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REPORT

ON

MECHANICS' LIENS LEGISLATION IN MANITOBA

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I. INTRODUCTION

"The Mechanics' Liens Act" (C.C.S.M. cap. M80) has attracted considerable critical attention for decades. The Act has been amended many times since it was first enacted in 1873. The last amendments were in 1963. Reforms have been requested for the past 16 years by groups representing architects, lawyers and builders but none have become law. One of the earliest tasks entrusted to the Manitoba Law Reform Commission when it was established in 1970 was a study of the Manitoba legislation affecting mechanics' liens.

In 1971 the Commission retained, as co-directors of the mechanics' liens study, John T. McJannet, B.A., LL.B. (Man.) and Prof. A. Burton Bass, B.Sc.,LL.B. (Man.), LL.M. (Harv.). The Commission then sought briefs, conducted public hearings and produced and published a working paper in December of 1974. Comment and criticism from the general public on this paper were sought and obtained.

Meanwhile, in other provinces, law reform commissions were engaged in similar undertakings. The Law Reform Commission of British Columbia in 1972 published a 133-page report on *"The Mechanics' Lien Act"* of British Columbia. British Columbia Bill 42 called "The Builders' Lien Act 1977", generally adopts the recommendations of the Law Reform Commission of British Columbia. The Bill was introduced into the Legislature in 1977 but has since been allowed to lapse. Several reports were done by the Ontario Law Reform Commission in the 1960s. The Ontario statute was substantially amended in 1970 and 1975. The Alberta statute called *"The Builders' Lien Act"* (R.S.A. 1970 cap. 35) came into being in 1970 as a result of a public inquiry into "the adequacy of the provisions of *"The Mechanics' Lien Act* 1960" conducted by a retired judge. Because of

problems with the Act since 1970, a study was done by the Institute of Law Research and Reform of Alberta. Their report was published in March of 1979. Similarly in Ontario, there is dissatisfaction with the Ontario legislation. On June 30th, 1978, a detailed submission for reform of the Act was made to the Attorney-General for Ontario by the Construction Industry and Allied Professions Committee on *"The Mechanics' Lien Act"*. In Nova Scotia, the Law Reform Advisory Commission submitted a report to the Attorney-General on Builders' Liens in January 1979. The Commission drafted a model statute taking into consideration the recent legislation in Ontario, Alberta and British Columbia. It was their stated hope that the model legislation would do much to promote economy and efficiency in construction work and construction finance.

The Manitoba Law Reform Commission profited from these developments in the other provinces and, in 1978, sought a review from John T. McJannet (Professor Bass now being a member of the Commission) taking into consideration these various new developments. His report was submitted to the Commission on January 25th, 1979 but was not reprinted for general circulation. The report done by Mr. McJannet, generally speaking, deals with amendments in concept only and does not deal with minor changes or details of major changes and, as a consequence, this Report necessarily, deals with proposed amendments in the same way. Much of Mr. McJannet's paper is incorporated in this Report, and we are most grateful to him for his help and advice to the Commission in a very complex area of the law.

For the purpose of clarity, we refer to Messrs. McJannet and Bass as our co-directors, and to Mr. McJannet, for his more recent efforts, as our consultant.

II. THE PRINCIPLES UNDERLYING MECHANICS' LIENS AND RELATED LEGISLATION

1. Fundamental Purpose

"The Mechanics' Liens Act" has been around long enough and in a sufficient number of jurisdictions to become an integral part of the construction industry and related industries which nurture it. The statute affects virtually every job where an asset attached to real property is created by the application of labour and materials. The fundamental purpose of this legislation and *"The Builders and Workers Act"* (C.C.S.M. cap. B90) is to ensure that a person contributing to the improvement of such land is paid for that contribution in accordance with his contractual entitlement. In other provinces, the trust provisions which are the main feature of our *"Builders and Workers Act"* are part of their mechanics' lien statutes.

2. Means of Achieving Purpose

The first method of better ensuring payment is through the establishment of the trust provisions. They are designed to keep the contract monies flowing from the owner of the land and improvements through the pyramid of contractors, sub-contractors, suppliers and workers who construct these improvements. Essentially, the trust provisions provide that all money received by a contractor or a sub-contractor on account of the contract price shall be held in trust, and the contractor and the sub-contractor, as the case may be, may not appropriate that money to his own use until the workers, suppliers and sub-contractors have been paid. Being a trust, priority is given to the claims of workers, suppliers and sub-contractors over and above claims of other creditors in

the distribution of the contract monies. Also, if an insolvent contractor or sub-contractor tries to use contract money to repay a debt or if he assigns a debt of contract money to someone else as security for a loan, the beneficiaries of the trust money may be entitled to claim against the person in whose hands the contract money is found. The consequence of this is to better ensure that those persons who contribute to the improvements on the land receive their share of the contract monies paid by the owner to the contractor by making it a breach of trust and a punishable offence not to use those contract monies to pay such workers, suppliers and sub-contractors to the extent that they are entitled to them.

The second method of better ensuring payment is established in *"The Mechanics' Liens Act"*. Unless contracted out of by way of a waiver of lien, the Act gives a right to a contributor, whether he is a workman, supplier or sub-contractor, to claim payment against the owner of the land who benefits from his work or materials. In addition to this right of lien, the worker, supplier, sub-contractor, etc., would still have the right to claim payment against the person with whom he has contracted to provide the work or supply the material for payment. The right to a lien is not, however, triggered unless certain statutory requirements are met. Once valid, it gives a right to take action to have the land and improvements sold to assist in paying the unsatisfied claims of lien claimants.

A third method of better ensuring payment is the establishment of the holdback fund as provided in *"The Mechanics' Liens Act"*. These provisions require the owner to hold back from the contractor at least 15% of the amount owing to him. In the Manitoba statute this requirement also applies as between the contractor and sub-contractor and sub-contractor and

sub-sub-contractor. Generally speaking, if a job is completed, and if, in turn, the owner has *bona fide* paid 85% of the contract price, holding back the remaining percentage, he will not be liable to any one or more of the persons within the construction pyramid for amounts above 15%. Theoretically, the 15% holdback is then to be made available to help pay the claims of the unpaid lienholders.

III. THE HISTORY OF MECHANICS' LIEN LEGISLATION

The right to security in the form of a lien against the land and improvements afforded to certain of those who participate in the construction of those improvements was first founded in Roman law, subsequently well developed in the civil law, and incorporated in the *Code Napoleon*. The right was introduced by statute in North America in Maryland in 1791. Similar statutes spread throughout the United States and became law in Ontario and Manitoba in 1873. Since then, all other provinces have followed suit except that the provisions of these statutes differ from province to province. Some notable differences historically are that the British Columbia legislation, for example, did not include a trust provision until 1948 and did not include holdback provisions until 1956. The Manitoba statute has never contained the trust provisions but, as we have already seen, these provisions are dealt with under separate legislation, first enacted in 1883, called "*The Builders and Workers Act*". The doctrine of substantial performance did not come into effect in Ontario until 1970. This doctrine subsequently became law in all provinces, except Manitoba and Nova Scotia. These various differences and others are discussed in more detail under other headings in this Report.

There is no equivalent of the North American mechanics' lien statutes in the United Kingdom. New Zealand and two Australian states, Queensland and South Australia, enacted such legislation but Queensland repealed its Act in 1964. *"The Mechanics' Lien Act"* (36 Vict. c. 31) was first enacted in Manitoba in 1873 and, as with much of the legislation which had preceded it in the American jurisdictions, set up a statutory scheme which contemplated a sale of the owner's interest in land and its improvements for distribution among those in whose favour liens had been filed. In the case of this particular statute, the lien was required to be filed and proceeded upon by a claimant within one month and 60 days respectively of his having completed work or supplied materials or machinery to a construction project.

Amendments to our Act first appeared in 1875 and 1876. These early amendments extended the period for filing of a lien from one month from the completion of work or from the supplying or placing of materials or machinery to two months and for proceeding upon a lien from 60 days to six months. Significant amendments were made the following year, in 1877, when the Act was substantially recast (40 Vict. c. 27). Among other things, the effect of this amendment was to give priority to the claim of a mortgagee where a mortgage existed before a lien arose. This priority was, however, limited to the extent of the actual value of the land in question to be determined as of the date upon which the lien arose. The balance of the provisions of the 1877 Act included definitions of the terms "owner", "contractor" and "sub-contractor" as well as more detailed provisions concerning the procedure for enforcing and discharging liens.

The 1880-81 Consolidation of the Statutes of Manitoba

re-enacted the 1877 amendments, including also the minor adjustments made in 1878. By these later amendments the six-month period for commencement of proceedings on a lien was reduced to 90 days. In addition, liens involving amounts of more than $100 were no longer to be brought to the Court of Queen's Bench. Section 8 now provided that cases involving amounts up to $250 should, in future, be brought in the County Courts of the Province. The arbitration alternative originally enacted in 1877, also re-appeared in this version of the Act.

Before the next revision in 1891, the Act was amended a further three times, in 1883, 1884 and again in 1888. For the most part, these amendments were concerned with the type of information to be filed in a statement of claim for lien and with the procedure for the taking of affidavits respecting these claims although a section of the 1883 Act was also added to deal with the time for filing of the lien in the registry office. In addition, section 6 of the Act reduced the previous two-month period to 30 days from the completion of the work or the supplying or placing of the machinery, etc. (46 & 47 Vict. c. 32). *"An Act to Secure The Payment of Builders"* (46 & 47 Vict. c. 21) was also passed in 1883 but concern for the workers' and labourers' wages was evident in the mechanics' lien area as well.

In order to afford increased protection to wage earners, amendments were made to the Act in 1895 and in 1896. By both of these amendments a better status was given to the lien for wages and any agreements between an owner and contractor made for the purpose of excluding a lien for wages were declared invalid. Section 4 of the 1895 amendment further provided that an owner was to be entitled to retain for a

period of 30 days after the completion of the contract, 10% of the price to be paid to the contractor so that, for the first time, funds were permitted to be held back from a contractor in order to satisfy lien claims.

In 1898 both the 1891 Act and subsequent amendments were repealed and replaced by a new Act. *"The Mechanics' and Wage Earners' Lien Act, 1898"* (61 Vict. c. 29) incorporated many of the provisions of the earlier law and in addition added a number of new sections to deal with matters of cost, jurisdiction, and sale proceedings in lien actions. Perhaps the most significant of the 1898 reforms was in the change it effected in the percentage now "required" to be retained by an owner.

Few amendments were made in the next 15 or more years. Indeed, the 1898 Act appeared without change in the general revision of 1902 and was amended only twice more until it was revised and consolidated again in 1913. Of these few amendments easily the most important occurred in 1913 when, by section 54 of the Act (3 Geo. V c. 32) judges of the County Courts were given authority to refer actions within their jurisdiction (those involving amounts of less than $500) to the Referee in Chambers of the Court of King's Bench, for trial in a summary way.

A number of amendments then followed in 1914 (4 Geo.V c. 60) and in 1923 (13 Geo. V cc. 29 and 30), none of which have proved to be particularly important in the development of the legislation. All of these were grouped and noted in the 1925 consolidated amendments to the Statutes of Manitoba.

In 1926 the Act was renamed *"The Mechanics' Lien Act*

At the same time provision to compel a lienholder to pursue his action to realize his claim for lien before the expiration of the usual limitation period was introduced. Where no notice was given, the Act permitted the lien to be proceeded upon at any time within two years. This Act was incorporated in the 1940 general revision. During the 14-year period which elapsed before the next general revision, the Act was amended three times (S.M. 1943, c. 31; 1950 (1st) c. 35; 1951 c. 37).

The constitutional defect of the 1913 Act (3 Geo. V c. 32) in giving the Referee in Chambers powers under the Act to hear and dispose of cases before him was remedied in the 1950 legislation. After further amendment to the law and the decision in a leading case (*C. Huebert Ltd. v. Sharman*, [1950] 2 D.L.R. 344) the exclusive jurisdiction of the County Courts in mechanics' liens matters was finally established.

The next revision occurred in 1954 (R.S.M. 1954 c. 157). It was amended six times between 1954 and 1963. These amendments were largely inconsequential and in at least three instances concerned matters of drafting and typographical error. No amendments have been made to the Act since 1963. (See Appendix A to this Report for a list of all of the amendments to the Act since 1873.)

Because *"The Mechanics' Liens Act"* is a law concerned with practical every-day business affairs, it must be responsive to changes in the industries it affects. Because there have been no significant amendments in Manitoba over the past several decades, the Manitoba legislation is far out of date. For example, the statutes of Ontario, Saskatchewan, Newfoundland

and Alberta were recently amended to permit a person who rents out equipment without an operator to claim a lien for the price of the rental of such equipment. In Manitoba at the present time only persons who rent out equipment with operators are entitled to claim a lien for the price of the rental, in spite of the fact that for many years equipment rental has been one of the most significant cost items of any construction project. This subject is dealt with in more depth under another heading in this Report.

It is surprising that in spite of the "bread and butter" nature of this legislation, its long history, its presence in every province in this country and the substantial amounts of time and energy and wealth expended on improving this legislation from time to time by so many jurisdictions, no Model Act has been accepted by all the provinces. Apparentl it is not for lack of trying because between 1923 and 1949, the Conference of Commissioners on Uniformity of Legislation in Canada produced a series of draft Acts but general acceptance was not secured. However, with reforms pending after lengthy and intensive study by law reform bodies the equivalent of ours, in Nova Scotia, Alberta and British Columbia and with improvements likely to be made in Ontario in the near future, it seems to be a particularly appropriate time to attempt to make concepts uniform even though details, such as the amount of statutory holdback, amounts of fines and time limitations on registrations, differ. In our opinion, these matters must necessarily differ because they are founded on local needs and desires and on differing opinions as to what degree and/or type of reform will most effectively achieve the objectives of the legislation.

IV. SHOULD THE ACT BE AMENDED OR REPEALED?

It is obvious that at least amendments to "*The Mechanics' Liens Act*" are required. First, the Act has not been kept up to date and therefore it does not protect the interests of certain people who have contributed to improvements on land but have no lien rights. Second, the fact that one can contract out of the legislation means that the big and powerful can force a small sub-contractor, supplier or worker to give up his right to file a lien under the Act by the signing of a waiver. This has been done with increasing regularity. Third, there have been many court decisions which have interpreted the legislation in ways which give guidance to a modern day Legislature as to how the statute could be improved. Fourth, the Manitoba legislation has not kept pace with that of neighbouring jurisdictions, where, for example, such concepts as substantial performance have been adopted or introduced. Fifth, many detail provisions in the statute are grossly out of date; two examples are the $20 minimum for the right to file a lien, and the name of the Act. Sixth, the Act is perceived by the people affected by it as being grossly unsatisfactory. It is alleged that it is causing considerable injustice, is abused or ignored with impunity and is making construction more costly, complex and litigious. Seventh, it appeared to the co-directors as a result of submissions made at the public hearings that there were basically two major problems in the construction industry which were aggravated by the legislation namely:

a) non-payment of funds;

b) an inadequate cash flow during the continuance of the construction contract.

The co-directors in their working paper stated:

> The orderly and rapid flow of funds is the life blood of the construction industry. In this respect it would appear that mechanics' lien legislation, which presently extends across Canada, operates more as a tourniquet than anything else. There was very little consensus that could be garnered from the briefs that were presented to us. Many parties were of the opinion that mechanics' lien legislation as it presently exists is beneficial in a coercive or deterrent sense only. It is in the actual implementation of any mechanics' lien system that the legal machinery thus far devised does not fulfil its function, in that it deters the flow of funds rather than facilitating same (pp. 2-3).

In spite of all the difficulties with the legislati with the singular exception of the Housing and Urban Development Association of Manitoba (formerly the Winnipeg House Builders Association), those who presented briefs were unanimously of the opinion that *"The Mechanics' Liens Act"*, with it limited protection, should be retained, but that extensive revision was required in order to facilitate rapidity of payment. Even the suggestion of repeal on a geographically limited basis was rejected because it was felt that no area could lend itself to the isolation necessary for laboratory testing involving so drastic a departure from the experience of over 100 years. However, law reform commissions in other jurisdictions have addressed themselves to the question of repeal and have felt that it should be re-examined in more depth. These commissions concluded that substantial amendment would be in order, that they should be tested and if experienc found them still wanting, repeal should be further and more seriously considered. The examination of the question of repeal by the Law Reform Commission of British Columbia in its 1972 report is particularly detailed and informative. It stated five main arguments in favour of repeal as follows:

1. The Act slows down the flow of funds along the construction chain.
2. It induces a false sense of security.
3. It gives rise to technical difficulties.
4. It is an instrument of blackmail.
5. It is unjust.

The last argument is probably the strongest because it is founded on an attack against the fundamental rationale for the existence of the legislation. The argument is that the Act gives a special protection to a particular class of people, namely people in the construction industry, as distinguished from other creditors. The answer to this argument offered by the Law Reform Commission of British Columbia was that the special circumstances of the construction industry warrant this special protection.

In our working paper, the co-directors advanced the following reasons in support of non-repeal:

1. Contracts granted within the industry usually do extend over a protracted period of time.
2. In the modern construction project, large amounts of money are involved (quite often running into the millions), with extended payment periods and greater than normal credit-granting risks.
3. By virtue of the fragmentation and specialization of the various building trades involved, (such as mechanical contractors, piling contractors, lathers, masonrymen and many others) all with their own particular area of expertise, the parties involved in a construction contract may be and quite often are drastically affected by the actions of other building trades or suppliers with which they have no privity of contract. Modern construction consists of the welding together of the various trades and sub-trades, and financial defalcation by any

> one trade or supplier in this interlocking pyramid can have a ruinous effect on an entire building project.
>
> 4. Lastly, and perhaps most importantly, it was repeatedly pointed out to your co-directors by credit-grantors within the industry, whether suppliers or financial lending institutions, that the one thing that mechanics' lien legislation does appear to have accomplished is the ensuring of adequate credit-granting. This is something that would not be obtainable normally, particularly in view of the volatile financial nature of the construction industry and, to some degree, the undercapitalization of many of its contractors and sub-trades.
>
> This is a situation that has come about even though it has been cynically pointed out in the past by some individuals who are possessed of rather deep insight into the nature of the construction industry that the protection theoretically granted by mechanics' lien legislation in many instances proves to be merely illusory. Illusion in itself is not such a bad thing, particularly when it performs a positive function. (pp. 5-6)

The British Columbia Commission similarly concluded that there was good reason for retaining the legislation. In their view, the trust provisions and the sanctions for their violation, together with the very threat of a lien, would better ensure that persons entitled to payment would be paid. Another convincing reason why the British Columbia Commission rejected repeal of the Act was the absence of factual evidence upon which to make an informed judgment. The Commission recommended that before making any firm conclusion, there should be a study of the experience in Queensland where the legislation has been repealed, as well as in England and other jurisdictions where such legislation has never existed. They pointed out, however, that this would demand time and resources not presently available to their Commission. Our co-directors came to the same conclusion as follows:

> There is not one single North American jurisdiction which has repealed mechanics' lien legislation. Our research has unearthed only one jurisdiction which has repealed mechanics' lien legislation in the past, namely the State of Queensland, in Australia. From what we have been able to ascertain, the mechanics' lien was never, even prior to repeal, utilized extensively in the State of Queensland. Hence, we have no hard statistical data on which to base a recommendation of abolition of this legislation. Any conclusions that we might come to in this regard can be conjectural only, and based on conjecture that would be primarily philosophic and economic in nature. It is true that some telling economic and philosophical arguments could be marshalled on the side of possible repeal; such as the simplification of credit-granting, the advantages inherent in untrammelled freedom to contract, the curtailment of the operations of those who are in a financially precarious position, etc. There are equally cogent arguments in favour of maintaining the legislation; such as the ensuring of a burgeoning construction industry within the capitalistic system, and the lessening of possible restrictive monopolies, through concentration of the industry in the hands of the well-capitalized concerns. Nevertheless, with the limited resources at our disposal, we cannot make a definitive value judgment. (pp. 6-7)

The co-directors also predicted that there would be considerable upset to the construction and related industries if the statutes were repealed:

> There is no doubt in the minds of both your co-directors that the abolition of existing mechanics' lien legislation would lead to a considerable furor in the construction and credit-granting industries. This manifested itself in the various briefs submitted, both written and oral, and in the replies solicited to numerous inquiries in this regard. It is evident that only one segment of the industry, namely housebuilders, (who are in a category by themselves - housebuilders usually are the owners of the land upon which they make improvements) are in favour of repeal. (p. 5)

They therefore concluded as follows:

> On balance . . . that a clear recommendation of repeal should not be made, but that the Act should be revised in such a manner that it will establish clearly and effectively the rights of all parties affected thereby. (p. 7)

More recently, in March 1979, the Institute of Law Research and Reform of Alberta indicated support for repeal. Despite the strong support for repeal in evidence in Alberta, the Institute nevertheless concluded that before recommending repeal, an extensive investigation to assess the effects of th Act and the consequences of its repeal would need to be conducted.

We agree with the above stated conclusions arrived a by the British Columbia and Alberta reform commissions and by our co-directors. Because we have taken this position, we wis to make it clear that we neither oppose nor approve of repeal. Rather, we would prefer that the substantial changes recommend in this Report be implemented and tested and, only after a reasonable trial period, that consideration then be given as t whether or not repeal would be more beneficial. For example, we believe that our recommendations for the reduction of the holdback to 7½%, the introduction of the substantial performan doctrine, the strengthening of the trust provisions and their more diligent enforcement, once enacted, will speed up the flow of funds along the construction chain, causing more respect for and observance of the legislation.

V. TRUST FUNDS

1. General

Section 3(1) of *"The Builders and Workers Act"* provides as follows:

> All sums received by a builder or contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the builder or contractor, or of the sub-contractor, as the case may be, for the benefit of the proprietor, builder or contractor, sub-contractors, Workers Compensation Board, workmen, and persons who have supplied material on account of the contract.

Section 3(2):

> The builder or contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract, and the Workers Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

In conjunction with these sections, the Act further provides that a pay list be kept by every contractor and sub-contractor showing the names of the workmen and their remuneration (s. 4(1)). Every workman is required to sign this list when he receives payment and the person benefitting from the labour is required to have the list produced to him before any amount claimed to be due in respect of the work is paid (ss. 4(2), (3)). The person benefitting from the work is also required to see to it that the workers shown on the pay list are paid the sums due and owing to them. Until so paid, the owner is liable to them directly for the amounts owing so

that, in effect, each worker has a personal claim against him for his wages (s. 5(1)). The relief is available not only to wage earners but also to piece workers (ss. 4(1), 5(1), 7, and 8). In all cases, the penalty for violating the requirements respecting the pay list is a fine ranging from $20 to $200 (s.9(1)). In order to protect the worker, various other sections of the Act provide for the subletting or assignment of work (ss. 10, 13).

