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A L B E R T A

PUBLIC INQUIRY UNDER THE PUBLIC INQUIRIES ACT

Chapter 258, R.S.A. 1955

into

The Adequacy of the Provisions

of

THE MECHANICS LIEN ACT, 1960,

Chapter 64, of the Statutes of Alberta, 1960,  
as amended

R E P O R T

of

THE COMMISSIONER

His Honour Chief Judge Nelles V. Buchanan (Retired)

James E. Redmond, Esq.  
of Counsel

November, 1967.

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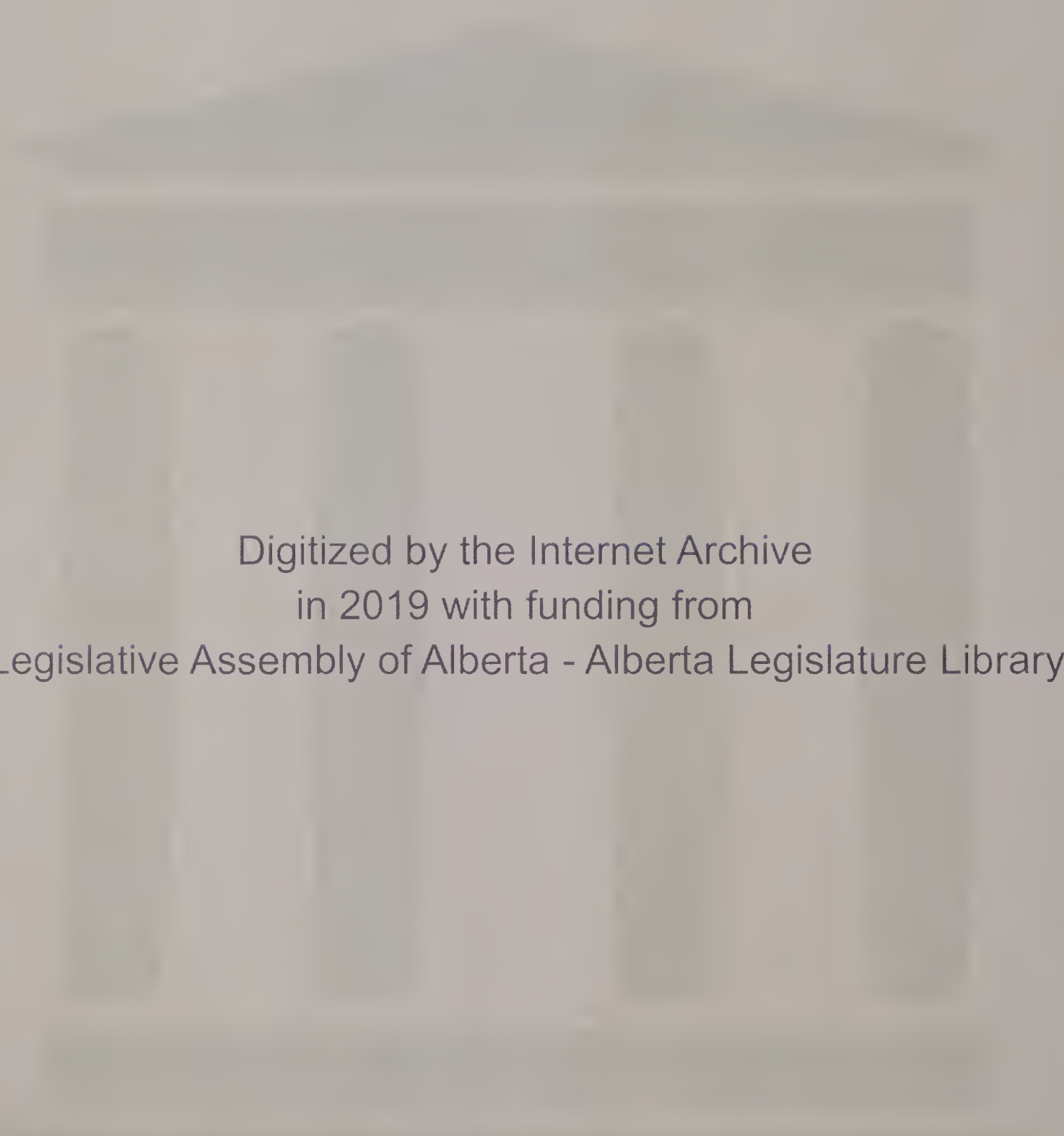
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TO HIS HONOUR,

THE LIEUTENANT GOVERNOR IN COUNCIL:

May it please Your Honour,

I, the undersigned, Nelles V. Buchanan, Retired Chief Judge of the District Court of the District of Northern Alberta, appointed Commissioner by Order-in-Council O.C. 1952/66, in conformity with The Inquiries Act:

- (a) To consider and report whether or not the Alberta Mechanics Lien Act should provide that all sums of money received by a builder or contractor, or subcontractor, on account of the contract price should constitute a trust fund in the hands of the builder or contractor, or the subcontractor, as the case may be, for the benefit of all persons who supplied material and all workmen for work done or material supplied on the contract,
- (b) To consider and report whether or not the time fixed for the registration of a lien should be extended,
- (c) To consider and report whether any further amendments should be made and if so, what amendments should be made to the said Act so that it may more effectively serve and protect the interests of those whose interests the said Act is intended to serve or protect.

Beg to submit to Your Honour

The following Report





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I

INTERPRETATION

I N T E R P R E T A T I O N

In this Report the words in Column 1, when used, have the meanings stated in Column 2.

| <u>Column 1</u>        | <u>Column 2</u>   |
|------------------------|---|
| Act .....              | The Mechanics' Lien Act, 1960, being Chapter 64, of the Statutes of Alberta, 1960, as amended to date.                              |
| Act of 1906 .....      | The Mechanics' Lien Act, being Chapter 21, of the Statutes of Alberta, 1906, prior to any amendments thereto.                       |
| Act of 1942 .....      | The Mechanics' Lien Act, being Chapter 236 of the Revised Statutes of Alberta, 1942, prior to any amendments thereto.               |
| Act of 1955 .....      | The Mechanics' Lien Act, being Chapter 197 of the Revised Statutes of Alberta, 1955, prior to any amendments thereto.               |
| B.C. Act .....         | The Mechanics' Lien Act of the Province of British Columbia being Chapter 238, of the Revised Statutes of British Columbia, 1960.   |
| Manitoba Act .....     | The Mechanics' Lien Act of the Province of Manitoba being Chapter 157 of the Revised Statutes of Manitoba, 1954 as amended to date. |
| Man. B. and W. Act ... | The Builders and Workmen Act of the Province of Manitoba being Chapter 28 of the Revised Statutes of Manitoba, 1954.                |

Column 1

Column 2

|                               |   |
|-------------------------------|---|
| New Brunswick Act . . . . .   | The Mechanics' Lien Act of the Province of New Brunswick being Chapter 142, of the Revised Statutes of New Brunswick, 1952, as amended to date.   |
| Newfoundland Act . . . . .    | The Mechanics' Lien Act of the Province of Newfoundland, being Chapter 263 of the Revised Statutes of Newfoundland, 1952, as amended to date.   |
| Nova Scotia Act . . . . .     | The Mechanics' Lien Act of the Province of Nova Scotia, being Chapter 171, of the Revised Statutes of Nova Scotia, 1954.  |
| O/C . . . . .                 | Order-in-Council O.C. 1952/66, establishing this Inquiry.   |
| O.L.R.C. . . . .              | Ontario Law Reform Commission.  |
| O.L.R.C., Report I . . . . .  | The Report of the Ontario Law Reform Commission in respect of the Mechanics' Lien Act of the Province of Ontario, being Chapter 233, of the Revised Statutes of Ontario, 1960, dated February 22, 1966. |
| O.L.R.C., Report II . . . . . | Report of the Ontario Law Reform Commission in respect of the Mechanics' Lien Act of Ontario, dated May 26, 1967.   |
| Ontario Act . . . . .         | The Mechanics' Lien Act of the Province of Ontario, being Chapter 233 of the Revised Statutes of Ontario, 1960.   |
| Ontario Draft Bill 1966       | Draft Bill 0026, 4th Session, 27th Legislature, Ontario, 14-15 Elizabeth II, 1966, based on the First Report of Ontario Law Reform Commission.  |

Column 1

Column 2

P.E.I. Act .....

The Mechanics' Lien Act of the Province of Prince Edward Island, being Chapter 93, of the Revised Statutes of the Province of Prince Edward Island, 1951, as amended to date.

Saskatchewan Act .....

The Mechanics' Lien Act of the Province of Saskatchewan, being Chapter 277 of the Revised Statutes of Saskatchewan 1965.

Thomson Report .....

Report dated May 1st, 1963, of the Honourable Harold Francis Thomson, Q.C., appointed as Commissioner under The Public Inquiries Act, Chapter 15 of the Revised Statutes of Saskatchewan 1953, to make inquiries and investigations in respect of The Mechanics' Lien Act of the Province of Saskatchewan, then Chapter 249, Revised Statutes of Saskatchewan, 1953, as amended.

Thomson Revision .....

A Revision of The Mechanics' Lien Act of the Province of Saskatchewan appended to the Thomson Report.

PROCEEDINGS

P R O C E E D I N G S

Following the promulgation of the Order-in-Council on October 18, 1966, Mr. James E. Redmond, Barrister and Solicitor of Edmonton, was appointed as Commission Counsel.

To ensure that those interested in the Inquiry would have appropriate warning of the contents of the O/C appointing the Commissioner, the scope of the Inquiry, the desire that briefs and submissions be filed and the intention of holding public hearings, a Notice, a copy of which appears as Appendix A, was published in the newspapers as shown in Appendix B.

The submissions received are listed in Appendix C. Following their receipt, dates were set for public hearings in Edmonton, March 1 and 2, 1967, and in Calgary, March 15 and 16, 1967. Those filing submissions were advised by letter of the hours at which they would be heard and Notices as to the Hearings in both cities were published in Edmonton and Calgary newspapers, Appendices D and E. Persons listed in Appendix F made oral presentations at the Edmonton and Calgary hearings.

The first task assigned by the O/C to the Commissioner -- and presumably the most important -- was to consider and report as to whether there should be

introduced into the Alberta Act what is popularly described as "the trust clause" which already appears in substantially the same form as recited in paragraph (a) of the Order-in-Council, in the Mechanics' Lien Acts of Ontario, New Brunswick and British Columbia, and in the Builders and Workmen Act of the Province of Manitoba.

It became apparent in the course of the public hearings that inasmuch as those presenting briefs or oral argument, whether lawyers or laymen, lacked personal experience as to the effects, good or bad, of the introduction of the trust clause into the Acts of the four Provinces named, the Commissioner and his Counsel must seek information in those Provinces. This was done. In Toronto, April 24-27, in Vancouver, July 19-21 and in Winnipeg, August 16-18, of 1967, the opinions and views of those thought to be best informed in respect of the operation of their Mechanics' Lien Acts, and most importantly of the trust clause therein, were sought. Without exception, the greatest courtesy and helpfulness were shown us by all those whose assistance we enlisted. To the members of the O.L.R.C. and in particular to its Chairman, H. Allan Leal, Q.C., LL.M. LL.D. we are greatly indebted. Happily for us, that Commission was also occupied at the time of our visit with proposals for the amendment of the Ontario Act and made available to us its wealth of materials

including its Reports dealing with those proposals. These will be referred to frequently throughout this Report.

Other than Ontario, only the Province of Saskatchewan has held, since 1960, an Inquiry into the operation and the desirable amendment, or the overhaul and re-enactment, of its Mechanics' Lien Act. The Report produced by the Honourable Harold Francis Thomson, in respect of the Saskatchewan Act, May 1, 1963, has been a fruitful source of ideas, for counsel and myself and will be referred to by me, as "the Thomson Report".



III

MECHANICS' LIEN LEGISLATION

MECHANICS' LIEN LEGISLATION

Although the terms of the Order-in-Council establishing this Commission would need very liberal interpretation to justify the inclusion in my Report of any detailed or extensive history of mechanics' lien legislation other than in Alberta, nevertheless, as background for the recommendations which are later made, the following facts should be stated:

- (1) Liens on real property were not a feature of the common law which we inherited from England. In the absence of a statute, neither the artisan nor the supplier of material had at common law a lien for labor bestowed or materials supplied, in respect of an improvement of realty, resulting from their joint contribution.
- (2) The Province of Ontario, presumably impressed by the value and need of protection to labourers and suppliers of material, even in the modest condition of the construction industry as it existed in that Province in the mid-nineteenth Century, looked to the neighbouring States of the Union for the models in mechanics' lien legislation which were used in

its first Mechanics' Lien Act, 1873. The State of Maryland in 1791, Pennsylvania in 1803, Massachusetts in 1819, Maine in 1821 and New York in 1830 -- had enacted mechanics' lien statutes, scanty and inadequate in content. As in the States named, so in Ontario, by gradual amendment to their original Acts, the present more elaborate and effective Acts have resulted; in Ontario, R.S.O. 1963, Chapter 233.

- (3) Every common law province in Canada, the North West Territories and Yukon Territory, has its mechanics' lien statute -- no two identical, but all fashioned on the same pattern. A series of ambitious attempts by the Conference of Commissioners on Uniformity of Legislation in Canada, between the years 1923 and 1949, aimed at the drafting of a model Act acceptable to all provinces, resulted in a succession of draft model acts, but in the final abandonment of the enterprise, due to inability to reconcile differences of opinion. The New Brunswick Act is indicated as most closely approximating the Conference's final effort to secure acceptable uniform legislation. In this Report certain recommendations will be based upon that Act.

A similar effort by The Standard State Mechanics' Lien Act Committee of the United States Department of Commerce with the co-operation of The National Conference of Commissioners on Uniform State Laws resulted in a draft Uniform Mechanics' Lien Act, which met with the approval of the American Bar Association in October 1932. Failure to win general acceptance by States or Provinces possibly justifies the conclusion that no uniform Act could be expected to meet the diverse construction and economic conditions either of the various States of the Union or of the Provinces of Canada.

- (4) On August 6, 1884, there was enacted by the Lieutenant-Governor of the North West Territories in Council, sitting at Battleford, an Ordinance No. 6 of that year, to establish liens in favour of mechanics, machinists and others. Its phraseology and content indicated the early onset of a habit which has persisted to this day -- approval and adoption of the efforts of Ontario legislators.

This 1884 ordinance, following minor amendments in 1889, 1897, 1898 and 1903, was revised and re-enacted as Chapter 21 of the 1906 Statutes of the newly created Province of Alberta.

In one-third of the intervening years that Act has been amended and four times consolidated. It has never been completely revised. In form it is an Act the basic pattern of which was set in the horse and buggy days: by patchwork additions and subtractions, an attempt has been made to adapt its provisions to the days of multi-million dollar construction, and without marked success.

- (5) The Act in this Province and the Mechanics' Lien Acts of those other provinces in which, as in Alberta, the construction industry has flourished, have proven most difficult of interpretation, both by courts and by the legal profession. The laity appear to have abandoned attempts at its understanding.

Of the Act, the late Mr. Justice Egbert in 1957 expressed the opinion that having been subjected to amendments for over a period of fifty years, it had acquired conflicting sections which would require pages to enumerate, that a complete revision was required. Challenged recently by a suggestion that he had acquired an understanding of the Act, a member of the Alberta judiciary replied, "nobody understands the Act".

(6) This Commissioner respectfully suggests that the complete revision of the Act is a proper task not for an individual Commissioner but for a several member Alberta Law Reform Commission established and empowered after the pattern of the Ontario Law Reform Commission, and is relieved that the Order-in-Council by which he was appointed, does not contemplate his functioning as a reviser or redrafter.

TRUST CLAUSE -- SHOULD IT BE INTRODUCED INTO THE ALBERTA ACT

TRUST CLAUSE -- SHOULD IT BE INTRODUCED INTO THE ALBERTA ACT?

1. The phraseology of paragraph (a) of the O/C cited earlier in this Report is based upon the so-called trust section which is contained in the legislation of the following four Provinces, arranged in order of the time of enactment.

- (1) Man. B. and W. Act: trust section inserted in that Act by amendment, Statutes of Manitoba, 1932, Chapter 2, as Section 2A -- became section 3 in the 1940 consolidation.
- (2) Ont. Act: section 3 inserted in that Act by amendment, Statutes of Ontario, 1942, chapter 34, section 21.
- (3) B.C. Act: section 3 first appeared in the 1956 Revision of the Mechanics' Lien Act, Statutes of British Columbia, 1956, chapter 27.
- (4) N.B. Act: section 2A, inserted in that Act by amendment, Statutes of New Brunswick, 1959, chapter 60, section 1.

There are but minor variations in the trust section in the four Acts: that in the Ontario Act reads:

"3. (1) All sums received by a builder or contractor or a subcontractor on account of the contract price are and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, is 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 subcontractors are paid for work done or material supplied on the contract and the Workmen's 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."

It should be noted that Manitoba has not provided any penalty for breach of the trust set up in section 3 of its B. and W. Act, and relies upon what is now section 282 of The Criminal Code, Criminal Breach of Trust, for its sanction, trial for an offence under that section being by indictment and not by summary conviction as in the penalty subsections of the three other Provinces.

Unlike Manitoba, the Province of Ontario, British Columbia and New Brunswick, either at the time of enactment of the trust clause, or by later amendment, and in uniform fashion, provided upon summary conviction for breach of the trust, a maximum penalty of not more than \$5,000.00 or imprisonment for a term of not more than two years, or both. In addition every director or officer of a corporation who knowingly assents to or acquiesces in any breach of the trust by that corporation is made equally guilty of the offence.

Careful personal inquiry in Manitoba, Ontario and British Columbia, among those thought most likely to know, failed to reveal the reasons for the insertion of the trust provision in their respective Acts. Surmises only could be made: possibly to assist laborers who had failed to file liens and who were thought worthy of a second chance, possibly to prevent the misapplication of contract funds by dishonest contractors or possibly to give to those whom the Acts were originally designed to assist, an additional security, even though the trust provision might be thought alien to the original principle of the Act. That principle has been variously stated, and on many occasions: thus, by Harvey J. as he then was, in *Scratch v. Anderson*, (1917) 1 W.W.R. 1340, 1342:

"I conceive (this) to be the general principle of the Act, viz: that the land which receives the benefit shall bear the burden."

and by LeBel J., as he then was, in *Bank of Montreal v. The Township of Sidney et al*, (1955) O.W.N. 581, 583:

"It has been authoritatively settled by a line of cases commencing with *Hickey v. Stalker*, 53 O.L.R. 414, (1924) 1 D.L.R. 440, that the object of The Mechanics' Lien Act is to prevent owners of land from getting the benefit of buildings erected and work done at their instance on their lands without paying for them. For that reason land may be charged with a lien to ensure payment."

and by Schroeder J.A. in Re Northlands Grading Co. Ltd.  
(1960) O.R. 455, 460:

"The spirit of that Act is concerned with making provision for a fair and equitable distribution among persons who performed work or supplied materials for use in connection with some building, erection, structure, or works upon lands, provided that they employ the means and adopt the rules fixed by the law to enable them to obtain these rights."

2. Of the twenty-two briefs which dealt with the question of the trust clause, fifteen favoured its introduction into the Alberta Act; nine of the fifteen gave no reasons for this opinion; six did. Of the seven briefs opposed to the use of the trust clause, all gave reasons. It must be said of the opinions expressed in respect of the trust clause, whether for or against, that the opinions in both cases could not be and were not based upon personal experience of the application of the section. Favourable opinions in some cases were based, I believe, upon a misunderstanding of the trust clause. The presumption was that the trust clause would normally demand the appointment of a trustee in respect of every contract, who would act as an administrator, receiving and disbursing all contract funds. This of course is not the case. Such an appointment would constitute an unwarranted interference with the contractor's rights and duties and is not

provided for in the current trust sections. The administration of contract funds for a percentage fee is already being sold as a service by a newly incorporated Alberta corporation.

3. In the Provinces of Ontario, British Columbia and Manitoba the Commissioner and Counsel interviewed members of the judiciary, lawyers, architects, trustees in bankruptcy, contractors, and subcontractors, large and small, material men, both wholesale and retail, credit managers and representatives of various construction associations. As a result, the following conclusions were made:

(a) The trust clauses have little significance for the large and generously financed corporations, whether contractors or subcontractors. They keep excellent records; for each contract separate accounts are maintained and funds from various jobs are either not intermingled or can readily be accounted for. With adequate funds at their disposal there is no need or temptation to apply contract funds to any purpose forbidden by the trust clause.

(b) One result of the presence of the trust clause frequently emphasized, was the retention in the hands of the contractor of funds over and above

the requirement of the holdback -- a precaution on his part to avoid involvement in litigation.

- (c) The introduction of the trust clause has altered the nature of The Mechanics' Lien Act; it can no longer be deemed exclusively a Mechanics' Lien Act. It is argued that section 3, creating a trust, must be enforced under The Trustee Act of the Province concerned. Some judges in trials of mechanics' lien actions have declined to deal with any issue involving the trust section.
- (d) The presence of the trust clause in the Act is a threat, and possibly a deterrent to the misapplication of funds, only to the underfinanced or to the dishonest. It was frequently suggested in all three Provinces that both groups of contractors exist. The effectiveness of the suggested deterrent is a matter for conjecture. It was a frequently expressed opinion however that the deterrent effect upon the fly-by-night or the evil intentioned of the mere presence of the trust clause in the Act must not be ignored; that just as the presence in the Criminal

Code of sections forbidding theft in its many forms, keeps the evil-prone minority honest, in similar fashion does the trust clause operate upon a similarly limited number of contractors.

(e) Since the activities of contractors who abscond with contract funds, leaving unpaid those entitled to them, and the inability of other contractors to cope with financial problems beyond their experience, are two fertile sources of bankruptcies, it was suggested that statistics provided by the Dominion Bureau of Statistics, might answer the question as to whether the Province of Alberta, lacking a trust clause, suffers, in number and amount of bankruptcies, when compared with the trust clause provinces. An examination of these statistics indicates that when related to volume of construction, bankruptcies in the construction industry in Alberta are not in excess of bankruptcies in the trust clause provinces.

(f) Surprisingly, the penal provisions of the Acts of the four provinces named appear to have been little used; some attributed this to their severity. Only one reported case of prosecution since the enactment of the trust section has

been found: R. v. Brunner (1960) 32 W.W.R. 478. An article, "Criminal Prosecutions under The Mechanics' Lien Act" by Mr. David I. Bristow, one of the learned authors of the most recent text in the field, "Mechanics' Liens in Canada", appearing in the May, 1964, issue of Chitty's Law Journal -- Vol. 12, p. 197, 199 -- emphasizes the little use made in Ontario of the penal provisions provided in the trust section; I quote:

"The unscrupulous and dishonest contractor has been allowed to spawn too long in the building industry and will continue to propagate unless new laws are enacted or the existing laws utilized to combat and restrain him. It is respectfully submitted that before new legislation is enacted the existing provisions already in the statute be acted upon and with the Brunner case as a guide, that prosecutions be launched in Ontario, under the penal sections of the Mechanics' Lien Act at least as a starting point toward the ultimate removal of this type of contractor from Canada's greatest single industry."

A viewpoint frequently expressed by those interviewed was: The trust clauses are aimed at the dishonest and they are not effective for that purpose. The experience of three provinces would appear to establish that the penal provisions of trust clauses have largely

gone unobserved and unenforced. I have no reason to expect that Alberta's experience would be in any way different.

- (g) The assignment of contract funds has long been the choice security used by contractors in securing interim financing from banks, pending the receipt of draws from lenders secured by mortgage. During the last decade litigation arising out of the presence of the trust clause, in which banks have been chosen by unpaid lien claimants as the most likely defendant, and in which banks have been none too fortunate, has greatly increased. As a result banks have tightened the flow of credit, credit applicants have been called upon to provide other security, often difficult to obtain, sometimes to seek advances elsewhere at exorbitant interest rates. Material suppliers, branded by many in the construction field as none too skilful in the banker's role, have in part filled the gap left by the retrenchment of the banks. The overall effect upon the general economy of a province is in my view unhealthy: excessive interest costs inevitably reach the consumer. The attempt



by quasi-criminal legislation to convert the dishonest minority has failed in that purpose and, equally unfortunate, has hurt the honest majority.

- (h) Among all the persons consulted in the three Provinces visited, persons experienced in the use and effect of the trust clause, we found nobody ready to recommend its introduction into our Alberta Act.

