improvement, if the owner is the Crown, a Crown agency, a municipality or a broader public sector organization as prescribed. (Ont. s. 85.1(1) modified for MB)



## **Application**

**137(2)** Subject to the regulations, this section applies to a public contract if the contract price exceeds the amount prescribed for the applicable owner. (Ont. s. 85.1(2) modified for MB)

## **Requirement for labour and material payment bond**

**137(3)** On entering into a public contract, a contractor shall furnish the owner with a labour and material payment bond, in the prescribed form, that,

- (a) is of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance;
- (b) has a coverage limit of at least 50 per cent of the contract price, or such other percentage of the contract price as may be prescribed; and
- (c) extends protection to all subcontractors and persons supplying labour or materials to the improvement other than the contractor. (Ont. s. 85.1(3) modified for MB)

## **Requirement for performance bond**

**137(4)** On entering into a public contract, a contractor shall furnish the owner with a performance bond, in the prescribed form, that,

- (a) is of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; and
- (b) has a coverage limit of at least 50 per cent of the contract price, or such other percentage of the contract price as may be prescribed. (Ont. s. 85.1(4) modified for MB)

## **Claims process**

**137(5)** A bond form prescribed for the purposes of subsection (3) or (4) may set out the claims process applicable in respect of the bond. (Ont. s. 85.1(5) modified for MB)

## **No limitation on other bonds or security**

**137(6)** For greater certainty, this section does not limit the ability of the owner to require the contractor to provide other types of bonds or security. (Ont. s. 85.1(6) modified for MB)

## **Rights of action**

### **Default, labour and material payment bond**

**138(1)** If a labour and material payment bond is in effect in respect of an improvement and the principal on the bond defaults in making a payment guaranteed by the bond, any person to whom the payment is guaranteed has a right of action to recover the amount of the person's claim, in accordance with the terms and conditions of the bond, against the surety and the principal. (Ont. s. 85.2(1) modified for MB)

### **Default, performance bond**

**138(2)** If a performance bond is in effect in respect of an improvement and the contractor defaults in performing the contract guaranteed by the bond, the owner has a right of action to enforce the bond, in accordance with its terms and conditions, against the surety and the contractor. (Ont. s. 85.2(2) modified for MB)

## **Saving**

**138(3)** Nothing in this section makes the surety liable for an amount in excess of the amount that the surety undertakes to pay under a bond, and the surety's liability under the bond shall be reduced by and to the extent of

any payment made in good faith by the surety either before or after judgment is obtained against the surety. (Ont. s. 85.2(3) modified for MB)

#### **Same**

**138(4)** Nothing in this section makes the surety liable as the principal under a bond, or makes the surety a party to any contract. (Ont. s. 85.2 (4) modified for MB)

#### **Subrogation**

**138(5)** On satisfaction of its obligation to any person under a bond to which this section applies, the surety shall be subrogated to all the rights of that person. (Ont. s. 85.2(5) modified for MB)

### **REGULATIONS**

#### **Regulations**

**139** For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations ancillary thereto and not inconsistent therewith and every regulation made under, and in accordance with the authority granted by, this section, has the force of law; and without limiting the generality of the foregoing, the Lieutenant Governor in Council may make regulations: (formerly section 80)

*[scope of required regulations to be detailed here]*