Finally, the Act provides that a written contract between a contractor or sub-contractor and the person benefitting from the improvement to the land may be registered in the Land Titles Office, thereby creating a lien against the land for the amount or unpaid portion of the contract price (s. 11). The effect of this provision is, of course, to give priority to the lienholder over any subsequent transferee or encumbrancer. New provisions were enacted in 1976 providing for discharge of the lien and requiring commencement of action on the lien within a certain time limit (ss. 11.1, 11.2). The procedure for enforcing the contract is the same as for mechanics' liens (s. 11.3). Forms for registering the contract and discharging it are found in Schedules B and C of the Act respectively (s. 15

The trust provision contained in section 3 of *"The Builders and Workers Act"* was first adopted in Manitoba in 1932. Ontario adopted the equivalent of section 3 into its *"Mechanics' Lien Act"* in 1942 and British Columbia and New Brunswick did the same thing in 1948 and 1959 respectively.

As stated by the Law Reform Commission of British Columbia in its 1972 report on Debtor Creditor Relationships Part 2 Mechanics' Lien Act: Improvements on Land:

> The intention of this provision is to secure to the classes of persons described in the sub-section a

> measure of protection additional to that provided by the ordinary law of contract and by the right, where it exists, to obtain a lien against the owner's interest. The device used to create the additional measure of protection is to make certain classes of persons owners in equity of contract monies and to give them the rights which the beneficiaries under a trust have against the trustee and anyone into whose hands trust property comes.

Research indicates that these provisions are scarcely, if ever, adhered to and that one of the principal reasons for this non-compliance is the difficulty attendant on implementation of accounting procedures. What is more, the present fines and penalties for breach of trust are unrealistic and consequently prosecutions are rarely undertaken. As indicated already, the present *"Builders and Workers Act"* provides a penalty of $20 to $200 for failing to keep a pay list. Aside from this, the Act provides no other specific sanction for breach of trust. However, section 4 of *"The Summary Convictions Act"* (C.C.S.M. c. S230) provides that unless another penalty is provided by an Act of the Legislature, the penalty for contravening a provincial statute or regulation is a fine of up to $100 and/or imprisonment for a period up to one month. There is, of course, also the offence created under the *Criminal Code* for breach of trust. In fact, *"The Builders and Workers Act"* actually contains a reference to this provision in the form of a notice to *"see section 282 of the Criminal Code"* which appears following section 3(2) of the Act.

2. Should the Trust Provision Be Retained?

Bearing in mind the fact that the present fines and penalties for breach of trust are unrealistic and further that prosecutions are rarely undertaken, we were persuaded in the view that the utility of the trust concept in this

area of law has been an extremely minimal one. At the time of the publication of the working paper in 1974, we therefore tentatively recommended not only that the present *"Builders and Workers Act"* be repealed, but also that the amendment of *"The Mechanics' Liens Act"* not include provisions similar in nature to the trust provisions contained in *"The Builders and Workers Act"*. Based on the submissions made to them, it was apparently our co-directors' overall view that these impractical and ineffective provisions merely acted as a detriment to banks and other lending institutions making them reluctant to provide normal financing arrangements within the construction industry. Moreover, according to our co-directors, it was only

> . . . the rare instance where funds have been traced and rarer still, isolated instances where an individual has been prosecuted for breach of trust. Overall the utility of the trust concept, in this particular area of the law, has been an extremely minimal one. (pp. 7-8)

The present thinking of the Commission is somewhat different, however. Instead of outright repeal, we now favour retention of the trust provisions provided however they are augmented by adequate enforcement provisions or sanctions to ensure compliance and to deter those who might otherwise commit breaches of trust.

The comments of our readers suggest that the trust provisions of *"The Builders and Workers Act"* are, in fact, serving a purpose in the industry. For example, The Winnipeg Builders Exchange took strong issue with the proposal that the trust provisions be done away with but agreed the lien provisions in the Act could be repealed if waivers of

mechanics' liens were abolished, so that there would be some effective protection against non-payment. Moreover, although the question was raised, no evidence has been produced to the Commission showing that the trust provisions increase the difficulties of builders in obtaining credit from financial institutions. If effective sanctions were contained within the legislation, we think much of the difficulty would be alleviated. Indeed the Commission hopes that a better understanding of the trust provisions, tougher sanctions, and more regular and diligent enforcement will expose at an earlier stage the sorts of problems in respect of a project which often lead to insolvency or bankruptcy of a contractor or sub-contractor. It seems to us that one criminal (quasi-criminal) prosecution with a heavy fine might well ensure that these rules, designed to protect contractors, suppliers and workers down the line, would in future be followed.

This view is now also shared by our consultant. In fact, in his final opinion as consultant to the Commission, Mr. McJannet recommended that the trust provisions be incorporated into "*The Mechanics' Liens Act*", and that adequate enforcement provisions be enacted to guarantee their observance. In response to possible claims that the provisions might impede credit granting he stated his belief that special limitations in claims against financial institutions might remedy the problem if and when it arose. (This subject is dealt with later under the sub-heading "Limit of Time for Asserting Claims to Trust Monies".)

While we are now in agreement with the most recent view expressed by our consultant, we do not believe that harsher penalties and more frequent prosecutions are the only answer. In our view, some minimum accounting standard, along the lines of the minimum required to be kept by employers

by *"The Employment Standards Act"* (C.C.S.M. cap. E110) would still need to be established. With the exception of those requirements in *"The Builders and Workers Act"* dealing with the pay list for workers there are at the present time no such minimum requirements set out by *"The Mechanics' Liens Act"* in respect of the building industry. In order to educate builders as to the minimum requirements in this regard to facilitate enforcement of the legislation, we therefore recommend that minimum accounting requirements be spelled out in *"The Mechanics' Liens Act"* or,alternatively, in the Regulations to the statute. Before coming to this conclusion, we considered the extreme alternative of requiring the licensing of all builders in the province. This would enable the industry to be policed much in the same fashion as real estate brokers are presently regulated under *"The Real Estate Brokers Act"* (C.C.S.M. R20) or for example, as the law profession is scrutinized by its own membership and would thereby ensure that trust obligations are maintained within the industry. Despite these examples we have nevertheless concluded that such an extreme step would not be necessary at this time. In our view the public interest will be best served if, once minimum requirements have been established by legislation, the industry is given the fullest opportunity to police itself.

In conclusion, we therefore recommend that the trust provisions (similar to those contained in *"The Builders and Workers Act"*) should be included in *"The Mechanics' Liens Act"* and furthermore that they be accompanied by adequate enforcement provisions to ensure their observance. In addition, we recommend that minimum accounting standards should be prescribed by the statute or alternatively, in the interests of greater flexibility, by the regulations under it. It is our expressed hope that such provisions will, in future, facilitate the education concerning this law and its enforcement.

3. Should Provisions of *"The Builders and Workers Act"* Other Than Trust Provisions Be Retained?

a) General

While neither the consultant nor anyone else making submissions has indicated that, with the exception of the trust provisions, any others of the provisions of *"The Builders and Workers Act"* should be retained, the Commission is nevertheless of the present view that certain portions of the Act should be retained and extended, but that these be incorporated into *"The Mechanics' Liens Act"*. This view is, for the most part, dictated by the fact that we are now recommending that minimum accounting requirements be introduced into *"The Mechanics' Liens Act"* or the Regulations under it. In other cases, our previous recommendations (as they appeared in our Working Paper) are entirely unaffected by these requirements and consequently we still recommend that *"The Builders and Workers Act"* be repealed.

b) Repeal of Builders' and Workers' Lien Rights

For example, the provision of the Act providing for registration of a lien by builders who contract directly with the owner of the interest in land and giving workers a right to claim directly against that owner should, we think, be repealed. These provisions are to a certain extent duplicated by *"The Mechanics' Liens Act"* with one critical difference, namely, the absence in *"The Builders and Workers Act"* of any special time limit within which a worker must claim against an owner or builder to establish a valid lien against the owner's interest in land. In 1974, our co-directors were very critical of this factor for reasons which to a

certain extent are no longer valid. They stated as follows:

> Section 11 of the present Builders and Workmen Act provides for the filing of a contract entered into between a contractor or sub-trade and an owner. There is no fixed time provided for the registration of any particular contract, and neither does the Act prescribe a method for enforcing a lien arising in this manner. This not only creates a situation anomalous to any other in the mechanics' lien field, but also, in our opinion, imposes an undue burden on any owner, something that is entirely inconsistent with the spirit of the law of any jurisdiction that adheres primarily to the concept of indefeasibility of title enshrined in our Real Property Act. Therefore, in our view, this specific right of registration should be withdrawn. (pp. 9-10)

Subsequently, in 1976, the Act was amended to prescribe a manner by which the lien could be enforced. Section 11.3 now provides that a lien, created by the registration of a contract under *"The Builders and Workers Act"* may realized in the County Court in the same manner as a mechanics' lien may be realized. The case of *Phillips-Anderson Construction Ltd. v. Tuxedo Estates Co. Ltd.* ([1977] 4 W.W.R. 320 (Man. C.A.)) has however since held that the section does not have the effect of incorporating into the Act by reference section 25(2) of *"The Mechanics' Liens Act"* (permitting payment into court to vacate a mechanics' lien) and therefore that a County Court judge sitting in a mechanics' lien action has no jurisdiction to vacate the lien created by the Act. The lien can only be removed (short of a court order disposing of the action) by way of discharge pursuant to section 11.1 or by failure of the lienholder to bring action on the lien within 30 days after notice (section 11.2). While the 1976 amendments do go some way to reduce the criticism expressed in our working paper, neither they nor the *Phillips* case deal with the diminution of

the indefeasibility of title concept. We therefore continue to agree with our consultant's concern in this regard. With considerable sympathy for potential lienholders who have contracted directly with the owner and have missed the time limits to file a mechanics' lien notwithstanding, we have concluded that any lien claim against land must meet the formal requirements of a mechanics' lien. The old right to file a builders' and workers' lien against land without regard to time limits must, we think, be sacrificed in order to create the following benefits:

1. Absolute certainty to owners and others having an interest in land, including mortgagees financing the construction on the land, in the knowledge that all lien rights have expired by a certain fixed date;

2. (Flowing from item 1), faster payment of funds by the mortgagee to the owner and in turn from the owner to the contractor as a result of the increased certainty concerning the existence of an encumbrance respecting the land.

3. A discipline that, in the absence of alternative security, a mechanics' lien must be registered in a timely fashion in order to secure the land and improvements.

4. An incentive to deal with problems of non-payment as they arise rather than postponing them until the project ends.

5. One comprehensive piece of legislation.

Finally, we believe that by abolishing lien waivers and by improving the trust provisions of *"The Builders and Workers Act"*, we are in actuality increasing rather than decreasing the protection of the current law. For these reasons we have concluded that the lien provisions of *"The Builders and Workers Act"* should be repealed.

c) Claims by Beneficiaries of the Trust

With respect to the right to assert the existence of a trust and to claim entitlement to payment as a beneficiary under that trust, we recommend that such right not be limited to persons holding or entitled to hold valid mechanics' liens. The trust provisions we recommend be inserted in the revisions to *"The Mechanics' Liens Act"* should make it clear that beneficiaries of the trust can make claims against the trust monies whether or not they have a lien or the right to file a lien. A summary procedure by way of obtaining a declaration in this regard is also recommended. The British Columbia Commission in its 1972 Report on Mechanics' Liens made a similar recommendation for that province. We agree with those conclusions and with the statements of Rand, J. in *Minneapolis-Honeywell v. Empire Brass* ([1955] S.C.R. 694) to the effect that the benefits of trust provisions in the British Columbia Act (similar to those in our *Builders and Workers Act*) are not in any event limited to persons holding valid mechanics' liens. The right to assert the existence of a trust is therefore not affected by the fact that the time limited for filing a lien has expired. In that case Mr. Justice Rand stated:

> I am unable to feel difficulty about what this language provides (referring to the trust provision in the B.C. legislation). The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him: only thereafter does he pay the contractor at any risk.

For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 (the trust section, now s. 3) has been added. The contractor and sub-contractor are made trustees of the contract moneys and the trust continues while employees, material men and others remain unpaid.

d) Right of Workers to Claim Against the Owner

With respect to the right of the worker to claim against the owner both the co-directors and later our consultant, have recommended that this right be eliminated not only in *"The Builders and Workers Act"* but also in *"The Mechanics' Liens Act"*. The effect of this recommendation once enacted would be that wage earners would have no lien rights or cause of action against the owner. While the Commission strongly disagrees with this recommendation, none of the submissions made in response to the Working Paper questioned it. According to the Department of Labour the relief which *"The Builders and Workers Act"* gives to workmen is in fact rarely utilized and furthermore is superfluous in light of the very far-ranging effective security and relief now available under *"The Payment of Wages Act"* (C.C.S.M. c. P15) for non-payment of wages. The following sections are illustrative:

> Wages deemed held in trust
> 3(4) Every employer shall be deemed to hold the wages accruing due to an employee in trust for the employee whether or not the amount thereof has been kept separate and apart by the employer and the employee has a lien and charge in the amount of wages on the assets of the employer that in the ordinary course of business would be entered in the

accounts of the business of the employer whether so entered or not.

Liability of directors and officers of corporation

5 Notwithstanding the provisions of any other Act of the Legislature every director and officer of a corporation, is liable for the unpaid wages of the employees of the corporation for an amount not exceeding 2 months wages and 12 months vacation wages, and the provisions of this Act apply, mutatis mutandis to the extent that they may be applicable, to the recovery of unpaid wages from a director or officer of a corporation where the corporation has failed or refuses to pay wages due and payable to the employees of that corporation.

Priority of wages

7(1) Notwithstanding any other Act, the amount of wages due and payable by an employer to an employee not exceeding $2,000.00 constitutes a lien and charge on the property and assets of the employer in favour of the employee, and is payable in priority to any other claim or right, including those of the Crown in right of Manitoba, and without limiting the generality of the foregoing that priority extends over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage on real or personal property, debenture and security, whether registered or not, made, given, accepted or issued before or after the coming into force of this Act.

Priority of order that is filed in County Court

7(2) Where pursuant to this Act the director files an order for payment of wages in a County Court and that order has been deemed to be a judgment of that Court, the judgment constitutes a lien on the property and assets of the employer named in the order, in favour of the director and has the same priority as mentioned in subsection (1).

Security by employers

12(1) The minister may, where he deems it advisable, require an employer to furnish to him, security in the form of a bond with one or more sureties in such amount and subject to such conditions as may be prescribed in the regulations.

<u>Application of proceeds of bond</u>
12(2) Where, in accordance with the provisions of this Act, it is found that an employer who has furnished a bond under subsection (1) is indebted to any of his employees, the minister may apply the proceeds of the bond towards the payment, pro tanto, of the unpaid wages of the employees and shall notify the employer accordingly.

<u>Failure to furnish bond an offence</u>
12(3) An employer who fails or refuses to furnish security when required to do so under subsection (1) is guilty of an offence and on summary conviction is liable to a fine not exceeding $500.00.

<u>Prohibition order</u>
12(4) Notwithstanding subsection (3), where an employer fails to furnish security as required under this section, the Court of Queen's Bench on an application made therefor by the minister, may issue an order prohibiting the employer from carrying on business in the province until that employer furnishes the security required under subsection (1).

These provisions give relief against the worker's employer but no relief against the owner who benefits from the worker's labour.

"The Construction Industry Wages Act" (C.C.S.M. c. C190) also gives some special security and relief to workers on governmental contracts. However, this protection does not operate in the form of security against land. Rather, section 15 of the Act provides as follows:

<u>Claim for wages under government contracts</u>
15(1) Where
(a) an employer doing work in performance of a contract with the government or a Crown agency; or

(b) an employer doing work in performance of a sub-contract under a contract

> between another person and the
> government or a Crown agency;

makes default in paying wages to an employee employed in the construction industry to do work under the contract or sub-contract, as the case may be, the employee may file a written claim for the wages with the minister not later than thirty days after the date upon which the wages first become due.

<u>Order for payment of wages</u>
15(2) Where the minister receives a claim made under subsection (1), if he is satisfied as to the amount of the claim and that the employer is liable to pay the wages, he shall order, in writing, that the amount of the claim be paid to the employee; and

(a) where the employer is under contract with the government or the Crown agency, shall send the order or a signed copy thereof to the minister of the Crown having charge of the contract or to the chief officer of the Crown agency, as the case may be; and

(b) where the employee is under a sub-contract under a contract between another person and the government or the Crown agency, shall send the order or a signed copy thereof to that other person.

There is no question that employees have been given very substantial *special* protection under these two statutes, which goes far beyond that provided to contractors, sub-contractors and suppliers independent of their lien rights against the owner. There is also no question that, employees probably more than anyone else need this help, doubtless because they are the ones least able to help themselves. This point of view was shared and expressed by at least one of our respondents who favoured the preservation of the workers'rights over that of the owner as the more appropriate remedy to guarantee payment of an individual working man's

wages. The then Chairman of the Manitoba Labour Board stated as a fact that:

> The success of obtaining monies for unpaid employees in the construction industry through Court action has in nearly every case resulted out of the provisions of the Builder's and Workmen Act. This Act at least gives the workmen a chance to share ratably with those who have invested material into the construction project.

Based on this submission, he concluded that, the repeal of *"The Builders and Workers Act"* notwithstanding, it would still be necessary to have some other right, similar to that now granted workers by *"The Builders and Workers Act"* incorporated in a revised *"Mechanics' Liens Act"*. Although it is not clear from his submission, we have presumed this to mean that the equivalent of sections 5(1) together with section 3(1) of *"The Builders and Workers Act"* should be preserved. Finally, in response to the argument that the rights under *"The Payment of Wages Act"* are sufficient, he concludes as follows:

> Under the B.C. Payment of Wages Act, which is an Act similar to the Manitoba Payment of Wages Act, the employee has a lien for his unpaid wages on the assets of the employer. Although such a provision in the Manitoba Act would to some extent help the employee, it would not be adequate security for him on a construction job as he should have the same opportunities as the other persons and corporations who enhance the value of the land by having a lien on the enhanced value. It is imperative, therefore, that an employee of a sub-trade who may be devoid of assets or go into receivership should be able to look to an interest in the project itself rather than to his employer alone.

This hiatus which exists in the law despite the existence of the right to file a lien and/or bond and the recourse against directors provided under amendments to *"The Payment of Wages Act"* must, in our view, be filled. The effect of this hiatus is that if an employer becomes insolvent before a bond is obtained and if, in addition, the directors are similarly unavailable or insolvent, an employee will have no recourse, either against his employer or its directors, or unhappily, against the person and/or property benefitting from his work.

While the Commission agrees with these concerns for workers we are also concerned that the already serious lack of knowledge by workers and the persons advising them as to their rights under *"The Mechanics' Liens Act"* and *"The Builders and Workers Act"* will be aggravated if *"The Builders and Workers Act"* is repealed and certain of its provisions are tucked away in a reformed *"Mechanics' Liens Act"*. We therefore recommend that *"The Payment of Wages Act"* should be amended to provide that there is a right to file a mechanics' lien for wages under *"The Mechanics' Liens Act"*. This may be accomplished simply by providing in *"The Payment of Wages Act"* that, in the case of an employee claiming wages for work done to improvements on land, the employee would have the right to claim a lien on the land, pursuant to *"The Mechanics' Liens Act"*. An example of this type of provision is section 14(4) of *"The Construction Industry Wages Act"*. Its sole purpose appears to be to direct an employee of his right to recover under *"The Wages Recovery Act"* (C.C.S.M. c. W10). It reads as follows:

<u>Application of Wages Recovery Act</u>

14(4) The Wages Recovery Act applies to the

recovery of wages by an employee in the building construction industry or the road and drainage construction industry.

In drafting amendments to *"The Payment of Wages Act"* careful consideration need also be given to the following matters:

1. There is already serious concern expressed about the lien rights in *"The Payment of Wages Act"* not requiring registration in any registry office even though they affect title to land and personal property of all employers. To illustrate see relevant portions of letters we received in this connection which are attached as Appendix B. Consistent with our earlier discussion about speeding the flow of funds, dealing with problems as they arise, and the need for indefeasibility of title, a registration requirement and a strict time limit is desirable and necessary in order for the objectives of our proposed amendments to be achieved.

2. Priority of mechanics' lien wage claims vis-à-vis other mechanics' lien claims should be clearly spelled out in amendments to *"The Payment of Wages Act"*. The then Chairman of the Labour Board in his letter recommended that employees should be given a preferred position over other mechanics' lien claimants respecting holdback monies and proceeds of the sale of any property. We agree that such priority should be given. For example, a worker who has wages owing to him, has by virtue of section 12(1) of *"The Mechanics' Liens Act"*, and should continue to have, a claim in priority to that of a material supplier.

3. *"The Payment of Wages Act"* should be made totally consistent with the tone, content and objectives of the revised *"Mechanics' Liens Act"* we propose.

In addition to the above stated recommendations, it would, in our view, also be desirable to have the provisions concerning non-payment of wages presently in *"The Construction Industry Wages Act"* dealt with in amendments to *"The Payment of Wages Act"* and we further recommend that the provisions of the former Act be considered in this revision.

4. Trust Provisions and Crown Lands

As will be seen in Part XIV of this Report, the Commission is of the view that *"The Mechanics' Liens Act"* should be extended to Crown lands. In our view the provisions imposing the trust should also be binding on the Crown and we recommend that the legislation should so provide.

5. The Time and Manner of Creation of the Trust

"The Builders and Workers Act" seems to make it clear that the creation of the trust occurs upon receipt of contract monies by the builder. By virtue of the wording of the provision, the owner, it would appear, can never be a statutory trustee and no trust attaches as long as monies are in his possession. This seems clear but litigation has arisen over this wording nevertheless. In the case of *Castlelein v. Boux*([1934] 3 D.L.R. 351) the Manitoba Court of Appeal held that where money was owed by an owner to a contractor, and a judgment creditor of the contractor issued a garnishee summons against the owner, the creditor was entitled to receive payment of the money owed to the creditor free of the trust which would attach if and when the contractor received payment. By a bare majority of 3 to 2, it was held that the trust did not come into being until the contract money was "received" by the contractor and, since the effect of the garnishee order was that the money would never be received by the contractor, the trust never attached to the contract money. The dissenting justices,on the other hand,

felt that the judgment creditor could not stand in any better position than the judgment debtor would have done vis-à-vis the debt, and since the judgment debtor could only receive it subject to the rights of trust beneficiaries, so must the judgment creditor. Other authority exists which does not support this view, however. In the case of *Beaver Lumber Co. Ltd. v. Suffert and Villeneuve and Villeneuve* ((1964), 49 W.W.R. 294 (Man. Q.B.)) for example, the trial judge held that a trust arises notwithstanding that monies have not, in fact, come physically into the hands of the contractor. In that case the court held that, notwithstanding the monies were, in fact, properly owing to the contractors, they were not also thereby liable to garnishment. Although this decision was affirmed on appeal, only one of the four justices sitting agreed with its reasoning. The others relied on other grounds.