4. It is true that the Province of British Columbia by the addition of the following subsection (3) to its trust section 3:

"Notwithstanding this section, where a contractor or subcontractor has paid in whole or in part for any materials supplied on account of the contract, or has paid any workman or subcontractor who has performed any work or placed or furnished any material in respect of such contract, the retention by such contractor or subcontractor of any amount equal to the amount so paid by him shall not be deemed an appropriation or conversion thereof to his own use, or to any use not authorized by the trust."

and the Provinces of New Brunswick and Ontario by similar amendment to their respective trust sections have sought to reduce the difficulties inflicted on contractors and subcontractors by the restrictions implicit in the trust clause.

It is also to be noted that following the filing of briefs and public hearings, the O.L.R.C. in its Report II has recognized the seriousness of the bank-contractor difficulty created by the trust clause, and the similar difficulty as between lenders and owners, and has recommended amendments to the Ontario section 3 calculated to ease or remove these difficulties. These legislative activities and recommendations to legislators serve to accentuate the fact that insofar as the three named Provinces are concerned, a period of experimentation still exists, the results of which have yet to appear.

In my view, attempts to cure the apparent ill effects of the trust clause, as revealed by experience, but serve to emphasize the fact that it has failed in its purpose and that tinkering with its phraseology is not the cure.

5. In view of the conclusions above set out, I recommend that the Alberta Mechanics' Lien Act should not be amended to provide that all sums of money received by a builder or contractor, or subcontractor, on account of the contract price should constitute a trust fund in the hands of the builder or contractor, or the subcontractor, as the case may be, for the benefit of all persons who supplied material and all workmen for work done or material supplied on the contract.

SHOULD THE TIME PRESENTLY FIXED FOR  
THE REGISTRATION OF A LIEN BE EXTENDED?

SECTION 32 OF THE ACT DEALING WITH  
TIMES FOR REGISTRATION OF LIENS.

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Time for  
registration  
of lien

**32.** (1) A lien in favour of a contractor or a sub-contractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or sub-contract, as the case may be, and

(a) within thirty-five days after completion or abandonment, or,

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after completion or abandonment.

(2) A claim of lien for materials may be registered at any time during the furnishing of the materials and

(a) within thirty-five days after the last of the materials is furnished, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after the last of the materials is furnished.

(3) A lien for the performance of services may be registered at any time during the performance of the services and

(a) within thirty-five days after the performance of the services is completed, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after the performance of the services is completed.

(4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and

(a) within thirty-five days after the completion of the work, or

(b) in the case of a lien for wages owing for work in, at or about a mine, within sixty days after the completion of the work.

(5) Where, in respect of work done on or material furnished for an improvement,

(a) something is improperly done, or

(b) something that should have been done is not done, at the time when the thing should have been done and if at a later date the thing improperly done is put right or the thing not done is done, the doing of the thing at the later date shall not be deemed to be the completion of the work or the furnishing of the last materials so as to enable a person to extend the time limited by this section for registering a lien.

[1960, c. 61, s. 32]

SHOULD THE TIME PRESENTLY FIXED FOR  
THE REGISTRATION OF A LIEN BE EXTENDED?

Paragraph (b) of the Order-in-Council establishing the Inquiry refers to the thirty-five day period following completion of the contract or subcontract presently provided in section 32 of the Act for the filing of liens by contractors, subcontractors and material suppliers and not, of course, to the one hundred and twenty day filing period provided by that section where the improvement giving rise to the lien is an oil or gas well or an oil and gas pipeline.

On no aspect or section of the Act was the expressed opinion, whether in filed briefs or in oral presentation, more hopelessly divided than on the question of the time which should be permitted for registration of liens.

The question is: what is a fair and reasonable time within which liens should be filed? It should be a time sufficient in length for the purposes of those to whom the Act grants the extraordinary privilege of securing to those contributing to its improvements, land security for their investment, but not a time so long as to stretch out inordinately the release of holdback or other contract funds. Too lengthy a filing period

contributes to the financial difficulty of those entitled to the funds, often necessitates the securing of temporary loans at exorbitant interest and with too great frequency, brings about the bankruptcy of those for whom early payment out of funds, so frozen, would have meant salvation.

Suggested extensions of time for filing -- excluding those liens relating to mines, oil or gas wells, or oil or gas pipelines -- range from extension of the present thirty-five days to forty-five days, sixty days, seventy days, ninety days, and even ninety-five days. In general, the period chosen was the period deemed most suitable to meet the special needs of the group, trade or occupation of the proposed filer.

Support of the forty-five day period was based upon the credit and filing practice said to prevail among material suppliers in the construction industry, namely, that deliveries made at any time during a calendar month, are billed at the end of that month and are made payable up to the 15th day of the following month, that the thirty-five day period may expire before the creditor knows whether his outlay is jeopardized or not.

The opposition to any extension whatever of the present thirty-five day period comes from those who maintain

that the right and obligation of the owner or proprietor to retain the holdback for thirty-five days after completion (pending incorporation in the Act of a definition of that term and of provisions for progressive reductions in the owner's holdback) is the greatest obstacle to the rapid and highly desirable flow of funds, from the owner down to the most junior claimant, and is in fact the most prolific source of bankruptcies in the construction industry.

A surprising piece of evidence was presented, not only in Alberta, but in the three provinces visited. It was commented upon in respect of the Province of Saskatchewan by the author of the Thomson Report, page 41. The evidence was that labourers are not resorting to the Mechanics' Lien Act for relief to any great extent these days; that they are using what appear to be more efficient methods of bringing employers to time, notably collection departments of the various Departments of Labour. Appendix G indicates what a small part of the work of the Northern Alberta Land Registration Office is occupied by the registration of mechanics' liens: in a ten-year period there were only 1,416 mechanics' lien registrations out of a total of 87,044 registrations.

Likewise the use of the lien privilege by all other participants in the construction industry, from contractors down to subcontractors, to sub-subcontractors, material men, large and small, has been greatly reduced. For the actual filing of the lien has been substituted the threat of filing, a mild form of blackmail. Where construction is financed by mortgage loans, the filing of a lien brings the flow of funds from a mortgagee to a prompt halt. The threat to file may bring vigorous language addressed to the threatener, but it likewise brings payment. It would not seem wise to increase the period during which the threat to file may be employed. Thirty-five days should be ample for the employment of pleasant blackmail.

In my view, the arguments against increase in the length of the filing period insofar as the construction industry at large is concerned, outweigh the advantages that might result from such extension, and I therefore recommend that there be no extension.

\* \* \* \* \*



Filing Time Re Oil Wells and Pipelines:

As stated previously, although paragraph (b) of the O/C speaks only of an extension of filing time, reference is undoubtedly to the present thirty-five day period only, and not to the greater periods presently provided by section 32 for the filing of liens in respect of mines, oil and gas wells, and oil and gas pipelines.

The briefs filed by the Alberta Division of the Canadian Petroleum Association and the Pipeline Contractors Association of Canada and oral argument presented in support of those briefs, submit that the one hundred and twenty day period limit provided by section 32 (1)(b), 32 (2)(b) and 32 (3)(b) of the Act for the filing of liens by contractors or subcontractors, material men and those rendering services, are inordinately long and should be reduced to the normal thirty-five day period, because:

- (a) Modern communication systems enable any potential lien filer to file within the thirty-five day period -- assisted as he will be by the amendment to section 27 (6) as recommended later in this Report. That subsection presently

reads thus:

"27.(6) Where the affidavit is made by some person other than the lienholder, it shall state that such person has a personal knowledge of the matters required to be verified."

As amended, it would read:

"27.(6) Where the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent gives the source of his information and states that he believes the facts to be true."

thus enabling a would-be filer to telephone or otherwise instruct his solicitor or agent, and permit the solicitor or agent to take the affidavit in support of the Statement of Lien though not having the "personal knowledge" now demanded.

- (b) The holdback provisions result in retention of funds for a period so unreasonably long as to jeopardize the financial stability even of the best financed contractors and subcontractors and do result in the borrowing of funds at extravagant rates of interest and occasionally in bankruptcies. The formidable accumulation of funds in the hands of the pipeline owner,

or its mortgagees, resulting from the inordinate length of the one hundred and twenty day filing provision and from the inevitable delay from winter to summer or fall of the clean-up operation is seen in Appendix H.

- (c) A uniform period for filing by all those who under the Act are entitled to claim liens would make for greater understanding by the uninformed citizenry of filing requirements and readier use of the lien privilege.

I believe the arguments of the oil and gas and pipeline representatives are sound, and I recommend that the filing periods set out in section 32 of the Act be made a uniform thirty-five days throughout the section.

VI

FURTHER AMENDMENTS TO THE ACT

FURTHER AMENDMENTS TO THE ACT

In paragraph (c) of the Order-in-Council the Commissioner is enjoined:

"To consider and report whether any further amendments should be made and, if so, what amendment should be made to the said Act so that it may more effectively serve and protect the interests of those whose interests the said Act is intended to serve or protect."

At this time, repeal of the Act is not a live issue in Alberta or elsewhere in Canada, but reasoned arguments directed at repeal and presented at hearings both in Edmonton and Calgary justify giving the subject of repeal a place in this Report.

In harmony with the frank admission contained in the wording of paragraph (c) of the O/C, evidence led before me emphasized the obvious fact that the Act was designed to serve the special interests of particular groups of people. The evidence indicated, moreover, that the persons benefiting most from the privileges given by the Act are not those with whom the legislators were most concerned when Mechanics' Lien Acts were first enacted in the various provinces.

The various provincial Acts were intended originally to protect labourers, individual artisans and

small suppliers in a day when the construction industry was in its infancy. Today, workers have remedies available to them which did not exist when the Acts were passed. In this province, the provisions of the Alberta Labour Act, the Masters and Servants Act, the Industrial Wages Security Act, the Public Works Act, and other statutes, give efficient remedies to working men who do not receive their wages promptly. Labour Unions, too, are most effective in obtaining payment of wages for their members. As indicated by Mr. Justice Thomson in his Report, and as most persons appearing before the Commission or interviewed by the Commission agreed, labourers scarcely need the provisions of the Mechanics' Lien Act and rarely use it. The only disagreement with this view was that expressed by the counsel who presented the only brief submitted to the Commission by organized labour. The most vocal supporters of mechanics' lien legislation in recent years appear to be the material men. Although it was suggested that much, if not most, construction material is now supplied by very large corporations, the representatives of material suppliers reminded the Commissioner that there are also many small companies and individuals who supply building materials. Even if some material suppliers are relatively small concerns, as are many subcontractors, it seems clear that the Act now serves mainly classes of persons whose needs and resources

are far different from those whom the Act was originally intended to protect. This raises the important question whether there is any justification for continuing to provide special privileges to these particular groups of persons.

Extensive criticism of mechanics' lien legislation was heard both in this and other provinces, criticism occasioning concern. I refer to some of the major difficulties and defects in respect of our Act which have become apparent in the course of this Inquiry. One serious difficulty arises from the holdback provisions of the Act. By reason of these provisions, fifteen or twenty percent of the moneys payable under a building contract are held back for varying periods. This has a progressive effect due to the phraseology of the present section 17 and its accepted interpretation. The owner makes a holdback, the contractor makes a holdback, each subcontractor does likewise, and so on, to the point where the cumulative effect causes a serious slow down in the flow of money. This in itself contributes considerably to financial instability in the construction industry and to the bankruptcies which characterize it. In addition, the moment a mechanics' lien is filed, all work invariably stops on a construction project; activity

may not be renewed for weeks or even months, while the lien difficulties are resolved. Persons engaged in the construction industry who suddenly find that moneys due them from a building project are not received, can be seriously embarrassed financially and are frequently forced into bankruptcy.

As indicated earlier in this Report the Act readily lends itself to a form of "blackmail" in that many lien claims, often quite without foundation, are filed for the purpose of compelling the payment of claims in respect of building contracts or subcontracts, claims which otherwise might be successfully disputed, but which are paid to avoid the instant stoppage of draws on mortgage funds, the immediate result of the filing of a lien.

Among those members of the Judiciary with whom I have discussed the Mechanics' Lien Acts, opinion was almost unanimous that these Acts are among the most difficult pieces of legislation facing the courts, that the decisions thereon across Canada have been so conflicting as to render the role of legal adviser almost impossible and that their use as protective devices for special groups justifies repeal.



It must be emphasized that none of the persons who made formal presentations to me at the public hearings in Edmonton and Calgary advocated repeal of the Act. This may conceivably be because the terms of reference did not raise the point. However the desirability of repeal has been expressed by a number of persons in this Province, particularly by members of the legal profession, the people most conversant, other than the judiciary, with the legal difficulties which the Act has always caused. In other provinces in Canada, and elsewhere, repeal has been strenuously urged. In 1960, the British Columbia Civil Justice Committee of the Canadian Bar Association voted to recommend repeal of the British Columbia Mechanics' Lien Act: the Agricultural Committee of the British Columbia Legislature rejected the recommendation.

In the State of Queensland, Australia, the Mechanics' and Workmen's Lien Acts of that State were repealed, effective April 15, 1964. The main arguments used by the Minister of Labour and Industry in favour of repeal were that the Acts had been originally intended for the protection of workmen, that they were no longer needed for that purpose as industrial legislation had bypassed them, and that the Acts could not be adjusted to suit modern building practices. It was pointed out,

in the debates in the Queensland Parliament, that the statutory requirement of a twenty-five percent retention of contract moneys had been found so unworkable in practice that in contravention of the law it was being ignored. It was also stated in the Queensland Debates that the Statute Law Revision Committee of the State of Victoria, Australia, had reported that the major reasons for the high rate of failure in the building industry in that State were the undercapitalization of contractors, extension of credit by suppliers without prudent investigation into the credit-worthiness of builders and contractors, and inefficient management of contracting organizations. These complaints, which I heard widely expressed across Canada, led the Victoria Committee to recommend against the enactment of any lien legislation, holding that this would cause suppliers and subcontractors to relax their vigilance in the extension of credit to contractors and would permit increasing numbers of bad-credit-risk contractors to enter the field, all of which would have disastrous repercussions.

Opposition to repeal in the State of Queensland was vigorous and able. It urged that the Act served a very worthwhile purpose and that its repeal would cause chaos and hardship among small persons in the building

industry. To determine whether these dire predictions had proven true, I sought the views of dependable correspondents in Brisbane, Queensland, and was advised that there has been "scarcely a ripple" of protest, much less either chaos or hardship to the construction industry in that State, since repeal. In fact, repeal appears to have worked well. With repeal in Queensland, only South Australia was left with mechanics' lien legislation. All of the other States, including the more densely populated and industrialized States of New South Wales and Victoria have never felt it necessary or desirable to have such legislation, despite the fact that building activity in the two largest States is greater than in any of the other States.

Many persons appearing before me were asked their views on repeal. Some were concerned that it would have bad effects, perhaps, even disastrous or chaotic effects, upon the building industry. On the other hand, the opinion was frequently expressed that one of the main evils in the construction industry today is the indiscriminate granting of credit by suppliers, subcontractors and others. The availability of the special form of security given by the Act has been said to contribute heavily to such indiscriminate granting of credit.

The conclusion drawn from all that I have heard and read on the subject of repeal is that financial stability would probably be greater in the construction industry without the crutch of mechanics' liens being available to the grantors of credit. This was admitted to us even by representatives of the building supply segment of the industry, as well as by many others engaged in construction. Many of the more successful contractors and subcontractors attributed their success not to their use of lien privileges granted by the Act but to their care in contracting only with persons of integrity, reliable and of reasonable financial stability.

The information available to me from many sources outside as well as inside this Province suggests that repeal of the Mechanics' Lien Act would have a generally beneficial effect on the building industry. While it might cause instances of hardship -- and loss of a lucrative area of litigation to lawyers -- at least during an initial period of adjustment, this might well be less than the hardship the Act now causes not only in construction generally, but to members of the citizenry at large, the unsuspecting home owners (one of whom, presenting his brief, dubbed the Act "The Homeowner's Harassment Act") who, while in theory are expected to know the law, don't know the law, and in practice

are often caught unaware by lien legislation and suffer accordingly. The home owner is not impressed by the lawyer's familiar dictum, "You're supposed to know the law". The retort, variously phrased, is: "Why should a narrow segment of the population be given the special privilege of lien filing to my damage, when the original need for such special privilege passed when the high-rise invaded the landscape, if not earlier?" As legislation which confers special benefits on particular classes of persons, the Act is justified only if there is an important reason for conferring such privileges. The evidence before me has not indicated a pressing need for such protection.

The O/C directs that I recommend what further amendments to the Act might be made. Having digressed to comment on repeal, I now return to the duty imposed by paragraph (c) of the O/C. By brief and oral presentation various amendments thought to be for the clarification or more effective operation of the Act were proposed. Discussions with those who appeared before me in other Provinces revealed additional difficulties in the interpretation and application of certain sections common to their and our Acts: suggestions for their amendment were made. With the more important of these proposals I will now deal and in the order in which the sections of the Act are presently numbered.

R E C O M M E N D A T I O N S

The drafting of legislation is a select vocation apart from that of the legal practitioner: he who is not of that vocation intrudes at his peril. THOSE OF THE RECOMMENDED AMENDMENTS WHICH ARE CAST IN STATUTE FORM ARE SO CAST ONLY FOR THE PURPOSE OF INDICATING AS CLEARLY AS POSSIBLE THE CONTENT AND NATURE OF THE DESIRED AMENDMENT: THE ACTUAL DRAFTING OF ALL THE RECOMMENDED AMENDMENTS IS THE TASK OF LEGISLATIVE COUNSEL.

- Interpre-  
tation  
"contractor"      **2.** In this Act,  
                    (a) "contractor" means a person contracting with or employed directly by an owner or his agent to do work upon or to furnish material for an improvement, but does not include a labourer;
- "court"            (b) "court" means the Supreme Court or a district court, as the case may be, having jurisdiction in the amount claimed in any proceedings under this Act, whether brought in respect of one or more than one lien;
- "improvement"  
                    (c) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;
- "labourer"        (d) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;
- "lienholder"     (e) "lienholder" means a person claiming a lien under this Act;
- "owner"           (f) "owner" means a person having an estate or interest in land at whose request, express or implied, and  
                    (i) upon whose credit,  
                    (ii) upon whose behalf,  
                    (iii) with whose privity and consent, or  
                    (iv) for whose direct benefit,  
work is done upon or material is furnished for an improvement to the land and includes all persons claiming under him whose rights are acquired after the commencement of the work or the furnishing of the material;

- "Registrar" (g) "Registrar" means a registrar of a land registration district under *The Land Titles Act*;
- "sub-contractor" (h) "sub-contractor" means a person not contracting with or employed directly by an owner or his agent for the doing of any work but contracting with or employed by a contractor, or under him by a sub-contractor, but does not include a labourer;
- "wages" (i) "wages" means money earned by a labourer for work done, whether by time or as piece work or otherwise;
- "work" (j) "work" includes the performance of services upon the improvement. [1960, c. 64, s. 2]

Section 2. (Definition section)

Section 2 contains no definition of the word "completion". Reported cases -- Rodewalt and Van's Plastering & Stucco Ltd. v. Plasky and Nycholat (1959-60) 30 WWR 457; Weathermakers Ltd. v. County of Wetaskiwin No. 10 et al, (1966) 56 WWR 271 -- continue to indicate the need of a definition for "completion of the contract". Contractors complain of long delay in release of holdbacks by owners financing at the expense of the unpaid in the construction chain, delays allegedly based on failure to complete, the "failure" often relating to trifles.

I recommend the adoption as subsection (a) of section 2, of the definition contained in section 1(a) of the New Brunswick Act which reads:

"'Completion of the contract' means substantial performance, not necessarily total performance, of the contract."

with the addition of the following:

Factors which the Court may consider among others in determining whether there has been substantial performance are occupation by the owner and readiness for use.

and the renumbering of the remaining subsections of section 2.

"Court" as presently defined -- section 2(b) -- means "the Supreme Court or a District Court, as the case may be, having jurisdiction in the amount whether brought in respect of one or more than one lien".

In Report I of the O.L.R.C., page 12, it is recommended that actions to realize a claim for lien should be tried in the County or District Court with the right to any party to have the proceedings removed into the Supreme Court upon application to a Judge of the Supreme Court if the action would ordinarily come within the jurisdiction of that Court. That Commission supports its recommendation thus: "The trial of these actions in the County and District Courts, with their extended jurisdiction, will provide a more efficient and expeditious procedure under the Act."

In O.L.R.C. Report II, page 10, the Commission adhered to its previous recommendation stating that "on the



ground of the principle the county court is the most effective and logical forum for the adjudication of these issues".

It is perhaps significant that the B.C. Act, section 2; the Manitoba Act, section 2(b); the New Brunswick Act, section 1(c); the Nova Scotia Act, section 33(1) and the Saskatchewan Act, section 2(c), all allocate to District or County Courts complete jurisdiction for the trial of mechanics' lien actions, regardless of the amount involved.

Neither by brief filed, nor by oral presentation, was this Commissioner urged to recommend any change in our present definition of "Court". I therefore make no recommendation. Since it is recognized both by the judiciary and by the lawyers that mechanics' lien litigation bristles with difficulties, and since extensive experience in mechanics' lien litigation seems to be essential before a trial judge is at home in that particular form of litigation, the authorities in Alberta might follow the example of those in Ontario and allocate to a specific judge or judges or Master in Chambers the trial of mechanics' lien actions -- allocation to Alberta's future Masters in Chambers might be considered.

It is suggested that the definition of "lienholder" in section 2(e) is not wide enough in its scope: that a preferable definition would be

"'Lienholder' means a person with an existing lien under this Act".

I recommend the adoption of this definition. It has the virtue of not only covering those liens created under sections 4 and 8 of the Act but also liens which have been filed and excludes only those liens which have been claimed but have been found at trial, to be invalid.

#### Creation and Extent of Lien

Waiver of  
Lien

3. (1) No agreement deprives any person otherwise entitled to a lien under this Act and not a party to the agreement, of the benefit of the lien and the lien attaches notwithstanding the agreement.

(2) An agreement by a labourer that this Act does not apply or that the remedies provided by it are not to be available for his benefit is against public policy and void.

(3) Subsection (2) does not apply to a manager, officer or foreman or to any person whose wages are more than twenty-five dollars per day.

[1960, c. 64, s. 3]

Section 3(3).

It was urged by the representative of the Alberta Provincial Building & Construction Trades Council that in view of today's scale of wages which for senior groups such as brick layers, electrical workers and plumbers, range considerably above the twenty-five dollars per day

now provided as the top daily rate of wages for those whom the section seeks to protect, this subsection should be amended by the insertion of thirty-five dollars per day in lieu of the present twenty-five dollars per day. The submission is reasonable and we recommend the amendment of the subsection accordingly.

It was further proposed that inasmuch as the role of foreman is not exclusively that of supervisor but more generally that of labourer or labourer and supervisor, the word foreman should be removed from subsection (3). Wider inquiry indicates the correctness of the information on which this proposal is based. Its adoption I recommend.

Creation  
of lien

4. (1) Unless he signs an express agreement to the contrary and subject to subsection (2), a person who

(a) does or causes to be done any work upon or in respect of an improvement, or

(b) furnishes any material to be used in an improvement,

for an owner, contractor or sub-contractor has, for so much of the price of the work or material as remains due to him a lien upon the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) Where work is done or materials are furnished

(a) preparatory to,

(b) in connection with, or

(c) for an abandonment operation in connection with, the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done or the material to be furnished, the lien given by subsection (1) attaches to all estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals unless the person holding the fee simple estate in the mines and minerals has expressly requested the work or the furnishing of material in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to such person's estate, if any, in the rest of the land.

(3) A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when severed from the land.

[1960, c. 64, s. 4]

Section 4.

In a Brief presented on behalf of Equipment Rental Companies of Alberta, it was convincingly argued that by reason of the increased use of large and expensive construction equipment, an increase of eighty percent in a five-year period, the rentals for such equipment, by amendment to the Act, should be made the proper subject matter for a lien; that the case, Clarkson Co. Ltd., Trustee in Bankruptcy et al v. Ace Lumber et al (1963) S.C.R. 110 had definitely settled that the phraseology of the pertinent sections of the Ontario Act did not cover equipment rentals. The decision is equally applicable to the Alberta Act. The submission of the Equipment Rental Companies was supported by other Briefs and was opposed by none. I recommend the amendment of section 4 by the addition thereto of a subsection substantially the same as subsection (4) of section 5 of Ontario Draft Bill, 1966, which slightly modified, reads:

"A person who rents equipment to an owner, contractor, or subcontractor for use on a contract site shall be deemed for the purposes of this Act to have performed a service and has a lien for a reasonable and just rental therefor while used on the contract site."

It was submitted that section 4 of the Act should be amended to make it clear that the services rendered by land surveyors, architects, caterers and others having to do with a construction project are entitled to file liens.