The Nova Scotia Law Reform Advisory Commission in its report of January 1979 has suggested a provision which, if adopted in Manitoba, would alleviate this controversy by imposing the trust not only on sums received by a contractor or sub-contractor but also on sums received by an owner as proceeds of a mortgage or other charge made with a view to construction (draft s. 12 at p. 51). Our consultant made a similar recommendation except that he did not limit his recommendation to the "proceeds of a mortgage or other charge" received by an owner. According to his view, with which we are in agreement, the trust is to be imposed upon monies in the hands of an owner in a variety of circumstances not limited to "proceeds of a mortgage or other charge". Section 2(3) of *"The Mechanics' Lien Act"* of Ontario has such a provision. This section is as follows:

> Trust funds in hands of owners
> 2(3) Where a sum becomes payable under a contract to a contractor by an owner on the certificate of a person authorized under the contract to make

> such a certificate, an amount equal to the sum so certified that is in the owner's hands or received by him at any time thereafter shall, until paid to the contractor, constitute a trust fund in the owner's hands for the benefit of the contractor, subcontractor, Workmen's Compensation Board, workmen and persons who have supplied materials on account of the contract or who have rented equipment to be used on the contract site and the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rented equipment to be used on the contract site and all contractors and subcontractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.

The effect of this provision is that where a sum becomes payable to a contractor by an owner upon the certificate of a person authorized under a contract to give such a certificate (normally the architect or engineer) then upon issuance of such a certificate, an amount equal to the sum certified that it is then in the owner's hands or is to be received by the owner at some time thereafter shall, until paid to the contractor constitute a trust fund in the owner's hands for the benefit of the contractor, sub-contractor, material supplier, etc. The Commission believes that the consultant's wording is not as broad as the wording suggested by the Nova Scotia Commission because it is restricted to circumstances where a certificate is issued. There are many contracts where there is no architect or engineer. However, section 2(4) of the Ontario Act covers the same ground as the Nova Scotia provision. Section 2(4) reads as follows:

> 2(4) All sums received by an owner . . ., which are to be used in the financing, including the purchase price of the land and the payment of prior encumbrances, of a building, structure or work, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund in the hands of the owner for the benefit of the persons . . . .

The stated intent of the consultant's proposal is that all sums received by the owner which were to be used in the financing, including the purchase price of the land and the payment of prior encumbrances, would constitute, subject to the payment of the purchase price of the land and the prior encumbrances, a trust fund in the hands of the owner for the benefit of the beneficiaries mentioned previously. It appears to the Commission that sections 2(3) and 2(4) of the Ontario Act are more satisfactory than the Nova Scotia wording. Therefore the Commission endorses the broader objectives of sections 2(3) and 2(4) of the Ontario legislation. To remove possible doubt about the application of the garnishment to these trust monies, we also suggest that the Act make it clear that trust monies, whether in the hands of the owner, contractor or sub-contractor, are not subject to this procedure.

6. Qualifications on the trust

Our consultant was of the view that, although imbued with a trust, an owner, contractor or sub-contractor should be entitled to retain amounts he is entitled to as payment for work done or materials supplied by him out of the funds he received in respect of a contract. We agree, except that we do not think such a right should accrue to the trustee until all of the beneficiaries entitled directly under him are paid their entitlement out of the payment. Section 2(3) of the Ontario Act is to this effect so far as owners are concerned.

Our consultant also suggested that provisions be included in the legislation allowing for the reimbursement of

the lender out of the trust funds for monies advanced by him. The British Columbia Commission has, in turn, agreed with this suggestion. According to its report, care would necessarily need to be taken in the drafting of the trust provision to ensure that their incidence and operation would not interfere unduly with the right of a statutory trustee to obtain financing. The Commission has therefore recommended that where a person lends money for the financing of a particular building project and receives an assignment from the borrower, the lender should be entitled to retain those contract monies, up to an amount equal to the sum lent for the purpose of the particular project, in priority to the trust beneficiaries. There is one situation in particular which commonly occurs and which has apparently persuaded the British Columbia Commission in its view. It is one where a contractor, not having received sufficient monies from the owner of land, nevertheless wishes to pay his sub-contractor for work or materials supplied to date. To enable him to pay these sub-contracts, the contractor usually obtains a loan from his bank with the expectation, and indeed upon the understanding, that once he receives payment from the owner, the contractor in turn will discharge his debt with the bank. However the risk is that any unpaid trust beneficiaries may also have a valid claim to those same monies received by the bank in payment of its loan. To the extent that the monies received by the bank represent repayment of a loan made to inject capital into the construction chain, the B.C. Commission was of the view that the bank ought to be able to retain these sums free of any possible trust. It therefore recommended a provision similar to that now found in the Ontario legislation. Section 2(6) of the Ontario Act provides as follows:

> 2(6) Notwithstanding anything in this section, where money is lent to a person upon whom a trust

> is imposed by this section and is used by him to pay in whole or in part for any work done, or for any materials placed or furnished or for any rented equipment, trust monies may be applied to discharge the loan to the extent 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 to the trustee's own use or to any use not authorized by the trust.

We also recommend the adoption of this provision.

7. Payment to trust beneficiaries

When a trustee pays a beneficiary his contractual entitlement out of contract monies that have become available on a particular job, we think that the payer's duties as trustee vis-à-vis that particular beneficiary should, from that point in time, be *pro tanto* discharged. In order to incorporate this provision within *"The Mechanics' Liens Act"* we recommend that section 3(1) and 3(2) of the present *"Builders and Workers Act"* be appropriately reworded in this regard.

8. Payments to a trustee in bankruptcy

The law in Manitoba seems clear that monies paid or payable on account of a construction contract are subject to or impressed with a trust whether or not they are actually, that is physically, received by the contractor or sub-contractor. Therefore, such money is not the property of a bankrupt contractor and is not divisible amongst his general creditors under the provisions of the *Bankruptcy Act* (R.S.C. c. B-3) until the beneficiaries under the trust are paid (*Re Walter Davidson* (1957), 10 D.L.R. (2d) 77 (Ont. S.C.)). In dealing with this problem we were of the opinion that the trustee in bankruptcy who receives monies from an owner, earned in respect of an improvement, should continue to receive these funds subject to that trust. That being the case, we have

accordingly refrained from making any recommendation in this regard.

9. Assignment of trust money

It is common practice for a person who borrows money to make an assignment of present or future accounts as security for the loan. In view of this fact, we think it should be made clear in the legislation that an assignee of trust monies takes them subject to the trust which would otherwise attach to the monies in the hands of the assignor. Section 13 of "*The Builders and Workers Act*" deals with this principle, at least in a limited way, so far as workers are concerned. However, we now recommend that a similar but extended provision should be inserted in "*The Mechanics' Liens Act*" to the effect that no assignment by the contractor or sub-contractor of any monies due in respect of the contract is valid against any trust created by the Act.

10. Limitation of trust

The Commission believes that the principle of limitation of trust, in the context of "*The Mechanics' Liens Act*", is a sound one. Drafters of the amendments to the Act must therefore ensure that this doctrine, as it was propounded by the Court of Appeal of Manitoba in *Royal Bank v. Wilson* ((1963), 42 W.W.R. 1) is preserved. In that case, the court held that the trust created by section 3(1) of "*The Builders and Workers Act*" applies for the benefit of only those beneficiaries who contract directly with the person alleged to be trustee. This means that if, for example, the contractor holds contract monies in trust, the beneficiaries are the sub-contractors and suppliers he employed, not the sub-sub-contractors and suppliers employed by the sub-contractor. They are beneficiaries of the

sub-contractor who is their trustee. In view of the fact that we agree with this result, we recommend that the trust section be drafted in the same way as section 3(1), so as to preserve the interpretation that contractors and sub-contractors are trustees only for people with whom they themselves contract in any way and the Workers Compensation Board.

11. Limit of time for asserting claims to trust monies

In determining an appropriate time limit for asserting claims to trust monies we considered the following:

1. the recommendation of our consultant;
2. the Ontario legislation;
3. the Nova Scotia Report;
4. the fact that it often takes considerable time to discover whether or not there has been a breach of trust;
5. the fact that construction projects can last upwards of two years;
6. the fact that litigation ensuing out of such projects can last even longer;
7. the desire to protect legitimate claims and in turn to deter breaches of trust;

and finally

8. the fundamental purpose of the legislation, which is to protect claimants under the Act.

Having considered each of these factors, we have concluded that the limitation period should be six months from the date that the person became aware of the breach of trust. In our view, the onus should be on those persons having knowledge of the breach, to bring on the action as quickly as possible.

In the working paper the co-directors suggested that the period of limitation for claims to trust monies against a lender should also be six months. In addition they recommended that this period should run from the date of the deposit of the funds within the lending institution and should be "unburdened by the concept of implied or constructive notice"(at p. 9). By so recommending they were, in effect, suggesting that lending institutions be freed from the responsibility to enquire as to whether or not trust obligations are, in fact, being observed. We, however, respectfully disagree with the suggestion that there be enacted a special limitation date vis-à-vis lenders, whether it be the six-month period suggested in the working paper or the twelve-month period later suggested by our consultant in his final report. In addition we disagree, perhaps even more strenuously, with the abolition of the concept of implied or constructive notice. This concept has, after all, enabled builders and workers to recover against lending institutions in the past. It is moreover of long-standing duration in our law and consequently would not necessitate major adjustments on the part of banks and other lending institutions (*Fonthill Lbr. Ltd. v. Bank of Montreal*, [1959] O.R. 451; *Ross v. Royal Bank*, [1966] 1 O.R. 90 at 106; *Clarkson Co. v. Can. Bank of Commerce*, [1966] S.C.R. 513; *Aetna Roofing (1965) Ltd. v. Robinson*, [1971] 4 W.W.R. 19, (Man. Q.B.)). In any event, we do not view the continuation of the principle as a hardship. Rather, we expect that the requirements for accounting records, the steeper penalties for breach of trust and the more diligent enforcement of these provisions will, in themselves, result in more careful handling of trust funds by lending institutions.

In summary, we see as the purpose of the legislation the protection, not of lending institutions and banks, but of the payment and security of builders in this province. A short limitation date, not contingent on knowledge of the offence on the one hand, deprives legitimate claimants of relief against a lender who has given itself priority to the funds at issue over those claimants, and on the other hand enables the lender to benefit at the expense of such claimants, if not knowingly, perhaps in circumstances when it should have known it was unilaterally asserting priority over the beneficiaries of a trust.

If the consequence of not enacting the six or twelve-month limitation date originally recommended by our co-directors and later by our consultant will be to discourage the extension of credit, which we are not sure it will, we believe that to be a small price to pay for the opportunity to improve both the protection of builders and workers under the Act and the overall operation of this law.

12. Penalties for breach of trust

There was a request for better enforcement of the trust provisions and harsher penalties for breach of trust obligations in the submissions respecting the working paper. Also, the consultant has recommended better enforcement and harsher penalties. Apparently these concerns are shared in other jurisdictions where the penalty for breach of trust has been increased to fines of up to $5,000 and imprisonment for periods of up to two years. The present *"Builders and Workers Act"*, on the other hand, provides only a penalty from $20 to 200 for failing to keep a pay list and makes no specific provision for breach of trust. In addition however section 4 of *"The Summary Convictions Act"* provides a penalty for contravening a provincial statute or Regulation

of up to $100 and/or imprisonment of up to one month where no other penalty is provided. There is also an offence created under the *Criminal Code* for breach of trust.

In June 1978, a detailed submission for reform of the Ontario legislation was made to the Attorney-General of Ontario by the Construction Industry and Allied Professions Committee on this subject. The suggestion there was that the penalties for breach of trust be increased from the current maximum of $5,000 to a maximum of $50,000 or imprisonment for not more than two years or both. In addition to imposing liability on corporate institutions, the suggested amendment would also extend and render liable directors and officers of a corporation who knowingly assent or acquiesce in such an offence. The Nova Scotia Law Advisory Commission has also studied this matter. In its recent report on Builders Liens, it raises the question as to whether or not the provision in the Ontario Act creating an offence and penalty for breach of trust is *ultra vires* in view of the *Criminal Code* provisions. To deal with this problem, the Nova Scotia Commission drafted a special section in their Model Act, section 12(8), as follows:

> Every one subject to the trust imposed by this Section who knowingly converts any of the trust funds to any use not authorized by the trust is, unless the conversion constitutes a criminal offence, guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for not more than two years or to both; every director or officer of a corporation who knowingly assents to or acquiesces in any such offence by the corporation is also guilty of the same offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for not more than two years or to both.

Although we have reservations about the need for and usefulness

of this proposal, we agree that the penalty for breach of trust should be substantially increased and that the increased fine and term of imprisonment (up to two years) should also be extended to officers and directors of a corporation. Our consultant, along with the Ontario construction industry, has suggested that the sum of $50,000 should be enacted and in this we now concur and unanimously so recommend. We also strongly recommend that in future the Attorney-General more diligently prosecute offenders under this Part.

13. Miscellaneous

As a final note to this portion of our Report we suggest that in drafting amendments to the trust provisions particular attention be given to section 12 of the Model Nova Scotia Act and to the commentary respecting this section at pages 51 and 52 of the Nova Scotia Report. Several significant variations from the Ontario legislation, attempting to improve it, are incorporated in that section. For example, in addition to the imposition of the trust, there is also an attempt (in s. 12(1)) to extend the main obligation of the trust, namely the duty "to pay", not only to the normal beneficiaries of the trust but also to "recompense the owner or any contractor or sub-contractor for any just set-off or counterclaim". 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. While we make no recommendation in regard to section 12(1) of the draft Model Act, we note with interest the remaining subsections of this section, in particular subsections (2), (4) and (5). In section 12(2) of the draft Act, it is made clear that priority to payment shall be determined in accordance with the rights and priorities provided by the Act with respect to liens. Section 12(4) and section 12(5) expand on the Ontario section 2(4) and 2(6) so as to enable the owner not only to repay the lender who lent money to pay claimants to the trust fund, but also to repay himself if he has advanced his own money from sources other than the contract money to pay claimants to the trust. This latter concept we recommend against. We do not believe the owner should be given this special privilege. Finally, we think that in drafting these provisions, recognition would also have to be given to our proposed holdback scheme, elaborated on under Part VI of this Report.

VI. HOLDBACK

The amount of the holdback under *"The Mechanics' Liens Act"* of Manitoba is 20% of the total contract price up to $15,000 and 15% if the total contract price exceeds $15,000. Many of the groups in the construction industry who made submissions urged that the holdback be reduced to 5%, others to 10%. Our consultant finally recommended that the holdback be set at 15% of the contract price, or, where there is no contract price, at 15% of the value of work and materials in place. His only other recommendation respecting the holdback system was that the provisions dealing with the

holdback (specifically section 9(6) of *"The Mechanics' Liens Act"*) be amended by the deletion of the words:

> before notice in writing of the lien given by the person claiming the lien to the owner, contractor or sub-contractor, as the case may be

and by the insertion in their place of the words:

> before registration of the lien in the appropriate land titles office by the person claiming the lien,

such that the section should then be read as follows:

> All payments, up to eighty-five per cent of such value, and payments permitted by reason of subsections (3) and (4) made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before registration of the lien in the appropriate land titles office by the person claiming the lien, or, in the case of public works, before notice in writing of the lien, as the case may be, operate as a discharge *pro tanto* of the lien created by this Act.

Once enacted this amendment in essence would authorize all payments up to 85 per cent of the holdback and all payments based upon the certificate of an architect, engineer or other person made in good faith, to operate as a discharge *pro tanto* of the lien created by the Act unless, prior to this payment, the lien is actually registered in the appropriate land titles office or, in the case of public works, notice in writing is given to the appropriate party. We agree with this aspect of our consultant's recommendation except that we would amend it

by striking out the words "eighty five" in the first line thereof and substituting therefor the words "ninety-two and one-half". In other words we are recommending a holdback of 7½%.

The Working Paper prepared by our co-directors suggested a further improvement to the holdback system, the intention of which was to speed up the flow of funds to sub-contractors who have finished their work prior to the completion of the whole of the project. The unique suggestion was that an optional disbursement system be set up and backed by an assurance fund. The assurance fund, it was suggested, would in turn be financed by *pro rata* premiums paid by individuals within the construction chain desirous of obtaining payment prior to full project completion. The stated purpose of the fund was to provide a source of monies to make up the difference between 15% of the total contract price and 15% of the total contract price less the holdback already advanced to sub-contractors who had completed their work. The fund would therefore provide a protection to those sub-contractors who did not complete their sub-contracts until the end of the project. The theory was that if the holdback funds were not for one reason or another available after the completion of the project and sub-contractors completing their jobs towards the end of the project were thereby deprived of holdback monies, the assurance fund would reimburse these sub-contractors so as to put them in an equal position with those persons having the good fortune to have been paid early in the project. In his final report to the Commission, our consultant withdrew endorsement of this proposal on the basis of the administrative establishment it would require. Quoting from the Mechanical Contractors Association of Manitoba in its submission to the Commission in response to the Working

Paper he stated:

> It is unlikely a contractor would welcome a system where he has to pay a premium to obtain money that is rightfully his.

Our consultant suggested no alternative amendment respecting the holdback which might induce a speedier flow of funds. Indeed, he concluded that delay in progress payments due on a construction contract was not, in his opinion, caused by the holdback provision but was due to owners and contractors and sub-contractors purposely exercising this delay to gain certain benefits to themselves: interest earned on monies held and not paid or, alternatively, interest saved on monies not borrowed.

The Winnipeg Builders Exchange also rejected the proposal and made the following comments:

> The co-authors have suggested a system of optional disbursements of holdbacks which would include what they refer to as '. . .provided a premium of payment was made concurrent with such application . . . '. To begin with, it is evident that such a payment would not be a premium but would rather be a penalty payment as it would be an additional cost to the contractor, sacrificed by him to obtain money which is rightfully his in the first place. The only justification offered for such a penalty payment is that he could then be given money which was rightfully his anyway at an earlier date. It is suggested that the penalty payment is not great, being 3/4 of 1% of the total contract price. On the basis of the 1974 construction volume in Manitoba of $948 million (source Manitoba Department of Industry and Commerce), contractors would have been asked last year to pay $711,000.00 into an insurance fund to ensure receiving, within a reasonable time, holdback monies which were rightfully theirs - including the $711,000.00. The justice of this principle escapes us and it is not

> a system which our industry can support. The problems which appear to be envisioned at this stage by the Working Paper could more readily be solved by the development of a substantial performance section in the legislation as well as some form of allowance for 'progressive release of holdback' as currently practised in some sections of the industry.

In spite of its obvious disadvantages, this Commission has nevertheless found the proposed optional disbursement scheme to be creative and, above all, very helpful because it points out the following:

1. The desirability of encouraging progressive payments from the holdback to sub-contractors who have completed their work early in the project;

2. The need for creating an actual, as opposed to a notional, holdback fund that will be available for payment to the appropriatly entitled persons.

3. The need to ensure that the accumulated holdback fund bears interest that will be payable to the persons deprived of holdback funds during the retention period.

These very objectives were considered by the Nova Scotia Law Reform Advisory Commission Report on Builders Liens and by the Ontario Construction Industry and Allied Professions Committee in its brief to the Ontario Attorney-General concerning amendments to the Ontario statute. The Ontario group considered five possible methods of accomplishing these same objectives, as follows:

1. A provincially-administered insurance scheme that would ensure that holdback funds were available to appropriately entitled persons. This proposal was rejected however as it appeared cumbersome, costly to administer

and inappropriate for small scale projects. Finally, it would have involved the provincial government in an area better served by the private sector.

2. The establishment of a mandatory bonding scheme. While statutory holdback payment bonds would ensure payment to the construction industry, they would also cause construction to be dependent on the whims of the bonding industry. This same approach was carefully studied by our co-directors in the Working Paper and, interestingly, rejected on the basis of its cost and restrictiveness. The Ontario Committee has also seen fit to reject the proposal as a possible solution.

3. The creation of a statutory holdback repository to receive the holdback as and when it becomes payable. According to this proposal the repository would be administered by a repository administrator who would be the recipient of the appropriate documentation indicating the persons involved in a construction project and the amounts payable from time to time as the statutory holdback. It was further proposed that the administrator would merely administer the statutory holdback funds and would exercise no discretion, but merely implement the mechanics of the proposed scheme. In the event of a dispute relating to his duties, the administrator would apply to the Court for a direction in the same manner as a bankruptcy trustee presently applies to the Court in contentious matters. This approach was, however, rejected as it would be extremely cumbersome and would have, in all probability, slowed down the payment of funds as a result of administrators applying to the Court for direction at any time that discretion had to be exercised. Furthermore, the approach was thought to be expensive, particularly in view of the anticipated fees of the administrator and the potential legal costs involved.

4. The Nova Scotia Law Reform Advisory Commission furnished the Attorney-General of that province with a draft Act that proposes many changes to its present mechanics lien legislation. Recognizing the need to secure the holdback, section 13(5) of the draft Act reads:

> Upon the application of any lienholder, owner or mortgagee, a judge may order the owner or other person primarily liable under the contract (not being a subcontract) under which the lien arises, or a mortgagee withholding from advances any amount to secure the holdback, from time to time
>
> (a) to pay the amount of the holdback retained by him into a joint bank account in the names of the payer and the lienholder or some other person or persons or to a trustee, to be held and paid out in either case under the terms of Section 12; or
>
> (b) to provide sufficient security for the payment of the holdback to those entitled
>
> and the parties may do by agreement what a judge may order done under this subsection.

Evidently counsel for the Mechanical Contractors Association of Ontario met in Halifax with the Committee responsible for the draft Act. His Honour Judge Peter J. O'Hearn advised that this legislation was designed to create an atmosphere of confidence that the statutory holdback provided for in mechanics' lien legislation would, in fact, exist. His Honour stated that he anticipated that the Order referred to in Section 13(5) would be made automatically in all cases relating to a construction project of any size. He anticipated that the Order would require the owner to furnish the holdback payable at that time as well as all holdback that would accumulate in the future as the job progressed. The Committee expressed the view that the Nova Scotia approach was most helpful, but felt it lacked precision and furthermore failed to set out guidelines for its implementation in practice.

5. Finally, the Ontario Construction Industry and Allied Professions Committee considered the establishment of a holdback interest-bearing account by all persons who, under section 11 of the Ontario Act, are required to retain holdback. This was rejected because it would establish a number of funds against which various parties would have diverse and competing interests; it would create an extremely cumbersome system; it would be more costly to administer same and slow down the payment of funds.

Having rejected these proposals, the Ontario Committee recommended the following:

1. In all cases where the contract price between the owner and the contractor is for a sum in excess of $150,000.00 the sum that the owner is required to retain from a contractor pursuant to Section 11 shall be paid into an interest bearing account of a chartered bank or trust company in the joint names of the owner and the contractor. The payments into the joint account are to be made at those times when the owner is obliged to pay the contractor on account of progress draws. The interest rate is to be such as offered at the time of opening the account.

2. In all cases where the contract price between the owner and the contractor is for a sum of $150,000.00 or less, a Judge or Officer having jurisdiction to try an action under this Act, may, upon the application of either the contractor or persons whose rights to a lien are derivative from the contractor, order the sum which the owner is required to retain from the contractor pursuant to Section 11, be paid into an interest bearing account of a chartered bank or trust company in the joint names of the owner and the contractor at those times when the owner pays to the contractor on account of progress draws.

3. The Lien is to be a charge upon the holdback directed to be retained by Section 11 and upon all sums deposited by an owner into an account of a chartered bank or trust company in favour of

lien claimants whose liens are derived under persons to whom the monies so required to be retained are respectively payable.

4. Any persons whose rights to a lien are derivative from a contractor to whom an owner is primarily liable upon a contract under or by virtue of which a lien may arise, may in writing at any time demand of the owner or contractor the following, namely:

   (a) The production for inspection of the contract or agreement between the owner and the contractor for or in respect of which that person was or is to perform work if the contract is in writing, or if not in writing, the terms of the contract or agreement;

   (b) The state of accounts between the owner and the contractor;

   (c) The whereabouts of the said account and its designated number;

   (d) A statement as to the particulars of the said account, including payments made into the account, disbursements from the account, the accrued interest and the present balance.

5. The sums paid into an interest-bearing account together with the interest accrued thereon, shall be paid out of the said account in the same manner as payment of holdback under Section 11.

6. Where an owner fails to pay into an interest-bearing account of a Chartered Bank or Trust Company in the joint names of the owner and the contractor contrary to 1 above, or an order made pursuant to 2 above, a Judge or Officer having jurisdiction to try an action under this Act, upon application, shall make an order that the owner pay into the said account the sum that the owner at the time of the application is required to retain from a contractor.

With respect to this proposal, it was apparently

intended by the Ontario Committee that the owner would include the Crown, a municipal corporation, etc. In summary, the Ontario Committee made the following points in its support:

1. It satisfies a very real need because, for example, if an owner is unable to finance his project at the 100% level required by this provision, the trades and material suppliers will have a better opportunity, and at an earlier stage, to determine the financial difficulties of the owner and therefore cease incurring expenses on the project which they will have little likelihood of recovering.

2. If an owner is unable to finance his project at the 100% level of financing required by this proposal, the trades and material suppliers at an early stage will determine the financial difficulties of the owner and cease incurring expenses on the project which they have little likelihood of recovering;

3. The proposed system is simple and requires few changes to the legislation;

4. The proposed system is the most self-policing of all alternatives considered and is the least cumbersome and expensive to administer;

5. The proposal creates a single identifiable fund that is available as the source of payment of statutory holdback for all those entitled to it;

6. The holdback together with the interest accrued on it is ultimately payable to those persons who are intended to benefit from it;

7. The burden of the risk of a construction project has shifted from the trade contractors and material suppliers to the owner.

The Manitoba Law Reform Commission is impressed by this proposal and we accordingly recommend that it be seriously considered as the best means of obtaining the

objectives of a holdback fund. The only variation we suggest however is that the amendments specifically provide that, in addition to chartered banks and trust companies, funds also be deposited in credit unions and, that in all cases, the interest be paid at the accepted level for deposit funds subject to fluctuation. By setting up a distinctively separate holdback fund and by reducing its size we believe that this will not only speed up the flow of funds, but also that hold-backs will not be used for the purpose of extracting concessions from contractors and sub-contractors in return for payment. In addition, issues relating to deficiencies which have often delayed projects will more likely be settled as they arise, particularly if the substantial performance concept and progressive payment schemes are implemented.

In conclusion, we are confident that this proposal will be well received by the Manitoba construction industry. In their original submission to us, the Winnipeg Builders Exchange (now called the Winnipeg Construction Association) suggested that a lending agency should retain and hold back the same percentage of holdback as the owner and furthermore, that "the money withheld by the agency be placed in an interest-bearing trust account until the point of final disbursement and that the interest be disbursed on a *pro rata* basis to the general and sub-contractors as well". Because we agree with their further suggestion that owners all too often use holdback monies to finance other projects (and, usually to the detriment of the particular project at hand), we make this recommendation unanimously.

As a further and final attempt by us to increase the flow of funds to the industry without thereby significantly reducing the existing protections to builders, we also recommend

a reduction in the holdback from 15% and 20% to a fixed amount of 7½%. The Commission believes that such a reduction will likely speed up the flow of funds and in addition will provide some test as to whether or not a holdback of any amount is required. We unanimously recommend the reduction of the holdback on the basis of the following considerations:

1. The report of the Nova Scotia Law Reform Advisory Commission on Builders Liens submitted to the Attorney-General in January 1979 recommended the holdback be reduced to 10%. This recommendation was apparently made on the basis of the belief held by that Commission that an amount of 10% would in most cases be more than sufficient security. In addition, the scheme of the draft Act contemplates that this figure will be further reduced by progressive release of the holdback as people at lower levels in the construction pyramid have their claims fully satisfied on completion of their sub-contracts, etc.

2. A detailed submission by the Construction Industry and Allied Professions Committee on the Mechanics' Liens Act and the Council of Ontario Contractors Association in June 1978 to the Attorney-General of Ontario, repeated its 1972 proposal that 15 percent of the total contract price is too great a proportion in light of today's industry conditions. For example, it was pointed out that, to an increasing extent, the prime contractor appears in the role of a contract broker who subcontracts all of the work which is to be done. To an even greater extent, the burden of financing the holdback is therefore being thrust upon the lowest level of sub-trades. According to the Committee, it is a fair statement that the average gross profit of subcontractors would as a result be less than 10% before charges for salaries, rent and other administrative costs. These people must pay their substantial weekly labour bill in cash and their equipment and material suppliers, for the most part, on net 30 day terms. Even a reduction of the percentage retention to 10%, therefore, would still pose for the greater part of the industry a financing burden which towards the

latter stages of major projects, would become quite considerable. As a result, the Ontario construction industry suggested that 10% would be a more realistic holdback than is the present 15% figure in Ontario.

For the sake of comparison, it is interesting to note the claims of the Winnipeg Construction Association contained in their supplemental brief submitted in 1978, to the effect that the majority of Manitoba construction firms are small, averaging 6.5 employees and that annual returns of 2-3% profit before taxes are typical.

3. The Mechanical Contractors Association of Manitoba, The Insurance Bureau of Canada, The Winnipeg Builders' Exchange in their 1975 submission and more recently in 1978 (now under the name of the Winnipeg Construction Association), have all requested a reduction of the holdback to 5%. While each association independently indicated strong support for its view, the Winnipeg Builders Exchange asserted that the reduction was "absolutely necessary".

4. The holdback in federal government projects where the Crown is not bound by the terms of *"The Mechanics' Liens Act"* has characteristically been:

   (a) 5% of the value of the work done and the materials supplied under the terms of the contract, as determined by the contracting authority, where a labour and material payment bond has been provided, or

   (b) 10% of the value of the work done and the materials supplied under the terms of the contract, as determined by the contracting authority, where a labour and material payment bond has not been provided (Government Contracts Regulations, P.C. 1975 - 2042, 27 Aug., 1975, Chap. 50 - R-1, s. 32(2)(a), (b)).

5. The fact that no mechanics' lien legislation whatsoever exists in jurisdictions such as

England and certain provinces in Australia. In addition, we have been much influenced by the fact that the Law Reform Commissions of British Columbia and Alberta have seriously considered repeal of the legislation.

6. If the 7½% figure which we have adopted and now propose should prove to be inadequate, persons involved in the industry might, as a result, be induced to begin to create security measures of their own, tailored to their own particular needs and budgets. We see this as having positive and rather beneficial implications.

VII. SUBSTANTIAL PERFORMANCE

This Commission recommends the substantial performance concept for incorporation in the Manitoba legislation for the following reasons:

1. It should speed up the flow of funds through the construction chain.

2. As proposed, it will likely discourage use of the holdback in extracting concessions from contractors and sub-contractors and give a means of relief for such use, if any;

3. All of the provinces with the exception of Manitoba and Nova Scotia now deal with this concept and attempt to define completion of a contract as "substantial performance, not necessarily total performance of the contract". This definition is a relatively recent addition to the Alberta, Newfoundland, Saskatchewan and Ontario legislation, adopted, no doubt, after careful review of its use and operation elsewhere.

4. After over eight years of experience with the concept in Ontario, the Construction Industry and Allied Professions Committee in that jurisdiction has suggested amendments to improve

its application in practice. While the Ontario Committee suggests quite a number of amendments to the substantial completion concept in order to speed up the release of holdbacks to those persons entitled to receive the funds, at no time has the Ontario Committee called for its repeal or replacement. (We suggest that the amendments proposed by the Ontario Committee in their brief to that government should be read in conjunction with the recommendations made in this Report.)

5. Our consultant has suggested that we adopt this same proposal.

Our consultant recommended that any amendment to our legislation should contain the following provisions:

a) "Completion of the contract" means substantial performance, not necessarily total performance, of the contract;

b) A contract shall be deemed to be substantially performed,

   i) when the work or a substantial part thereof is ready for use or is being used for the purpose intended;

   ii) when the work to be done under the contract is capable of completion or correction at a cost of not more than,
   A) 3% of the first $250,000 of the contract price; and
   B) 2% of the next $250,000 of the contract price; and
   C) 1% of the balance of the contract price.

It is recommended that where the work or a substantial part thereof is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

In addition to these suggestions, provision would also have to be included for the issuance of a certificate by an architect, engineer or other ageed-upon person, certifying that the work has been completed to his satisfaction. Where the architect, engineer or said other person neglects or refuses to issue and deliver such certificate, provision should also be made for application to a judge, having jurisdiction to try an action under the Act, to order that the work or materials to which the architect's, engineer's, or other agreed-upon person's certificate would have related have been done, placed or furnished, as the case may be. This order could, of course, be made upon such terms and conditions as to costs and otherwise as the court deems necessary and would have the same effect as if the certificate had been issued and delivered by the architect, engineer or other agreed-upon person empowered to certify substantial completion. Where there is no engineer, architect or other person, we recommend that the court be similarly empowered to make an order respecting substantial completion. In this regard we make particular note of section 16(8) of the draft Alberta *"Builders Lien Amendment Act"* which was recommended by the Alberta Institute of Law Research and Reform to facilitate progressive release of holdback funds where a contract is neither under the supervision of an architect nor an engineer. However, because it appears that section 16(8) is limited in its application to sub-contracts, we do not recommend its adoption in Manitoba. Rather, we are recommending the enactment of some similar section which will encompass both primary and secondary contracts within its provisions.

In Alberta and Ontario, as no doubt in other provinces, difficulties have arisen with regard to the definition of substantial performance and whether the same would apply

to the main contract between the owner and the general contractor or would also apply to sub-contractors. In fact, at the time of the publication of our Working Paper in 1974, our co-directors entirely rejected the substantial performance doctrine and recommended against its adoption. The basis for this provisional view was apparently the belief that, as of that date in 1974, the doctrine had done nothing to speed up the flow of funds or to reduce the legal problems associated with the legislation. The main reason for this failure, it was said, was the fact that because of the poor drafting of the legislation, many architects and contractors had taken the position that the substantial performance doctrine applied only to the main contract between the owner and the general contractor and not to the sub-contractors and others. The consequence of this was that a great majority of general contractors refused to release holdbacks to sub-contractors upon substantial completion of their work.

As we have already seen, the present thinking of our consultant is somewhat different. Though he now supports the substantial performance concept, we note that he does so only insofar as it may concern the primary or over-all contract. Because he still has reservations about the usefulness of the doctrine, or at least this particular aspect of the doctrine, our consultant now recommends that no part of the holdback should become payable to a sub-contractor completing his work, at any time, prior to the substantial completion of the principal contract. We, however, respectfully disagree with that opinion. And, while we appreciate that some of the need for early payment to sub-contractors will be reduced because of our proposed reduction in the size of the holdback, we are not persuaded that any sound

reason exists why the concept should not also apply to subcontracts, so as to allow progressive releases of the holdback.

In further support of this view is the already substantive and increasing evidence that the substantial performance doctrine, through proper drafting of statutory provisions, can be effectively applied to subcontracts in order to speed up the release of holdback funds. In addition, since the Ontario Court of Appeal decision in *Union Electric Supplies Co. Limited v. Joice Sweanor Electric Limited* ((1975) 7 O.R. (2nd) 227) much of the controversy surrounding the ambiguity in the legislation has been settled. Related amendments and more careful drafting could only improve this situation. As a result, the report of the Institute of Law Research and Reform of Alberta in March of 1979 has recommended that contract supervisors, and alternatively the Court, be permitted to certify completion of a subcontract when there has been substantial performance, thereby enacting portions of the holdback to be released at a date earlier than substantial completion of the entire project. The Alberta Commissioners have also recommended that the relevant section of the Alberta statute make it clear that payments may still be made following substantial performance of the subcontract.

Unlike our consultant, we have also had the benefit of the Report of the Nova Scotia Law Reform Advisory Commission and the very helpful submission from the Ontario Construction Industry and Allied Professions Committee on *"The Mechanics' Lien Act"*. As we now understand it, the problem with payment upon substantial completion of sub-

contracts in these jurisdictions has been the difficulty it causes in determining that very important date - the day after which liens can no longer be registered. Payment under such circumstances is hazardous at best and naturally few owners would wish to pay out the holdback if a lien could be filed after payment is made. As a result,in practice, payment is withheld until substantial completion of the entire or principal contract.

In order to alleviate this uncertainty and to improve the flow of funds in that jurisdiction the Construction Industry and Allied Professions Committee on *"The Mechanics' Lien Act"* in Ontario has recommended:

1. That there be established a specific date of "substantial performance" for all purposes under the Act;
2. That the Notice of Substantial Performance be a form prescribed under the Act which gives basic information concerning the Project;
3. That the lien rights commence to run from the date the Notice is "given", rather than from the date of its registration;
4. That the day and manner in which the Notice is given be fixed;
5. That persons who do work may by written demand personally served be entitled to receive a copy of such Notice before the date their liens will expire in respect of all Projects except where the Project is undertaken by a "homeowner" for improvement to his or her land or house to a value not in excess of $30,000.00;
6. That holdback be released to totally completed subcontractors prior to substantial performance whether or not it is an "architect supervised project"; and
7. That all persons and not just the owner be required to retain holdback for the work remaining after substantial performance.

The Manitoba Law Reform Commission agrees; and, in acccrdance with the above-noted submission of the Ontario Construction Industry, we recommend that the concept of substantial performance be adopted, both with respect to the general contract and to all related sub-contracts. In drafting an amendment to this effect, we also recommend that reference be made to the Alberta Institute's study and to the submission of the Ontario Construction Industry and Allied Professions Committee and, in particular, to the last two paragraphs on page 7 of that submission, and to sections 1(a); 11(1), (4), (9), 10); 21; 22; 24; 27; 28; 33(5) and (6) of the draft model amendments attached. In our view very careful attention should be given to this latter submission which canvasses in depth many of the problems associated with the substantial completion doctrine and with the progressive release of holdback to sub-contractors on substantial completion of their contracts. All in all, it provides some excellent model amendments to correct deficiencies experienced over the past eight or nine years. In addition, the Ontario Committee's brief prescribes a form of notice of substantial performance requirements for its service and for a holdback with respect to the balance of the work to be done where the contract has been substantially performed. We recommend that these sections be considered in drafting amendments to the Manitoba Act.

In conclusion we think that the solutions offered by the Alberta Institute of Law Research and Reform and the Nova Scotia Law Advisory Commission and by the Ontario Construction Industry and Allied Professions Committee to the problems of extending the substantial completion concept to sub-contracts should be tried in Manitoba. Finally, we

suggest that the drafting of the amendments be done in cooperation with these three groups and with such other knowledgeable bodies as, for example, the Ontario Law Reform Commission.

On the basis of the representations we have received from the construction industry in Manitoba, we are satisfied that individuals involved in the industry are willing to undertake the risk of pioneering in this area. For example, in the 1975 submission of the Winnipeg Builders Exchange (now the Winnipeg Construction Association) the following statement appears:

> When a piling contractor completes his work on the project, and his work has been done satisfactorily, he should be able to expect to be paid for same, and within a reasonable time. The same applies to the painting contractor and landscape gardener. However, under current legislation, the piling contractor may wait two years before he is paid, while the landscape gardener and other finishing tradesmen only wait thirty days. The inequity results from the current mechanics' lien legislation which is based on the concept of total completion as the only criterion for payment of the final holdback. Under the implementation of the substantial performance system in the mechanics' lien legislation as it is in other provinces, the final holdback would be available to the first trades on the job at an earlier date.

and

> We pointed out in the past to the Manitoba Law Reform Commission, and do so again, that the basic fault of the Ontario system is a matter of draftsmanship in the wording of the Act where it is not clear whether or not this section applies to general contractors only or to sub-contractors as well. We have previously recommended, and do so again, that the doctrine of substantial performance be included in the Manitoba legislation and that the wording be clear to allow for the legislation to apply for general contractors on total projects. In the past

> two years, we have consulted on this matter with a number of other associations within the construction industry, several architects and consulting engineers, and with a considerable number of practitioners in the field as general contractors, trade contractors or manufacturers and suppliers to the construction industry. It has been our finding that those representatives to whom we spoke have, virtually without exception, a continuing desire for the introduction of a concept of substantial performance under the Mechanics' Lien legislation in this Province.

While the Builders Exchange has suggested that the doctrine apply only to the general contract and not to its related sub-contracts, this conclusion appears to be based on the existence of a satisfactory system of payment regarding the sub-trades which is currently practised by some architectural firms in Manitoba. (An excellent summary of the Manitoba law is contained in Macklem and Bristow's text, *"Mechanics' Liens in Canada"* at pp. 130-131.) Under this system, sub-trades are entitled to recover the existing 15% holdback from the owner as they complete their work on a project, without the necessity of waiting for completion of the main contract. The basis of this progressive release is the approval of an architect or engineer and their certificate to that effect. On closer examination we favour the substantial performance doctrine over this proposal and, in light of the new developments and suggested amendments for its application, unanimously recommend its extension to sub-trades in Manitoba.

VIII. PROGRESS PAYMENTS

As has been previously stated, one of the prime concerns voiced by those individuals within the industry has been the extent of the delays which they encounter in receiving payment on construction projects. As a result of these

submissions, the Working Paper recommended that the most effective way in which to compel prompt progress certificates in instances where payments were not forthcoming would be by the implementation of progress certificates, issued by independent government evaluators. In addition to this broad recommendation, it set out a detailed procedure whereby a party entitled to receive payment, not having received same, could apply to the Court requesting an order for judgment against the owner for the amount of the progress payment as set out in the evaluator's certificate. Failure to pay under the judgment would automatically result in an extension of time for filing the mechanics' lien against the property concerned.

However, those commenting on the Working Paper objected to the concept of independent evaluators both from the point of view of cost and the creation of government bureaucracy. The suggestion made was that, rather than enhancing the progress of these payments, such a procedure would only delay it. After considerable review, our consultant has, as a result, been persuaded in the belief that the concept and implementation of government evaluators would not, of itself, resolve this problem.

According to the consultant's report, where progress payments are withheld, the party to whom payment is due would still have the choice of deciding whether or not to register a mechanics' lien against the property concerned. And, in the event that the time for registration has expired, he would have the same alternative or remedy available to other creditors to proceed in the courts for judgment against the debtor and enforce payment in the ordinary way.

As a result of these comments, we have decided not to recommend any alteration in this respect. In our view the present law concerning progress payments is preferable to the proposal contained in the Working Paper. In any event, we are in agreement with the comments of our consultant to the effect that the protection provided to a lien claimant as an ordinary creditor is already substantial. In addition, however, a claimant whose lien has expired would also have the protection of the trust provisions of *"The Builders and Workers Act"* which we have recommended now be incorporated in *"The Mechanics' Liens Act"*. Based on this recommendation, a claimant to trust funds would not need to have a valid lien in order to assert prior rights to these funds. And, as a result of a recommendation we make later in this Report (under the heading "Housekeeping"), an action claiming a share of these funds, independent of a valid lien, would not have to be brought in the County Court which otherwise has exclusive jurisdiction over mechanics' lien actions. Instead, we propose that such a claim may be brought with an action to enforce a claim for lien, unless upon an application by any party to the action or any other interested person, a judge, having jurisdiction to try the action, is satisfied that such a claim cannot be conveniently tried with the action or if tried with it, the same would likely cause undue prejudice to the other lien claimants. In such cases, we think the action should be permitted to be heard in the Court of Queen's Bench, at the option of the claimant. An excellent explanation of the reasons for this proposal appear at page 6 of the June 1978 submission by the Ontario Construction Industry and Allied Professions Committee on the Mechanics' Lien Act. We suggest that reference be made to model sections 2(8) and (9) which follow that submission.

IX. <u>LIEN CLAIMANTS</u>

1. <u>Workers' Liens</u>

With respect to the right of the worker to claim against the owner, both the co-directors and later our consultant, have recommended that this right be eliminated not only in *"The Builders and Workers Act"* but also in *"The Mechanics' Liens Act"*. The rationale for this view is apparently that other, more expeditious methods of enforcing recovery of wages against his employer are now available to a worker under statute law. For reasons already stated at pages 27 to 34 of this Report, under the heading <u>Right of Workers to Claim Against the Owner</u>, we do not agree. In our recommendations concerning this matter we have attempted to tailor a solution to the problem referred to by our co-directors at the same time preserving the right of a worker to claim against the beneficiary of his labour. In this regard, we once again refer the reader to pages 27 to 34 of this Report.

2. <u>Equipment Rentals</u>

The rental industry in Manitoba has repeatedly requested that it should have lien rights. Despite these representations and the very significant and increasing role of rented equipment in construction projects, the courts have however consistently refused to acknowledge such claims on the basis that, whereas a person who supplies equipment together with men to operate it, "performs any work or service upon or in respect of" construction, a person who simply hires out equipment does not furnish "materials to be <u>used</u> in the . . . construction" (emphasis added). On this basis,

the courts have chosen to find that the provision of rental equipment to a construction site does not fall within the requirements of the Act unless it is supplied together with operators whose wages, along with the price of the equipment, are included in the rental contract. Thus, where the operator's wages are paid by the general contractor or some person other than the supplier in question, no lien may be claimed *(North Coast Forest Products Ltd. v. Eakins Const. Ltd.* (1960), 35 W.W.R. 233 (B.C. S.Ct.)).

Clarkson Co. v. Ace Lbr. Ltd. ([1963] S.C.R. 110) and *Bodner Road Const. Ltd.; R. v. Can. Indemnity Co.*((1963) 43 W.W.R. 641 (Man. Q.B.)) illustrate the very specific and detailed, though perhaps curious, reasoning of the courts in their rejection of these claims. In the *Clarkson* case, for example, the court refused to allow a lien for the rental of jacks used to reinforce concrete construction in the process of hardening because, though the metal supports and other equipment were furnished for the purpose of facilitating the work, they were not consumed in the project but remained the property of the renter, still capable of use in some other construction or improvement. Curiously, as a result of this decision, the use of rental equipment, at least in a mechanics' liens context, will not amount to consumption whereas, under *"The Retail Sales Tax Act"*, C.C.S.M. c. R150, ss. 2(1)(b)(i), 2(1)(k)(i) and 2(1)(l)(viii), the use of equipment for rental purposes is a retail sale for consumption for the purpose of computing the sales tax on the amount of rent paid.