The definition of "work" in section 2(j) specifically includes "the performance of services upon the improvement". The word "service" has been the subject for judicial interpretation in a series of cases -- Peterson Truck Company Limited vs. Socony-Vacuum Exploration Co. et al (1955-56) 17 WWR 257; Inglewood Plumbing & Gasfitting Ltd. v. Northgate Development Ltd. et al (1966) 54 WWR 225 and others.

The Canadian Manufacturers Association urged that food suppliers, furnishing, under contract, food for consumption by workmen employed on a construction project should be granted lienholders status particularly when the food forms part of the employees' pay. Reference was made to failure of a construction project in British Columbia resulting in a loss of \$170,000.00 to food suppliers of Alberta.

A basic principle traditionally respected during the evolution of the Act has been that those whose

protection is the objective of the Act must supply work to, materials for incorporation in, or services rendered to, the process of construction. Cases dealing with claims to lien rights of architects, surveyors, truckers and others are already of record. Further decisions as to the forms of service falling within section 2(j), including those of food suppliers, in my opinion, may well be left to the courts.

Extent  
of lien

**6.** (1) Except as herein provided, a lien does not attach so as to make the owner liable for a greater sum than the sum duly owing by the owner to the contractor.

(2) Except as herein provided, where a lien is claimed by any person other than the contractor, it does not attach so as to make the owner liable for a greater sum than the amount owing to the contractor for whom, or for whose sub-contractor, the work has been done or the material has been furnished.

(3) Where the same lien attaches to estates or interests in more than one lot, block or parcel, as the case may be, in respect of a separate improvement upon each such lot, block or parcel hereinafter referred to as a "lot", the lien does not apply so as to make the owner of any one lot liable in respect of that lot for a sum in excess of the price of the work done or material furnished in respect of the improvement on that lot less a proportionate share of any moneys paid to the person claiming the lien in respect of the work done on or the material furnished for all the lots to which the lien attaches. [1960, c. 64, s. 6]

Section 6.

The majority decision of our Appellate Division in the case of C. J. Oliver Ltd. v. Foothills Lighting & Electric Ltd. et al (1966) 54 WWR 37 was attacked with gusto by both lawyers and laymen who appeared at the public

hearings in Edmonton and Calgary: the interpretation placed upon subsection (1) and (2) of section 6 in combination with section 4(1) and section 17(1) and (2) by Mr. Justice Kirby, at trial, met with almost unanimous approval as being the interpretation previously accepted by the construction industry and, in all probability, intended by the Legislature.

The limitation which this decision places upon the protection granted by the Act to suppliers, performers of services or employees, in their dealings with subcontractors, is such as to call for early amendment of the Act to make it clear:

(1) That the obligation placed by section 17 upon the person primarily liable on the contract, when making payment thereunder, to retain twenty percent (or fifteen percent, as the case may be) of the value of the work done (a sum familiarly known as "the holdback", though not so labelled in the Act) shall apply, as in section 14 of the New Brunswick Act, only to the owner and not, in addition, to the contractor and subcontractors, as has heretofore been the interpretation of the words "the person primarily liable on the contract" and the practice thereunder.

(2) That the "holdback" fund so created is a fund to which all lienholders are entitled to have recourse, in accordance with the priorities set out in the Act.

It is recommended that subsections (1) and (2) of section 6 be repealed and that the present subsection (3) of section (6) become section 6. Further grounds for this recommendation will be advanced when discussing a redraft of sections 17 and 19 designed to accomplish the objectives set out in the preceding paragraph.

Priority  
of lien

**9.** Except as provided in sections 11 and 57 a lien arising by virtue of this Act has priority over any unregistered mortgage and any mortgage that is registered, after the date on which the lien arose, against the land that is subject to the lien. [1960, c. 64, s. 9]

Proceedings  
re liens

**10.** Except as provided in sections 11 and 57 no lien arising by virtue of this Act shall be dealt with in any manner in proceedings on or respecting a mortgage against the land that is subject to the lien. [1960, c. 64, s. 10]

Interpre-  
tation

**11.** (1) In this section,

"mortgage"

(a) "mortgage" includes charges and encumbrances existing and registered or filed against the land at the date the lien arose,

"value of  
improve-  
ments"

(b) "value of improvements", for the purposes of subsection (12), means the difference between the value of mortgaged land immediately before the sale thereof, as determined by the court and the value of the mortgaged land immediately before the lien arose, as determined by the court.

Mortgage  
for lien

(2) Where work is done or material is furnished for an improvement upon land that is subject to a mortgage

(a) a lien has priority over the mortgage to the extent of the increase in value of the mortgaged land resulting from the work or improvement and from all subsequent work or improvements, and

(b) the lien shall not be barred or foreclosed in any proceedings on the mortgage.

(3) Where proceedings on a mortgage of land that is subject to a lien lead to sale or foreclosure, or where proceedings are taken to enforce a lien upon land that is subject to a mortgage, the court shall direct that the land be sold by tender or public auction.

(4) Immediately before a sale by tender or public auction of mortgaged land that is subject to a lien, the court shall, upon proper evidence and on notice to all persons concerned, determine both the value, at that time, of the mortgaged land and the value of the mortgaged land immediately before the lien arose.

(5) A sale of mortgaged land that is subject to a lien shall not be subject to an upset price or reserve bid but no sale of such land shall be made unless the sale is approved and confirmed by the court.



(6) A lienholder and a mortgagee of land that is subject to a lien may tender or bid at a sale of the mortgaged land by tender or public auction but any such tender or bid shall be at least equal to the amount of the value of the mortgaged land immediately before the sale as determined pursuant to subsection (4).

(7) When both a lienholder and a mortgagee submit the same tender or bid at the sale of the mortgaged land, the preference shall be given to the one having the larger claim against the mortgaged land.

(8) Where the mortgaged land is not sold at the sale by tender or public auction, a lienholder or mortgagee, upon notice to the other and to such other persons as the court may direct, may, within one year from the date the mortgaged land was offered for sale, apply to the court to purchase the mortgaged land at a price not lower than the value of the mortgaged land immediately before the abortive sale, as determined pursuant to subsection (4).

(9) Where more than one person applies under subsection (8) to purchase the mortgaged land at an amount greater than the value of the mortgaged land immediately before the abortive sale, as determined pursuant to subsection (4), the mortgaged land shall be sold to the person offering the highest price.

(10) Where more than one person applies under subsection (8) to purchase the mortgaged land, the preference shall be given, subject to subsection (9), to the one having the larger claim against the mortgaged land.

(11) Upon the sale of the mortgaged property by tender or public auction or pursuant to subsection (8), the purchase moneys shall be paid into court and, subject to subsection (12), shall be paid out to the persons entitled thereto.

(12) Where the proceeds of a sale of mortgaged land by tender or public auction or pursuant to subsection (8) are insufficient to satisfy fully the amounts owing in respect of the lien and the mortgage, the proceeds shall be divided between the lienholder and mortgagee so that the portion of the sale proceeds bearing the same relation to the total sale proceeds as the value of the improvements bears to the value of the mortgaged land immediately before the sale as determined pursuant to subsection (4) will be applied on the lien and the balances of the sale proceeds will be applied on the mortgage.

(13) When, on a distribution of the sale proceeds pursuant to subsection (12), the amount to be applied on either the lien or the mortgage is more than the amount owing in respect of the lien or mortgage, the excess shall be applied on the unsatisfied lien or mortgage, as the case may be.

(14) Where there is more than one lien, the portion of the sale proceeds applied on the lien pursuant to subsection (12) shall be divided among the lienholders in proportion to the amounts by which the improvements in respect of which each lien arose are found by the court to have respectively contributed to the sale price, but lienholders in respect of the same improvements shall share among themselves in the manner provided in section 51.

(15) Where the mortgaged land is not sold when offered for sale by tender or public auction and is not sold pursuant to subsection (8), the mortgaged land may, after the expiration of one year from the date it was last offered for sale by tender or public auction, be again offered for sale at intervals of not less than one year in the same or any other proceedings under the mortgage or lien.

(16) This section applies to any sale proceedings pursuant to subsection (15) in the same manner and to the same extent as if the mortgaged land had not previously been offered for sale.

(17) Where all or part of the purchase money under an agreement for sale of land that is subject to a lien has not been paid, then, for the purposes of this section, the unpaid vendor, if the title to the land is registered in his name, shall be deemed to be a mortgagee whose mortgage was registered on the date of execution of the agreement for sale.

[1960, c. 64, s. 11]

Sections 9, 10 & 11.

On March 2, 1962, the Honourable H. F. Thomson, retired judge of the Supreme Court of Saskatchewan, was appointed a Commissioner under the Public Inquiries Act to conduct an Inquiry into the operation of the Mechanics' Lien Act of that Province and to report thereon. In the course of his Inquiry, he, of necessity, made a study of the Mechanics' Lien Acts of all the Provinces. In his report dated May 1, 1963, he made this comment (page 13) on the treatment accorded mortgages by the Alberta Act:

"The Alberta Statute has fairly rigorous provisions as to the priorities of mechanics' liens in relation to mortgages. These had not been explained and no information was available as to why these provisions had been incorporated in the Alberta Act."

That the term "rigorous" as applied to the Alberta Act dealing with priorities between liens and mortgages is justified, my studies and inquiries leave me in no doubt. The sections in question are sections 9, 10 and 11.

The rigors of sections 9, 10 and 11 are apparent when compared with the following provisions of other jurisdictions establishing the status of mortgages with respect to liens:

(1) B. C. Act, section 7 (1) and (2):

"7.(1) A registered mortgage has priority over a lien to the extent of the mortgage moneys bona fide secured or advanced in money prior to the filing of the claim of lien, but in proceedings for the enforcement of a claim of lien the Court may order the sale of mortgaged lands at an upset price of not less than the amount secured under all registered mortgages having priority over such claim, costs, and the costs of the sale, and which mortgages shall be satisfied out of the proceeds of the sale according to their respective priorities and in priority to the lien to the extent aforesaid and subject to subsection (2) hereof.

"7.(2) Advances or payments made under a mortgage after a claim of lien has been filed shall rank after the lien; but any mortgagee who has applied mortgage-moneys in payment of a claim of lien which has been filed is subrogated to the rights and priority of the lien claimant who has been paid as aforesaid to the extent of the moneys so applied."

(2) Manitoba Act, section 5(3) and 11(1):

"5.(3) 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 shall have priority over a lien under this Act to the extent of the actual value of the land at the time the improvements were commenced. Am. R.S.M., c. 129, s. 5; am."

"11.(1) The lien created by this Act shall have 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 notice in writing of the lien to the person making such payments or after registration of the lien as hereinafter provided."

(3) New Brunswick Act, section 8 (1), (2) (3) (4):

"8.(1) A lien has priority over all judgments, executions, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Upon filing of the claim of lien, the lien subject to subsection (3) has priority over all claims under conveyance, mortgages and other charges, and agreements for sale of land, registered or unregistered, made by the owner after the lien arises.

(3) A conveyance, mortgage, or other charge, and an agreement for sale of land that is registered after a lien arises, but before the filing of the claim of lien, has priority over the lien to the extent of any payments or advances made thereunder in good faith before the filing of the claim of lien.

(4) Where land upon or in respect of which work is done or material is furnished, is encumbered by a mortgage or other charge registered before a lien arises, the mortgage or other charge has

- (a) priority over the lien to the amount of the moneys owing under the mortgage or charge at the time the lien arises but only to the extent of the value of the land at that time; and
- (b) priority over such lien to the extent of any payments or advances made under the mortgage or charge after such lien arose and before the filing of a claim for such lien. 1966 c. 78, s. 1."

(4) Newfoundland Act, section 5 (3):

"5.(3) In case the land, upon or in respect of which any work as aforesaid is executed, or labor performed, or upon which materials or machinery are placed, is encumbered by a prior 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, such mortgage or other charge shall not bear priority over the lien to any greater extent than the sum by which the selling value of the land, with such work, material, or machinery thereon, exceeds the sum by which such selling value thereof has been actually increased by the improvement caused by such work, materials, or machinery being placed thereon; provided that the mortgagee or holder of such charge consents to such lien charging the land, and testifies his consent thereto by executing the contract in respect of which the lien is claimed; and, in case such consent is not given, no such mortgage or other charge shall be affected by any subsequently acquired lien."

(5) Nova Scotia Act, section 7 (3):

"7.(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is encumbered by a prior mortgage or other charge; and

(a) the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials; and

(b) the mortgagee consents to the performance of such work or service or the furnishing, or placing of such materials;

the lien shall attach upon such increased value in priority to the mortgage or other charge. R.S., c. 171, s. 7."

(6) Ontario Act, sections 7(3) and 13(1):

"7.(3) Where the land and premises upon or in respect of which any work or service is performed or materials are furnished to be used is encumbered by a prior mortgage or other charge existing in fact before any lien arises, the mortgage or other charge has priority over all liens under this Act to the extent of the actual value of the land and premises at the time the first lien arose, such value to be ascertained by the judge or officer having jurisdiction to try the action by proper evidence to be adduced before him."

"13.(1) The lien has 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 notice in writing of the lien has been given (at the address endorsed on such conveyance or mortgage pursuant to section 45 of The Registry Act) to the person making such payments or after registration of a claim for the lien as hereinafter provided, and in the absence of such notice in writing or the registration of a claim for lien all such payments or advances have priority over any such lien."

(7) P.E.I. Act, section 9 (1) to (4) inclusive.

"9. (1) A lien has priority over all judgments, executions, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Upon registration of the claim of lien, the lien, subject to subsection (3), has priority over all claims under conveyances, mortgages, and other charges, and agreements for sale of land, registered or unregistered, made by the owner after the lien arises.

"9. (3) A mortgage or conveyance that is registered after a lien for material arises, but before the registration of the claim of lien, has priority over the lien to the extent of any payments or advances made thereunder in good faith before the person making such payments or advances has knowledge of the lien.

(4) Where land upon or in respect of which work is done or material is furnished, is encumbered by a mortgage or other charge registered before a lien arises, the mortgage or other charge has priority

- (a) over the lien to the amount of the moneys owing under the mortgage or charge at the time the lien arises, but only to the extent of the value of the land at the time; and
- (b) over a lien for material furnished to the extent of any payments or advances made under the mortgage or charge after the lien arose but before the person making the payments or advances has received notice in writing of the lien from the lienholder."

(8) Saskatchewan Act, section 13 (1):

"13.(1) ' The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises and over all conveyances or mortgages registered after registration of a claim of lien as in this Act provided."

In none of the Acts of the eight provinces from which these portions are cited is there any section or sections of content equivalent to our sections 9, 10 and 11.



None of those eight Acts give priority to liens which have not been registered and of which actual notice has not been given, over mortgage money bona fide advanced, to the extent to which this is done by the detailed provisions of sections 9, 10 and 11 of our Act. None of those Acts so severely limit the mortgagee's right to realize on his security. The presence of section 57 in our Act, granting special status to National Housing loans demonstrates that federal authorities were alert to the fact that sections 9, 10 and 11 do not give adequate or fair protection to mortgagees.

That mortgage lenders are concerned about their position under the Act seems evident from evidence given before me that mortgagees in this Province frequently require general waivers of lien before advancing any money. The extensive use of lien waivers was criticized by many. It was suggested that the bar to the giving of lien waivers by labourers contained in section 3(2) should be extended to all lienholders. Public policy may well require that labourers be prohibited from waiving their lien rights, without demanding that all lienholders be given similar protection. Inquiries in other provinces indicate that where mortgagees receive adequate protection under mechanics'

lien legislation, there is no widespread use of lien waivers. I am of the view that if my recommendations for amendment of those portions of the Act dealing with mortgages are accepted, the use of lien waivers will be greatly reduced, thus rendering unnecessary any change in the present provisions respecting waivers.

Of sections 9, 10 and 11 it may be fairly stated that they constitute discrimination against mortgagees, discrimination not practised in any other common law province in Canada. The construction industry, admittedly essential to Alberta's economy, flourishes when mortgage funds, no matter what the source, are readily available. The presence of sections 9, 10 and 11 constitute no encouragement to lenders, corporate or private.

Submission was made that the priorities between mortgagees and lienholders as set out in our Act of 1942, section 11, subsections (1) and (2), should be restored to our present Act. I suggest a preferable alternative. The substitution of a portion of section 31(1) of the Ontario Act together with a portion of subsection (1) and all of subsections (2) and (3) of section 7 of the B.C. Act for our present sections 9, 10 and 11, and the repeal of the said sections 9, 10 and 11 would avoid trespass upon the Torrens system of land registration so highly esteemed by courts and lawyers, and would do justice, in my view,

to both mortgagees and lienholders. Our consultations with those familiar with the operation of the B.C. Act would indicate that section 7 (1), (2) and (3) of the B.C. Act have proved acceptable in that Province both to mortgagees and lienholders.

The section which I propose be substituted for the present sections 9, 10 and 11 would read as follows:

"9.(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) A registered mortgage has priority over a lien to the extent of the mortgage-moneys bona fide secured or advanced in money prior to the registration of the statement of lien.

(3) Advances or payments made under a mortgage after a statement of lien has been registered shall rank after the lien; but any mortgagee who has applied mortgage-moneys in payment of a statement of lien which has been registered is subrogated to the rights and priority of the lienholder who has been paid as aforesaid to the extent of the moneys so applied.

(4) A registered agreement for the sale and purchase of land and any moneys bona fide secured or payable thereunder has the same priority over a lien as is provided for a mortgage and mortgage-moneys in subsections (1) and (2) hereof, and for the purposes of this Act the seller shall be deemed to be a mortgagee, and any moneys bona fide secured and payable under such agreement shall be deemed to be mortgage-moneys bona fide secured or advanced."

Priority of  
lien for  
wages

**12.** (1) A lien for the wages of a labourer has priority, to the extent of six weeks' wages, over all claims on that portion of the amount retained as required by section 17 to which the contractor or sub-contractor through whom the lien is derived is entitled, and all such labourers rank *pari passu*.

(2) Any device by an owner, contractor or sub-contractor to defeat the priority given by this Act to a labourer for his wages is against public policy and void.

[1960, c. 64, s. 12]

## Section 12.

It was submitted on behalf of the Alberta Provincial Building and Construction Trades Council that the six weeks priority granted liens for the wages of the labourer should be increased to eight weeks. A survey of the Mechanics' Lien Acts of eight other provinces, indicates that only one province, British Columbia, provides a wage priority equal to that now provided by the Alberta Act -- all others are less.

The O.L.R.C. in its Report I, p. 16, declined to recommend that the thirty-day wage priority granted by the Ontario Act, sec. 14(1), be extended, reasoning thus:

"We do not feel that it is clear that it would be in the best interests of the wage earners to increase the present period to six weeks. The thirty days provided in the present Act tends to give less latitude to the contractor to finance the project in question at the expense of the wage earner and tends to exert pressure for prompt payment of wages."

In the construction industry in Alberta the payment of wages weekly is almost universal. A situation where a labourer would continue working for an employer who had failed to pay wages for a six-week period must be rare. Moreover the vigor with which employees of the Alberta Board of Industrial Relations pursue their wage collection activities, must by now have convinced employers of the wisdom of prompt wage payment. I make no recommendation as to the suggested increase in the present priority of six weeks' wages provided by section 12.

Insurance  
moneys

**15.** Where any improvement on land in respect of which a lien attaches is wholly or partly destroyed by fire any money received or receivable by the owner by reason of any insurance thereon is subject to all claims for liens to the same extent as if the money had been realized by a sale of the land in proceedings to enforce a lien.

[1960, c. 64, s. 15]

Section 15.

It was submitted by several that inasmuch as it has become increasingly the custom to insure against perils other than fire insurance, such as vandalism, theft and the elements, this section should be enlarged to include insurance against these additional perils. I so recommend.

Retention  
of percentage

17. (1) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract the person primarily liable on the contract shall, when making payment thereunder, retain for the time limited by section 32, an amount equal to twenty per cent of the value of the work actually done.

(2) Where the value of the work to be done exceeds fifteen thousand dollars, the amount to be retained shall be fifteen per cent instead of twenty per cent of the value, or twenty per cent of fifteen thousand dollars, whichever is the greater amount.

(3) The value shall be calculated on the basis of the contract price or, if there is no specific contract price, then on the basis of the actual value of the work done.

(4) Every lien is a charge upon the amount directed by this section to be retained in favour of the lienholder whose lien is derived under the person to whom the moneys so required to be retained are payable.

(5) A payment, other than of the amount required to be retained by this section, made in good faith

(a) by an owner or mortgagee to a contractor,

(b) by a contractor to a sub-contractor, or

(c) by one sub-contractor to another sub-contractor,

before notice in writing of the lien is given to the owner, mortgagee, contractor or sub-contractor, as the case may be, by the lienholder operates as a discharge *pro tanto* of the lien.

(6) Where a contractor or sub-contractor defaults in completing his contract, the amount required to be retained by this section

(a) shall not, as against a lienholder, be applied to the completion of the contract or for any other purpose than the satisfaction of liens, and

(b) when distributed, shall be distributed in the manner prescribed by section 51.

(7) A person who in good faith underestimates the value of the work actually done at any specific time and retains the percentage of the value required to be retained by this section, calculated on that underestimated value, does not lose the protection afforded by this Act if he provides, for the satisfaction of liens in accordance with this Act, an amount equal to the correct amount that should have been retained pursuant to this section. [1960, c. 64, s. 17]

Sections 17 and 19

This question was frequently asked: Does section 17 intend that the owner should make a holdback from the contractor, that the contractor should make a holdback from each subcontractor, that each subcontractor should make a holdback from each of his sub-subcontractors, and so on down the line, or was the original intention of the Act simply that the owner should make a holdback which would be the fund to which all lienholders would look for payment, and that in default of the holdback having been retained, lienholders could look to the land?

I think there is merit in the view that the proper provision would be that the only holdback required by the Act would be the owner's holdback, and that the owner's holdback would constitute a fund to which all lienholders would look for satisfaction of their claims. This would avoid the snowball effect which now exists where there are holdbacks upon holdbacks upon holdbacks, slowing down the flow of money at every stage of a project. If the Act were to provide for a holdback by the owner only, this would not interfere with the common law right of contractors to make provision in their contracts with subcontractors for any deficiency fund or other holdback fund which they might wish to create, but that fund would

have no relevance to the rights of lienholders under the Mechanics' Lien Act. The only person liable to make a holdback would be the owner, and all of the rights of lienholders (apart from existing contractual rights) would be against the holdback fund or the land.

It will be noted that this is the way in which section 14 of the New Brunswick Act is drawn, and I recall the comment in the Thomson Report that the New Brunswick Act in content is the closest to that which the Conference of Commissioners on Uniformity of Legislation wished to have enacted generally, pp. 4, 30 and 44. New Brunswick's section 14 makes it clear that the owner only must make the holdback, that only the fund in the hand of the owner is available to lien claimants, and that only the owner and his land are liable when there is default in complying with the holdback provisions of the Act. I adopt the view of the New Brunswick legislators as thus expressed in their Act and have redrawn section 17 accordingly as it appears below.

I have included in redrafted section 17 a definition of the expression "the lien fund" and have used that expression throughout the following redrafted sections. This was done because of the problems arising from the expressions currently used, "the amount required to be retained", or "the percentage of the value required



to be retained" -- problems discussed in the B.C. cases: Cross and Grant v. Brooks et al (1958) 13 D.L.R. (2d) 491; Denston Co. Ltd. v. Board of Trustees, S.D. No. 37 (Delta) (1958) 13 D.L.R. (2d) 494, and Fraser Sash and Door Co. Ltd. v. Bevenco Construction Ltd. et al (1960) 35 W.W.R. 124 -- and emphasizing the ambiguity of these expressions: do they mean only the actual percentage referred to in the section requiring "a holdback" or do they include also the amounts for which an owner may become liable if he makes payments in bad faith or with notice of liens? I believe that the use of the expression "the lien fund" for the purpose indicated in my draft section 17 will remove the ambiguity of the expressions presently used and make more effective the operation of sections 17 and 19, as redrafted.

I also recommend, for the reasons stated elsewhere in this Report, that registration, rather than notice in writing, should determine when the owner may no longer reduce the lien fund by bona fide payments on the contract, and my draft so provides.

For the sake of uniformity, simplicity, readiness of comprehension and compliance by the average uninformed citizen, I think the "holdback" ought in all cases to be fifteen percent regardless of the size of the contract. Section 17 is drafted accordingly.

17.(1) In this section and in section 19, the expression "the lien fund" means the percentage retained by the owner as required by this section, plus any amount which has not been paid by the owner under the contract in good faith prior to the registration of a lien, less any amount permitted by section 17A to be paid.