In the *Bodnar* case, it was held that gasoline and oil supplied to and consumed by the machines engaged in the construction operation were lienable items provided the machines were actually in use in the job site. The peculiar

effect of this decision is that any gasoline and oil used in transporting the men, equipment and materials to the job site would as a result not be lienable items.

In 1970, a new subsection was added to the Ontario Act giving a person who rents equipment a lien for the period during which the equipment in question is in use on the contract site. Subsection 5 of s. 5 of the Ontario Act provides as follows:

> A person who rents equipment to an owner, contractor or sub-contractor for use on a contract site shall be deemed for the purposes of this Act to have performed a service for which he has a lien for the price of the rental of the equipment used on the contract site, limited, however, in amount to the sum justly owed and due to the person entitled to the lien from the owner, builder, contractor or sub-contractor in respect of the rental of the equipment.

The Acts of Alberta and Newfoundland contain the same provision in sections 4(4) and 8 respectively. Section 2(1)(m) of the Saskatchewan Act is also similar in effect.

The Commission recommends that a similar provision be added to the Manitoba legislation. From the point of view of policy there is, in our view, little basis for the present difference in treatment of rented equipment with an operator and rented equipment without an operator.

Some misgivings have however been voiced about rental equipment in particular, in that granting such a right to register a lien might be abused. We contended in our Working Paper that while an unscrupulous rental equipment

operator could very well allow an expensive piece of equipment to sit unutilized on a building site compounding expensive rental charges without attendant wear and tear on the equipment involved, this problem could easily be resolved by a provision to the effect that the time fixed for the filing of the lien should commence to run the day that the equipment in question was last actually utilized and that rental charges incurred after such date would be disallowed as a lien claim. If there was no fixed expiration date as regards the rental of a particular piece of equipment utilized on the construction project, rental charges would then be deemed to have terminated upon the completion, abandonment or other significantly lengthy interruption of the work or service for which the equipment had actually been employed. At that time, it was felt that such an amendment would tend to counteract any potential abuse, and, in any event, would be a marked improvement to the corresponding provision in the Ontario Act which limits an equipment renter's lien to "the sum justly owed and due", a phrase which, it was contended , is open to ambiguity and interpretation. As of the present date our consultant is recommending the Ontario wording be adopted in preference to the earlier proposal. In the interests of uniformity we are similarly persuaded in this view. Our reasons for recommending the extension of lien rights to equipment renters as in Ontario are as follows:

1. Four other provinces have extended rights to renters;

2. Not to extend the rights would be to ignore modern changes in methods of construction and a major cost of construction;

3. There is little basis for the difference in treatment of rented equipment with an

operator and rented equipment without an operator;

4. There have been numerous demands made on the part of the rental industry for the provision of such rights;

5. We know of no sound reason based on mechanics' liens law why equipment renters should be precluded from exercising lien rights;

6. Our consultant has recommended it.

3. Architects and Engineers Liens

There has been litigation in several provinces on the question whether architects and engineers are entitled to claim liens in respect of amounts by which they are unpaid. Indeed, in the course of our own research concerning this right, we have been surprised by the confusion which surrounds the status of these professionals to claim liens when the work they supply to an improvement involves planning services not performed on the actual location of construction. Legislatures and courts have used phrases like "any work or service upon or in respect of an improvement", ". . .a building", ". . . land" etc. loosely, often interchangeably, to the point where the decisions within various provinces are at odds. In spite of this confusion and varying opinions on the subject (including the contrary view of our own consultant) our inclination is to extend the full protection of the Act to architects and engineers to permit them a lien for whatever services or labour they bestow in respect of the permanent improvement of land. Accordingly, we recommend that the legislation clearly declare that the services for which these professionals are entitled to claim includes all of the work

done in connection with the improvement of land, without reference to the distinction between planning and supervisory services, provided however that the intended construction or improvement proceeds.

One possible suggestion is to adopt a provision similar to that in the Alberta Act. According to recent case law, Alberta legislation allows an architect's claim for lien for planning work on the basis of the fact that the lien arises for work done "upon or in respect of an improvement" (R.S.A. 1970, c. 35, s. 4(1)). According to section 2(c) of the Alberta Act, *improvement* is defined to include "in tended construction" and, the definition of *work* in section 2(j) has been interpreted to include work not performed on the job site. *Peterson Truck Co. v. Soconoy Vacuum Exploration Co.* (1955-56, 17 W.W.R. 1 at 257 (Alta. S.C.)) is authority for the further proposition that the words "upon the improvement" in the requirement that the work be done "upon or in respect of an improvement" do not require that the work be done on the actual location of the improvement.

In spite of this authority, confusion nevertheless exists on the question of whether or not the different wording of the Alberta legislation, if adopted in Manitoba, would be sufficient to change the law in this jurisdiction to allow architects' liens for planning services. For the avoidance of doubt, we therefore suggest that it be clearly enacted by statute that architects and engineers be included within the range of persons able to claim a lien, and, that in addition, the definition of the services for which they are entitled to claim should in future include all work done in connection with an improvement, whether or not the work was done at the actual physical location of the improvement.

The Law Reform Commission of British Columbia in its Report #2 *Debtor Creditor Relationships Part 2 Mechanics' Lien Act" Improvements on Land* has recommended a similar proposal. Bill 42, *"The Builders Lien Act"*, 1977, introduced during the 1977 Legislative Assembly to implement the recommendations of the Law Reform Commission of British Columbia includes the necessary provision and, if enacted, will extend the protection of the Act both to architects and to engineers. In substance the Bill provides that workers, material suppliers, contractors and sub-contractors who do or cause to be done any work, supply materials or do both work and supply material on, to, or for an improvement have a lien for wages and for the price of the work and material. "Contractor" has been defined to include a person contracting with or employed by an owner or his agent who, as an architect or engineer, renders services in connection with an improvement whether or not the services are rendered prior to the commencement of construction of the improvement. Where the owner engages a head contractor, the lien may be filed within 31 days after the contract of the head contractor has been completed, abandoned, or otherwise determined. Where the owner does not engage a head contractor, the Bill provides that the lien be filed no later than 31 days after the improvement has been completed or abandoned. Though Bill 42 was introduced and given first reading in 1977, it has been allowed to lapse. It was nevertheless our view that the British Columbia approach would still be preferable to that found in the Alberta legislation and, with due deference to the differing opinion of our consultant, to the present state of the Manitoba law (see *Malkin v. Guerra and Guerra* [1979] W.W.R. 164). We therefore recommend its adoption in Manitoba.

One final matter concerned us in reaching the conclusion to recommend provision for the special protection of architects and engineers. It was the considerable discussion amongst our own members as to the equity of extending the full protection of the Act to these professionals when people like interior deisgners, draftspersons, planners and developers to name a few, would not also benefit from the amendment. For example, it has been suggested that no objection to extending the lien claim to these others can logically be made. Notwithstanding this comment, we have nevertheless concluded both as a matter of policy and of practicality, that it would not be desirable for Manitoba to extend and thereby enact such a provision. Since there are no restrictions that we know of regarding the use by persons of terms like planner, designer, etc., such a provision would only cause increased confusion and litigation. Such a result in our view is to be avoided rather than encouraged. Architects and engineers, on the other hand, are identifiable groups, which as a result of prescribed course and licensing requirements earn easily recognizable status. Evidence of this fact is the already frequent reference made to these groups in the many existing provisions of our *"Mechanics' Liens Act"* (see ss. 9(3) and 9(4)).

Finally, we note the repeated requests made by and on behalf of architects and engineers groups and others, to have the right of lien extended to them. The Mechanical Contractors Association of Manitoba, for example, has stated that, "being essential to the success of a project" architects and engineers should have the full right to register a lien subject to the same restrictions as anyone else (ie. 7½% holdback of monies owed to them until substantial completion). No other group, whether it be the interior designers or city

planners, has urged us to make a similar recommendation. In conclusion we therefore recommend that, subject to the usual restrictions and limitations, the provisions of "*The Mechanics' Liens Act*" be extended to architects and en ineers. As to the amount of a claim that might be recovered under the Act by these individuals we recommend this be limited *pro rata* to the extent of the work done on a project. In our view, this claim should be founded in *quantum meruit* and would also encompass the relationship of work done on the property or improvement to the total cost of construction. Provision for application to the court to determine this sum would also need to be made.

4. Leasehold Interests

As the present legislation in Manitoba now stands, when the estate or interest upon which a lien attaches is leasehold, the consent of the owner must also be obtained in order that the lien will validly bind the freehold. According to section 5(2) of the Act the fee simple may be subjected to the lien only with the consent of the owner provided that at the time of registration of the lien such consent is testified to by the signature of the owner upon the claim for lien, duly verified by affidavit. There is some limited case law that has dealt with the problem in the past but the state of the law in this particular area, at least in the opinion of many in the industry, is highly unsatisfactory. In the commercial area, at least, it appears just and equitable that a tenant should, in some fashion, be able to bind the land. The residential sphere is perhaps another matter and, as a result, some consideration has been

given by us to distinctions which might have to be drawn as between commercial and residential leasehold interests.

At the time of the publication of the Working Paper in 1974 the co-directors proposed a certain approach for reform to the effect that leasehold interests would be subject to all of the provisions of *"The Mechanics' Liens Act"* and, in addition, that the fee simple interest of the landlord would *without notice* be capable of being attached upon the registration of a lien but that the liability of the landlord would be limited to 15% of the total value of any leasehold improvements effected. It was further pointed out that any leasehold interest, whether it be commercial or residential, would be subject to this provision.

The comments which we received from our respondents have varied considerably with respect to this proposal. While many have endorsed the recommendation, a substantial number have indicated rather strong disapproval. In their view, no right of lien, not even one of a limited nature (ie. 15%) should attach to the freehold where goods or services are supplied to or for the benefit of a lessee, except where the owner of the property gives his consent to the improvements. Any proposal which would permit otherwise is viewed as an invitation to extravagant and fraudulent alterations or "improvements" to rented premises. The suggested alternative is to adopt the provision of section 7(1) of the Ontario *"Mechanics' Lien Act"*, which states in effect that the fee simple is subject to a lien if the person doing the work or placing or furnishing the materials gives notice in writing to the "owner" in fee simple or his agent of the work, etc., to be done and

the owner, within 15 days thereof, does not give notice in writing to such person that he will not be responsible therefor. Newfoundland, New Brunswick, Prince Edward Island and Alberta also have similar provisions, whereas in British Columbia all improvements done with the knowledge, but not at the request of the "owner", are deemed to have been done at his request unless there has been posted on at least two conspicuous places upon the land, or upon the improvements, by him, notice in writing that he will not be responsible for the improvements, or after actual notice in writing to the like effect has reached the person claiming a lien under the Act. As with other provinces, a statutory definition of owner is provided. Its meaning is thus artificial and is neither limited nor to be confused with the legal or registered owner of the property.

Since the publication of our Working Paper we have discussed the provisions of section 7(1) of the Ontario *"Mechanics' Lien Act"* with our consultant and, while he adopts and highly recommends the provisions of section 7(1) to us, we are nevertheless concerned that the adoption of such a provision in Manitoba would work a serious hardship on the ignorant and ill-informed owner who fails to object to a notice received. It seems to us that this provision is merely a trap for the unwary. Indeed, the shifting of onus from contractor to owner is at best difficult to understand. Moreover it is hard to imagine the circumstances under which an owner's actual consent would be forthcoming once notice is received. It seems to us that the only consequence of this type of amendment to the present Manitoba law would be to impose liability on the owner who, out of ignorance or accident, fails to respond in the required manner.

As for the contractor or sub-contractor, his responsibility would not be any less or, for that matter, any greater under the Ontario law than it is presently under the

Manitoba provision. For example, the present system requires that, in order to bind the freehold, the prospective lien claimant must determine who the landlord is and obtain consent before he proceeds with the work. However, even if the Ontario provision were adopted in Manitoba, it would still be necessary for the contractor, etc., to search the property to determine who is its owner before he could notify him respecting the proposed work. Having found out who the owner is, it seems more sensible that the prospective lien-holder be required to approach the owner and obtain his consent directly rather than chance catching the unwary owner who unwittingly fails to respond to some form of notice. Several members of the Commission are also concerned that the Ontario procedure would generate increased paper work.

Because the members of our Commission were unhappy with the Ontario procedure proposed and not entirely happy with the existing situation under which a prospective lien-holder might be duped into believing he was performing work on freehold property (only subsequently to learn that he was working for a tenant with a leasehold interest) special contact was made with the Ontario Law Reform Commission to determine how the provisions of Ontario operated in practice. The response from the Ontario Law Reform Commission legal research officer dated May 3rd, 1979 raised an additional deficiency in the Ontario legislation, namely, since the binding of the owner's interest requires some initial affirmative action on the part of the contractor, lack of knowledge of the existence of this requirement clearly reduces the use to which the notice provision is put. According to the research officer, section 7(1) is perhaps in this sense

almost as much a trap for the unwary contractor as it is a trap for the unwary owner of land. In addition, it was pointed out to us that because section 7(1) requires that written notice be served personally on the owner *prior to* the commencement of the work or the placement or furnishing of materials and, because many contractors, and even solicitors, are ignorant of this prerequisite, many potential lien claimants will serve their notice (if at all) only subsequent to this juncture. Once challenged, such a defect would, of course, be fatal to a contractor's claim for lien against the freehold under section 7(1).

The report of the Nova Scotia Law Reform Advisory Commission in January of 1979 described the Nova Scotia equivalent of Manitoba section 5(2) as "nonsense". As a result, section 7(3) of their *"Model Act"* has been designed and drafted as a possible amendment. The intention of the provision is to provide some protection against a landlord garnering undue benefits without rendering himself liable to the builder. It provides as follows:

> Where the estate or interest upon which the lien attaches is leasehold, the fee simple or other estate or interest of the owner's landlord is also subject to the lien not only
>
> a) where the landlord is an owner under this Act because he consents to the construction of the structure and it is for his direct benefit;
>
> but also
>
> b) where the lessee is required, by his lease, to construct the structure.

In our view this provision has much to commend it, and accordingly we propose that, with some minor adjustment, it be adopted for use in Manitoba. The one change we would make would be to broaden the wording *"by his lease"* by adding the words *"or other agreement"*. We make this recommendation unanimously for the following reasons:

1. Unlike the present Manitoba provision, it does not impose the impossible on a person wishing to file his lien against the freehold.

2. It puts the onus on the owner in circumstances where the owner consents to the construction and benefits by it directly.

3. If the landlord required the structure to be built by the tenant and, as a result, is liable to liens filed against the freehold, there is the added inducement to ensure that builders hired by the tenant will be paid.

4. The builder will not be required to know who is the owner of the leasehold interest before he can file a lien in respect of the freehold estate.

In addition to the right of a contractor to claim for leasehold improvements against the freehold as proposed above, prospective lien claimants already have the right to lien against leasehold interests. In order to strengthen the rights of lienholders against such interests, however, we make one final recommendation to change the status of the present law in this respect. Since the ultimate remedy of a lien claimant is to sell the term for which the tenant holds the land and his interest in any building on the land, this remedy is negated when the landlord cancels or forfeits the lease. The Acts of Ontario, Prince Edward Island, New

Brunswick, Newfoundland and Alberta prohibit the landlord from acting in this way, except where there is non-payment of rent. In this event, the lienholder is given the right to pay rent accruing in default after he becomes entitled to his lien and to add the amount paid to the total of his claim. The Nova Scotia Law Reform Advisory Commission also decided to improve the similar deficiency in their legislation and has adopted the Ontario provision which reads as follows:

> No forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, deprives any person entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after he becomes so entitled and the amounts so paid may be added to his claim.

We recommend the adoption of a similar provision in Manitoba except that we would clarify the wording and strongly suggest that the claim for any amount of rent paid be limited to the tenant's estate in the leasehold.

5. Prevenient Arrangements

This principle has evolved in the courts over a number of years to the extent that a prior understanding preceding the supplying of materials has the effect of connecting what would otherwise be isolated deliveries into a continuous contract. If there is a prevenient arrangement then, for the purposes of *"The Mechanics' Liens Act"*, time begins to run from the date of the last delivery of materials under the continuous contract and not from the date of each individual delivery, thereby avoiding the necessity of registering a lien for each separate delivery.

Originally, in the Working Paper, our co-directors recommended that the doctrine be codified in the legislation, stating specifically that the time in which a lien may be registered commences to run from that day on which the last materials were supplied to a construction project, notwithstanding that the agreement may be terminable by either party at will. However, in his final report, our consultant expressed the opinion that the principle was well established in case law and that there was no need for legislative reform. For fear of changing an existing situation which seems to be operating satisfactorily, we agree. In accordance with the views of our consultant, we therefore make no recommendation for reform in this area.

X. WAIVERS OF LIEN

It has long been established in Manitoba that *"The Mechanics' Liens Act"* does not prohibit the use of waivers (*Ritchie v. Grundy* (1891), 7 Man. R. 532 and section 4(1)). Today as a result, it is standard custom and usage in many contracts (and indeed as a condition precedent to the letting of such contracts) for a waiver of lien to be included. However at the time of the publication of the Working Paper our co-directors reported an overwhelming consensus among those concerned, that waivers of lien should no longer be legal and that they be declared null and void and as against public policy. Saskatchewan and Alberta have such provisions. In those jurisdictions, each of the relevant statutes provide that any agreement to avoid either their application or alternatively the remedies or benefits they provide is void. The Acts of all other provinces with the exception of Manitoba make similar provision with respect to agreements involving workers but not others. The statutes of Newfoundland and

Ontario, for example, specifically provide that the prohibition against waivers of liens does not apply to a manager, officer, foreman, or any person whose wages amount to more than a specified amount per day. In Ontario and Newfoundland this amount is $50 (R.S.O. 1970, c. 267, s. 4(1), (2); R.S. Nfld. 1970, c. 229, s. 4(1), (2)).

In our view the more encompassing approach of the Alberta legislation is preferable. As we have seen, in that jurisdiction, waivers of lien of all kinds are no longer valid. We have heard hardly a murmur of discontent or disadvantage as a result. Therefore, we adopt the views of our co-directors and recommend that waivers of lien be deemed to be null and void, and contrary to public policy. To do otherwise would subvert the major purpose of mechanics' lien legislation.

XI. TIME OF REGISTRATION

At the present time our *"Mechanics' Liens Act"* requires registration of a lien in the appropriate land titles office as follows:

(a) a claim for lien by a contractor or sub-contractor, in cases not otherwise provided for, before or during performance or within 30 days after the completion of the contract or sub-contract, as the case may be;

(b) a claim for lien for materials, before or during the furnishing or placing thereof, or within 30 days after the furnishing or placing of the last materials so furnished or placed;

(c) a claim for lien for services, at any time during the performance of the service or within 30 days after the completion of the service;

(d) a claim for lien for wages, at any time during the performance of the work for which the wages are claimed or within 30 days after the last day's work for which the lien is claimed. (See section 20(1), (2), (3) and (4); for comparison see section 7(1) of *"The Payment of Wages Act"* where no time limit is placed with respect to the filing of this lien.)

In light of our earlier recommendations many of the above provisions will need to be amended to bring them into line with the concept of substantial performance. The term "completion of the contract" will, for example, have to be defined. Most of the provinces use a common formula in the definition of this term and indeed all of the provinces except Manitoba and Nova Scotia define it as "substantial performance, not necessarily total performance, of the contract".

There are many niceties concerning the requirement for registration of liens, but the essential matter which has concerned our co-directors and us has been the amount of time in which a lien should be permitted to be filed.

According to our co-directors the historical basis for the present 30-day time requirement was that credit granting originally was based upon 30-day credit terms. It was however their understanding that the industry today operated on extended periods of credit and that 60 and 90 day credit terms are now more the rule than the exception. In addition, the co-directors recognized the present influence and effect of the computer in the bookkeeping of many firms. According to their research invoices are frequently not remitted by creditors to the parties concerned until the expiration of one calendar month following the month in which

the charges for labour and/or materials and/or services were incurred. On many occasions delays were found to extend as long as 60 days.

The determination of the time allowed for registration, despite all arguments, is necessarily arbitrary in nature. Like our co-directors and later our consultant, we are however concerned about achieving an appropriate balance between the competing objectives we share: the desire, on the one hand to speed up the flow of funds and, on the other, to extend the time for registration of a lien. At the time of the publication of the Working Paper our co-directors acknowledged these concerns and proposed a dual system whereby, in addition to registration, a notice of intention to lien would have to be transmitted to an owner as a condition precedent to its filing. Such a proposal might, it was suggested, allow an owner to take appropriate steps to provide payment or security for outstanding accounts, thus avoiding the necessity of registering a lien and perhaps causing the project to grind to a halt to the detriment of all claimants. They therefore proposed a maximum 40-day period within which notice of intention to register a lien would have to be served on an owner and a further maximum period of 10 days for the actual filing of a lien, subsequent to the service of the notice of intention. Under this proposed scheme, they suggested that a potential lien claimant would proceed as follows:

(a) Within 40 days of the completion of the contract or sub-contract, the last supply of materials or the last services provided, notice of intention to register a lien would be given to the registered owner of the land concerned;

(b) Thereafter, failing receipt by the potential lien claimant of either payment and/or satisfactory security for payment of his

> account upon which the potential lien is based, the claimant would be entitled to register a mechanics' lien not earlier than 5 days and not later than 10 days from the date upon which the notice of intention was served upon the owner. (page 28)

The Winnipeg Builders Exchange in its 1975 brief, *agreed with the proposal contained in the Working Paper and* stated that the notice of intention scheme would eliminate a number of nuisance liens and lead generally to the filing of fewer liens and in addition the payment of money at an earlier date. This position was maintained in their supplementary report filed in April 1978.

In spite of the Working Paper and the support for it expressed by the construction industry, our consultant, in his final report stated as follows:

> As indicated in the working paper the determination of time for registration is arbitrary in nature. To extend the time for registration to 60-90 days would, in my view, not serve the interests of those parties requesting such an extension; to reduce the time for registration to 10 days would not serve the interests of those parties requesting such reduction in this time.
>
> It is therefore recommended that the time for registration be extended to 40 days from the present 30 days.
>
> The notice of intention initially referred to in the Working Paper is not practical. The purported benefit of such a notice will be as well served by informal notice at any time during the 40 days without the necessity of making such a notice a condition precedent to the registration of a lien.
>
> In any case it is my recommendation that informal notice, other than for information purposes only, (and except in the case of public works), shall

> have no legal effect and that registration shall be the only method of notice available to effect a distribution of funds otherwise to be made in accordance with the provisions of "The Mechanics' Lien Act".