(2) Irrespective of whether a contract provides for installment payments or payment on completion of the contract an owner liable on a contract under which a lien may arise shall, when making payment thereunder, retain for the time limited by section 32, an amount equal to fifteen percent of the value of the work actually done.

(3) Value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work done.

(4) Every lien is a charge upon the lien fund.

(5) The owner shall not be liable under this Act for more than the amount of the lien fund.

(6) A payment, other than of the percentage required by this section to be retained, made in good faith by an owner or mortgagee to a contractor before registration of any liens is valid so that the lien fund is reduced by the amount of such payment.

(7) Where a contractor or subcontractor defaults in completing his contract, the lien fund

- (a) shall not, as against a lienholder, be applied to the completion of the contract or for any other purpose than the satisfaction of liens, and
- (b) when distributed, shall be distributed in the manner prescribed by section 50.

(8) A person who in good faith underestimates the value of the work actually done at any specific time and retains the percentage of the value required to be retained by this section, calculated on that underestimated value, does not lose the protection afforded by this Act if he provides, for the satisfaction of liens in accordance with this Act, an amount equal to the correct amount that should have been retained pursuant to this section.

Progressive Release of Holdbacks

In many of the briefs filed as well as in oral argument, the unjustified retention by owners, contractors and subcontractors of holdback funds was severely criticized and was blamed not only for the slowing of the flow of contract funds but also for needless bankruptcies. Only three of our common law provinces -- Ontario, New Brunswick and Manitoba -- have moved to speed the disbursement of holdback funds. The statutory provisions enacted for the purpose are based upon the services of architects, engineers or other persons supervising contracts and the issue by them progressively of certificates of completion of sub-contracts.

The Thomson Revision attempted to deal with the holdback situation: it drew upon sections 11 (3) and (4) of the Ontario Act and section 14 (3A) and (3B) of the New Brunswick Act, improving upon them by making provision for an application to the Court for the issue of an order as to completion, when the architect, engineer or other person, charged with the responsibility, fails to do so.

I recommend the inclusion in our Act between the present sections 17 and 18 of a new section 17A incorporating section 13 (1), (2), (3) and (4) of the Thomson Revision. To meet the situation, of frequent occurrence in this Province, in which construction is not

supervised by an architect, engineer or other person, I recommend the addition of a subsection (5) to the new section, authorizing application by a contract or sub-contractor to the Court for the desired order as to completion.

Payment of  
retained  
moneys

**19.** (1) Upon the expiration of the time limited by section 32, payment of the amount retained as required by section 17 may be validly made so as to discharge every lien in respect thereof, unless in the meantime a statement of lien has been registered or proceedings have been commenced to enforce a lien.

(2) Where a statement of lien has been registered or proceedings have been commenced to enforce a lien the person primarily liable on the contract or a mortgagee authorized by the owner to disburse the moneys secured by a mortgage may pay the amount retained as required by section 17 into court

- (a) in any proceedings that have been commenced to enforce a lien, or
- (b) on his own application by originating notice of motion,

and payment into court under this provision constitutes a valid payment in discharge of the person primarily liable on the contract to the amount thereof.

[1960, c. 64, s. 19]

Section 19.

The following redraft of section 19 is designed to deal with problems which can arise from the fact that the present section 19 has the effect not only of discharging the owner from liability but also of removing the liens from

his land and having the moneys in Court stand in the place of the land. The danger arising from this wide provision is that if the amount of the lien fund is not properly determined, lienholders can be prejudiced by the loss of their security against the land as well as the loss of their money claim against the owner. I have tried to meet this difficulty by providing that notice of the application must be served on all people interested, that the judge may at the hearing of the application receive all evidence necessary to determine the proper amount of the lien fund (for example, whether the owner has made any payments in bad faith or after registration of liens) and that if he thinks the matter should be reserved for trial, he may so direct.

In my view the object of the present sections 19 and 38 is that the payment in of the holdback fund is, indeed, to permit the owner to be completely discharged of liability and his land to be discharged of liens, when he has fulfilled the only obligation on him or his land under the Act, namely, to make the proper holdback and to see that those moneys become available to lien claimants rather than to the contractor to whom they would otherwise be paid.

I think it is perfectly reasonable that if the owner pays into Court the full amount for which he can be

liable under section 17, then he ought to have no further liability and the rights of lien claimants ought to be restricted entirely to the moneys which he has so provided. So long as he has provided the proper amount then there is no reason why his land should continue to be encumbered or that he should continue to be under personal liability.

As to the payment of costs, I accept the view that the full obligation of the owner is that created by section 17 and that he ought not to be liable for any amount beyond the lien fund. Any costs that are recovered by lien claimants or others ought to come out of that fund, and not out of the owner's pocket.

Redraft:

19.(1) Upon the expiration of the time limited by section 32, payment of the lien fund may be validly made so as to discharge every lien in respect thereof, unless, in the meantime, a statement of lien has been registered.

(2) Where a statement of lien has been registered, the owner, or a mortgage authorized by the owner to disburse the moneys secured by a mortgage, may

- (a) by interlocutory application in any proceedings that have been commenced to enforce a lien, or
- (b) on application by originating notice of motion,

pay into Court the amount of the lien fund.

(3) Payment into Court ordered under subsection (2) shall

- (a) discharge the owner from any liability in respect of liens, and
- (b) the money when paid into Court shall stand in the place of the land and the order shall provide that the liens be removed from the title to the land concerned.

(4) On an application under subsection (2)

- (a) notice shall be given as provided in section 40(1),
- (b) the Court may hear and receive such evidence, by affidavit or viva voce or otherwise, as it may deem necessary in order to determine the proper amount of the lien fund to be paid into Court,
- (c) the Court may direct the trial of an issue to determine the amount of the lien fund to be paid into Court,
- (d) the Court may refuse the application if of the opinion that the determination of the amount of the lien fund should be made at the trial of the action.

Payment  
where  
contract  
price not  
money

**21.** (1) Where a lien becomes a charge on the amount required to be retained under section 17 and the contract price is not payable in money, the owner or the person primarily liable on the contract is liable to pay in money the percentage of the value to be retained by him.

(2) Where the owner or person primarily liable on the contract desires to avail himself of the provisions of section 19 and pay into court the amount to be retained and the contract price is not payable in money, a judge may, on application by the owner on such notice, if any, as the judge may direct, fix the amount of money that is to be paid into court with respect to the value of the percentage to be retained.

[1960, c. 64, s. 21]

#### Section 21.

It is suggested that since the intention of this section is to make mandatory the obligation of the owner or the person primarily liable on the contract to pay, the words "shall pay" be substituted for the words "is liable to pay".

I so recommend.



### Right to Information

Inspection of  
contract, etc.

26. (1) A lienholder may at a reasonable time demand of the owner or his agent the production for inspection of

- (a) the contract or agreement with the contractor in respect of which work has been, is being or is to be done, or in respect of which materials have been, are being or are to be furnished, if the contract or agreement is in writing, or
- (b) if the contract or agreement is not in writing, the terms of the contract or agreement and the state of the accounts between the owner and contractor.

(2) Where the owner or his agent at the time of the demand or within a reasonable time thereafter

- (a) does not produce the written contract or agreement, or
- (b) if the contract or agreement is not in writing,
  - (i) 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
  - (ii) knowingly and falsely states the terms of the contract or agreement or the amount due or unpaid thereon,

then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner is liable to him in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of his lien.

(3) A lienholder may at any reasonable time demand of a mortgagee or his agent or unpaid vendor or his agent

- (a) the terms of any mortgage on the land or any agreement for the purchase of the land in respect of which the work is or is to be done or in respect of which materials have been or are to be furnished, and
- (b) a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be.

(4) Where the mortgagee or vendor or his agent fails to inform the lienholder at the time of the demand or within a reasonable time thereafter

- (a) of the terms of the mortgage or agreement, and
- (b) of the amount owing thereon,

then, if the lienholder sustains loss by the refusal or neglect or by reason of any misstatement by the mortgagee or vendor of the terms thereof or amount owing thereon, the mortgagee or vendor is liable to him in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of his lien.

(5) The court may on summary application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

- (a) the owner or his agent,
- (b) the mortgagee or his agent, or
- (c) the unpaid vendor or his agent,

as the case may be, to produce and allow a lienholder to inspect any contract or agreement or mortgage or agreement for sale, upon such terms as to costs as the court may deem just.

Section 26.

For more effective use of this section by a lienholder it is recommended that

- (1) it be made applicable only to a lienholder who has registered his lien;
- (2) that "the demand" be made by notice in writing;
- (3) that a specific period be named within which response to the notice in writing must be made, e.g. six days;
- (4) that an additional subsection be added giving to the lienholder the right to obtain information from the contractor, subcontractor or the agent of either of them.

### Registration of Lien

Registration  
of lien

**27.** (1) A lien may be registered in the land titles office of the land registration district in which the land is situate by filing with the Registrar a statement of lien in Form 1 of the Schedule.

(2) The statement of lien shall set out

(a) the name and residence of

(i) the lienholder,

(ii) the owner or alleged owner, and

(iii) the person for whom the work was or is being done or the materials were or are being furnished,

(b) the date when the work was completed or the last materials were furnished, or if the lien is filed before the completion of the contract or sub-contract, as the case may be, a statement that the work is not yet completed or the materials have not yet all been furnished,

(c) a short description of the work done or to be done or of the materials furnished or to be furnished,

(d) the sum claimed as due or to become due,

(e) a description, sufficient for registration, of the land and estate or interest therein to be charged, and

(f) an address for service of the lienholder within the Province.

(3) In the case of a lien arising in connection with an oil or gas well it is not necessary to set out in the statement of lien the name of the owner or alleged owner of the oil or gas well.

(4) The statement of lien shall be verified by an affidavit, in Form 2 in the Schedule, of the lienholder or of his agent or assignee.

(5) Where the statement of lien is made by a corporation, it shall be verified by the affidavit of an officer or employee of the corporation or its agent.

(6) Where the affidavit is made by some person other than the lienholder, it shall state that such person has a personal knowledge of the matters required to be verified.

(7) A Registrar shall be supplied with printed forms of such statements of lien and affidavits, in blank, which shall be supplied to every person requesting the same and desiring to register a lien.

(8) A Registrar shall decide whether his office is or is not the appropriate office for the registration of the statement of lien and shall direct the applicant accordingly.

(9) No lien shall be registered unless the claim or joined claims amount to or aggregate twenty dollars or more.

(10) The Registrar shall, in accordance with *The Land Titles Act*, register the lien as an encumbrance against the estate or interest in the land affected, or if the land affected has not been registered under *The Land Titles Act* and section 56 does not apply thereto, he shall make a record of the lien in a book or such other manner as he deems advisable. [1960, c. 64, s. 27; 1963, c. 34, s. 2]

Section 27.

Subsection (6) in its requirement that where the affidavit is made by some person other than the lienholder "shall state that such person has a personal knowledge of the matters required to be verified" is unduly restrictive and prevents the taking of the affidavit by a person (for example, the lienholder's solicitor) to whom the lienholder without ready access to a Land Titles Office, Department of Mines and Minerals, or Department of Lands and Forests, may have communicated the necessary facts by telephone, telegraph or other modern communication medium.

I recommend the repeal of present subsection (6) of section 27 and the substitution therefor of a new subsection (6), following the phraseology of the B.C. Act reading as follows:

"(6) Where the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent gives the source of his information and states that he believes the facts to be true."

Wrongful  
registration

**31.** A person who has a lien against an estate or interest in minerals only and who registers a lien against an estate or interest in the land to which his lien does not attach is liable for legal and other costs and any damages incurred by or resulting to the owner of any estate or interest in the land by reason of the wrongful registration of the lien against his estate or interest.

[1960, c. 64, s. 31]

### Section 31.

Farmers by brief filed and in person, complained vigorously of the filing of liens against surface rights by subcontractors employed by owners of pipeline easements, whose claims in fact related only to the easements -- and of the annoyance and expense caused in securing the removal of such liens.

Investigation indicates that subcontractors seeking to file liens against pipeline easements within the statutory period may find upon search at the appropriate Land Titles Office that although construction of the pipeline is under way the easement whether created by Order of the Public Utilities Board or grant by the surface owner has not yet been registered, or has been registered by way of caveat only. The quarter sections across which the pipeline is to be constructed have been ascertained from

the Department of Mines and Minerals which granted the Permit for Construction but which is not concerned with the securing by the permit holder of the necessary easements.

The lien claimant pressed for time files his lien against the surface title: the Registrar is not called upon to check the correctness or validity of the lien claimed -- Canadian Pacific Railway Co. v. District Registrar of Dauphin Land Titles Office (1956) 18 W.W.R. 241 -- and registers it. Notice of filing goes to the surface owner from the Land Titles Office. Registration of the lien may well prejudice sale or mortgaging by the owner and its removal necessitates the incurring of costs.

The only genuine cure for the irate farmer's condition would be the issue by the Land Titles Office of titles to easements, admittedly an expensive innovation. If, indeed, the issue of titles to easements be the only genuine cure, then perhaps the question of cost is not pertinent. In the meantime the farmer might be assisted by an amendment to section 31. As presently worded that section gives a right of action to an owner of any estate or interest in land against the person who has an estate or interest in minerals only and who wrongfully registers a lien against the estate or interest of the owner, to

which his lien does not attach. The section might well be given a more general wording which would include all wrongful lien registrations, thus:

"31. A person who has a lien against a particular estate or interest only and who registers a lien against an estate or interest in the lands to which his lien does not attach is liable for legal and other costs and any damages incurred by or resulting to the owner of any estate or interest in the land by reason of the wrongful registration of the lien against his estate or interest."

Time for  
registration  
of lien

**32.** (1) A lien in favour of a contractor or a sub-contractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or sub-contract, as the case may be, and

(a) within thirty-five days after completion or abandonment, or,

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after completion or abandonment.

(2) A claim of lien for materials may be registered at any time during the furnishing of the materials and

(a) within thirty-five days after the last of the materials is furnished, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after the last of the materials is furnished.

(3) A lien for the performance of services may be registered at any time during the performance of the services and

(a) within thirty-five days after the performance of the services is completed, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within one hundred and twenty days after the performance of the services is completed.

(4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and

(a) within thirty-five days after the completion of the work, or

(b) in the case of a lien for wages owing for work in, at or about a mine, within sixty days after the completion of the work.

(5) Where, in respect of work done on or material furnished for an improvement,

(a) something is improperly done, or

(b) something that should have been done is not done, at the time when the thing should have been done and if at a later date the thing improperly done is put right or the thing not done is done, the doing of the thing at the later date shall not be deemed to be the completion of the work or the furnishing of the last materials so as to enable a person to extend the time limited by this section for registering a lien. [1960, c. 64, s. 32]

The desirability of amendment to Section 32 is the subject matter of section (b) of the O/C and has been dealt with under Part V of this Report, pages 32 to 38.

#### Expiry and Discharge of Lien

Expiry of  
unregis-  
tered lien

**33.** Where a lien is not registered within the time limited by section 32, the lien ceases to exist.

[1960, c. 64, s. 33]

Section 33.

In their joint submission The Western Retail Lumbermen's Association and The Edmonton Retail Lumbermen's Association urged that a proviso be added to section 33



similar to the proviso contained in section 24 of the Saskatchewan Act permitting late registrations of liens, with protection to the rights of intervening parties. Mr. Justice Thomson accepted the representations of the lumber companies as to the value of Saskatchewan section 24 expressed to have been valuable to farmers and lumber companies alike, in that it resulted in improved credit arrangements and the reduction in the number of liens filed.

The adoption of Saskatchewan's section 24, as included in improved form in section 31 of the Thomson Revision, in effect extends indefinitely the right to file a lien. It opens up further avenues of litigation in deciding just what equities have intervened between the normal expiry date for filing liens and the late date at which a lien claimant by Saskatchewan's section 24 is permitted to file. I think it unwise that the right to file liens should be opened up in this generous fashion.

Re: Present sections dealing with "Expiry and Discharge of Lien" and "Enforcement of Lien".

The following redrafts of several sections of the Act are based upon these principles:

- (1) A major criticism of the Act has been that enforcement proceedings under it are too cumbersome, lengthy and expensive. While the nature of mechanics' lien

litigation may render this unavoidable, to some extent, the lack of specific procedural provisions in the Act is a contributing factor. While reciting in section 45 (1) that the procedure for enforcement shall be summary, the Act fails on the whole to provide guidance as to how summary procedure is to be accomplished.

- (2) Procedural guides should enable the court and litigants to give effect to the desire expressed in section 45 that procedure in mechanics' lien actions should be of a summary character.
- (3) Rules of procedure should be set out in sufficient detail so that there will be both certainty and uniformity in procedure.
- (4) Procedure should be designed to speed up the adjudication of lien cases as much as possible and to enable persons interested in property on which liens are filed, to have the liens cleared or the property dealt with so that unfinished improvements may be completed.
- (5) Those persons seeking to take advantage of the security given by the Mechanics' Lien Act should be barred from resting on their rights and should be required to act promptly.

- (6) Sections 34, 35 and 36 offend against the principle that lienholders who desire to take advantage of their security should be required to act promptly. There is no justification for permitting a lien, once registered, to continue for six years and for placing the onus on some person other than the lienholder to serve a notice under section 34 (1) when it's desired to have an action started. Under present circumstances, interested persons are reluctant to initiate an action with the result that liens remain on titles for months while discussions and negotiations between lienholders and others continue.

Expiration  
of lien

**34.** (1) A lien in respect of which a statement of lien is registered ceases to exist thirty days from the date a notice in Form 4 of the Schedule is

(a) served on the lienholder in the manner processes are usually served, or

(b) deposited in the mail by registered mail addressed to the lienholder at the address for service of record in the land titles office.

(2) The court may, upon an *ex parte* application, shorten the thirty day period provided in subsection (1) to such shorter period as it deems adequate.

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

(4) Service in accordance with subsection (1) of the notice and order, if any, shall be proved to the satisfaction of the Registrar. [1960, c. 64, s. 34; 1963, c. 34, s. 3]

I recommend that sections 34, 35, 36 and 37 be replaced by three new sections 34, 35 and 36 worded as follows. For the content of these sections I have drawn heavily on the provisions of the Ontario Act and have incorporated these borrowings with portions of our present Alberta sections 36 and 37:

New  
Section 34.

34.(1) A lien which has been registered ceases to exist unless, within ninety days from the date of registration thereof

- (a) an action is commenced to realize upon the lien or in which the lien may be realized upon under this Act, and
- (b) a certificate of lis pendens in Form 5 in the schedule is registered in the appropriate Land Titles Office.

(2) The Clerk of the Court in which an action is begun may grant a certificate of lis pendens to any lienholder who is a party to the proceedings.

(3) Any lienholder who is a party to the proceedings may cause a certificate of lis pendens to be filed in the appropriate Land Titles Office.

(4) Upon receiving

- (a) a certificate under the seal of the Clerk of the Court stating that proceedings for which a certificate of lis pendens was granted are discontinued, or
- (b) withdrawal of a certificate of lis pendens signed by the person on whose behalf the certificate was registered,

the registrar shall cancel registration of the certificate of lis pendens.

Renewal  
statement

35. (1) A lien in respect of which a statement of lien is registered in accordance with this Act ceases to exist six years from the date of registration unless before the expiration of that period, but not more than two months before the end of that period, the lienholder or a person claiming through or under him causes to be filed in the appropriate land titles office a renewal statement in Form 6 in the Schedule.

(2) The renewal statement shall be verified by affidavit and set out the interest of the lienholder and the amount still owing for principal and interest.

(3) The Registrar shall file the renewal statement and make a memorandum of the filing upon the appropriate certificate of title.

(4) Where a renewal statement is filed pursuant to subsection (1), the lien in respect of which the statement of lien and renewal statement are registered ceases to exist six years from the date of filing of the renewal statement.

[1960, c. 64, s. 35]

New section 35.

35.(1) Where a certificate of lis pendens is filed in accordance with this section any lien which has continued to exist by reason of registration of the certificate of lis pendens shall continue to exist until the proceedings are concluded.

(2) Notwithstanding subsection (1), if no trial has been held within two years from the date of the registration of the certificate of lis pendens, any interested party may apply ex parte to the court to have the certificate of lis pendens vacated and all liens depending thereon discharged.

(3) On an application under subsection (2) the court may direct the giving of notice of the application to such parties as it may deem appropriate.

Certificate of  
*lis pendens*

36. (1) Notwithstanding section 34 or section 35, a lien in respect of which a statement of lien is registered does not cease to exist if, at any time before the lien expires, the lienholder

- (a) takes proceedings in court to enforce his lien, and
- (b) files or causes to be filed a certificate of *lis pendens* in Form 5 in the Schedule in the appropriate land titles office.

(2) The clerk of the court in which the proceedings are begun may grant a certificate of *lis pendens* to any lienholder who is a party to the proceedings.

(3) Any lienholder who is a party to the proceedings may cause a certificate of *lis pendens* to be filed in the appropriate land titles office on his own behalf or on behalf of himself and all or any other lienholders who are parties to the proceedings.

(4) Where a certificate of *lis pendens* is filed in accordance with this section, any lien in respect of which it is filed continues to exist until the proceedings are concluded.

(5) Upon receiving

- (a) a certificate under the seal of the clerk of a court stating that proceedings for which a certificate of *lis pendens* was granted are discontinued, or
- (b) a withdrawal of a certificate of *lis pendens* signed by the person on whose behalf the certificate was registered,

the Registrar shall cancel registration of the certificate of *lis pendens*.

[1960, c. 64, s. 36; 1963, c. 34, s. 4]

New section 36.

36.(1) The registrar of the Land Titles Office shall cancel the registration of a lien in whole or in part

- (a) upon receiving notification in Form 6 or Form 7 in the schedule signed by the claimant or his agent stating that the lien has been satisfied in whole or in part,

- (b) upon receiving proof satisfactory to him that a lien which has been registered has ceased to exist under the terms of this Act.

(2) The registrar shall cancel the registration of a lien and of any certificate of *lis pendens*

- (a) upon receiving a certified copy of an order or judgment of a court ordering the cancellation of the registration of a lien,
- (b) upon receiving a certificate under the seal of the Clerk of the Court stating that pursuant to an order or judgment of the court
  - (i) the amount due by an owner in respect of a lien has been ascertained and paid into court, or
  - (ii) the land, improvement or material has been sold in satisfaction of the lien.

Cancellation  
of lien

37. (1) Upon receiving a notification in Form 7 in the Schedule signed by the claimant or his agent stating that the lien has been satisfied, the Registrar shall cancel the registration of the statement of lien registered by such party.

(2) Upon receiving proof satisfactory to him that, in accordance with section 34 or 35, a lien in respect of which a statement of lien is registered has ceased to exist the Registrar may cancel the registration of the lien.

(3) Upon receiving a certified copy of an order or judgment of a court ordering the cancellation of the registration of a lien, the Registrar shall cancel the registration of the lien and any certificate of *lis pendens* filed in connection therewith.

(4) Upon receiving a certificate under the seal of the clerk of a court stating that pursuant to an order or judgment of the court

- (a) the amount due by an owner in respect of a lien has been ascertained and paid into court, or
- (b) the land, improvement or material has been sold in satisfaction of the lien,

and the registration of the lien is thereby ordered to be cancelled, the Registrar shall cancel the registration of the lien and any certificate of *lis pendens* filed in connection therewith.

[1960, c. 64, s. 37]

Present  
Section 37.

Present section 37 to be repealed. Sub-section (1) of section 37 and Form 7, provided for use thereunder, contemplate only complete discharge of a registered lien by the lienholder. Submissions were that frequently it is desired to give a partial discharge where the lien is registered against more than one parcel. It would therefore seem reasonable that provision be made for the registration of a partial discharge by the addition of a Partial Discharge Form as Form 8 in the Schedule. I so recommend.

To implement the "principles" outlined on page 92 it is recommended that sections 39 to 47 inclusive, sections 51 and 55 be repealed and new sections 39 to 50, 52, 53 and 58 substituted.

#### Enforcement of Lien

Enforcement  
of lien

**39.** Proceedings to enforce a lien may be commenced either by a statement of claim or by originating notice.

[1960, c. 64, s. 39]



New section 39.

39.(1) Proceedings to enforce a lien shall be commenced by statement of claim.

(2) Lienholders shall not be named as defendants.

(3) Where the party issuing the statement of claim is not the contractor, the statement of claim shall name as defendant

- (a) the owner, and
- (b) the contractor, and
- (c) the holder of any prior registered encumbrance.

(4) Where the person issuing the statement of claim is the contractor, he shall name as defendants

- (a) the owner, and
- (b) the holder of any prior registered encumbrance.

(5) The expression "prior registered encumbrance" shall not include liens.

(6) Proceedings to enforce a lien shall be of a summary character so far as is possible having regard to the nature and extent of the issues involved.

COMMENT:

The present section 39 provides for the commencement of an action by Statement of Claim or Originating Notice. This seems to cause some uncertainty in the practice. It would seem that the reason for including the Originating Notice as one means of commencing a mechanics' lien action is that it necessitates an appearance

in chambers before further pleadings are drawn. This would enable summary determination by the Judge of some points, and directions from him as to what issues must be determined. The purpose of the new section 39 is to establish uniformity of practice. The commencement of proceedings by Statement of Claim only is recommended because this fits in better with procedure in other actions. The draft section is expanded to clarify the practice by indicating what persons shall and shall not be named as defendants. Later draft sections provide for a chambers application to be known as "the Pre-trial Application" at which uncontested matters may be disposed of and the issues clarified.

Service of  
notice

**40.** (1) The statement of claim or originating notice shall be served upon all persons who by the records of the land titles office appear to have an interest in the land in question and upon such other persons as the court may direct.

(2) A lienholder served with a statement of claim or originating notice is a party to the proceedings.

(3) A lienholder who is a party to the proceedings shall file in the office of the clerk or deputy clerk of the court in which the proceedings are pending detailed particulars of his lien, which shall be verified by affidavit.

(4) A lienholder who fails to appear at the hearing shall, upon proof of service of notice upon him, lose his lien.

[1960, c. 64, s. 40]

New  
Section 40.

40.(1) The statement of claim shall be served upon all persons who by the records of the Land Titles Office appear to have an interest in the land in question and upon such other persons as the court may direct.

(2) All persons including lienholders served with a statement of claim are parties to the proceedings.

COMMENT:

Subsection (1) substantially repeats the present section 40 (1), with appropriate amendment.

Subsection (2) is substantially the same as the present section 40 (2), with some amendment for the purpose of clarity.

Subsections (3) and (4) of present section 40 have been deleted, as the new section 41 deals with the filing of affidavits by lienholders.

Enforcement  
of lien by  
sub-con-  
tractor

**41.** Subject to subsection (2) of section 6, a sub-contractor may enforce his lien notwithstanding the non-completion or abandonment of the contract by a contractor or sub-contractor under whom he claims.

[1960, c. 64, s. 41]

New section 41.

41.(1) The time within which a defendant must file a statement of defence or demand of notice shall be the period limited for the filing of defence by the consolidated rules of the Supreme Court of Alberta.

- (2) (a) A party not named as a defendant shall not be required to file a statement of defence.
- (b) At any time following service of the statement of claim upon him, a party may file with the Clerk of the Court and serve upon any lienholder a Notice to Prove Lien in Form 8 in the Schedule.
- (c) A lienholder served with a Notice to Prove Lien shall, within fifteen days of the service of such notice upon him, file in the office of the Clerk of the Court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(3) A lienholder upon whom a Notice to Prove Lien is served and who does not file his affidavit within fifteen days of the service of such notice, or within such further period as the Court may order on application upon notice, shall lose his lien.

(4) Any party to the action may examine the lienholder upon his affidavit filed pursuant to this section.

COMMENT:

This new section is intended to clarify the practice respecting the filing of defence; to eliminate the confusion sometimes existing as to which parties in a

lien action need to file Statements of Defence and what issues need be dealt with therein. Also, it is intended to provide a means by which parties to lien proceedings may contest lien claims and obtain particulars necessary to do so. Later sections provide for summary determination in appropriate cases of the validity of liens and a procedure for declaring liens valid where they are not contested, in part eliminating the severity of the present subsection (4) of section 40.

Enforcement  
of lien by  
labourer

**42.** (1) Subject to subsection (2) of section 6, a labourer may enforce a lien in respect of an unfulfilled contract or sub-contract and notwithstanding anything to the contrary in this Act, a labourer may serve a notice of motion, returnable before a judge not less than four days after service thereof, on the proper parties asking for judgment on his lien.

(2) The notice of motion shall be accompanied by particulars of the labourer's lien, verified by affidavit.

(3) Where the contract or sub-contract has not been completed when the lien is claimed by a labourer, the amount required to be retained by section 17 shall be calculated on the value of the work done by the contractor or sub-contractor by whom the labourer is employed, having regard to the contract price, if any. [1960, c. 64, s. 42]

New Section 42.

42.(1) At any time following the expiry of the time limited for defence, the plaintiff may, and before setting the action down for trial the plaintiff must, make a Pre-trial Application.

(2) If the plaintiff does not, within thirty days from the expiry of the time limited for defence, serve notice of a Pre-Trial Application, any other party to the action may do so and may make the Application.

(3) Notice of the Pre-trial Application shall be served upon all defendants, and on any such other persons as the Court may direct, at least ten days before the date of hearing of such Application.

(4) Upon the hearing of the Pre-trial Application,

- (a) If no defence has been filed and no Notice to Prove Lien has been filed and served, the Court may declare the liens valid and make such further judgment or order as the Court may deem appropriate.
- (b) If defence has been filed the Court may give judgment declaring valid any liens in respect of which no Notice to Prove Liens has been filed.
- (c) The Court may consider the affidavits filed upon service of Notice to Prove Liens and the transcript of any examination thereon, and may
  - (i) determine summarily the validity of the liens concerned,
  - (ii) hear evidence viva voce,
  - (iii) direct that at the trial of the action any particular issue or issues arising on the application be determined.
- (d) The Court may make such further order or direction as the Court may deem necessary or desirable, including inter alia, an order that the property be sold pursuant to this Act and an order that the action be entered for trial.
- (e) The Court may order that any lienholder or other party shall be given the carriage of the proceedings.
- (f) The Court may order that examinations for discovery be held, but no examinations for discovery shall be held without an order of the Court.

COMMENT:

The present sections 41 and 42 (1) are partially included in the new section 44. The portion of present section 42 (1) providing a summary procedure for the obtaining of judgment on a labourer's lien is eliminated. Summary determination of the validity of all liens will be possible under the amended provisions. The necessity for the taking of any steps by a labourer to obtain judgment on his lien would be unnecessary unless the lien is contested: in such a case, the procedure provided in the new draft sections for determination of these points would appear adequate.

The material in this proposed section 42 is substantially new. The Pre-trial Application is intended to provide a means for having uncontested liens declared valid and to have them enforced where appropriate. It also provides for a summary procedure to determine any issues requiring decision; it further provides a means of determining and narrowing the issues as much as possible in order that only those matters involving actual disputes of fact or law will have to go to trial. It is felt that the provisions of this draft section will assist in providing a quick and expeditious means of determining the matters at issue in lien actions.

Conduct of  
proceedings

43. Where more than one action is commenced in respect of the same land the court, upon the application of a lienholder or other interested person, may in its discretion

- (a) give the conduct of the proceedings to any lienholder, or
- (b) consolidate all the causes of action into one cause and give the conduct of the proceedings to any plaintiff.

[1960, c. 64, s. 43]

New  
Section 43.

43.(1) At any time after service of the statement of claim, any party may apply to the Court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the Court may order the appointment of a receiver upon such terms and upon the giving of such security or without security as the Court may deem appropriate.

(2) At any time after service of the statement of claim, any party may apply to the Court for the appointment of a trustee or trustees, and the Court may, upon the giving of such security or without security as the Court deems appropriate, appoint a trustee or trustees with power to manage, sell, mortgage, or lease the property subject to the supervision, direction and approbation of the Court and with power upon approval of the Court to complete or partially complete the improvement.

(3) Mortgage moneys advanced to the trustee or trustees as the result of any of the powers conferred upon him or them by this section take priority over all liens existing at the date of the appointment of the trustee or trustees.



(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the Court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into Court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The Court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

COMMENT:

Subsection (1) joins together the provisions of the present section 48 (1) and of section 32 (3) of the Ontario Act. Both the present Alberta and Ontario sections provide for the appointment of a receiver, but from the Ontario Act is borrowed the additional power for the judge to order security or to set other terms of the receivership if necessary.

The balance of this section comes substantially from sections 32 (4) to 32 (8) of the Ontario Act with

some appropriate re-wording. As the filing of liens often results in the cessation of building operations leaving an improvement incomplete, these provisions are designed to enable a trustee to be appointed who may be able to arrange the completion of the improvement. This will help to avoid the lengthy delays which often occur because there are no provisions in the Act as it stands to enable anything to be done with the incomplete improvement.

Trial of  
claim

44. Except as provided in this Act no interlocutory proceedings are permitted without the consent of the court and upon proof that such proceedings are in the interests of justice. [1960, c. 64, s. 43]

New  
Section 44:

44.(1) Subject to subsection (2) a lienholder may enforce his lien notwithstanding the non-completion or abandonment of any contract under which his lien arises.

(2) Subsection (1) does not apply in favour of a contractor or subcontractor whose contract provides that nothing is to be paid until completion of the contract.

COMMENT:

This section replaces the present sections 41 and 42.

Procedure  
in adjudicating claims

45. (1) The procedure in adjudicating upon the claims shall be of a summary character, so far as is possible, having regard to the amount and nature of the liens in question and the enforcement thereof at the least expense.

(2) The court shall decide all questions that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the parties concerned.

(3) Where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against a party to the proceedings for any sum that is due to such claimant and that he might recover in an action against such party. [1960, c. 64, s. 45]

New  
Section 45.

45. Where more than one action is commenced to enforce liens in respect of the same land the court may, upon the application of any person interested, consolidate such actions into one action, and may give the conduct of the consolidated action to any plaintiff as it deems fit.

COMMENT:

This is intended to accomplish substantially the same purpose as the present section 43, but as the question of the giving of the carriage of the action to a particular party may arise where there is one action or where there are consolidated actions, the former situation is now covered by the new section 42 (4)(e). The Ontario wording has been used in preference to that part

of the present section 43 dealing with consolidation, including the carriage of the consolidated action.

Court order  
to sell

**46.** (1) The court may in its judgment order that the estate or interest in land that is charged with a lien be sold.

(2) When a judgment orders a sale the court

(a) may direct that the sale take place at any time after the judgment, allowing a reasonable time for advertising the sale, and

(b) may make all necessary orders for the completion of the sale and the vesting of the estate or interest in the purchaser.

(3) The court may also direct the sale and removal of any materials. [1960, c. 64, s. 46]

New  
Section 46.

46. Where a defence has been filed and no order is made upon the Pre-trial Application for the holding of a trial, the plaintiff or any other party may enter the action for trial.

COMMENT:

This is a new section, designed, again, to make clear and uniform the practice regarding entry for trial of lien actions.

Enforcement  
of deficiency  
by execution

47. Where sufficient money to satisfy the judgment and costs is not realized from the sale the court shall certify

- (a) the amount of the deficiency,
- (b) the names of the persons who are entitled to recover the deficiency, and
- (c) the persons by the judgment adjudged to pay the same,

and the persons so entitled may enforce payment by execution or otherwise as a judgment of the court.

[1960, c. 64, s. 47]

New  
Section 47.

47. Upon the trial of the action, the court
- (a) shall decide all questions that arise therein that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the parties;
  - (b) shall take all accounts, make all inquiries, give all directions and do all other things necessary finally to dispose of the action and of all matters, questions and accounts arising therein and to adjust the rights and liabilities of and give all necessary relief to all parties.

COMMENT:

This section includes as subsection (a) the present section 45 (2) and incorporates section 35 (4)(b) of the Ontario Act, for the purpose of making it clear that the judge hearing a mechanics' lien act shall dispose of all the issues involved. It is felt that the provisions

of the new sections 47, 48, 49, 50 and 51 place in more orderly form these sections of the present Act which the said new sections replace.

Receiver

48. (1) The court may, on the application of a judgment creditor made at any time before the sale of the property, appoint a receiver to take charge of the property and to rent or operate it on such terms and conditions as the receiver thinks fit.

(2) The proceeds received by a receiver appointed under subsection (1) shall, after deduction of all rates, taxes, insurance or other expense necessary for the maintenance of the property including the costs of management, be applied in such manner as may be directed by the court.

[1960, c. 64, s. 48]

New

Section 48.

48.(1) Where a lien claimant fails to establish a valid lien, he may nevertheless be awarded personal judgment against any party to the proceedings for any sum that is due to such claimant and that he might recover in an action against such party.

(2) The Court may in its judgment order that the estate or interest in land that is charged with a lien be sold.

(3) When the Court orders a sale, the Court may

- (a) direct that the sale take place at any time after the judgment, allowing a reasonable time for advertising,
- (b) direct what advertising of the sale shall be required, and
- (c) make all necessary orders and directions for the completion of the sale and the vesting of the estate or interest in the purchase.

(4) The Court may direct the sale and removal of any materials.

COMMENT:

Subsection (1) is the present section 45 (3).  
Subsection (2) is the present section 46 (1). Sub-  
section (3) is substantially the present section 46 (2).  
Subsection (4) is the present section 46 (3).

Order for  
removal of  
structure

49. (1) Where the work performed or material furnished in respect of which the lien arose results in the creation of an improvement consisting of a structure, erection or building, then notwithstanding

(a) that such structure, erection or building may be affixed to or have become part of the land, or

(b) the provisions of section 11,

the court, if of the opinion that having regard to the value of the improvement and the amount owing on the lien it is proper to do so, may, upon application of the lienholder in proceedings to enforce the lien or in any other proceedings affecting the lien, order such structure, erection or building removed and sold and the proceeds of such sale applied on the lien that arose in respect of such improvement.

(2) If the proceeds of the sale exceed the amount owing, the excess shall be applied in the same manner as the proceeds of the sale of the land and improvements remaining thereon would be applied. [1960, c. 64, s. 49]

New  
Section 49.

49.(1) All moneys realized from a sale, receivership or trusteeship under this Act, and insurance moneys to which Section 15 applies, shall be paid into Court for distribution as provided in this Act.

(2) Upon application by the plaintiff or any party, following the payment of moneys into Court under subsection (1), the Court shall

- (a) where there is sufficient money realized to satisfy all claims, direct that the moneys be paid out of court to the claimants, as they are entitled in respect of their claims, costs and disbursements,
- (b) where sufficient moneys are not realized to satisfy all claims, costs and disbursements, certify the amount of the deficiency, the names of the persons who are entitled to share the moneys in court, the amounts which the various persons interested are entitled to receive from the moneys in court, the persons adjudged to pay any moneys and any credits allowed to such persons under this Act.

COMMENT:

Having dealt in the new section 48 with the sale of the lien property, section 49 gathers together provisions for the payment into Court of all moneys realized by sale, and for the distribution thereof, or the determination of the priorities and distribution where there is a deficiency of moneys realized.



Proof of  
claim after  
proceedings

50. (1) At any time before the amount realized in the proceedings for the satisfaction of liens has been distributed, a lienholder who has not been served with notice of the proceedings may, on application to the court and on such terms as to costs and otherwise as may be just, be allowed to prove his lien.

(2) Where a lien under subsection (1) is proved and allowed the court shall amend the judgment to include the lien.

[1960, c. 64, s. 50]

New  
Section 50.

50.(1) Where a mortgage or other registered encumbrance is prior to liens under this Act, the court may

- (a) order that in a sale under this Act, the property be sold subject to the mortgage or encumbrance,
- (b) order that in a sale under this Act the property be sold at an upset price of not less than the amount secured under the mortgage or encumbrance, costs, and the costs of the sale.

(2) Where a sale is made as in subsection (1)(a) the moneys in court shall be distributed in the following order:

- (a) in paying the costs of those parties to whom costs have been awarded by the court
  - (i) of and incidental to the proceedings, and
  - (ii) of registering and proving the liens;

- (b) in paying six weeks' wages, if so much is owing, of all labourers employed by the owner, contractor or subcontractor;
- (c) in paying the several amounts owing to lienholders other than the contractor;
- (d) in paying the amount owing to the contractor;
- (e) in paying any balance remaining to the owner or any other person legally entitled thereto.

(3) Where a sale is made pursuant to subsection (1)(b) the moneys in court shall be distributed in the following order:

- (a) in payment of all amounts due, including costs and costs of sale, to the holders of mortgages or other registered encumbrances which are prior to liens under this Act;
- (b) in paying the costs of all lienholders
  - (i) of and incidental to the proceedings, and
  - (ii) of registering and proving the liens;
- (c) in paying the several amounts owing to lienholders other than the contractor;
- (d) in paying the amount owing to the contractor;
- (e) in paying any balance remaining to the owner or any other person legally entitled thereto.

(4) Each class of lienholders shall as between themselves rank without preference for their several amounts, and the portion of the said moneys available for distribution to each class shall be distributed among the lienholders in such class proportionately according to the amounts of their respective claims as proved.

(5) Where a labourer has more than six weeks' wages owing to him by a subcontractor, contractor or owner, the court

- (a) shall cause the sum additional to six weeks' wages to be deducted out of any sum actually coming to the subcontractor, contractor or owner under a distribution pursuant to subsection (1), and
- (b) shall order the same to be paid to the labourer.

COMMENT:

This is substantially a new section, although incorporating considerable material from the present section 51.

Subsection (1) is intended to provide a flexibility in the ordering of a sale which is not available in the present Act. Subsection (1)(b) incorporates a part of the British Columbia section 7(1) which was deleted, in incorporating that section in the new section 9 recommended herein, so that it might be incorporated in the part of the Act dealing with enforcement of liens, which seemed more logical.

Subsection (3) duplicates in considerable measure the present section 51 (1), with some re-wording as to costs. However, this subsection is now limited to those cases where lands are sold subject to a prior mortgage or encumbrance. The present section 51 (1) seems to ignore the fact that a mortgage or other encumbrance may be found to be prior to liens, and if interpreted literally, would appear to mean that such prior encumbrance would not share in proceeds of the sale.

Subsection (3) is designed to cure the deficiency of the present section 51 (1) by making clear that where a prior mortgage or other encumbrance is removed from the title by a sale under the Act, that prior mortgage or encumbrance is also entitled to be paid first from the moneys available. Subsection (1)(b) has already made provision to assure that where the mortgage or other encumbrance is to be removed from the title, this will only occur where sufficient moneys are available to pay it in full.

Subsection (4) is the present section 51 (2).

The present section 51 (3) is incorporated in subsections (2)(e) and (3)(e) of the new section 50. The present subsection (4) of section 51 now appears as subsection (5) of new section 50.

Application  
of moneys  
realized

**51.** (1) All moneys realized by proceedings under this Act, including any money received or receivable by the owner by reason of any insurance thereon as mentioned in section 15 and subject thereto, shall be applied and distributed in the following order, that is to say:

- (a) in paying the costs of all lienholders
  - (i) of and incidental to the proceedings, and
  - (ii) of registering and proving the liens;
- (b) in paying six weeks' wages, if so much is owing, of all labourers employed by the owner, contractor or sub-contractor;
- (c) in paying the several amounts owing to other lienholders other than the contractor;
- (d) in paying the amount owing to the contractor.

(2) Each class of lienholders shall as between themselves rank without preference for their several amounts and the portion of the said moneys available for distribution to each class shall be distributed among the lienholders in such class proportionately according to the amounts of their respective claims as proved.

(3) Where a balance remains after all the amounts set out in subsection (1) have been paid, the balance shall be paid to the owners or other persons legally entitled thereto.

(4) Where a labourer has more than six weeks' wages owing to him by a sub-contractor, contractor or owner, the court

- (a) shall cause the sum additional to six weeks' wages to be deducted out of any sum actually coming to the sub-contractor, contractor or owner under a distribution pursuant to subsection (1), and
- (b) shall order the same to be paid to the labourer.

[1960, c. 64, s. 51]

## Section 51.

51.(1) Where the work performed or material furnished in respect of which the lien arose results in the creation of an improvement consisting of a structure, erection or building, then notwithstanding

- (a) that such structure, erection or building may be affixed to or have become part of the land, or
- (b) the provisions of section 11,

the court, if of the opinion that having regard to the value of the improvement and the amount owing on the lien it is proper to do so, may, upon application of the lienholder in proceedings to enforce the lien or in any other proceedings affecting the lien, order such structure, erection or building removed and sold and the proceeds of such sale applied on the lien that arose in respect of such improvement.

(2) If the proceeds of the sale exceed the amount owing, the excess shall be applied in the same manner as the proceeds of the sale of the land and improvements remaining thereon would be applied.

COMMENT:

This section repeats present section 49.

Appeal

**52.** (1) An appeal lies to the Appellate Division of the Supreme Court from the decision of the court hereunder in all matters where the amount of the lien or the total amount of the liens joined in one action or proceedings is two hundred dollars or more.

(2) Where the amount of the lien or the total amount of the liens joined is less than two hundred dollars the decision of the court of first instance is final.

[1960, c. 64, s. 52]

New

Section 52.

52. Any judgment given by the Court pursuant to this Act may be enforced by execution or otherwise as a judgment of the court.

COMMENT: This section incorporates relevant parts of Ontario section 35 (4)(c), for the purpose of making clear that the judgment of the Court in a mechanics' lien action can be enforced as any other Court judgment.

This section incorporates relevant parts of Ontario section 35 (4)(c), for the purpose of making clear that the judgment of the Court in a mechanics' lien action can be enforced as any other Court judgment.

Ontario section 35 (4)(c), for the purpose of making clear that the judgment of the Court in a mechanics' lien action can be enforced as any other Court judgment.

**Fees and Costs**

Fees

**53.** No fees shall be payable to a Registrar or to a court (a) in connection with the registration or discharge of any proceedings taken by a labourer to realize a claim for wages under this Act, or (b) on the filing of an order, record or judgment or other proceeding in connection therewith.

[1960, c. 64, s. 53]

New Section 53.

53. The Consolidated Rules of the Supreme Court of Alberta shall apply in all actions brought under this Act except where and to the extent that they are inconsistent with this Act.

COMMENT:

This section is designed to avoid any doubt on the part of litigants as to whether the Rules of Court apply, again for the purpose of clarifying the practice. Since the amended Act will make clear provision for the

taking of various steps ensuring that proceedings will in fact be of a summary character wherever possible, there seems to be no reason why the Rules of the Supreme Court should not be applied in lien actions wherever they are not inconsistent with the Act.

Costs

54. When it appears to the court in a proceeding to enforce a lien under this Act that the proceedings have arisen from the failure of an owner or contractor

(a) to fulfil the terms of his contract of engagement for the work in respect of which the liens are sought to be enforced, or

(b) to comply with the provisions of this Act,

the court may order the owner and contractor, or either of them, to pay all the costs of the proceedings in addition to the amount of the contract or sub-contract or wages due by him or them to any contractor, sub-contractor or labourer and may order a final judgment against the contractor and owner, or either of them, in default for such costs.

[1960, c. 64, s. 54]

#### Section 54.

54.(1) At any time before the amount realized in the proceedings for the satisfaction of liens has been distributed, a lienholder who has not been served with notice of the proceedings may, on application to the court and on such terms as to costs and otherwise as may be just, be allowed to prove his lien.

(2) Where a lien under subsection (1) is proved and allowed the court shall amend the judgment to include the lien.

#### COMMENT:

This section repeats present section 50.



Rules and  
tariff  
of costs

55. (1) The Lieutenant Governor in Council

(a) may make general rules not inconsistent with this Act to expedite and facilitate the business before any court under this Act, and to advance the interests of suitors therein, and

(b) may prescribe a tariff of costs

(i) as between parties, and

(ii) as between solicitor and client,

payable for services rendered in respect of a lien under this Act,

or may authorize the judges of the Supreme Court to make and promulgate such rules.

(2) After the making thereof, the tariff shall be laid upon the table of the Legislative Assembly at its next ensuing session, and unless or until it is disallowed by resolution of the Legislative Assembly it has the same effect as if enacted hereby. [1960, c. 64, s. 55]

Section 55.

55.(1) An appeal lies to the Appellate Division of the Supreme Court from the decision of the court hereunder in all matters where the amount of the lien or the total amount of the liens joined in one action or proceedings is two hundred dollars or more.

(2) Where the amount of the lien or the total amount of the liens joined is less than two hundred dollars the decision of the court of first instance is final.

COMMENT:

This section repeats present section 52.

**Lien on Minerals Held from the Crown**

Minerals  
held from  
Crown

**56.** (1) Where a lien attaches to an estate or interest in minerals held directly from the Crown in right of Alberta and the estate or interest

(a) is less than a fee simple estate, and

(b) is not registered under *The Land Titles Act*,

the statement of lien shall be filed with the Minister of Mines and Minerals and not with the Registrar.

(2) The provisions of this Act apply *mutatis mutandis* to all claims of lien registered with the Minister of Mines and Minerals in accordance with this section.

[1960, c. 64, s. 56]

Section 56.