The time for registration varies from province to province. In British Columbia the time for filing the sub-contractor's claim is dependent on the main contractor's claim since the sub-contractor must file his claim "not later than 31 days after the contract of the contractor has been completed, abandoned or otherwise determined" (s.23(1)). In most of the other provinces a claim for lien by a contractor or sub-contractor may be registered before or during the performance of the contract or sub-contract or within a certain prescribed number of days after the completion (meaning "substantial completion" in all provinces except Manitoba and Nova Scotia) or abandonment of the contract or sub-contract, as the case may be. The following table illustrates the variety, from province to province in the common law jurisdictions, in the prescribed number of days they permit for the filing of a lien:

Province	Time (Days)
Manitoba	30
Newfoundland	30
New Brunswick	30
British Columbia	31 (except for work done on a mine or quarry in which case the time is 60 days)
Alberta	35
Ontario	37

Province	Time (Days)
Saskatchewan	37
Nova Scotia	45
Prince Edward Island	60

After considerable discussion and much introspection we have finally concluded that our consultant's recommendation should be adopted. We also are in agreement with our consultant's suggestion that no formal procedure for giving prior notice of a lien should be provided for in the legislation. There would, of course, be nothing to prevent a prospective lien claimant from attempting to get payment without filing a lien by first giving notice to the owner that he had not been paid. While in most cases this would be a desirable practice to follow, we think the only way of securing payment against the owner's land and holdback, and the only means of obtaining security over a mortgage advance should be by timely registration of a lien. Nothing short of such registration should, in our view, give either security or priority to a lien claimant.

In conclusion we note with particular interest the provisions of section 21 of "*The Mechanics' Liens Act*". According to this section a claim for lien by a contractor, sub-contractor or materialman may be filed in Manitoba, *before*, as well as within the prescribed period during which the work is performed and the material supplied. No such privilege to register *before* has, however, been granted to persons providing services or to wage earners providing labour. The Nova Scotia Law Reform Advisory Commission has recommended that the same right be granted to all claimants and that the provision allowing some claimants to register

their liens before supplying materials, etc., be extended to apply to all. According to the Nova Scotia Commission Report, the chief reason for permitting early registration is that some people may not be willing to supply their services or materials unless they have registered a lien as security. The Nova Scotia Commission felt it would also eliminate an inquiry as to the beginning of the lien and, thus, simplify the procedure and interpretation of the Act. We agree and accordingly recommend that the provisions of section 21 be enlarged to apply to all lien claimants in Manitoba.

XII. OWNERS' AND LIENHOLDERS' RIGHTS TO INFORMATION

There are many instances in which a potential lienholder is entitled to receive detailed information from owners, contractors, sub-contractors and mortgagees which information may assist him in carrying out his obligations or otherwise relating to a particular building contract. Specifically, section 27 of *"The Mechanics' Liens Act"* entitles the lienholder to demand information from the owner or his agent relating to the terms of the contract or agreement with the contractor for or in respect of which work, services or materials are performed, furnished or placed. If the owner or his agent do not provide this information within a reasonable time or if they knowingly supply incorrect information, the section further provides that the person claiming the lien is also entitled to a claim for loss or damages resulting from the refusal or neglect. However, this right seems to be limited to lienholders and, as a result, it is, in our view, inadequate. We therefore recommend that any person who may become liable for payment arising out a lien should similarly be entitled to demand any relevant information from the lienholder. If the lienholder neglects or refuses to

provide the necessary details or states them falsely, the lienholder should also be liable to any damages suffered by the owner, etc., and, in that case, his lien should be limited by the information actually furnished.

Section 27 would need to be further extended to allow the lienholder to obtain the terms of an agreement for sale or mortgage from an unpaid vendor or mortgagee. If such information were not forthcoming, it should also extend liability for any loss suffered by the lienholder to the person refusing or neglecting to provide the information or to provide it correctly. In our view all of the above-noted and recommended rights should be enforceable upon application, at any time, to a judge having jurisdiction in the matter. Finally, because we consider the Ontario *"Mechanics' Lien Act"* most effective in providing similar rights in that jurisdiction, we recommend that in drafting the Manitoba amendments, very special attention be given to section 28 of that Act (see Appendix C to this Report for s. 28 of the Ontario *"Mechanics' Lien Act"*).

XIII. RECEIVERS AND TRUSTEES

Of the many problems involving mechanics' lien legislation which concern us in this Report, perhaps one of the most obvious is that it does not provide for the appointment of receivers and trustees of properties which are at the same time affected by the registration of mechanics' liens. Consequently anomalous situations exist in which jurisdiction over large mechanics' liens actions is vested in the County Court, while the Court of Queen's Bench presides over the appointment of receivers of the property.

In accordance with the previous view expressed in the Working Paper and with the more recent view of our consultant, we therefore recommend that consideration be given to the adoption of section 34 of the Ontario *"Mechanics' Lien Act"* which deals with:

a) power to appoint a receiver of rents and profits;

b) power to direct a sale and appoint trustees.

(See Appendix D to this Report for section 34 of the Ontario *"Mechanics' Lien Act"*)

XIV. NON-LIENABLE PROJECTS - SOVEREIGN IMMUNITY

The general principle is that property owned by the Crown is not subject to a mechanics' lien since the Crown's interest cannot be sold (*Wells H. Morton & Co. v. Can. Credit Men's Trust Assn. Ltd.* (1965), 53 W.W.R. 178 (Man. C.A.)). Personal judgment is also not available against Crown land (*Johnson & Carey Co. v. Can. Nor. Ry.* (1918) 43 O.R. 10; varied 44 O.L.R. 533 (C.A.)). Similarly, the trust provisions of *"The Builders and Workers Act"* in Manitoba do not extend to the Crown, as a result of the statutory provisions of *"The Interpretation Act"* (C.C.S.M. c. I180) which provide that, unless expressly stated, no provincial Act will affect Her Majesty(s. 15). Because it contains no provisions extending its scope to the Crown, the holdback provisions of *"The Mechanics' Liens Act"* also do not apply to the Crown. The province does not, in any event, have the constitutional power to legislate in respect of the lands or interests or estates in land of the Crown in the Right of Canada (*Bain v. Director of Veterans' Land Act et al* [1947] O.W. 1917). On the basis of this principle

Crown agencies are also exempt from the scope of the legislation (*Bodrug v. Man. Housing and Renewal Corporation* (1977), 79 D.L.R. (3d) 409). However, the federal Crown itself can, by specific enactment, subject its own property to provincial mechanics' lien legislation. In addition, though the federal government has jurisdiction over railways, canals, telegraphs and other works and undertakings connecting one province with another, or which extend beyond the limits of the provinces or are situate within the province and are also for the general advantage of Canada, in a number of instances certain land, etc., has been made the subject of a lien. For example, it was recently held that a quarry in the name of the Canadian National Railway did not fall within definition of "railway" and furthermore that the declaration of Parliament that their railway was for the general advantage of Canada did not extend to the quarry. As a result, the land in question was not immune from the application of provincial mechanics' liens legislation (*C.N.R. v. Nor-Minn. Supplies Ltd.* [1977] 1 S.C.R. 322).

Unlike Crown lands etc., in Manitoba, municipal property is not exempt from the scope of the statute (R.S.M. c. M80, s. 2(d), see also *McArthur v. Dewar* (1885), 3 Man. R. 72). However, by virtue of case law based on public policy grounds, judicial exceptions have been made so that, for example, municipal streets are exempt from these liens. On the other hand, The Winnipeg City Hall has been held to be the subject of a mechanics' lien. In that case, the defence that the building was for public purposes was not allowed (*McArthur v. Dewar*).

However, even though mechanics' liens legislation may not apply with respect to them, the vast majority of

public works projects, whether under the direction of federal, provincial or municipal governments are governed by principles emanating from this law. According to our co-directors, the fact that these principles colour the actions of government authorities is evidenced by their insistence on holdbacks to ensure the proper, satisfactory early completion of concerned projects. The government also frequently requires that the general contractor post performance and payment bonds. As pointed out by our co-directors in their Working Paper, a distinction can, however, be drawn between private owners to whom liens law applies and government, which must be regarded as a solvent owner. Our co-directors therefore recommended consideration of the Ontario *"Public Works Creditors Payment Act"* (S.O. 1962-63 c. 121) for adoption in Manitoba. The rationale for this recommendation was apparently their belief that, because the Ontario legislation under consideration required performance and/or payment bonds on all projects, it would do away with the need for holdbacks to be maintained. We, however, have rejected this much-attacked suggestion because of its proven lack of workability in Ontario. However, we do adopt the alternative recommendation of our co-directors as follows:

> It is our opinion that time has long since passed where the concept of "the King can do no wrong" should hold full sway. . . . we suggest that the Mechanics' Liens Act should provide that although the lands in question could not be sold as a condition subsequent to a successful lien action, nevertheless, a money judgment could be obtained as against Her Majesty The Queen in Right of the Province of Manitoba or such other governmental authority concerned. In such event the registration of a lien in the appropriate Land Titles Office would be sufficient. Should the legal description not be available the claim of lien would simply refer to this fact, and name the appropriate governmental authority, and the lack of a specific legal description would not, of itself inavalidate this type of lien. (pp. 25-26)

In the case of the federal Crown, of course, different considerations apply as, in that particular area, the doctrine of sovereign immunity does not lie within the ambit of the provincial Legislature. With respect to the federal Crown, we therefore recommend that Parliament be urged to pass appropriate legislation making provincial mechanics' lien legislation applicable to the Crown, in the Right of Canada, in the same fashion and to the same extent that it is applicable to the province.

Since the publication of the Working Paper in 1974, our consultant has also elected to favour this alternative, at least to the extent that he now agrees that Crown land in the Right of the Province of Manitoba should be capable of being the subject matter of a lien. In this situation, he suggests consideration of section 5(2) of *"The Mechanics' Lien Act"* of Ontario. This section provides as follows:

> Where the land or premises upon or in respect of which any work is done or materials are placed or furnished is,
>
> (a) a public street or highway owned by a municipality; or
>
> (b) a public work,
>
> the lien given by subsection 1 does not in any event attach to such land or premises but shall instead constitute a charge on amounts directed to be retained by section 11, and the provisions of this Act shall be construed, *mutatis mutandis*, to have effect without requiring the registration or enforcement of a lien or a claim for lien against such land or premises.

The term "public work" is defined in Section 1(da) as follows:

> "public work" means the property of the Crown and includes land in which the Crown has an estate or interests, and also includes all works and properties acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Crown, or for the acquisition, construction, repairing, equipping, extending, enlarging or improving of which any public money is appropriated by the Legislature, but not any work for which money is appropriated as a subsidy only.

Also, the term "Crown" is defined in Section 1(ba) as follows:

> "Crown" includes Crown agencies to which *The Crown Agency Act* applies.

The Ontario Act also specifically prohibits the registering of liens against such public works, highways, etc., in Section 21a(1) as follows:

> Without limiting the generality of subsection 2 of section 5, where the lien does not attach to the land by virtue of subsection 2 of section 5, sections 16, 17, 19 and 20 do not apply. (Those sections deal with the registration of a lien.)

The Ontario Act further provides that notice in writing of the claim must be given to the Crown by section 21a(2) as follows:

> Where the lien does not attach to the land by virtue of subsection 2 of section 5, any person who is claiming a lien shall give notice thereof in writing to the owner in the manner hereafter provided.

The Ontario provisions also deal with methods for providing notice, the contents of the notice and its verification. Special provisions of the Regulations deal with similar

matters (R.R.O. 1970, #575, ss. 1, 2, 3 and Form 1a as amended by O. Reg. 849/75). In his final report, our consultant recommended the adoption of these provisions, including that provision found in the Regulations requiring the posting of a notice declaring the project to be a public work, and advising "any person who may consider filing notice of lien as to the name and address of the appropriate office to which the notice of claim must be sent". We agree with the objective of the Ontario legislation respecting Crown immunity and recommend that the wording of the statute and the regulations be closely examined by our draftsmen in order to achieve that objective in Manitoba. Reference should also be made to our earlier discussion of *"The Construction Industry Wages Act"* under the sub-heading Rights of Workers to Claim Against the Owner and, in particular, to section 15 of that Act which covers claims for wages under government contracts. As we pointed out under Trust Provisions and Crown Lands, earlier in this Report, provisions imposing the trust should also be binding on the Crown and the legislation should specifically so provide. Finally, we recommend that great care be taken in drafting these amendments in order to ensure that full mechanics' liens rights, now permitted by virtue of case law in Manitoba, as against public schools, most municipal property and certain quasi-Crown agencies are not eroded by the application of the Ontario provisions to public works and highways, etc. In other words, the right of sale against public schools, municipal land, other than public works and highways, should not unwittingly be taken away by the draftsmen.

XV. MORTGAGE ADVANCES

In view of our earlier proposal to abolish lien

waivers in Manitoba, both our co-directors and later our consultant have suggested that some alternate means will be required to permit a mortgagee who acts in good faith to make a mortgage advance without fear of attack. While we agree that such a provision would be desirable to ensure effective legislation we do, however, disagree with the method by which our consultant suggests it be implemented. Our disagreement with his method is based on our position that the trust provision should be sustained whether or not a lien is registered. Our consultant does not accept this view, however. According to his report, section 11(1) of *"The Mechanics' Liens Act"* should be amended to ensure that a lien will take priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made <u>after</u> the lien arises and, over all payments or advances made on account of any conveyance or mortgage <u>after</u> registration of a claim for lien. In the absence of registration of a lien claim, all payments or advances would have priority over the lien. This suggestion would be acceptable to us if it were limited to payments or advances made only on account of any conveyance or mortgage. We do, however, agree with the balance of our consultant's suggestions and, subject to the one qualification just mentioned, recommend the following:

a) An exception to this proposed amendment would be necessary to grant priority over liens for payment to be made on public works prior to any notice in writing of any claim for lien where the lien or claim for lien is against a public work. This exception is required because registration for a claim for lien in the appropriate land titles office is not available but notice to a designated officer would be allowed (see discussion under the heading <u>Non-Lienable Projects - Sovereign Immunity</u>).

b) A mortgagee making a bona fide advance under its mortgage may make such advance having full knowledge that the advance will take priority over any lien unless the lien is actually registered in the appropriate land titles office.

c) With the one noted exception, any notice in writing by the lienholder to the mortgagee is deleted. Where the mortgagee may maintain a number of branch offices, any one of which may receive notice in writing, in practical terms this becomes difficult to determine and if not determined may cause the mortgagee, from an abundance of caution, to delay and in certain cases to withhold mortgage advances. The deletion of reference to notice in writing (in Section 11(1) of The Manitoba Mechanics' Liens Act would resolve this difficulty.

d) In my view, under the law today in Manitoba, building declarations are not required for the mortgagee's purposes or for that matter for the owner's purposes provided the owner maintains the appropriate holdback. Should my recommendation be adopted, that waivers of lien be deemed void and against public policy, then in my view there becomes no necessity whatsoever for building declarations. For greater certainty any amendments should so state.

e) Finally it should be clearly expressed that, in normal circumstances, the mortgagee acts as mortgagee only and not in the place or position of the owner of the property and the mortgagee is not bound to maintain any holdback whatsoever.

In drafting the amendments under this heading, we suggest that the drafstmen pay special attention to section 17 of *"The Mortgage Act"* (C.C.S.M. c. M200), which section is "subject to subsection (1) of section 11 of The Mechanics' Lien Act". As mentioned earlier, our intention in this regard is to ensure that only the actual registration of a mechanics' lien in the appropriate Land Titles Office would, in future, be capable of fulfilling the notice requirement under section 17 of *"The Mortgage Act"*.

XVI. MINIMUM AMOUNT FOR LIEN REGISTRATION

The Working Paper and our consultant, in his recent report, both recommended that the amount for which a mechanics' lien might be registered should be established at a minimum of $500. The present Act sets this amount at $20. While those appearing before the Commission have expressed differing opinions as to what would be an appropriate minimum sum, the 1975 submssion of the then Chairman of the Labour Board indicated satisfaction with the minimum $500 figure we proposed, provided employees could lien for unlimited sums. He suggested different limitations for employees and other types of lien claimants.

As might be expected, reconciliation of this with opposing views has caused considerable debate within the Commission, particularly because of concern on the part of some of our members that raising the minimum would preclude those persons who most need it from gaining the protection of the legislation. This concern must, of course, be balanced against the need to make the legislation workable and not subject to the abuse of petty claims and liens which force an owner, contractor or sub-contractor to pay for their discharge in those circumstances where it is uneconomic to challenge their validity, or, despite their validity the sum claimed. In our view, the present minimum of $20 is capable of lending itself to such abuse. Originally enacted in 1873, the provision is today most certainly out of date so that the equivalent value in today's terms would quite obviously, in light of inflation, be far more.

Various views have, of course, been expressed as

to what new minimum should be established. For example, the Mechanical Contractors Association has suggested the figure of $300. Another suggestion is to adopt the provisions of Bill 42 of the British Columbia Legislature (introduced but not passed in the 1977 Session) which set the minimum of $100. Closer to home we note the provisions of *"The Judgments Act"* (C.C.S.M. c. J10, s. 3(1)) which sets a minimum for the registration of a certificate of judgment in the Land Titles Office of $40 and *"The County Court Act"* (C.C.S.M. c. C260) which provides for the recovery of small debts to a maximum of $1,000.

As for *"The Judgments Act"*, as recently as February 1978, the Registrar General of Manitoba suggested the need to raise the minimum requirements for certificates of judgment and government liens alike from the present $40 to $500.

After considerable debate on this matter, we have concluded that, in light of the various considerations and opinions expressed to us, a $300 minimum would best satisfy and accomplish the competing objectives involved. This conclusion was, however, arrived at only after giving serious consideration to an interesting proposal suggested by one of our own members, to the effect that a special small claims procedure for mechanics' lien recovery under $1,000 be established. The Commission has concluded, however, that the trial of a mechanics' lien claim by a provincial government appointee under Part II of *"The County Courts Act"* would not be a constitutionally proper function for such clerk to perform. It was also our considered opinion that such a procedure would, in any event, be difficult to create and to maintain in isolation from other greater claims involved in the same action. We therefore recommend the adoption of a

$300 minimum as the best possible option. So far as the 1975 suggestion of the then Chairman of the Labour Board respecting claims for wages of less than $300 by employees of a contractor or sub-contractor is concerned, the Commission is of the opinion that improvements made to *"The Payment of Wages Act"* since 1977 already give special and extensive protection to employees for the non-payment of their wages by employers. Indeed we believe that together with the reforms suggested in this Report, these protections are sufficient. We are reinforced in this view by the fact that few liens are filed by employees. As for the small claims of others, such persons would still receive the benefit of the trust provisions of the legislation and, in addition, would still have the same rights to recover amounts owing to them as other creditors, by suing the person or persons with whom they have contracted.

XVII. SUMMARY PROCEDURES - LAY TRIBUNALS

As past experience has so amply proven, mechanics' lien legislation is highly technical, expensive and protracted. As a result our co-directors, in their Working Paper, questioned why the arbitration provisions incorporated in the standard form of construction contracts were not more often utilized. They speculated that architects were most likely responsible for the failure to exercise these provisions but suggested that they had perhaps too often been placed in the untenable position of satisfying both the owners, with whom they contract, and other disputants. Our co-directors therefore suggested that matters arising under *"The Mechanics' Liens Act"* be taken, at the parties' option, in the normal manner to the County Court or, in a more summary manner, through arbitration. In cases where the vehicle of arbitration was chosen, they recommended that the arbitration tribunal consist of

three members, two of whom would be architects or engineers with a lawyer as chairman. It was the stated hope of our co-directors that, in proposing this recommendation, an impeded flow of funds would not so often prove to be the case with its consequent disastrous pyramidal effects. No mention of this recommendation was, however, made by our consultant in his most recent report.

Regardless of the absence of any provision in the statute, it is fairly well established law that parties to an agreement may, nevertheless, establish by agreement a procedure by way of arbitration to realize upon their lien claims. Depending on the precise wording of the arbitration clause selected, the parties may prevent recourse to the court, at least until the arbitration is complete. The normal method of preventing this recourse is to apply to the court for a stay of proceedings pursuant to *"The Arbitration Act"* (C.C.S.M. c. A120). The Manitoba authority for this proposition appears to be the case of *Jorgenson v. Sitar and Ellor* ([1937] 2 W.W.R. 251). Because we believe that it is worthwhile to preserve the right of parties to create their own procedures by such agreements, rather than to impose by statute a single procedure to be followed by all parties in all circumstances, we do not adopt the recommendation of our co-directors and have refrained from making any recommendation in this area.

XVIII. HOUSEKEEPING

As stated in the Introduction to this Report, there are a number of minor changes required in reform of *"The Mechanics' Liens Act"* which should be given consideration when the draftsm n drafts the actual amendments to the present law.

1. Amend section 5(3) of *"The Mechanics' Liens Act"*

Section 5(3) of the present Act limits the priority over a lien by an existing mortgage or other charge to the actual value of the land at the time the improvements were commenced. The section reads as follows:

> If the land upon or in respect of which the work is done, or materials or machinery are placed, is encumbered by a mortgage or other charge existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, the mortgage or other charge has priority over a lien under this Act to the extent of the actual value of the land at the time the improvements were commenced.

Such a provision should be extended to ensure that this prior mortgage, existing as a valid security,and subject to the protection granted under section 5(3), should be capable of securing future advances under that mortgage subject always to the priority of any lien which may be registered in the appropriate Land Titles Office at the time of making such advance. Our co-directors illustrated the need for this in their Working Paper as follows:

> Consider the situation where land, prior to the commencement of improvements, has an appraised value of $100,000.00. The land is subject to a mortgage, prior to commencement of the improvements, in the sum of $200,000.00 which amount has been validly and fully advanced. The purpose of Section 5(3) is to limit the priority of the mortgagee under this mortgage to the actual value of the land at the time the improvements were commenced, that is to the sum of $100,000.00. We are of the opinion that this prior mortgage, existing as a valid security, and subject to the protection granted under Section 5(3), should be

> capable of securing future advances, always subject to Section 11(1) of our Act which, by deleting the present existing notice in writing provisions of that section, would then state, in part, that a lien has priority over all payments or advances made on account of any conveyance or mortgage after registration of a claim for the lien, but that in the absence of registration of a claim, all such payments or advances take priority. (p. 46)

One matter respecting section 5(3) which was not dealt with by our co-directors in their Working Paper is the fact that this section does not require that the prior mortgage be a registered one (*Winnipeg Supply & Fuel Co. v. Genevieve Mtge. Corpn.; Wiebe v. Dom. Bronze Ltd.* [1972] 1 W.W.R. 651 (Man. C.A.)). Under the Acts of most of the other provinces, including the present Ontario Act, a prior mortgage must, however, be registered. Since we are recommending that liens must be registered before they will have priority over mortgage advances, it seems only fair that any claims to priority by way of mortgage which detrimentally affect the strength of the lien security should likewise be required to be registered, thereby enabling a prospective builder to know at the outset what is his available security.

2. Land Titles Office - Notice of Lien to Owner

The present legislation does not require the Land Titles Office Registrar to provide notice to registered owners of land informing them that mechanics' liens have been registered against their land. Our co-directors, in their Working Paper, and more recently our consultant in his report, recommended a simple amendment to the Act requiring the provision of written notice to the owner of the land concerned, immediately following registration of a mechanics' lien against

his land. We agree and recommend that a procedure, similar to that presently in effect dealing with notice to land owners upon registration of caveats, be adopted.

3. Commencement of Actions

The present legislation states that a lien for which a claim is registered ceases to exist on the expiration of two years after the work has been completed or the materials have been placed or furnished or after two years following the expiry of the period of credit, provided such period of credit is referred to in the registered claim for lien. As the Ontario *"Mechanics' Lien Act"* set 90 days as the required time, it was our co-directors', and later our consultant's opinion, that the two-year period found in the Manitoba law could readily be shortened to six months following the date upon which the work has been completed or the materials and/or services have been placed or furnished or supplied, or after the expiry of the period of credit. If not commenced within the six-month period, it was further recommended that the lien would cease to exist. It was both our co-directors, and later our consultant's opinion that the six-month period would, on the one hand, allow the potential lien claimant ample time to prosecute his claim where he desired to do so, and yet, on the other hand, would neither unnecessarily delay the administration of justice nor disadvantage an owner by keeping property subject to a lien and *lis pendens* for periods as long as two years. The present two-year limit is, however, subject to the owner having the District Registrar notify the lienholder by notice in writing that unless an action on the lien is commenced within 30 days from the date of the mailing of the notice, the lien shall cease to exist (section 23(1)). Because an action can, in this way,

be induced to start within thirty days of the mailing of the notice, we fail to grasp the rationale behind the earlier recommendation; indeed, we have not been made aware of any sound reason why this provision should now be changed and therefore make no recommendation in this regard.

4. Costs

Times change, and so do economic circumstances. As a result our co-directors and later our consultant have recommended costs no longer be limited to 25% of the amount being litigated as presently provided in sections 49 and 50 of *"The Mechanics' Liens Act"*. Instead they recommend that any order as to costs in an action under the Act should, in future, remain in the discretion of the judge trying the action. We agree with this recommendation and, in addition, with the underlying rationale, that if the present statutory bar is lifted, it would tend to have a rather salutary effect in that the registration of liens without much substance would be studiously avoided by prospective lienholders who merely wished to use *"The Mechanics' Liens Act"* as a modified instrument of blackmail. In connection with the judicial sale of property involved in a mechanics' liens action, our co-directors also recommended that a judge be entitled to award costs in connection with the sale itself. We also agree with this recommendation.

5. Assistance of Experts

Our co-directors recommended that any judge having jurisdiction to try a mechanics' lien action should also have the authority to obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person under such terms as he deems suitable to

assist him in the determination of any matter or fact in question. In such event, it was further recommended that the judge be allowed to fix the remuneration of any such person and direct payment thereof by any or all of the parties concerned. The Commission's research indicates that the origin of this suggestion is *"The Mechanics' Lien Act"* of Ontario, Saskatchewan and Newfoundland, all of which contain similar provisions in their sections 46(3), 59(1) and 46(3) respectively.

Though part of the legislation in other provinces for some time, our Commission does not agree that such provisions are appropriate matters to be dealt with under *"The Mechanics' Liens Act"*. The problems with comlexity of evidence are not, after all, limited to mechanics' lien cases. In recognition of this fact, the Rules of Court in Queen's Bench Rule 351(2) and (3) already provide that:

> 351(2) The court may obtain the assistance of merchants, accountants, actuaries, and professional or scientific persons in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any action or matter, and may act on the certificate of any such person.
>
> 351(3) The Court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

If any improvement is required in this wording we suggest that amendments be made directly to the Rule in question. We are,moreover, loath to tamper with the adversarial system of justice as we know it in matters of this nature without our first thoroughly examining the problem on a broader scale and in considerably more depth. In conclusion, we make no recommendation regarding the assistance of experts at this time.

6. Service of Documents

With regard to the service of documents, our co-directors proposed that all documents relating to an action under *"The Mechanics' Liens Act"*, other than statements of claim and notices of trial, should be sufficiently served upon their attendant recipients either personally or by certified mail service. However, in his final report, our consultant made no recommendation for change to the method of service of documents presently provided for in the legislation. As for the Commission we can suggest no sound reason why the legislation should be changed and consequently make no recommendation about this matter.

7. Payment Into Court in Lieu of Lien

Under our present system, once a mechanics' lien has been registered, the owner or other person desirous of removing it, may apply to the court for an order to establish an appropriate fund or security to be paid into court with the ultimate direction that the mechanics' lien be discharged from the land concerned (s. 25(2)). Since the registration of the lien is cancelled, it appears that the lien claimant would thereby lose any security he has in the land. Moreover, the recent Manitoba Court of Appeal decision in *Northern Electric Co. Ltd. v. Frank Warkentin Ltd.* ([1972], 27 D.L.R. (3d) 519) suggests that a claimant whose lien is discharged in this way would also be precluded from sharing in the proceeds of the sale of the land by any subsequent lienholder. Although once paid into court, the money or security so furnished constitutes the only security available to him, these funds are in addition subject and available to the claims for liens of

all persons to the same extent as if the money had been realized by the sale of the land in an action to enforce the lien. Thus, although deprived of his security in the land in return for the payment into court, a former lien-holder may nevertheless be required to share his fund with other lien claimants. While on the one hand the equities of this situation remain in doubt, on the other hand, we easily appreciate that, in order to ensure the flow of construction monies, it is desirable that the lien should disappear and that the lienholder's security should, in turn, be strictly limited to the funds paid into court. Were the lienholder not required to share his fund, problems involving prejudice to other lien claimants by the reduction in the amount of money available for distribution, would also result. The March 1979 Report of The Institute of Law Research and Reform in Alberta suggested the following solution to the problem:

> We think that the best way to resolve the problem is to give the lien claimant whose claim is discharged priority to the extent that he proves a valid claim, but to provide that the percentage holdback cannot be used to make the payment into court under section 35.

Accordingly, our consultant has recommended that in such circumstances any monies paid into court should take the place of the property charged and, in addition, be subject to the registered claims of all those who, at the time of the application, have subsisting claims for lien but that the amount which the judge finds owing to the person whose lien is vacated be a first charge upon the fund, bond or other security in priority to subsequent lienholders.

In addition to the need to establish limited priorities as between lien claimants, another matter we found lacking in section 25(2) involved what we believe is a pressing need to expedite the disposition of claims of lienholders once their liens are vacated from the title. In this regard, the Alberta Institute of Law Research and Reform has proposed that a notice similar in form to the notice now provided for under section 23(1) of the Manitoba Act, requiring an action to be commenced, be extended to apply to those persons granted security under section 25(2). We agree and accordingly recommend that section 23(1) be amended to provide that where a lien has been removed from the title and security is given or money is paid into court, the owner or other affected party may serve notice on the lien claimant requiring that an action to recover the funds be commenced within thirty days, in default of which proceedings the lien against the security will cease to exist and the money paid into court is returned to the owner.

Finally, with respect to section 25(2), we note what appears to be a deficiency in the wording of this section. The section, which authorizes a judge to order the vacation of a lien on payment into court of the amount claimed does not authorize the judge to order the vacation of the *lis pendens* which may also be filed against the title to land. We recommend that the necessary authority be extended and appropriately drafted to form part of this section.

8. Third Party Procedure

Our Working Paper expressed the view that section 57, as presently stated, appeared to make third party proceedings applicable in a mechanics' lien action in Manitoba. Since

it was our view that such proceedings *should* be applicable in these circumstances, we recommended certain remedial amendments to the section, including an express stipulation to the effect that they might be adopted and applied. On subsequent consideration we are, however, of the view that the decision of the Manitoba Court of Appeal in *Halls Associates (Western) Ltd. v. Trident Construction Ltd.* ((1968) 65 W.W.R. 415) adequately deals with this problem and in fact has removed any need for legislative solution to this question. On balance we think it best to avoid the potentially less favourable interpretation of some new amendment and, as a result, make no recommendation for change under this heading.

9. Option to Sue for Breach of Trust Provisions in Court of Queen's Bench

Earlier in this Report, under the heading Progress Payments, we emphasized that a trust action, independent of a valid mechanics' lien should not have to be brought in the County Court, which otherwise has exclusive jurisdiction over mechanics' lien actions, but, that it might also be brought in the Court of Queen's Bench when the claimant so wishes. In this regard, reference was made to page six of the 1978 submission by the Ontario Construction Industry and Allied Professions Committee on *"The Mechanics' Lien Act"* and to section 2(8) and (9) of the model legislation it suggested. In its 1973 brief, the Ontario Committee recommended that *"The Mechanics' Lien Act"* be amended to provide that a trust action should be pursued within the framework of the Act and that the general procedure contained in the Act should be followed. According to its 1978 brief, the

Ontario Committee is still of the belief that *"The Mechanics' Lien Act"* should make some provision for the procedure to enforce a trust fund claim. However, on reconsideration of the matter, the Committee thought the procedure should be permissive rather than mandatory.

As the Act presently stands there are four basic trust fund actions under the Ontario legislation, namely:

1. an action against a contractor or sub-contractor for breach of section 2(1) trusts;
2. an action against a lender of money for transmitted breach of section 2(1) and 2(3) trusts;
3. an action against an owner and a mortgagee for breach of section 2(3) trusts;
4. an action for payment of trust funds as certified and unpaid draws pursuant to section 2(3).

Generally speaking, the first two types of trust fund actions are extremely technical, time consuming and expensive and, as a rule, are appealed to the Court of Appeal or the Supreme Court of Canada. Thus, if such a trust action were required to be instituted within the framework of a mechanics' lien statement of claim, it was the opinion of the Ontario Committee that there could be substantial delays in the actual lien portion of the action. The third type of trust fund action, though similarly complicated, was described by the Ontario Committee as one which generally could be tried within the lien action since in most cases the questions of priorities between the mortgagee and the

lien claimants would in whole or in part be determined as a result of the adjudication on the trust fund issue. Similarly, the fourth type of trust fund would involve much the same determination as is necessary to establish an owner's liability to the lien claimant and therefore could also be appropriately dealt with in the mechanics' lien action. It was on the basis of this analysis that the Ontario Committee proposed that *"The Mechanics' Lien Act"* should be amended to make it permissible to include a trust fund action within the lien action, but subject to the court's overriding power to prohibit same if it would likely cause prejudice to the other lien claimants or if the trust action cannot be tried conveniently with the lien actions. We adopt these recommendations for use in Manitoba.

10. Types of Matters That May Be Heard With a Mechanics' Lien Action

Section 39 of *"The Mechanics' Liens Act"* provides as follows:

> 39(1) 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 give all necessary relief to, the persons appearing before him or upon whom the notice of trial has been served, including all questions of set-off and counter-claim arising under the building contract, or out of the work or service done or materials furnished to the land against which the claim of lien is registered.
>
> 39(2) At the trial 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.

This provision has long been assumed by many to be sufficiently broad to permit a court to hear all questions arising in a mechanics' lien proceeding so that all of its related issues might be determined at the trial of the action. However, a 1975 decision of the Manitoba County Court has determined otherwise.

In *Western Caissons (Man.) Ltd. et al v. Trident Construction Ltd., et al* ([1975], 5 W.W.R. 74) the plaintiffs brought a counterclaim against their project engineer seeking personal damages for tort. When the defendants objected that the action could not be heard at the same time as the lien action and sought dismissal, the plaintiffs replied by asserting that section 39 permitted the action to be brought and that it was its purpose to do so, and the court, in the past, had interpreted its application in this way. Counsel for the plaintiffs relied on the provision of section 37 of the Act to further reinforce their position. Since the engineer had been served with a notice of trial and since he was in addition inextricably involved with the other parties to the action, it was the plaintiff's overall view that section 39 of the Act was sufficiently broad to include the counterclaim against the engineer in the proceedings to permit the County Court both to hear the trial and to deliver judgment disposing finally and completely of the action.

Judge Hewak of the County Court of Winnipeg (as he then was) disagreed with the plaintiffs' interpretation and dismissed the action. According to the learned trial judge *Halls Associates (Western) Ltd. v. Trident Construction Ltd.* referred to earlier in this Report dealt with third party proceedings whereas the case at hand dealt with an

attempt to join a party, as a defendant in a mechanics' lien action through a counterclaim in order to obtain personal judgment against him for what amounted to an allegation of tortious conduct. He further distinguished the case on the basis that in the *Halls* case there was a contractual relationship between the parties whereas no contractual relationship existed as between plaintiffs and the engineer. In support of the position that the relationship must be contractual, the learned trial judge referred to section 43 of *"The Mechanics' Liens Act"* which he interpreted as meaning a personal judgment could only be obtained where a claim for lien fails when the plaintiff "might recover in an action in contract against the parties". The judge concluded that this statutory provision prohibited him from granting a personal judgment against the engineer unless he was satisfied that the relationship between the lien claimant and the engineer was contractual. He based this view on the authority of the Court of Appeal of Ontario decision in *Alros Products Ltd. v. Dalecore Construction Ltd.* ((1974), 2 O.R. (2d) 312) which held that under the Ontario *"Mechanics' Lien Act"* a claim for damages which is not the subject matter of a claim for lien could not result in personal judgment against the defendant. This decision was based on an interpretation of section 40 of the Ontario Act (equivalent of section 43 in Manitoba) and the case of *Northern Electric Co. v. Frank Warkentin Electric Ltd.* ((1972), 72 D.L.R. (Man. C.A.)) and in particular the judgment of Dickson J.A. (as he then was) who stated at pages 530-531 as follows:

> Section 43 of *"The Mechanics' Liens Act"* specifically restricts the power to give personal judgment where the claim for lien fails. This section at once creates and limits the right to give personal judgment to those actions which sound in contract only.

These cases were relied on by the learned trial judge to hold that since the claims against the engineer sounded in tort not contract, and in any event, were not lienable claims, these actions could not be heard as part of the mechanics' lien action.

Though the authority for the decision in *Western Caissons* appears to be well founded, the problem with this decision is that it compels a duplication of proceedings. And, though we acknowledge that substantial delay and attendant difficulties would accompany many such actions causing injustice to concerned parties, we also believe that if such cases were heard together, it might, in certain situations, give a greater opportunity for all issues to be dealt with and for speedy justice to be dispensed. In our view the appropriateness of the relief would depend on the particular circumstances of each case. Since these circumstances would have to be analyzed by the learned trial judge at the County Court level to determine whether justice could be dispatched more quickly and effectively in one court rather than two we recommend that the statute be amended to make it permissible for all actions, not just contractual actions, to be heard at the same time as the mechanics' lien action, subject however to the court's overriding power to prohibit the joining of the causes if it would likely cause prejudice to the other lien claimants or if such actions could not be tried conveniently with the lien action. This provision would be similar to that we suggest for trust actions under subheading number 9 under this part of the Report.

11. Drafting

The changes proposed to *"The Mechanics' Liens Act"* and *"The Builders and Workers Act"* in this Report are far reaching. Because of the long history of the legislation, the many court decisions interpreting it and the everyday use of the legislation by many in day-to-day business affairs, there are many ramifications to our proposed reforms. The equivalent legislation in all other Canadian jurisdictions differs in small and large ways and the courts in other provinces have often interpreted similar and sometimes even identical wording differently than Manitoba courts. For these reasons drafting of the amendments to the legislation must be done very carefully and knowledgeably. We recommend very special attention to this matter.

12. Name of Statute

In conclusion, the Commission recommends that the revised statute be named *"The Builders' Lien Act"*. We believe that this new name will more appropriately describe the content of the legislation we now propose.

SUMMARY OF RECOMMENDATIONS

For ease of reference our major recommendations may be summarized as follows:

1. A clear recommendation of repeal should not be made without extensive investigation to assess the effects of the Act, as we propose it be amended, and the consequences of its repeal. In the meantime, *"The Mechanics' Liens Act"* should be revised in such a manner that it will establish clearly and effectively the rights of all parties affected thereby. (p. 11-16)

2. The trust provisions now contained in section 3 of *"The Builders and Workers Act"* should be removed from that Act and incorporated in *"The Mechanics' Liens Act"* provided however they are augmented by adequate enforcement provisions or sanctions and more regular and diligent enforcement to ensure compliance and to deter those who might otherwise commit breaches of trust (p. 19-22)

3. Minimum accounting standards, along the lines of those now required to be kept by employers respecting their employees by *"The Employment Standards Act"* should be established and clearly enunciated in *"The Mechanics' Liens Act"* (p. 20-22)

4. Although some of its provisions should be retained and incorporated into *"The Mechanics' Liens Act"*, *"The Builders and Workers Act"* should be repealed (p.23)

5. The right of a builder or contractor to register a building contract under *"The Builders and Workers Act"* to establish a lien upon land upon which the contract is being executed without regard to time should neither be retained nor incorporated into *"The Mechanics' Liens Act"* (p. 23-25)

6. *"The Mechanics' Liens Act"* should be amended to ensure that beneficiaries of a trust can make claims against trust monies whether or not they have registered or have the right to register a lien. A summary procedure by way of obtaining a declaration in this regard is also recommended. (p. 26-27)

7. While the right of the worker to claim a lien against the owner of land should be eliminated in *"The Builders and Workers Act"*, it should be preserved and incorporated into *"The Mechanics' Liens Act"*. (p. 27-29)

8. (a) The matters concerning non-payment of wages presently dealt with in *"The Construction Industry Wages Act"* should, in future, be dealt with in amendments to *"The Payment of Wages Act"*.

   (b) Priority of mechanics' lien wage claims vis-à-vis other mechanics' lien claims should be clearly spelled out in amendments to *"The Payment of Wages Act"*. Employees' mechanics' lien claims, above all, should be given a preferred position over other mechanics' liens claimants.

   (c) *"The Payment of Wages Act"* should be made totally consistent with the tone, content and objective of the revised *"Mechanics' Liens Act"* we propose. For example, a registration requirement and a strict time limit for the filing of such liens is desirable and necessary in order for the objectives of our proposed amendments to be achieved.

   (d) The amendments to *"The Payment of Wages Act"* should refer to *"The Mechanics' Liens Act"* (which we recommend should contain the trust provisions and right to recover as against the owner) and should deal with the method of obtaining security and its extent; the method of recovery and priority and time limits (all of which should be tied, by reference, to *"The Mechanics' Liens Act"*). This may be accomplished simply by providing in *"The Payment of Wages Act"* that, in the case of an employee claiming wages for work done to improvements on land, the employee would have the right to claim a lien on the land pursuant to *"The Mechanics' Liens Act"* (p. 29-34)

9. The trust provisions to be included in the revised *"Mechanics' Liens Act"* should also be binding on the Crown (p. 34)

10. (a) Amendments to *"The Mechanics' Liens Act"* should ensure that the occurrence of the creation of the trust under that Act is not limited to cases where contract monies are received by the contractor, etc. In certain specified cases the trust should also be imposed upon monies in the hands of an owner. In this regard we recommend the adoption of Ontario sections 2(3) and 2(4) of *"The Mechanics' Lien Act"*.

(b) The Act should also ensure that trust monies whether in the hands of the owner, contractor or sub-contractor, are not subject to garnishment proceedings (p. 34-37).

11. (a) Amendments to *"The Mechanics' Liens Act"* should ensure that, despite his position as trustee of the funds, an owner, contractor or sub-contractor should be entitled to retain amounts due to him as payment for work done or materials supplied by him out of the funds he receives in respect of a contract but only after all beneficiaries entitled directly under him are paid.

    (b) Where money is lent to a person upon whom a trust is imposed and is used by him to pay,in whole or in part, for any work done, or any materials placed or furnished, or for any rented equipment, the amendments to *"The Mechanics' Liens Act"* should provide that the trust monies may be applied to discharge the loan to the extent that the lender's money was used by the trustee. Any sum so applied should be deemed not to be an appropriation or conversion to the trustee's own use or to any other use not authorized by the trust (p. 37-39)

12. Amendments to *"The Mechanics' Liens Act"* should specifically provide that, once a trustee pays a beneficiary his contractual entitlement out of contract monies that have become available in a particular job, the payer's duties as trustee vis-à-vis that particular beneficiary should, from that point in time, be *pro tanto* discharged (p. 39)

13. A similar but extended provision to that of section 13 of the present *"Builders and Workers Act"* should be incorporated in the revised *"Mechanics' Liens Act"* to ensure that no assignment by a contractor or sub-contractor of any monies due in respect of a contract is valid against any trust created by the Act (p.40)

14. The trust section of the revised *"Mechanics' Liens Act"* should be drafted to preserve the interpretation that contractors and sub-contractors are trustees only for people with whom they contract in any way and the Workers Compensation Board (p.40-41)

15. The period of limitation for asserting claims to trust monies should be six months from the date

that the person becomes aware of the breach of trust. The concept of implied or constructive notice should continue to operate in these circumstances (p. 41-43)

16. (a) In drafting amendments to *"The Mechanics' Liens Act"* the present penalties for breach of trust should be substantially increased and the increased fine and term of imprisonment should also be extended to officers and directors of a corporation. In particular we recommend adoption of the $50,000 and two year figures.

(b) We also strongly recommend that the Attorney-General, in future, more diligently prosecute offenders under this Part (p. 43-45)

17. (a) The holdback provisions of *"The Mechanics' Liens Act"* should be amended and set at a fixed amount of seven and one-half percent of the contract price, or, where there is no contract price, at seven and one-half percent of the value of the work and materials in place.

(b) Section 9(6) should also be amended to ensure that only the actual registration of a mechanics' lien in the appropriate land titles office before payment of up to 92 1/2 percent of the holdback will prevent the discharge *pro tanto* of the lien created by *"The Mechanics' Liens Act"*.

(c) Finally, the holdback system proposed by the Ontario Construction Industry and Allied Professions Committee should be adopted for use in Manitoba. *"The Mechanics' Liens Act"* should therefore be amended to provide that:

(i) In all cases where the contract price between the owner and the contractor is for a sum in excess of $150,000 the sum that the owner is required to retain from a contractor shall be paid into an interest bearing account of a chartered bank, trust company or credit union in the joint names of the owner and the contractor. The payments into the joint account are to be made at those times when the owner is obliged to pay the contractor on account of progress draws.

(ii) In all cases where the contract price between the owner and the contractor is for a

sum of $150,000 or less, a Judge or Officer having jurisdiction to try an action under the Act, may, upon the application of either the contractor or persons whose rights to a lien are derivative from the contractor, order the sum which the owner is required to retain from the contractor be paid into an interest bearing account of a chartered bank, trust company or credit union, in the joint names of the owner and the contractor at those times when the owner pays to the contractor on account of progress draws.

(iii) The lien is to be a charge upon the holdback directed to be retained and upon all sums deposited by an owner into an account of a chartered bank, trust company or credit union in favour of lien claimants whose liens are derived under persons to whom the monies so required to be retained are respectively payable.