**FEEES AND COSTS**

56. No fees shall be payable to a Registrar or to a court

(a) in connection with the registration or discharge of any proceedings taken by a labourer to realize a claim for wages under this Act, or

(b) on the filing of an order, record or judgment or other proceeding in connection therewith.

COMMENT:

This section repeats present section 53.

Present section 56 is moved to a more appropriate location under the title "Registration of Lien" as section 27A.

### National Housing Loans

N.H.A.  
mortgages

57. (1) The provisions of this section apply only to land subject to a mortgage made pursuant to the *National Housing Act* (Canada) or the *National Housing Act, 1954* (Canada) and to the rights of lienholders and the holder of such mortgage.

(2) Subject to the provisions of subsection (3) and for the purpose of ascertaining the respective priorities of charges upon the estate or interest of the owner, the lien and all mortgages rank according to the dates of their respective registrations in the proper land titles office, but no mortgage has any priority over a lien in respect of advances or payments made by the mortgagee after the date of registration of the lien or after the mortgagee has notice of the existence of the lien.

(3) Any mortgage existing in fact before the lien arises has only priority over the lien in respect of the value at the date of the proceedings to enforce the lien of the mortgaged premises as they existed immediately before the lien arose, but no such mortgage has priority over a lien in respect of advances or payments made by the mortgagee after the date upon which the lien arose.

(4) Where any of the property upon which a lien attaches is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee takes the place of the property so destroyed and, after satisfying any prior mortgage to the extent set out in subsection (3), is subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in proceedings to enforce the lien.

(5) Section 5 of *The National Housing Loans Act* (Alberta), being chapter 220 of the Revised Statutes of Alberta, 1955, is hereby repealed. [1960, c. 64, s. 57]

### Section 57.

57. When it appears to the court in a proceeding to enforce a lien under this Act that the proceedings have arisen from the failure of an owner or contractor

(a) to fulfil the terms of his contract of engagement for the work in respect of which the liens are sought to be enforced, or

(b) to comply with the provisions of this Act,  
the court may order the owner and contractor, or either of them, to pay all the costs of the proceedings in addition to the amount of the contract or subcontract or wages due by him or them to any contractor, subcontractor or labourer and may order a final judgment against the contractor and owner, or either of them, in default for such costs.

COMMENT:

This section repeats present section 54.

The present section 57 will be superfluous if the present sections 9, 10 and 11 are repealed as previously recommended and new sections 9 and 50 are accepted. The new sections 9 and 50 would give to National Housing mortgages the same, if not better protection, than that given by the present section 57. Presumably the repeal of section 57 would be subject to collaboration between the Alberta Government and the Federal Department responsible for the administration of the National Housing Act.

Transitional provisions

58. (1) Subject to subsection (2), *The Mechanics' Lien Act*, being chapter 197 of the Revised Statutes, is repealed.

(2) The provisions of chapter 197 of the Revised Statutes continue in effect and apply, notwithstanding its repeal by this Act, to any lien registered in a land titles office before the commencement of this Act.

[1960, c. 64, s. 58]

Coming into force

59. This Act comes into force upon a date to be fixed by proclamation of the Lieutenant Governor in Council.

[1960, c. 64, s. 59]

New  
Section 58.

58.(1) The Lieutenant Governor in Council

- (a) may make general rules not inconsistent with this Act to expedite and facilitate the business before any court under this Act, and to advance the interests of suitors therein, and
- (b) may prescribe a tariff of costs
  - (i) as between parties, and
  - (ii) as between solicitor and client, payable for services rendered in respect of a lien under this Act,

or may authorize the judges of the Supreme Court to make and promulgate such rules, provided that any tariff of costs so prescribed shall cover only those steps in an action up to the making of the Pre-trial order, costs thereafter incurred to be as in the present Schedule C of the Consolidated Rules of the Supreme Court of Alberta.

(2) After the making thereof, the tariff shall be laid upon the table of the Legislative Assembly at its next ensuing session, and unless or until it is disallowed by resolution of the Legislative Assembly it has the same effect as if enacted hereby.

COMMENT:

This new section 58 is a redraft of present section 55. The subsection (2) of the redraft is a repetition of the present subsection (2) of section 55, the significance of which escapes the Commissioner and Counsel.

The present sections 58 and 59 are applicable only to The Mechanics' Lien Act 1960, chapter 64. They will of course remain as appropriate sections of an amended Act although not of a new Act. The fate of these two sections is dependent on the disposition of this Report.

SCHEDULE

For the convenience of those desiring to file a statement of lien in respect to minerals, I recommend that a new FORM 2 be drafted and inserted between the present FORM 1 and 2, this Statement of Lien to be filed in accordance with the provisions of section 27A (present section 56) with the Department of Mines and Minerals.

The present FORM 2 will be renumbered as FORM 3 and made referable to section 27 and new section 27A.

An affidavit verifying claim, but based on information and belief, in conformance with new subsection (6) of section 27, to be drafted and numbered FORM 4.

The present FORM 3 will become FORM 5.

The present FORM 4 will be struck out as no longer necessary in view of the contents of the new sections 34 to 36.

The present FORM 5 will be renumbered as FORM 6 and made referable to the new section 36.

The present FORM 6 will be struck out as no longer necessary in view of the contents of the proposed new sections 34 to 36.

The present FORM 7 will be amended as to title and will be made referable to new section 36.

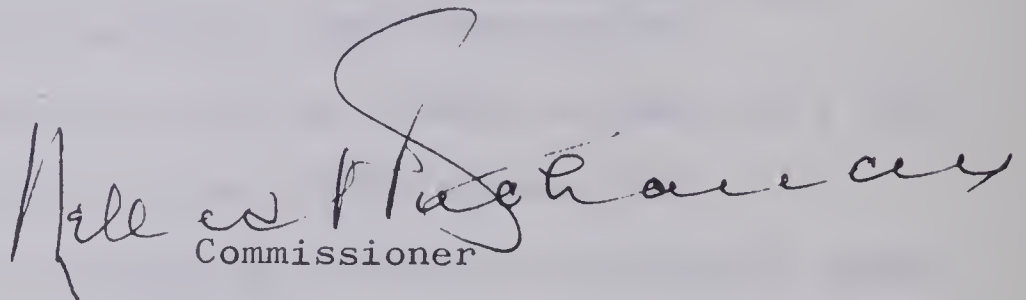
As recommended, a Partial Discharge of Lien Form will be drafted, inserted as new FORM 8 and made referable to the new section 36.

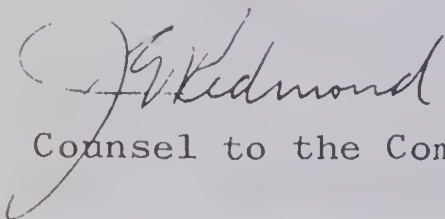
A new FORM 9, NOTICE TO PROVE LIEN, has been drafted to meet the provisions of new section 41, to which it will be made referable.

Appendix J shows the form of the Act upon the inclusion therein of the series of amendments which I have recommended.

I have been exceedingly fortunate in the assignment to me of James E. Redmond, Esquire, as Counsel. He has served in a dual capacity, acting not only as Counsel but as collaborator throughout. I am greatly in his debt and express to him my sincere thanks.

All of which I respectfully submit for Your Honour's consideration.

  
Commissioner

  
Counsel to the Commission.



# NOTICE

APPENDIXES A to J.

## ATTENDIA A

## NOTICE

TAKE NOTICE that retired Chief Judge Nelles V. Buchanan has been appointed Commissioner pursuant to The Public Inquiries Act, Chapter 258 of the Revised Statutes of Alberta, 1955, to investigate the adequacy of the provisions of THE MECHANICS' LIEN ACT, being Chapter 64 of the Statutes of Alberta, 1960, and in particular.

- (a) to consider and report whether or not the Act should provide that all sums of money received by a builder or contractor, or subcontractor, on account of the contract price should constitute a trust fund, in the hands of the builder or contractor, or the subcontractor, as the case may be, for the benefit of all persons who supplied material and all workmen for work done or material supplied on the contract.
- (b) to consider and report whether or not the time fixed for the registration of a lien should be extended.
- (c) to consider and report whether any further amendments should be made and if so, what amendments should be made to the said Act so that it may more effectively serve and protect the interests of those whose interests that said Act is intended to serve or protect.

The Commissioner therefore invites all persons, Associations and Companies who are interested in the said Act and possible amendments thereto to file with the Commissioner, 305 Blue Cross Building, Edmonton, in writin and in triplicate, not later than January 15, 1967, their representations, recommendations and submissions. Following that date the Commissioner will announce the dates and places of public meetings at which submissions both written and oral will be heard and discussed.



PROVINCE OF  
ALBERTA

**James E. Redmond**  
**Counsel to the Commissioner**

## APPENDIX B

Calgary Albertan

Calgary Herald

Edmonton Journal

Grande Prairie Daily Herald Tribune

Lothbridge Herald

Medicine Hat News

Red Deer Advocate

Western Construction and Building Journal, December 1966 issue  
-- a trade paper published in Winnipeg, circulating in Western  
Canada.

APPENDIX C

|   |   |
|---|---|
| The Alberta Association of Architects                     | Direct Lumber Company Limited   |
| Alberta Construction Association                          | Economy Plumbing Ltd.   |
| Alberta Construction Industry Credit Reporting Limited    | Edmonton Drywall Contractors Association  |
| Alberta Federation of Labour                              | Edmonton House Builders Association   |
| Alberta Government Telephones                             | Ed Sinclair Construction and Supplies Ltd.  |
| Alberta Land Surveyors' Association                       | Equipment Rental Companies In Alberta   |
| Alberta Provincial Building & Construction Trades Council | Farmers' Union of Alberta   |
| Alberta Ready Mixed Concrete Association                  | Mr. W.G. Geddes, Barrister & Solicitor, Edmonton  |
| Alberta Road Builders Association                         | Mr. A. H. Holmes, Edmonton  |
| Alberta Roofing Contractors Association Ltd.              | Humphrey Aluminum Windows Ltd.  |
| Mr. J. W. Beames, Barrister & Solicitor, Red Deer         | Messrs. Kostenuke, Forest & Associates Ltd., Calgary  |
| Mr. J. Caddy, Red Deer                                    | Mortgage Loans Association  |
| Calgary House Builders Association                        | National Contractors Control of Canada  |
| The Canadian Bankers' Association                         | Messrs. Petrasuk, Maguire & Raymaker, Consulting Mechanical & Electrical Engineers, Calgary |
| Canadian Credit Men's Association Ltd.                    | Pipe-Line Contractors Association   |
| Canadian Manufacturers' Association                       | Utopia F.U.A. Local 1222, Pincher Creek.  |
| Canadian Petroleum Association (Alberta Division)         | Western Retail Lumbermen's Association<br>- and -   |
| Central Construction Specialties Ltd.                     | Edmonton Retail Lumbermen's Association   |
| Con-Force Products Ltd.                                   | Mr. H. Williams, Architect, Calgary.  |
| Mr. Thomas C. Davis, Barrister & Solicitor, Calgary       |   |

## APPENDIX D

# NOTICE

The Public Inquiries Act, Chapter 258,  
Revised Statutes of Alberta, 1955

## INQUIRY INTO THE MECHANICS' LIEN ACT OF THE PROVINCE OF ALBERTA

Public Hearings for the discussion of submissions filed with the Commissioner will be held in Court Room Number 3 at the Court House, Edmonton, on Wednesday and Thursday, March 1 and 2, 1967, commencing at 10:00 a.m. and 2:00 p.m.

Persons, Associations and Companies who did not file submissions, but desire nevertheless to be heard, are invited to appear Friday, March 3, 1967, at the place and hours stated.



James E. Redmond,  
Counsel to the Commissioner.

## **NOTICE**

The Public Inquiries Act, Chapter 258,  
Revised Statutes of Alberta, 1955

### **Inquiry into the Mechanics' Lien Act of the Province of Alberta**

Public Hearings for the discussion of submissions filed with the Commissioner will be held in Court Room Number 2 at the Court House, Calgary, on Wednesday and Thursday, March 15 and 16, 1967, commencing at 10:00 a.m. and 2:00 p.m.

Persons, Associations and Companies who did not file submissions, but desire nevertheless to be heard, are invited to appear Friday, March 17, 1967, at the place and hours stated.



James E. Redmond,  
Counsel to the Commissioner

APPENDIX FCALGARY:

|   |  |
|---|--|
| Mr. Gordon Barr<br>Consolidated Concrete Ltd.               | Mr. Charles Quance<br>Industrial Plumbers (Calgary) Ltd. |
| Mr. Wilki Kristenson, Peter<br>Kristenson Construction Ltd. | Mr. Fred Walker<br>Modern Lathing Ltd.                   |
| Mr. Dale McRae, Pincher Creek                               | Mr. W. M. Winterton<br>Barrister and Solicitor.          |
| Mr. H. Morsted,<br>H. Morsted & Son, Ltd.                   |  |

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EDMONTON:

|   |   |
|---|---|
| Mr. W. G. Alexander,<br>Alberta Construction<br>Association                     | Mr. George McLaughlin<br>Alberta Ready Mixed Concrete<br>Association  |
| Mr. R. G. Appleton<br>Beaver Lumber Co. Ltd.                                    | Mortgage Loans Association<br>Mr. James Fendall<br>Mr. Keith French<br>Mr. Donald Goodwin<br>Mr. J. R. Klinck |
| Mr. Gordon Barr<br>Consolidated Concrete Ltd.                                   | Mr. Stuart Olson<br>Stuart Olson Ltd.,<br>General Contractors   |
| Mr. J. C. Blackwell<br>and Mr. R. R. Behm,<br>Poole Construction Ltd.           | Mr. Bruce Peterson<br>Crown Lumber Co. Ltd.   |
| Mr. Robert Bodner<br>Burns & Dutton Construction<br>(1962) Ltd.                 | Mr. R. H. Scheibelhofer<br>Edmonton House Builders<br>Association   |
| Mr. W. J. T. Burgess<br>Sarnia Scaffolds Ltd.                                   | Mr. Charles Webb<br>Tiger Transit Mix Ltd.  |
| Mr. William J. Cottrell<br>Alberta Ready-Mix Concrete<br>Association            | Mr. W. A. Weir,<br>A. V. Carlson Construction Ltd.  |
| Mr. Harold Fraser<br>Douglas Rentals Ltd.                                       | Mr. W. M. Winterton<br>British American Oil Co. Ltd.  |
| Mr. Lawrence L. Garner<br>Edmonton Drywall Contractors<br>Association           | Mr. James Wright,<br>Western Retail Lumbermen's<br>Association  |
| Mr. Douglas A. Hunter<br>Alberta Construction Industry<br>Credit Reporting Ltd. |   |

## APPENDIX G

## STATISTICS OF REGISTRATIONS AT LAND TITLES OFFICE, EDMONTON, 1948 to March 31st, 1967.

| FISCAL YEAR.<br>(Endg. March 31st.) | TRANSFERS.<br>(does not incl. Tax transfers). | TITLES USED<br>(does not incl. new subd. or R/W titles). | MTGS. | CAVEATS | MECH. LIENS | MISS.<br>(Incl. Writs, Leases, Easements, etc.) | FREE<br>(Mostly Govt.) | TOTAL. |
|-------------------------------------|---|--|-------|---------|-------------|---|------------------------|--------|
| 1948-49                             | 26249   | 27793  | 4627  | 5385    | 396         | 7107  | 2249                   | 45923  |
| 1949-50                             | 25647   | 26771  | 5584  | 4619    | 813         | 7262  | 1886                   | 45811  |
| 1950-51                             | 24599   | 25910  | 5865  | 5587    | 786         | 8666  | 1805                   | 47308  |
| 1951-52                             | 22741   | 24066  | 4944  | 5968    | 681         | 8263  | 2223                   | 44820  |
| 1952-53                             | 24077   | 25431  | 6080  | 7853    | 663         | 10363   | 1708                   | 50744  |
| 1953-54                             | 25804   | 27344  | 6724  | 7115    | 905         | 12039   | 5303                   | 57890  |
| 1954-55                             | 24248   | 26085  | 7060  | 6687    | 1209        | 12839   | 5499                   | 57542  |
| 1955-56                             | 25371   | 27395  | 8757  | 7822    | 980         | 13644   | 4024                   | 60598  |
| 1956-57                             | 27363   | 29912  | 8421  | 11097   | 931         | 15683   | 2190                   | 65685  |
| 1957-58                             | 26674   | 28420  | 8520  | 10853   | 895         | 18141   | 2628                   | 67711  |
| 1958-59                             | 30508   | 32677  | 10755 | 10325   | 1117        | 21454   | 3999                   | 78158  |
| 1959-60                             | 30794   | 34058  | 10873 | 9349    | 1349        | 21055   | 4579                   | 77999  |
| 1960-61                             | 27745   | 33935  | 8705  | 8359    | 1362        | 22581   | 4234                   | 72986  |
| 1961-62                             | 29687   | 35633  | 10835 | 10068   | 1210        | 27915   | 5324                   | 85039  |
| 1962-63                             | 32195   | 38178  | 11727 | 10334   | 1810        | 29656   | 6141                   | 91863  |
| 1963-64                             | 31467   | 37516  | 12540 | 10089   | 2058        | 32543   | 7195                   | 95892  |
| 1964-65                             | 28779   | 34754  | 11735 | 8634    | 2190        | 32878   | 6317                   | 90533  |
| 1965-66                             | 28530   | 35044  | 11922 | 9533    | 2108        | 32651   | 6339                   | 91083  |
| 1966-67                             | 28248   | 34365  | 10605 | 9122    | 1416        | 31155   | 6498                   | 87044  |



APPENDIX H

Prepared by Mr. A. John Cressey, Barrister and Solicitor, counsel to Banister Construction (1963) Ltd.

SCHEDULE OF EXPECTED REVENUE AND HOLDBACK TYPICAL OF A PIPELINE PROJECT, 100 MILES IN LENGTH, CONTRACT PRICE \$5.00 PER LINEAR FOOT, AVERAGE DAILY CONSTRUCTION OF TWO MILES, WITH MOVE-IN COMMENCED JANUARY FIRST OF THE YEAR.

|              | <u>Revenue in Thousands of Dollars</u> |                       | <u>Holdback in Thousands of Dollars</u> |   |
|--------------|--|-----------------------|---|---|
|              | <u>Billed this Period</u>              | <u>Billed to Date</u> | <u>Taken This Period</u>                | <u>Taken This Date</u>  |
| January 15,  | 82.5                                   | 82.5                  | 12.4                                    | 12.4  |
| January 31,  | 535.0                                  | 617.5                 | 80.2                                    | 92.6  |
| February 15, | 750.0                                  | 1,367.5               | 112.5                                   | 205.1   |
| February 28, | 656.0                                  | 2,023.5               | 98.4                                    | 303.5   |
| March 15,    | 565.5                                  | 2,589.0               | 84.9                                    | 388.4   |
| March 31,    | 51.0                                   | 2,640.0               | 7.6                                     | 396.0   |
|              | <u>2640.0</u>                          |                       | <u>396.0</u>                            |   |
| August 20    | -                                      | -                     | -                                       | -   |
|              |  |                       |   | - Final completion delayed until this date due to fact clean-up cannot be completed until after spring break-up and usual early summer rains. 120 day period commences. |
| December 18  | -                                      | -                     | -                                       | - Payment of \$396,000 holdback made.   |

TYPICAL PLI LINE PROJECT

Footage of progress expected expressed in thousands of feet

|                     | <u>Jan. 8-15</u> | <u>Jan. 16-31</u> | <u>Feb. 1-15</u> | <u>Feb. 16-28</u> | <u>Mar. 1-15</u> | <u>Mar. 16-31</u> |
|---------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
| Clearing            | 80               | 240               | 390              | 528               | 528              | 528               |
| Grading             | 40               | 200               | 350              | 480               | 528              | 528               |
| Stringing           | 10               | 160               | 310              | 440               | 528              | 528               |
| Ditching            |                  | 120               | 270              | 400               | 528              | 528               |
| Laying              |                  | 100               | 250              | 380               | 528              | 528               |
| Welding             |                  | 100               | 250              | 380               | 528              | 528               |
| Doping              |                  | 90                | 240              | 370               | 528              | 528               |
| Backfilling, Tie-in |                  | 70                | 220              | 350               | 528              | 528               |
| Clean-up            |                  | 30                | 180              | 310               | 460              | 528               |

Cumulative Progress Billings Expressed in thousands of dollars

|                  | <u>Jan. 8-15</u> | <u>Jan. 16-31</u> | <u>Feb. 1-15</u> | <u>Feb. 16-28</u> | <u>Mar. 1-15</u> | <u>Mar. 16-31</u> |
|------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
| Clearing Crew    | 60.0             | 180.0             | 292.5            | 396.0             | 396.0            | 396.0             |
| Grading Crew     | 20.0             | 100.0             | 175.0            | 240.0             | 264.0            | 264.0             |
| Stringing Crew   | 2.5              | 40.0              | 77.5             | 110.0             | 132.0            | 132.0             |
| Ditching Crew    |                  | 60.0              | 135.0            | 200.0             | 264.0            | 264.0             |
| Laying Crew      |                  | 75.0              | 187.5            | 285.0             | 396.0            | 396.0             |
| Welding Crew     |                  | 100.0             | 250.0            | 380.0             | 528.0            | 528.0             |
| Doping Crew      |                  | 22.5              | 60.0             | 92.5              | 132.0            | 132.0             |
| Backfilling Crew |                  | 17.5              | 55.0             | 87.5              | 132.0            | 132.0             |
| Cleanup Crew     |                  | 22.5              | 135.0            | 232.5             | 345.0            | 396.0             |
| <b>Total:</b>    | <b>82.5</b>      | <b>617.5</b>      | <b>1,367.5</b>   | <b>2,023.5</b>    | <b>2,589.0</b>   | <b>2,640.0</b>    |

Accumulated holdback expressed in dollars

|  |        |        |         |         |         |         |
|--|--------|--------|---------|---------|---------|---------|
|  | 12,400 | 92,600 | 205,100 | 303,500 | 388,400 | 396,000 |
|--|--------|--------|---------|---------|---------|---------|

## APPENDIX H - Page 3

C O M M E N T

The table on page 1 shows a typical pipeline project cash flow of monies earned by the contractor, but the detailed explanation is found on page 2. The table on page 2 assumes:

1. Construction price is \$5.00 per lineal foot of installed and accepted pipeline.
2. Contractor commenced to move onto the project January 1.
3. 'Strike off' period is every 15 days - thus, every 15 days the Contractor submits an invoice for work completed during the immediately preceding 15 days.
4. During the period, January 1 to January 15, the Contractor moved onto the project and got his equipment and personnel organized and had installed 16,500 lineal feet of pipeline and his first billing to the Owner was  $16,500 \times \$5.00 = \$82,500$ .
5. After January 15 the progress was constant at two miles per day (10,560 lineal feet).
6. Although the price for doing the work is \$5.00 per lineal foot, for the purposes of progress billing only, the entire 'spread' is broken up into individual crews and payment is made for the progress made by each of these crews during the immediately preceding fifteen days.

| <u>Crew</u> | <u>Price/Ft.</u> |  |
|-------------|------------------|--|
| Clearing    | \$0.75           |  |
| Grading     | 0.50             |  |
| Stringing   | 0.25             |  |
| Ditching    | 0.50             |  |
| Laying      | 0.75             |  |
| Welding     | 1.00             |  |
| Doping      | 0.25             |  |
| Backfilling | 0.25             |  |
| Cleanup     | 0.75             |  |
|             | <u>\$5.00</u>    |  |

Crews are listed in the order in which they proceed down the construction right-of-way.

## APPENDIX II - Page 4

7. Looking at the uppermost table on Page 2 we see that no work was done prior to January 8th. By January 15 the clearing crew had completed 80,000 feet of work and they were paid \$0.75 per foot, thus  $80,000 \times 0.75 = \$60,000$ .

Thus, during the period, January 8-15, only the following three crews had commenced work and the contractor was paid in the following manner:

| <u>January 8-15</u>                              |   |                  |                    |
|--|---|------------------|--------------------|
| Cleared  | - | 80,000 ft. x .75 | ..... \$60,000     |
| Graded   | - | 40,000 ft. x .50 | ..... 20,000       |
| Stringing  | - | 10,000 ft. x .25 | ..... <u>2,500</u> |
| Total Invoice - January 15                       |   |                  | ..... \$82,500     |
| Less Holdback = $\frac{15}{100} \times 82,500 =$ |   |                  | <u>12,400</u>      |
| Net Payout, period ending<br>January 15          |   |                  | ..... \$70,100     |

8. Each pay period sees the contractor invoice for each crew on the basis of that individual crew's progress but it cumulatively amounts to \$5.00 per lineal foot. Thus, additional money is retained each invoice period until the project is completed. However, it is a practice in the industry, and a standard clause in all contracts, that the holdback money does not become due and payable until 120 days after the Engineer, on behalf of the Owner, has accepted all aspects of the work, in other words, until the Engineer considers the job to be "completed".