(iv) Any persons whose rights to a lien are derivative from a contractor to whom an owner is primarily liable upon a contract under or by virtue of which a lien may arise, may in writing at any time demand of the owner or contractor the following, namely:

(a) The production for inspection of the contract or agreement between the owner and the contractor for or in respect of which that person was or is to perform work if the contract is in writing, or if not in writing, the terms of the contract or agreement;

(b) The state of accounts between the owner and the contractor;

(c) The whereabouts of the said account and its designated number;

(d) A statement as to the particulars of the said account, including payments made into the account, disbursements from the account, the accrued interest and the present balance.

(v) The sums paid into an interest-bearing account, together with the interest accrued thereon, shall be paid out of the said account on a *pro rata* basis, in the same manner as payment of the holdback.

(vi) Where an owner fails to pay into an interest-bearing account of a chartered bank, trust company or credit union in the joint names of the owner and the contractor contrary to 1 above, or an order made pursuant to (ii) above, a Judge or Officer having jurisdiction to try an action under the Act, upon application, shall make an order that the owner pay into the said account the sum that the owner at the time of the application is required to retain from a contractor. (p. 46-59)

18. (a) The term "completion of a contract" should be defined in amendments to *"The Mechanics' Liens Act"* as "substantial performance not necessarily total performance of the contract" to incorporate the substantial completion concept into the Act.

(b) Amendments to *"The Mechanics' Liens Act"* should also include a provision to the effect that a contract shall be deemed to be substantially performed, ie. completed,

(i) when the work or substantial part thereof is ready for use or is being used for the purpose intended; and

(ii) when the work to be done under the contract is capable of completion or correction at a cost of not more than, (A) three percent of the first $250,000 of the contract price; and (B) two percent of the next $250,000 of the contract price; and (C) one percent of the balance of the contract price.

(c) It is also recommended that where the work or a substantial part thereof is ready for use or is being used for the purposes intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, *"The Mechanics' Liens Act"* should provide that the value of the work to be completed shall be deducted from the contract price in determining substantial completion.

(d) In drafting these amendments to *"The Mechanics' Liens Act"* careful attention should be paid to ensure that the concept of substantial completion is adopted both with respect to the general contract and to all related sub-contracts.

(e) Finally, the recommendations of the Ontario Construction Industry and Allied Professions Committee as they relate to the substantial completion concept and sub-contracts should be adopted for use in Manitoba. *"The Mechanics' Liens Act"* should therefore be amended to provide that

(i) there be established a specific date of "substantial completion" for all purposes under the Act;

(ii) the Notice of Substantial Completion be a form prescribed under the Act which gives basic information concerning the project;

(iii) the lien rights commence to run from the date the Notice is "given", rather than from the date of its registration;

(iv) the day and manner in which the notice is given be fixed;

(v) persons who do work may by written demand personally served be entitled to receive a copy of such notice before the date their liens will expire in respect of all projects except where the project is undertaken by a "homeowner" for improvement to his or her land or house to a value not in excess of $30,000;

(vi) holdback be released to totally completed sub-contractors prior to substantial completion whether or not it is an "architect supervised project"; and

(vii) all persons and not just the owner be required to retain holdback for the work remaining after substantial completion. (p. 59-67)

19. (a) Where a contract (or any of its related sub-contracts) is under the supervision of an architect, engineer or other agreed upon person, amendments to *"The Mechanics' Liens Act"* should provide for the issuance of a certificate by the architect, engineer or said other person once there is "completion of a contract". Where the architect, engineer or said other person neglects or refuses to issue and deliver such certificate, the Act should also provide for the application to a judge, having jurisdiction to try an action under the Act, to order

that the work or materials to which the architect's, engineer's or other agreed-upon person's certificate would have related has been done, have been placed or furnished, as the case may be.

(b) Where either a contract(or any of its related sub-contracts) is not under the supervision of an architect, engineer or other agreed-upon person, the court should be empowered to make an order respecting substantial completion. In this regard we particularly recommend the adoption of section 16(8) of the draft Alberta *"Builders Lien Amendment Act"* which was recommended by the Alberta Institute of Law Research and Reform to facilitate progressive release of holdback where a contract is neither under the supervision of an architect, engineer nor other agreed upon person. (p. 67-69)

20. *"The Mechanics' Liens Act"* should be amended to provide that a person who rents out equipment to an owner, contractor or sub-contractor for use on a contract site shall be deemed for the purposes of the Act to have performed a service for which he has a lien for the price of the rental of the equipment used on the contract site, limited however in amount to the sum justly owed and due to the person entitled to the lien from the owner, builder, contractor or sub-contractor in respect of the rental of the equipment. (p. 70-74)

21. (a) Subject to the usual restrictions and limitations, the provisions of *"The Mechanics' Liens Act"* should be amended to ensure that architects and engineers will be included within the range of persons able to claim a lien, and, in addition, the definition of the services for which they are entitled to claim should in future include all work done in connection with an improvement of land, without reference to the distinction between planning and supervisory services and to whether or not the work was done at the actual physical location of the improvement; provided however that the intended construction or improvement proceeds.

(b) With respect to the time limited for the filing of such liens, we recommend adoption of a provision similar to section 28(1) and section 28(2) of British Columbia Bill 42, "The Builders Lien Act" to provide that where an owner engages a head contractor, a lien may be filed within 40 days after the contract of the head contractor has been completed, abandoned or otherwise determined and where the owner does not engage a head contractor that the lien be filed not later than 40 days after the improvement has been completed or abandoned.

(c) As to the amount of the claim that might be recovered under the Act by architects and engineers, we recommend that this be limited *pro rata* to the extent of the work done on a project. This claim should be founded in *quantum meruit* and should also encompass the relationship of work done on the property or improvement to the total cost of construction. Provision for application to the court to determine the sum should also be made in *"The Mechanics' Liens Act"*. (p. 76-78)

22. (a) With respect to the right of a contractor to claim leasehold improvements against the freehold, *"The Mechanics' Liens Act"* should be amended to provide that where the estate or interest upon which the lien attaches is leasehold, the owner of the fee simple or other estate or interest will also be subject to the lien where such owner is the landlord under the Act and consents to the construction of the structure which is for his direct benefit and also where the lessee is required by his lease, or other agreement, to construct the structure.

    (b) With respect to the right of a lien claimant to lien against leasehold interests, *"The Mechanics' Liens Act"* should be amended to provide that no forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, will deprive any person otherwise entitled to a lien or the benefit of a lien, but the person entitled to the lien may pay any rent accruing after he becomes so entitled and the amounts so paid may be added to his claim, provided however that the claim for any amount of rent paid will be limited to the tenant's estate in the leasehold. (p. 78-84)

23. Waivers of lien should no longer be legal. They should be deemed to be null and void and contrary to public policy. (p. 85-86)

24. (a) The time limited for registration of a lien under *"The Mechanics' Liens Act"* should be extended to 40 days from the present 30 days.

    (b) *"The Mechanics' Liens Act"* should be further amended to provide that informal notice, other than for information purposes only, and except in the case of public works, has no legal effect and the registration shall be the only method of notice available to effect the distribution of funds otherwise to be made in accordance with the provisions of the Act.

    (c) Finally, amendments to *"The Mechanics' Liens Act"*

should ensure that the present provisions of section 21 are enlarged and extended to apply not only to claims for liens by contractors, sub-contractors and material men but to all lien claimants in Manitoba. (p. 85-92)

25. (a) Section 27(1) of *"The Mechanics' Liens Act"* should be amended and its present provisions extended to allow any person who may become liable for payment arising out of a lien claim to demand any relevant information from the lienholder. Where the lienholder neglects or refuses to provide the necessary details or states them falsely, the lienholder should also be liable for any damages suffered by the owner, etc., and in that case, his lien should be limited by the information actually furnished.

    (b) Section 27 should be further extended to allow a lienholder or person entitled to a lien not only to demand of the owner or his agent the terms of any contract or agreement with the contractor, but also to allow him to obtain the terms of any agreement for sale or mortgage from an unpaid vendor or mortgagee. Where such information is not forthcoming, it should also extend liability for any loss suffered by the lienholder to the person refusing or neglecting to provide the information or to provide it correctly.

    (c) Section 27(2) of *"The Mechanics' Liens Act"* should be amended in accordance with the above stated recommendations. (p. 92-93)

26. *"The Mechanics' Liens Act"* should be amended to provide for the appointment by a judge having jurisdiction under the Act of receivers and trustees of properties which are at the same time affected by the registration of mechanics' liens. In this regard we particularly recommend adoption of Ontari section 34 of *"The Mechanics' Lien Act"* (p. 93-94)

27. With respect to lands or interests or estates in land of the Crown in the Right of the Province of Manitoba, *"The Mechanics' Liens Act"* should provide that although the lands in question cannot be sold as a condition subsequent to a successful lien action, a money judgment may nevertheless be obtained as against Her Majesty the Queen in Right of the Province or any other provincial Crown agency. (p. 94-99)

28. (a) *"The Mechanics' Liens Act"* should be amended to ensure that a lien will take priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises and, over all payments or advances made on account of any conveyance or mortgage after registration of a claim for lien. In the absence of registration

of a lien claim, the Act should provide that only payments or advances made on account of a conveyance or mortgage will have priority over the lien.

(b) An exception to this proposed amendment should be made in order to grant priority over liens for payment to be made on public works prior to any notice in writing of any claim for lien where the lien or claim for lien is against a public work. (p. 99-101)

29. Section 11(1) of *"The Mechanics' Liens Act"* should be amended to ensure that only the actual registration of a mechanics' lien in the appropriate Land Titles Office will, in future, be capable of fulfilling the notice requirement under section 17 of *"The Mortgage Act"*. (p.101)

30. The amount for which a mechanics' lien might be registered should be established at a minimum of $300. (p. 102-104)

31. Section 5(3) and section 11(1) of *"The Mechanics' Liens Act"* should be amended to ensure that, in the absence of registration of a lien claim, an existing registered mortgage will have priority over any subsequent registered lien, not merely to the extent of the actual value of the land at the time the improvements are commenced, but also with respect to future advances made under that mortgage. In drafting these amendments, care should be taken to ensure that only actual registration of both liens and mortgages is capable of providing the security and/or priority outlined above. (p. 106-107)

32. Written notice to the owner of land should be required to be given by the District Registrar immediately following registration of a mechanics' lien against the land in question. The appropriate procedure outlined in *"The Real Property Act"* for notice to the caveatee upon the filing of a caveat should be noted in this regard. (p.107-108)

33. Sections 49 and 50 of *"The Mechanics' Liens Act"* should be amended to provide that the costs in an action shall be determined, apportioned and borne as the judge may direct. In the case of a judicial sale of property in a mechanics' lien action, a further provision should be included in the Act to permit the additional award of costs in connection with this sale. (p. 109)

34. (a) Section 25(2) of *"The Mechanics' Liens Act"* should be amended to provide that monies paid into court in lieu of the amount of a claim should, in addition to taking the place of the property charged, be subject

to the registered claims of all lienholders but that the amount which is found owing to the person whose lien is vacated be a first charge on the fund etc. in priority to subsequent lienholders.

(b) Section 23(1) of *"The Mechanics' Liens Act"* should also be amended to provide that where a lien has been removed from the title and security is given or money is paid into court, the owner of the land in question (or other affected party) may serve notice on the lien claimant requiring that an action to recover the funds be commenced within thirty days, in default of which proceedings the lien against the security will cease to exist.

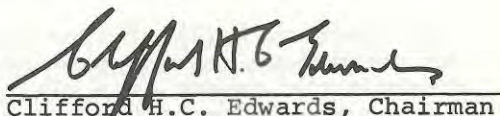
(c) Finally, section 25(2) of *"The Mechanics' Liens Act"* should be further amended to provide both for the vacation or registration of liens and *lis pendens*, if any, filed against the land. (p. 111-113)

35. *"The Mechanics' Liens Act"* should be amended to make it permissible to include a trust fund action within a lien action, but subject to the court's overriding power to prohibit same if it would likely cause prejudice to the other lien claimants or if the trust action cannot be tried conveniently with the lien action. (p. 114-116)

36. *"The Mechanics' Liens Act"* should be amended to make it permissible for all actions, not just contractual actions, to be heard at the same time as a mechanics' lien action, subject however to the court's overriding power to prohibit the joining of the causes if it would likely cause prejudice to the other lien claimants or, if such actions could not be tried conveniently with the lien action. (p. 116-119)

37. The revised *"Mechanics' Liens Act"* should be renamed and entitled *"The Builders Lien Act"*. (p. 120)

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"* dated this 13th day of August 1979.



Clifford H.C. Edwards, Chairman

R.G. Smethurst, Commissioner

Val Werier, Commissioner

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Evan H.L. Littler, Commissioner

APPENDIX A

LIST OF AMENDMENTS TO *"THE MECHANICS' LIENS ACT"* SINCE 1873

(1873) 36 Vict. c. 31 An Act to establish Liens in favor of Mechanics, Machinists, and Others (assented to 8th March 1873)

(1875) 38 Vict. c. 43 An Act to amend cap. 31 of the Statutes of Manitoba, entitled: An Act to establish Liens in favour of Mechanics, Machinists and others (assented to 14th May 1875)

(1876) 39 Vict. c. 22 An Act to amend the Act of 1873, to establish liens in favour of mechanics, machinists and others (assented to 4th February 1876)

(1877) 40 Vict. c. 27 An Act to amend the Mechanics' Lien Act of 1877 (assented to 28th February 1877)

(1878) 41 Vict. c. 27 An Act to amend the Mechanics' Lien Act of 1877 (assented to 2nd February 1878)

(1880-81) Consolidated Statutes of Manitoba, c. 53.

(1883) 46 & 47 Vict. c. 32 An Act to amend the law relating to Mechanics' Liens (assented to 7th July 1883)

(1884) 47 Vict. c. 14 An Act respecting The Mechanics' Lien Act and amendments thereto (assented to 29th April 1884)

(1888) 51 Vict. c. 29 s. 5 An Act to amend certain Acts to provide for certain matters (assented to May 18th, 1888)

(1891) Revised Statutes of Manitoba, 1891, Vol 2, c. 97. An Act Respecting Mechanics' Liens.

(1895) 58 & 59 Vict. c. 28, An Act to amend The Mechanics' Lien Act and to make further provision respecting the liens of Mechanics and Laborers (assented to 28th June 1895)

(1896) 59 Vict. c. 13 An Act to amend The Mechanics' Lien Amendment Act (assented to 19th March 1896)

(1898) 61 Vict. c. 29 An Act Respecting Liens of Mechanics, Wage Earners and Others (assented to 27th April 1898) ie. The Mechanics' and Wage Earners' Lien Act, 1898.

(1902) Revised Statutes of Manitoba 1902 Vol. 2, c. 110 An Act Respecting Liens of Mechanics', Wage Earners and others.

(1908) 7 & 8 Ed. VII c. 28 An Act to amend The Mechanics and Wage Earners' Lien Act (assented to 26th February 1908)

(1913) 3 Geo. V c. 32 An Act to amend The Mechanics' and Wage E rners' Lien Act (assented to 15th February 1913)

(1913) Revised Statutes of Manitoba 1913, c. 125 An Act Respecting Liens of Mechanics, Wage Earners and Others.

(1914) 4 Geo. V. c. 60 An Act to amend "The Mechanics' and Wage Earners' Lien Act" (assented to 2nd February 1914)

(1923) 13 Geo. V. c. 29 An Act to amend The Mechanics' and Wage Earners' Lien Act (assented to 12th April 1923)

(1923) 13 Geo. V. c. 30 An Act to Amend the Mechanics' and Wage Earners' Lien Act (assented to 27th April 1923)

(1925) Consolidated Statutes of Manitoba c. 125 An Act to Amend "The Mechanics' and Wage Earners' Lien Act.

(1926) 16 Geo. c. 30 An Act to amend the Mechanics' and Wage Earners' Lien Act (assented to 31st March, 1926)

(1940) Revised Statutes of Manitoba 1940 c. 129 An Act Respecting Liens of Mechanics and Others.

(1943) 1943 c. 31, An Act to amend The Mechanics' Lien Act (assented to 17th March 1943)

(1950) 1950 (1st) c. 35, An Act to Amend the Mechanics' Lien Act (assented to 22 April, 1950)

(1951) 1951 c. 37, An Act to amend the Mechanics' Lien Act (assented to 30th March 1951)

(1954) Revised Statutes of Manitoba 1954 c. 157 An Act respecting liens of mechanics' and others.

(1958) 1958 c. 39, An Act to amend the Mechanics' Liens Act (assented to 28th March 1958)

(1960) 1960 c. 39 An Act to amend The Mechanics' Liens Act (assented to 26th March 1960)

(1961) 1961 c. 53, s. 23 An Act to Amend Certain provisions of Statute Law (1) (assented to 15th April 1961)

(1962) 1962 c. 66 s. 14 An Act to amend certain provisions of the Statute Law and to correct certain typographical errors in the Statutes (assented to May 1, 1962)

(1963) 1963 c. 77, s. 5 Bill No. 130 An Act to amend Certain Provisions of the statute Law and to correct certain typographical errors in the Statutes (assented to 6th May 1963)

(1970) Revised Statutes of Manitoba 1970 c. M80.

APPENDIX B

EXCERPTS OF LETTERS RECEIVED RE REGISTRATION OF LIEN RIGHTS UNDER *"THE PAYMENT OF WAGES ACT"*

. . . We are concerned about the Employee's Lien under Section 7 of The Payment of Wages Act. . . particularly with what appears to be a lack of registration requirements as would provide some protection to a prospective purchaser or Mortgagee, similar perhaps to the registration requirements of a Mechanics Lien.

We expect that most Mortgage Lenders are not yet aware of Section 7 or, if they are, do not realize that the Employee's Lien thereunder has an absolute priority overall mortgages regardless of when the Lien arises. . . .

. . . Over the last several months, [we] have been encountering problems relating to unclear title and priority positions as a result of The Payment of Wages Act. We believe that the form of the present . . . is ill conceived even for its own purposes. Section 7 creates a danger to the systems of registration both for real property and personal property. . . .

[We] can understand the concept behind the original legislation relating to payment of wages. As enacted in 1970 it provided for assistance to employees to collect wages from employers who had failed or neglected to make payment. The Act at that time appeared well constructed and provided for a vehicle through county court enforcement which would allow The Department of Labour to intercede and enforce payment on behalf of the employee. This . . . did not affect the rights of other parties, not involved in the labour relationship.

Then in 1975 and . . . in 1977 and 1978 drastic amendments were made to the legislation which result in an undermining of the entire registration system for both personal property and real property. These amendments place . . . the director of the employment standards division of the Department of Labour in a position to take action without concerns for the rights of other parties not involved in the labour relationship. The amendments also create numerous conflicts with other legislation and in particular the Real Property Act and the newly in force Personal Property Security Act. These conflicts are not alleviated but rather high-lighted by such clauses as section 68(3) of The Personal Property Act - "where there is a conflict between the provision of this Act and the provision of any general or special Act other than the Consumer Protection Act or the Farm Machinery and Equipment Act,

the provision of this Act prevails" and section 24 of The Payment of Wages Act "where there is conflict between the provisions of this Act and those of any other Acts of the legislature, the provisions of this Act prevail". . . . [D]oes The Payment of Wages Act prevail over Section 57(1) of The Real Property Act which provides specifically those rights to which a Certificate of Title shall by implication be subject?

. . . [O]ur concern in this representation is to bring this matter to your attention and indicate that in our opinion there is some urgency for an immediate correction of the present state of this legislation. We would strongly recommend that consideration be given to the immediate repeal of several sections of the Payment of Wages Act including in particular Sections 3(4),5, Section 6, Section 7 and Section 24.

. . .

APPENDIX C

"THE MECHANICS' LIEN ACT" OF ONTARIO

SECTION 28

Production of contract or agreement

28.—(1) Any lien claimant may in writing at any time demand of the owner or his agent the production, for inspection, of the contract or agreement with the contractor for or in respect of which the work was or is to be done or the materials were or are to be placed or furnished, if the contract or agreement is in writing or, if not in writing, the terms of the contract or agreement and the state of the accounts between the owner and the contractor, and, if the owner or his agent does not, at the time of the demand or within a reasonable time thereafter, produce the contract or agreement if in writing or, if not in writing, does not inform the person making the demand of the terms of the contract or agreement and the amount due and unpaid upon the contract or agreement or if he knowingly falsely states the terms of the contract or agreement or the amount due or unpaid thereon and if the person claiming the lien sustains loss by reason of the refusal or neglect or false statement, the owner is liable to him for the amount of the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 4 of section 38 applies.

Statement of mortgagee or unpaid vendor

(2) Any lien claimant may in writing at any time demand of a mortgagee or unpaid vendor or his agent the terms of any mortgage on the land or of any agreement for the purchase of the land in respect of which the work was or is to be done or the materials were or are to be placed or furnished and a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be, and, if the mortgagee or vendor or his agent fails to inform the lien claimant at the time of the demand or within a reasonable time thereafter of the terms of the mortgage or agreement and the amount advanced or owing thereon or if he knowingly falsely states the terms of the mortgage or agreement and the amount owing thereon and the lien claimant sustains loss by the refusal or neglect or misstatement, the mortgagee or vendor is liable to him for the amount of the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 4 of section 38 applies.

Production of contract or agreement

(3) The judge or, in the Judicial District of York, the master, may, on a summary application at any time before or after an action is commenced for the enforcement of the claim for lien, make an order requiring the owner or his agent or the mortgagee or his agent or the unpaid vendor or his agent or the contractor or his agent or the subcontractor or his agent, as the case may be, to produce and permit any lien claimant to inspect any such contract or agreement or mortgage or agreement for sale or the accounts or any other relevant document upon such terms as to costs as the judge or master considers just.

APPENDIX D

"THE MECHANICS' LIEN ACT" OF ONTARIO

SECTION 34

Power to appoint a receiver of rents and profits

34.—(1) At any time after the delivery of the statement of claim, the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, may, on the application of any lien claimant, mortgagee or other person interested, appoint a receiver of the rents and profits of the property against which the claim for lien is registered upon such terms and upon the giving of such security or without security as the judge considers just.

Power to direct sale and appoint trustee

(2) Any lien claimant, mortgagee or other person interested may make an application to the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, at any time before or after judgment, who may hear *viva voce* or affidavit evidence or both and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee or trustees as the result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of appointment.

Property offered for sale

(3) Any property directed to be sold under subsection 2 may be offered for sale subject to any mortgage or other charge or encumbrance if the judge so directs.

Proceeds to be paid into court

(4) The proceeds of any sale made by a trustee or trustees under subsection 2 shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, in so far as applicable, section 39 applies.

Orders for completion of sale

(5) The judge shall make all necessary orders for the completion of any mortgage, lease or sale authorized to be made under subsection 2.

Vesting of title

(6) Any vesting order made of property sold by a trustee or trustees appointed under subsection 2 vests the title of the property free from all claims for liens, encumbrances and interests of any kind including dower, except in cases where sale is made subject to any mortgage, charge, encumbrance or interest as hereinbefore provided, but nothing in this section or elsewhere in this Act shall be deemed to extinguish the right to dower, if any, of any married woman or the right to have the value of her dower ascertained and deducted from the proceeds of the sale so paid into court.