## COMMISSIONER'S COMMENT:

Although for purposes of the Appendix the clean-up process on page 2 is shown as completed March 31, this is not usually the case. Working conditions generally do not permit clean-up completion until the summer or Fall. Expiry of the filing period and the necessary retention may therefore extend to 120 days from a summer or Fall date, thus prolonging in extraordinary and damaging fashion the paying out of the holdback.

APPENDIX I

Concordance indicating disposition of  
those sections of present Act the  
amendment or repeal of which is recommended.

APPENDIX ICONCORDANCE

| <u>Present Act</u> |         | <u>Act as amended</u>  |
|--------------------|---------|--|
| Section 1          | becomes | 1  |
| Section 2(a)       | "       | 2(b)   |
| (b)                | "       | (c)  |
| (c)                | "       | (d)  |
| (d)                | "       | (e)  |
| (e)                |         | (f) amended  |
| (f)                | "       | (g)  |
| (g)                | "       | (h)  |
| (h)                | "       | (i)  |
| (i)                | "       | (j)  |
| (j)                | "       | (k)  |
| Section 3(1)       |         | 3(1)   |
| (2)                |         | (2)  |
| (3)                |         | (3) Amended  |
| Section 4(1)       |         | 4(1)   |
| (2)                |         | (2)  |
| (3)                |         | (3)  |
| Section 5          |         | 5  |
| Section 6(1)       |         | repealed: reappears in amended form as subsection (5) of new Section 17. |
| (2)                |         | repealed   |
| (3)                | becomes | 6  |
| Section 7(1)       |         | 7(1)   |
| (2)                |         | (2)  |
| Section 8          |         | 8  |

| <u>Present Act</u>  | <u>Act as amended</u>  |
|---|--|
| Section 9   | Repealed and new section 9 substituted.  |
| Section 10  | Repealed   |
| Section 11  | Repealed   |
| Section 12(1)<br>(2)  | 12(1)<br>(2)   |
| Section 13(1)<br>(2)  | 13(1)<br>(2)   |
| Section 14(1)<br>(2)<br>(3)   | 14(1)<br>(2)<br>(3)  |
| Section 15  | 15       amended   |
| Section 16(1)<br>(2)  | 16(1)<br>(2)   |
| Section 17<br>(1) becomes<br>(2)<br>(3)<br>(4)<br>(5)<br>(6) becomes<br>(7)       " | 17(2)       Section redrafted.<br>amended<br>repealed<br>(3)<br>(4) amended<br>(6) amended<br>(7)<br>(8) |
| Section 18  | 18   |
| Section 19(1)<br>(2)  | 19       Redrafted as new section<br>19(1), (2), (3), (4).   |
| Section 20  | 20   |

| <u>Present Act</u>  | <u>Act as amended</u>  |
|---|--|
| Section 21(1)<br>(2)                                      | 21(1) amended<br>(2)   |
| Section 22  | 22   |
| Section 23  | 23   |
| Section 24  | 24   |
| Section 25  | 25   |
| Section 26(1)<br>(2)<br>(3) becomes<br><br>(4) "<br>(5) " | 26(1) amended<br>(2) amended<br>(4) A new subsection (3) to be<br>drafted<br>(5)<br>(6)      |
| Section 27  | 27 Present subsection (6)<br>struck out and new<br>subsection (6)<br>substituted.            |
| Section 28  | 28   |
| Section 29  | 29   |
| Section 30  | 30   |
| Section 31  | 31 amended.  |
| Section 32  | 32 Amended to provide a<br>uniform registration<br>period of thirty-five<br>days throughout. |
| Section 33  | 33   |



| <u>Present Act</u>  | <u>Act as amended</u>  |
|---|--|
| Section 34 )<br>)<br>Section 35 )<br>)<br>Section 36 )<br>)<br>Section 37 ) | Repealed and new sections 34, 35 and 36 substituted incorporating in part the contents of present sections 34 to 37 inclusive with changes based in part upon provisions of the Ontario Act. |
| Section 38  | 38   |
| Section 39  | 39 Repealed and new extended section 39 substituted.   |
| Section 40(1)<br>(2)<br>(3) & (4)   | 40(1) Amended<br>(2) Amended<br>Repealed, subject matter dealt with, in part, in new section 41.   |
| Section 41  | Repealed: new section 41 substituted; former section 41 reappears in amended form as new section 44(1).  |
| Section 42  | Repealed: new section 42 substituted; former section 42(1) appears in part in amended form in new section 44.  |
| Section 43  | Repealed, its substance reappearing in new section 42(3)(e) and in new section 45.   |
| Section 44  | Repealed.  |

| <u>Present Act</u>    | <u>Act as amended</u>  |
|-----------------------|--|
| Section 45(1) becomes | 39(6)  |
| (2)                   | Repealed: appears in amended form as new section 47(a)                             |
| (3)                   | Repealed: appears as new section 48(1).  |
| Section 46(1) )       | Repealed: substance reappears as new section 48(2), (3), (4).                      |
| (2) )                 |  |
| (3) )                 |  |
| Section 47            | Repealed: its substance reappears in part in new section 49(2) and new section 52. |
| Section 48            | Repealed: appears in much extended form as new section 43.                         |
| Section 49            | Reappears without change as new section 51.  |
| Section 50            | Reappears without change as new section 54.  |
| Section 51            | Repealed: reappears in amended form in new section 50.                             |
| Section 52            | Reappears without change as new section 55.  |
| Section 53            | Reappears as new section 56, without change.                                       |
| Section 54            | Reappears without change as new section 57.  |
| Section 55            | Repealed and reappears in amended form in section 58.                              |
| Section 56            | Altered as to position only, becoming new section 27A.                             |

Present ActAct as amended

Section 57

This section appears without amendment as section 59. However, if new section 9 and 50 as previously recommended, are in fact adopted, they will give all mortgages the status and privileges granted N.H.A. loans in the present section 57 and the present section 57 would thereupon become redundant.

Section 58     )  
                  )  
Section 59     )

The fate of these two sections is dependent on the disposition of this Report.

SCHEDULE

FORM 1

FORM 1, without change.

FORM 2 becomes

FORM 3, and made referable to sections 27 and 27A.

FORM 3 becomes

FORM 5, without change.

FORM 4

Repealed, as no longer necessary in view of amendments to the Act.

FORM 5

FORM 6, and made referable to section 36.

FORM 6

Repealed as no longer necessary in view of amendments to the Act.

FORM 7

Will be amended as to title and made referable to new section 36.

APPENDIX J

The present Alberta Mechanics' Lien Act with all recommended amendments included.

## THE MECHANICS' LIEN ACT

An Act respecting Liens of Mechanics, Material Suppliers, Wage-earners and others

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

1. This Act may be cited as "The Mechanics' Lien Act ....."

2. In this Act,

Interpre-  
tation

"completion"

(a) "Completion of the contract" means substantial performance, not necessarily total performance, of the contract. Factors which the Court may consider among others in determining whether there has been substantial performance are occupation by the owner and readiness for use.

"contractor" (b) (x) "contractor" means a person contracting with or employed directly by an owner or his agent to do work upon or to furnish material for an improvement, but does not include a labourer;

"court" (c) (x) "court" means the Supreme Court or a district court, as the case may be, having jurisdiction in the amount claimed in any proceedings under this Act, whether brought in respect of one or more than one lien;

"improvement" (d) (x) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

"labourer" (e) (x) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;

"lienholder"

(f) "Lienholder" means a person with an existing lien under this Act.

|                  |   |
|------------------|---|
| "owner"          | (g)( <del>f</del> ) "owner" means a person having an estate or interest in land at whose request, express or implied, and<br>(i) upon whose credit,<br>(ii) upon whose behalf,<br>(iii) with whose privity and consent, or<br>(iv) for whose direct benefit,<br>work is done upon or material is furnished for an improvement to the land and includes all persons claiming under him whose rights are acquired after the commencement of the work or the furnishing of the material; |
| "Registrar"      | (h)( <del>g</del> ) "Registrar" means a registrar of a land registration district under <i>The Land Titles Act</i> ;  |
| "sub-contractor" | (i)( <del>h</del> ) "sub-contractor" means a person not contracting with or employed directly by an owner or his agent for the doing of any work but contracting with or employed by a contractor, or under him by a sub-contractor, but does not include a labourer;   |
| "wages"          | (j)( <del>i</del> ) "wages" means money earned by a labourer for work done, whether by time or as piece work or otherwise;  |
| "work"           | (k)( <del>j</del> ) "work" includes the performance of services upon the improvement. [1960, c. 64, s. 2]   |

Subsection 2(a): new subsection. Remaining subsections (a) to (j) renumbered (b) to (k). Comment, page 50.

Subsection 2(c): comment page 51.

Subsection 2(f): replacing former subsection 2(e) and renumbered. Comment, page 53.

### Creation and Extent of Lien

#### Waiver of lien

3. (1) No agreement deprives any person otherwise entitled to a lien under this Act and not a party to the agreement, of the benefit of the lien and the lien attaches notwithstanding the agreement.

(2) An agreement by a labourer that this Act does not apply or that the remedies provided by it are not to be available for his benefit is against public policy and void.

(3) Subsection (2) does not apply to a manager, officer or to any person whose wages are more than thirty-five dollars per day.

Subsection 3(3): subsection amended by striking out the words "foreman or": the said subsection further amended by substituting the words "thirty-five" for the words "twenty-five". Comment, page 53.

Creation  
of lien

4. (1) Unless he signs an express agreement to the contrary and subject to subsection (2), a person who

(a) does or causes to be done any work upon or in respect of an improvement, or

(b) furnishes any material to be used in an improvement,

for an owner, contractor or sub-contractor has, for so much of the price of the work or material as remains due to him a lien upon the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) Where work is done or materials are furnished

(a) preparatory to,

(b) in connection with, or

(c) for an abandonment operation in connection with, the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done or the material to be furnished, the lien given by subsection (1) attaches to all estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals unless the person holding the fee simple estate in the mines and minerals has expressly requested

the work or the furnishing of material in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to such person's estate, if any, in the rest of the land.

(3) A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when severed from the land. [1960, c. 64, s. 4]

(4) A person who rents equipment to an owner, contractor, or subcontractor for use on a contract site shall be deemed for the purposes of this Act to have performed a service and has a lien for a reasonable and just rental therefor while used on the contract site.

Section 4: Amended by the addition of new subsection (4).  
Comment, page 55.

Highways

5. No lien exists with respect to a public highway or for any work or improvement caused to be done thereon by a municipal corporation. [1960, c. 64, s. 5]

6. (3) Where the same lien attaches to estates or interests in more than one lot, block or parcel, as the case may be, in respect of a separate improvement upon each such lot, block or parcel hereinafter referred to as a "lot", the lien does not apply so as to make the owner of any one lot liable in respect of that lot for a sum in excess of the price of the work done or material furnished in respect of the improvement on that lot less a proportionate share of any moneys paid to the person claiming the lien in respect of the work done on or the material furnished for all the lots to which the lien attaches. [1960, c. 64, s. 6]

Section 6: Present subsections (1) and (2) repealed, former subsection (1) reappears in amended form as subsection (5) of new section 17; present subsection (3) becomes the section.  
Comment, page 57.

Furnishing  
material

7. (1) Material shall be considered to be furnished to be used within the meaning of this Act when it is delivered either on the land upon which it is to be used or on such land or in such place in the immediate vicinity thereof as is designated by the owner or his agent or by the contractor or sub-contractor.

(2) Notwithstanding that any material to be used in an improvement may not have been delivered in strict accordance with subsection (1), where the material is incorporated in the improvement the person furnishing the material has a lien as set out in section 4.

[1960, c. 64, s. 7]

Date of lien

8. The lien created by this Act arises when the work is begun or the first material is furnished.

[1960, c. 64, s. 8]



New Section 9. (1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) A registered mortgage has priority over a lien to the extent of the mortgage-moneys bona fide secured or advanced in money prior to the registration of the statement of lien.

(3) Advances or payments made under a mortgage after a statement of lien has been registered shall rank after the lien; but any mortgagee who has applied mortgage-moneys in payment of a statement of lien which has been registered in subrogated to the rights and priority of the lienholder who has been paid as aforesaid to the extent of the moneys so applied.

(4) A registered agreement for the sale and purchase of land and any moneys bona fide secured or payable thereunder has the same priority over a lien as is provided for a mortgage and mortgage-moneys in subsections (1) and (2) hereof, and for the purposes of this Act the seller shall be deemed to be a mortgagee, and any moneys bona fide secured and payable under such agreement shall be deemed to be mortgage-moneys bona fide secured or advanced.

Section 9: Present section 9 repealed and new section 9 substituted.  
Comment, page 57 et seq.

Sections 10 and 11: Repealed.  
Comment, page 62 et seq.

Priority of  
lien for  
wages

**12.** (1) A lien for the wages of a labourer has priority, to the extent of six weeks' wages, over all claims on that portion of the amount retained as required by section 17 to which the contractor or sub-contractor through whom the lien is derived is entitled, and all such labourers rank *pari passu*.

(2) Any device by an owner, contractor or sub-contractor to defeat the priority given by this Act to a labourer for his wages is against public policy and void.

[1960, c. 64, s. 12]

Section 12: Comment, page 71.

Work on  
land owned  
by married  
person

**13.** (1) Where work is done or material is furnished in respect of land in which a married person has an estate or interest, if the work is done or the material is furnished with the privity of the spouse of the married person, then, for the purposes of this Act, the spouse shall be conclusively presumed to be acting as the agent of the married person as well as for himself.

(2) The presumption arising under subsection (1) applies only in respect of that part of the work done or portion of the materials furnished before the person doing the work or furnishing the materials has had actual notice that the spouse is not the agent of the married person who has an estate or interest in the land. [1960, c. 64, s. 13]

Lien on  
occupied  
land

**14.** (1) Where the estate upon which a lien attaches is a freehold estate for a life or lives or a leasehold estate, then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or his agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate or his agent, within five days after the receipt of the notice, gives notice that he will not be responsible for the doing of the work or the furnishing of the materials.

(2) Where the estate upon which a lien attaches is leasehold, no forfeiture or cancellation of a lease, except for non-payment of rent, is effective to deprive a lienholder of the benefit of the lien, but the lienholder may, in order to avoid forfeiture or termination of the lease for non-payment of rent, pay any rent due or accruing due on the lease and continue the lease to its term and the sums so paid may be added to the claim of the lienholder.

(3) This section applies in respect of land other than minerals. [1960, c. 64, s. 14]

Insurance  
money

**15.** Where any improvement on land in respect of which a lien attaches is wholly or partly destroyed by fire any money received or receivable by the owner by reason of any insurance thereon is subject to all claims for liens to the same extent as if the money had been realized by a sale of the land in proceedings to enforce a lien.

[1960, c. 64, s. 15]

Section 15: Amendment to be drafted to include insurance against additional perils.

Comment, page 72.

Removal  
of material

**16.** (1) During the continuance of a lien no part of the material giving rise to the lien shall be removed to the prejudice of the lien.

(2) Material actually delivered and to be used for any improvement

(a) is subject to a charge in favour of the person furnishing such material until incorporated in the improvement, and

(b) is not subject to execution or other process to enforce a debt other than a debt for the purchase of the material due to the person furnishing the same.

[1960, c. 64, s. 16]

17.(1) In this section and in section 19, the expression "the lien fund" means the percentage retained by the owner as required by this section, plus any amount which has not been paid by the owner under the contract in good faith prior to the registration of a lien, less any amount permitted by section 17A to be paid.

(2) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract an owner liable on a contract under which a lien may arise shall, when making payment thereunder, retain for the time limited by section 32, an amount equal to fifteen percent of the value of the work actually done.

(3) The value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work done.

(4) Every lien is a charge upon the lien fund.

(5) The owner shall not be liable under this Act for more than the amount of the lien fund.

(6) A payment, other than of the percentage required by this section to be retained, made in good faith by an owner or mortgagee to a contractor before registration of any liens is valid so that the lien fund is reduced by the amount of such payment.

(7) Where a contractor or subcontractor defaults in completing his contract, the lien fund

(a) shall not, as against a lienholder, be applied to the completion of the contract or for any other purpose than the satisfaction of liens, and

(b) when distributed, shall be distributed in the manner prescribed by section 50.

(8) A person who in good faith underestimates the value of the work actually done at any specific time and retains the percentage of the value requires to be retained by this section, calculated on that underestimated value, does not lose the protection afforded by this Act if he provides, for the satisfaction of liens in accordance with this Act, an amount equal to the correct amount that should have been retained pursuant to this section.

New Section 17: Present section 17 repealed and new section 17 substituted.

Comment, pages 74 et seq.

17A. (1) Where a contract is under the supervision of an architect, engineer or other person upon whose certificates payments are to be made, and the statutory period has elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by twenty percent or fifteen percent, as the case may be, of the subcontract price or, if there is no specific subcontract price, by twenty percent or fifteen percent, as the case may be, of the actual value of the work done and materials furnished under that subcontract, but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act.

(2) The contractor or subcontractor may at any time after the completion of the contract demand a certificate of completion of the contract from the architect, engineer or other person mentioned in subsection (1), which said demand shall be made in writing and may be delivered to the said architect, engineer or other person or sent to him by registered mail with postage fully prepaid and a copy of such demand shall be given to the owner or his agent, or sent to the owner or his agent, as the case may be, by registered mail with postage fully prepaid and the said architect, engineer or other person of whom such demand is made, shall within ten days of the making of the said demand issue and deliver to the applicant the required certificate of completion.

(3) If the said architect, engineer or other person neglects or refuses to issue or deliver the said certificate of completion within the ten days limited for so doing a judge, upon the application of the contractor or subcontractor desiring the same, and upon being satisfied that the contract has been completed may make an order that the said contract has been completed upon such terms and conditions as to costs or otherwise as may seem just and such order shall have the same force and effect as a certificate of completion issued by the said architect, engineer or other person would have.

(4) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed has been given to that subcontractor, then for the purposes of subsection (1), (2), (3) and (4) of section 32 that subcontract and any work done or to be done thereunder and any materials furnished or to be furnished thereunder shall, so far as concerns any lien thereunder of that subcontractor, be deemed to have been completed, done or furnished not later than the time at which the certificate was so given.

(5) (A new subsection to be drafted authorizing application to a judge for a completion order where construction is not supervised by an architect, engineer or other person.)

New Section 17A. A new section dealing with progressive release of holdbacks. Subsection (5) of the new section 17A to be drafted.  
Comment, page 78.

Mortgagee  
disbursing  
money

**18.** A mortgagee authorized by the owner to disburse the moneys secured by a mortgage may retain the amount required to be retained by the owner as the person primarily liable on the contract and the retention by the mortgagee of such amount shall be deemed to be a compliance with subsection (1) of section 17 by the owner as the person primarily liable on the contract. [1960, c. 64, s. 18]

19. (1) Upon the expiration of the time limited by section 32, payment of the lien fund may be validly made so as to discharge every lien in respect thereof, unless, in the meantime, a statement of lien has been registered.

(2) Where a statement of lien has been registered, the owner, or a mortgagee authorized by the owner to disburse the monies secured by a mortgage, may

- (a) by interlocutory application in any proceedings that have been commenced to enforce a lien, or
- (b) on application by originating notice of motion,

pay into court the amount of the lien fund.

(3) Payment into court ordered under subsection (2) shall

- (a) discharge the owner from any liability in respect of liens, and
- (b) the money when paid into court shall stand in the place of the land and the order shall provide that the liens be removed from the title to the land concerned.

(4) On an application under subsection (2)

- (a) notice shall be given as provided in section 40(1),
- (b) the court may hear and receive such evidence, by affidavit or viva voce or otherwise, as it may deem necessary in order to determine the proper amount of the lien fund to be paid into court,
- (c) the court may direct the trial of an issue to determine the amount of the lien fund to be paid into court,
- (d) the court may refuse the application if of the opinion that the determination of the amount of the lien fund should be made at the trial of the action.

New Section 19: Present section 19 repealed and new section 19 substituted.

Comment: Pages 74-82.

Contract  
price not  
money

**20.** Where the contract price or the sum agreed to be paid does not consist of a sum of money, then the value of the consideration for the performance of the work is the determining factor in calculating the amount duly owing by the owner pursuant to section 6. [1960, c. 64, s. 20]

Payment  
where  
contract  
price  
not  
money

21.(1) Where a lien becomes a charge on the amount required to be retained under section 17 and the contract price is not payable in money, the owner or the person primarily liable on the contract shall pay in money the percentage of the value to be retained by him.

(2) Where the owner or person primarily liable on the contract desires to avail himself of the provisions of section 19 and pay into court the amount to be retained and the contract price is not payable in money, a judge may, on application by the owner on such notice, if any, as the judge may direct, fix the amount of money that is to be paid into court with respect to the value of the percentage to be retained. [1960, c. 64, s. 21]

Section 21(1): Present section 21(1) amended by striking out on line four thereof, the words "is liable to" and substituting therefor, the word "shall".  
Comment, page 83.

Payment to  
lienholder by  
owner, etc.

**22.** Where an owner, mortgagee, contractor or sub-contractor

(a) makes a payment to a person entitled to a lien for or on account of a debt justly due to the person for work done or materials furnished and for which the owner, mortgagee, contractor or sub-contractor is not primarily liable on the contract, and

(b) within three days afterwards gives written notice of the payment to the person primarily liable on the contract or his agent,

the payment shall be deemed to be a payment on his contract generally to the contractor or sub-contractor primarily liable on the contract, but not so as to affect the percentage to be retained by the owner as provided by section 17. [1960, c. 64, s. 22]

Assignment

**23.** The right of a lienholder may be assigned by an instrument in writing and, if not assigned, passes upon his death to his personal representative.

[1960, c. 64, s. 23]



Merging,  
etc., of lien

**24.** (1) A lien is not merged, waived, paid, satisfied, prejudiced or destroyed by

- (a) the taking of any security,
- (b) the acceptance of a promissory note or bill of exchange,
- (c) the taking of any acknowledgment of the claim,
- (d) the giving of time for payment, or
- (e) the taking of any proceedings for the recovery of a personal judgment,

unless the lienholder agrees in writing that such an action is to have that effect.

(2) Where a promissory note or bill of exchange issued in respect of the claim of a lienholder has been negotiated, the lienholder does not thereby lose his lien if he is the holder of the promissory note or bill of exchange

- (a) at the time of beginning proceedings to enforce the lien, or
- (b) at the time of proving his claim therein, where proceedings are brought by another lienholder.

[1960, c. 64, s. 24]

Proving  
claim

**25.** Where the period of credit in respect of a claim has not expired or where there has been an extension of time for payment of the claim, then, if proceedings are commenced by any other person to enforce a lien against the same property, the lienholder may, nevertheless, prove and obtain payment of his claim therein as if the period of credit or the extended time had expired.

[1960, c. 64, s. 25]

#### RIGHT TO INFORMATION

26.(1) A registered lienholder may at a reasonable time demand of the owner or his agent by notice in writing the production for inspection of

- (a) the contract or agreement with the contractor in respect of which work has been, is being or is to be done, or in respect of which materials have been, are being or are to be furnished, if the contract or agreement is in writing, or
- (b) if the contract or agreement is not in writing, the terms of the contract or agreement and the state of the accounts between the owner and contractor.

(2) Where the owner or his agent at the time of the demand or within six days thereafter

- (a) does not produce the written contract or agreement, or
- (b) if the contract or agreement is not in writing,
  - (i) 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
  - (ii) knowingly and falsely states the terms of the contract or agreement or the amount due or unpaid thereon,

then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner is liable to him in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of his lien.

(3) (A new subsection to be drafted giving to the lienholder the right to obtain information from the contractor, subcontractor or their respective agents.)

- (4) ~~(3)~~ A lienholder may at any reasonable time demand of a mortgagee or his agent or unpaid vendor or his agent
- (a) the terms of any mortgage on the land or any agreement for the purchase of the land in respect of which the work is or is to be done or in respect of which materials have been or are to be furnished, and
  - (b) a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be.

(5) ~~(4)~~ Where the mortgagee or vendor or his agent fails to inform the lienholder at the time of the demand or within a reasonable time thereafter

- (a) of the terms of the mortgage or agreement, and
- (b) of the amount owing thereon,

then, if the lienholder sustains loss by the refusal or neglect or by reason of any misstatement by the mortgagee or vendor of the terms thereof or amount owing thereon, the mortgagee or vendor is liable to him in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of his lien.

(6) ~~(5)~~ The court may on summary application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

- (a) the owner or his agent,
- (b) the mortgagee or his agent, or
- (c) the unpaid vendor or his agent,

as the case may be, to produce and allow a lienholder to inspect any contract or agreement or mortgage or agreement for sale, upon such terms as to costs as the court may deem just.

Section 26: Minor amendments to subsection (1) and (2) underlined.  
 Subsection (3) of section 26 to be drafted:  
 remaining subsections renumbered.  
 Comment, page 85.

### Registration of Lien

Registration  
of lien

**27.** (1) A lien may be registered in the land titles office of the land registration district in which the land is situate by filing with the Registrar a statement of lien in Form 1 of the Schedule.

(2) The statement of lien shall set out

(a) the name and residence of

(i) the lienholder,

(ii) the owner or alleged owner, and

(iii) the person for whom the work was or is being done or the materials were or are being furnished,

(b) the date when the work was completed or the last materials were furnished, or if the lien is filed before the completion of the contract or sub-contract, as the case may be, a statement that the work is not yet completed or the materials have not yet all been furnished,

(c) a short description of the work done or to be done or of the materials furnished or to be furnished,

(d) the sum claimed as due or to become due,

(e) a description, sufficient for registration, of the land and estate or interest therein to be charged, and

(f) an address for service of the lienholder within the Province.

(3) In the case of a lien arising in connection with an oil or gas well it is not necessary to set out in the statement of lien the name of the owner or alleged owner of the oil or gas well.

(4) The statement of lien shall be verified by an affidavit, in Form 3 in the Schedule, of the lienholder or of his agent or assignee.

(5) Where the statement of lien is made by a corporation, it shall be verified by the affidavit of an officer or employee of the corporation or its agent.

(6) Where the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent gives the source of his information and states that he believes the facts to be true.

(7) A Registrar shall be supplied with printed forms of such statements of lien and affidavits, in blank, which shall be supplied to every person requesting the same and desiring to register a lien.

(8) A Registrar shall decide whether his office is or is not the appropriate office for the registration of the statement of lien and shall direct the applicant accordingly.

(9) No lien shall be registered unless the claim or joined claims amount to or aggregate twenty dollars or more.

(10) The Registrar shall, in accordance with *The Land Titles Act*, register the lien as an encumbrance against the estate or interest in the land affected, or if the land affected has not been registered under *The Land Titles Act* and section 56 does not apply thereto, he shall make a record of the lien in a book or such other manner as he deems advisable. [1960, c. 64, s. 27; 1963, c. 34, s. 2]

Section 27(4): Subsection (4), present Form "2" to read Form "3" to comply with rearrangement of Schedule.

Section 27(6): Subsection (6) deleted and new subsection (6) substituted.  
Comment, page 87.

#### Lien on Minerals Held from the Crown

**Minerals held from Crown** 27A.56. (1) Where a lien attaches to an estate or interest in minerals held directly from the Crown in right of Alberta and the estate or interest

(a) is less than a fee simple estate, and

(b) is not registered under *The Land Titles Act*, the statement of lien shall be filed with the Minister of Mines and Minerals and not with the Registrar.

(2) The provisions of this Act apply *mutatis mutandis* to all claims of lien registered with the Minister of Mines and Minerals in accordance with this section.

[1960, c. 64, s. 56]

Section 27A: This is the former section 56, unamended and altered only as to position.

Validity  
of lien

**28.** (1) A substantial compliance with section 27 is sufficient and a lien shall not be invalidated by failure to comply with any requirements of section 27 unless, in the opinion of the court, the owner, contractor, sub-contractor, mortgagee or some other person is prejudiced thereby.

(2) Where, in the opinion of the court a person is prejudiced by a failure to comply with section 27, the lien shall be invalidated only to the extent that such person is prejudiced by the default.

(3) Nothing in this section dispenses with the requirement of registration of a lien. [1960, c. 64, s. 28]

Change of  
address

**29.** (1) A lienholder may change his address for service within the Province by delivering to the Registrar of the appropriate land registration district a notice of change of address for service in Form ~~3~~<sup>5</sup> of the Schedule.

(2) The Registrar shall

(a) upon receipt of a notice of change of address for service, and

(b) upon receipt of his proper fee,  
enter the notice of change of address in the day book and make a memorandum setting forth the new address for service upon the registered statement of lien.

[1960, c. 64, s. 29]

Section 29: Amended by renumbering Form 3 as Form 5.

Railway  
land

**30.** Where a lienholder desires to register a lien against a railway, it is a sufficient description of the land to describe it as the land of the railway company.

[1960, c. 64, s. 30]

31. A person who has a lien against a particular estate or interest only and who registers a lien against an estate or interest in the lands to which his lien does not attach is liable for legal and other costs and any damages incurred by or resulting to the owner of any estate or interest in the land by reason of the wrongful registration of the lien against his estate or interest.

Section 31: Present section 31 as amended.  
Comment, page 88.

Time for  
registration  
of lien

**32.** (1) A lien in favour of a contractor or a sub-contractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or sub-contract, as the case may be, and

(a) within thirty-five days after completion or abandonment, or,

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within thirty-five days after completion or abandonment.

(2) A claim of lien for materials may be registered at any time during the furnishing of the materials and

(a) within thirty-five days after the last of the materials is furnished, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipeline, within thirty-five days after the last of the materials is furnished.

(3) A lien for the performance of services may be registered at any time during the performance of the services and

(a) within thirty-five days after the performance of the services is completed, or

(b) where the improvement in respect of which the lien arises is an oil or gas well or an oil or gas pipe line, within thirty-five days after the performance of the services is completed.

(4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and

(a) within thirty-five days after the completion of the work, or

(b) in the case of a lien for wages owing for work in, at or about a mine, within thirty-five days after the completion of the work.

(5) Where, in respect of work done on or material furnished for an improvement,

(a) something is improperly done, or

(b) something that should have been done is not done, at the time when the thing should have been done and if at a later date the thing improperly done is put right or the thing not done is done, the doing of the thing at the later date shall not be deemed to be the completion of the work or the furnishing of the last materials so as to enable a person to extend the time limited by this section for registering a lien.

[1960, c. 64, s. 32]

Section 32: Present section 32 amended by altering periods for filing to a uniform thirty-five days as indicated. Comment, pages 31-38.

### Expiry and Discharge of Lien

Expiry of  
unregis-  
tered lien

**33.** Where a lien is not registered within the time limited by section 32, the lien ceases to exist.

[1960, c. 64, s. 33]

Section 33: Section 33 unamended.  
Comment, page 91 et seq.

34.(1) A lien which has been registered ceases to exist unless, within ninety days from the date of registration thereof

- (a) an action is commenced to realize upon the lien or in which the lien may be realized upon under this Act, and
- (b) a certificate of lis pendens in Form 5 in the Schedule is registered in the appropriate Land Titles Office.

(2) The Clerk of the Court in which an action is begun may grant a certificate of lis pendens to any lienholder who is a party to the proceedings.

(3) Any lienholder who is a party to the proceedings may cause a certificate of lis pendens to be filed in the appropriate Land Titles Office.

(4) Upon receiving

- (a) a certificate under the seal of the Clerk of the Court stating that proceedings for which a certificate of lis pendens was granted are discontinued, or
- (b) withdrawal of a certificate of lis pendens signed by the person on whose behalf the certificate was registered,

the Registrar shall cancel registration of the certificate of lis pendens.

35.(1) Where a certificate of lis pendens is filed in accordance with this section any lien which has continued to exist by reason of registration of the certificate of lis pendens shall continue to exist until the proceedings are concluded.

(2) Notwithstanding subsection (1), if no trial has been held within two years from the date of the registration of the certificate of lis pendens, any interested party may apply ex parte to a judge to have the certificate of lis pendens vacated and all liens depending thereon discharged.

36.(1) The Registrar of the Land Titles Office shall cancel the registration of a lien either in whole or in part

- (a) upon receiving notification in Form 6 or Form 7 in the Schedule signed by the claimant or his agent stating that the lien has been satisfied in whole or in part.
- (b) upon receiving proof satisfactory to him that a lien which has been registered has ceased to exist under the terms of this Act.

(2) The Registrar of the Land Titles Office shall cancel the registration of a lien in part only upon receiving notification in Form 8 in the Schedule signed by the claimant or his agent stating that the lien has been satisfied in part only and describing that part of the land described in the statement of lien as to which the lien has been satisfied.

(3) The Registrar shall cancel the registration of a lien and of any certificate of lis pendens

- (a) upon receiving a certified copy of an order or judgment of a court ordering the cancellation of the registration of a lien,



- (b) upon receiving a certificate under the seal of the Clerk of the Court stating that pursuant to an order or judgment of the court
  - (i) the amount due by an owner in respect of a lien has been ascertained and paid into court, or
  - (ii) the land, improvement or material has been sold in satisfaction of the lien.

Sections 34, 35 and 36: New, replacing present sections 34, 35, 36 and 37.  
 Comment, pages 92 - 98.

Present section 37 repealed and in part incorporated in sections 34 to 36. New Form 8 to be drafted covering Partial Discharge.  
 Comment page 99.

Cancellation  
 of lien  
 by court

**38.** (1) The court may, upon application by originating notice,

- (a) order that the registration of a lien be cancelled upon the giving of security for or the payment into court of the amount of the claim and such costs as the judge may fix, or
  - (b) order that the registration of a lien be cancelled on any proper ground.
- (2) Money paid into court replaces the land discharged and is subject to the claim of all persons for liens to the same extent as if the money had been realized by a sale of the land in an action to enforce the lien.

[1960, c. 64, s. 38]

## ENFORCEMENT OF LIEN

39.(1) Proceedings to enforce a lien shall be commenced by statement of claim.

(2) Lienholders shall not be named as defendants.

(3) Where the party issuing the statement of claim is not the contractor, the statement of claim shall name as defendant

- (a) the owner, and
- (b) the contractor, and
- (c) the holder of any prior registered encumbrance.

(4) Where the person issuing the statement of claim is the contractor, he shall name as defendants

- (a) the owner, and
- (b) the holder of any prior registered encumbrance.

(5) The expression "prior registered encumbrance" shall not include liens.

(6) The procedure in adjudicating upon the claims shall be of a summary character, so far as is possible, having regard to the amount and nature of the liens in question and the enforcement thereof at the least expense.

Section 39: New.  
Comment, pages 99-101.

40.(1) The statement of claim shall be served upon all persons who by the records of the Land Titles Office appear to have an interest in the land in question and upon such other persons as the court may direct.

(2) All persons including lienholders served with a statement of claim are parties to the proceedings.

Section 40: New.  
Comment, page 102.

41.(1) The time within which a defendant must file a statement of defence or demand of notice shall be the period limited for the filing of defence by the consolidated rules of the Supreme Court of Alberta.

- (2) (a) A party not named as a defendant shall not be required to file a statement of defence.
- (b) At any time following service of the statement of claim upon him, a party may file with the Clerk of the Court and serve upon any lienholder a Notice to Prove Lien in Form 9 in the Schedule.
- (c) A lienholder served with a Notice to Prove Lien shall, within fifteen days of the service of such notice upon him, file in the office of the Clerk of the Court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(3) A lienholder upon whom a Notice to Prove Lien is served and who does not file his affidavit within fifteen days of the service of such notice, or within such further period as the court may order on application upon notice, shall lose his lien.

(4) Any party to the action may examine the lienholder upon his affidavit filed pursuant to this section.

Section 41: New.  
Comment, page 103.

42.(1) At any time following the expiry of the time limited for defence, the plaintiff may, and before setting the action down for trial the plaintiff must, make a Pre-trial Application.

(2) The plaintiff shall serve notice of the Pre-trial Application upon all defendants, and on any such other persons as the court may direct, at least ten days before the date of such application.

(3) Upon the hearing of the Pre-trial Application,

(a) If no defence has been filed and no Notice to Prove Lien has been filed and served, the court may declare the liens valid and make such further judgment or order as the court may deem appropriate.

(b) If defence has been filed the court may give judgment declaring valid any liens in respect of which no Notice to Prove Lien has been filed.

- (c) The court may consider the affidavits filed upon service of Notice to Prove Lien and the transcript of any examination thereon, and may
  - (i) determine summarily the validity of the liens concerned,
  - (ii) hear evidence viva voce,
  - (iii) direct that at the trial of the action any particular issue or issues arising on the application be determined.
- (d) The court may make such further order or direction as the court may deem necessary or desirable, including inter alia, an order that the Property be sold pursuant to this Act and an order that the action be entered for trial.
- (e) The court may order that any lienholder or other party shall be given the carriage of the proceedings.
- (f) The court may order that examinations for discovery be held, but no examinations for discovery shall be held without an order of the court.

Section 42:       New.  
                  Comment, page 106.

43.(1)       At any time after service of the statement of claim, any party may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver upon such terms and upon the giving of such security or without security as the court may deem appropriate.

(2) At any time after service of the statement of claim, any party may apply to the court for the appointment of a trustee or trustees, and the court may, upon the giving of such security or without security as the court deems appropriate, appoint a trustee or trustees with power to manage, sell, mortgage, or lease the property subject to the supervision, direction and approbation of the court and with power upon approval of the court to complete or partially complete the improvement.

(3) Mortgage monies advanced to the trustee or trustees as the result of any of the powers conferred upon him or them by this section take priority over all liens existing at the date of the appointment of the trustee or trustees.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

Section 43: New.  
Comment, page 108.

44.(1) Subject to subsection (2) a lienholder may enforce his lien notwithstanding the non-completion or abandonment of any contract under which his lien arises.

(2) Subsection (1) does not apply in favour of a contractor or subcontractor whose contract provides that nothing is to be paid until completion of the contract.

Section 44: New.  
Comment, page 109.

45. Where more than one action is commenced to enforce liens in respect of the same land the court may, upon the application of any person interested, consolidate such actions into one action, and may give the conduct of the consolidated action to any plaintiff as it deems fit.

Section 45: New.  
Comment, page 110.

46. Where a defence has been filed and no order is made upon the Pre-trial Application for the holding of a trial, the plaintiff or any other party may enter the action for trial.

Section 46: New.  
Comment, page 111.

47. Upon the trial of the action, the court
- (a) shall decide all questions that arise therein that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the parties;
  - (b) shall take all accounts, make all inquiries, give all directions and do all other things necessary finally to dispose of the action and of all matters, questions and accounts arising therein and to adjust the rights and liabilities of and give all necessary relief to all parties.

Section 47: New.  
Comment, page 112.

- 48.(1) Where a lien claimant fails to establish a valid lien, he may nevertheless be awarded personal judgment against any party to the proceedings for any sum that is due to such claimant and that he might recover in an action against such party.
- (2) The court may in its judgment order that the estate or interest in land that is charged with a lien be sold.
  - (3) When the court orders a sale, the court may
    - (a) direct that the sale take place at any time after the judgment, allowing a reasonable time for advertising,
    - (b) direct what advertising of the sale shall be required, and
    - (c) make all necessary orders and directions for the completion of the sale and the vesting of the estate or interest in the purchase.
  - (4) The court may direct the sale and removal of any materials.



Section 48: This new section 48 is composed largely of portions of present sections 45 and 46. Comment, page 114.

49.(1) Where a sale takes place as provided in section 48, the monies realized from such sale shall be paid into court to the credit of the action.

(2) Upon application by the plaintiff or any party, following the payment of monies into court under subsection (1), the court shall

- (a) where there is sufficient money realized to satisfy all claims, direct that the moneys be paid out of court to the claimants as they are entitled in respect of their claims, costs and disbursements,
- (b) where sufficient moneys are not realized to satisfy all claims, costs and disbursements, certify the amount of the deficiency, the names of the persons who are entitled to share the moneys in court, the amounts which the various persons interested are entitled to receive from the moneys in court, the persons adjudged to pay any moneys and any credits allowed to such persons under this Act.

Section 49: New. Comment, page 117.

50.(1) Where a mortgage or other registered encumbrance is prior to liens under this Act, the court may

- (a) order that in a sale under this Act, the property be sold subject to the mortgage or encumbrance,
- (b) order that in a sale under this Act the property be sold at an upset price of not less than the amount secured under the mortgage or encumbrance, costs, and the costs of the sale.

(2) All monies realized from a sale, receivership or trusteeship under this Act, and insurance moneys to which section 15 applies, shall be paid into court for distribution as provided in this section.

(3) Where a sale is made as in subsection (1)(a) the moneys in court shall be distributed in the following order:

- (a) in paying the costs of those parties to whom costs have been awarded by the court
  - (i) of and incidental to the proceedings, and
  - (ii) of registering and proving the liens;
- (b) in paying six weeks' wages, if so much is owing, of all labourers employed by the owner, contractor or subcontractor;
- (c) in paying the several amounts owing to lienholders other than the contractor;
- (d) in paying the amount owing to the contractor.

(4) Where a sale is made pursuant to subsection (1)(b) the moneys in court shall be distributed in the following order:

- (a) in payment of all amounts due, including costs and costs of sale, to the holders of mortgages or other registered encumbrances which are prior to liens under this Act;

- (b) in paying the costs of all lienholders
  - (i) of and incidental to the proceedings, and
  - (ii) of registering and proving the liens;
- (c) in paying the several amounts owing to lienholders other than the contractor;
- (d) in paying the amount owing to the contractor.

(5) Each class of lienholders shall as between themselves rank without preference for their several amounts and the portion of the said moneys available for distribution to each class shall be distributed among the lienholders in such class proportionately according to the amounts of their respective claims as proved.

(6) Where a labourer has more than six weeks' wages owing to him by a subcontractor, contractor or owner, the court

- (a) shall cause the sum additional to six weeks' wages to be deducted out of any sum actually coming to the subcontractor, contractor or owner under a distribution pursuant to subsection (1), and
- (b) shall order the same to be paid to the labourer.

Section 50: New.  
Comment on page 118.

Order for  
removal of  
structure

51 ~~49~~. (1) Where the work performed or material furnished in respect of which the lien arose results in the creation of an improvement consisting of a structure, erection or building, then notwithstanding

(a) that such structure, erection or building may be affixed to or have become part of the land, or

(b) the provisions of section 11,

the court, if of the opinion that having regard to the value of the improvement and the amount owing on the lien it is proper to do so, may, upon application of the lienholder in proceedings to enforce the lien or in any other proceedings affecting the lien, order such structure, erection or building removed and sold and the proceeds of such sale applied on the lien that arose in respect of such improvement.

(2) If the proceeds of the sale exceed the amount owing, the excess shall be applied in the same manner as the proceeds of the sale of the land and improvements remaining thereon would be applied. [1960, c. 64, s. 49]

Section 51: This is the present section 49, unchanged.  
Comment, page 121.

52. Any judgment given by the court pursuant to this Act may be enforced by execution or otherwise as a judgment of the court.

Section 52: New.  
Comment, page 122.

53. The Consolidated Rules of the Supreme Court of Alberta shall apply in all actions brought under this Act except where and to the extent that they are inconsistent with this Act.

Section 53: New.  
Comment, page 122.

Proof of claim after proceedings 54. ~~50~~. (1) At any time before the amount realized in the proceedings for the satisfaction of liens has been distributed, a lienholder who has not been served with notice of the proceedings may, on application to the court and on such terms as to costs and otherwise as may be just, be allowed to prove his lien.

(2) Where a lien under subsection (1) is proved and allowed the court shall amend the judgment to include the lien. [1960, c. 64, s. 50]

Section 54: This is the present section 50, unchanged.  
Comment, page 123.

Appeal 55. ~~52~~. (1) An appeal lies to the Appellate Division of the Supreme Court from the decision of the court hereunder in all matters where the amount of the lien or the total amount of the liens joined in one action or proceedings is two hundred dollars or more.

(2) Where the amount of the lien or the total amount of the liens joined is less than two hundred dollars the decision of the court of first instance is final.

[1960, c. 64, s. 52]

Section 55: This is the present section 52, unchanged.  
Comment, page 124

#### Fees and Costs

Fees 56. ~~53~~. No fees shall be payable to a Registrar or to a court  
(a) in connection with the registration or discharge of any proceedings taken by a labourer to realize a claim for wages under this Act, or  
(b) on the filing of an order, record or judgment or other proceeding in connection therewith.

[1960, c. 64, s. 53]

Section 56: This is the present section 53, unchanged.  
Comment, page 125.

- Costs 57. ~~54~~ When it appears to the court in a proceeding to enforce a lien under this Act that the proceedings have arisen from the failure of an owner or contractor
- (a) to fulfil the terms of his contract of engagement for the work in respect of which the liens are sought to be enforced, or
  - (b) to comply with the provisions of this Act,
- the court may order the owner and contractor, or either of them, to pay all the costs of the proceedings in addition to the amount of the contract or sub-contract or wages due by him or them to any contractor, sub-contractor or labourer and may order a final judgment against the contractor and owner, or either of them, in default for such costs.
- [1960, c. 64, s. 54]

Section 57: This is the present section 54, unchanged.  
Comment, page 127.

- 58.(1) The Lieutenant Governor in Council
- (a) may make general rules not inconsistent with this Act to expedite and facilitate the business before any court under this Act, and to advance the interests of suitors therein, and
  - (b) may prescribe a tariff of costs
    - (i) as between parties, and
    - (ii) as between solicitor and client,
 payable for services rendered in respect of a lien under this Act,

or may authorize the judges of the Supreme Court to make and promulgate such rules, provided that any tariff of costs so prescribed shall cover only those steps in an action up to the making of the Pre-trial order, costs thereafter incurred to be as in the present Schedule C of the Consolidated Rules of the Supreme Court of Alberta.

(2) After the making thereof, the tariff shall be laid upon the table of the Legislative Assembly at its next ensuing session, and unless or until it is disallowed by resolution of the Legislative Assembly it has the same effect as it enacted hereby.

Section 58: This is the present section 55, amended.  
Comment, page 128.

#### National Housing Loans

N.H.A.  
mortgages

59. ~~57~~. (1) The provisions of this section apply only to land subject to a mortgage made pursuant to the *National Housing Act* (Canada) or the *National Housing Act, 1954* (Canada) and to the rights of lienholders and the holder of such mortgage.

(2) Subject to the provisions of subsection (3) and for the purpose of ascertaining the respective priorities of charges upon the estate or interest of the owner, the lien and all mortgages rank according to the dates of their respective registrations in the proper land titles office, but no mortgage has any priority over a lien in respect of advances or payments made by the mortgagee after the date of registration of the lien or after the mortgagee has notice of the existence of the lien.

(3) Any mortgage existing in fact before the lien arises has only priority over the lien in respect of the value at the date of the proceedings to enforce the lien of the mortgaged premises as they existed immediately before the lien arose, but no such mortgage has priority over a lien in respect of advances or payments made by the mortgagee after the date upon which the lien arose.

(4) Where any of the property upon which a lien attaches is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee takes the place of the property so destroyed and, after satisfying any prior mortgage to the extent set out in subsection (3), is subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in proceedings to enforce the lien.

(5) Section 5 of *The National Housing Loans Act* (Alberta), being chapter 220 of the Revised Statutes of Alberta, 1955, is hereby repealed. [1960, c. 64, s. 57]

Section 59: This is the present section 57, unchanged. However, if new sections 9 and 50 as previously recommended, are in fact adopted, they will give all mortgages the status and privileges granted National Housing Act loans in the present section 57, and the present section 57 (renumbered 59) would thereupon become redundant.

Transitional provisions 60.~~58~~. (1) Subject to subsection (2), *The Mechanics' Lien Act*, being chapter 197 of the Revised Statutes, is repealed.

(2) The provisions of chapter 197 of the Revised Statutes continue in effect and apply, notwithstanding its repeal by this Act, to any lien registered in a land titles office before the commencement of this Act.

[1960, c. 64, s. 58]

Coming into force 61.~~59~~. This Act comes into force upon a date to be fixed by proclamation of the Lieutenant Governor in Council.

[1960, c. 64, s. 59]

Sections 60 and 61: The fate of these two sections (present sections 58 and 59) is dependent on the disposition of this Report.



SCHEDULE

Schedule

## SCHEDULE

Form 1

## FORM 1

(Section 27)

## STATEMENT OF LIEN

(Name of claimant) of (residence of claimant) (if claimant is a representative or assignee set out the facts) claims a lien upon the estate of (name and residence of the owner of the land upon which the lien is claimed) in the undermentioned land, in respect of the following work or material, that is to say: (give a short description of the nature of the work done or to be done or the material furnished or to be furnished) which work was or is to be done or material was or is to be furnished for (name and residence of person upon whose request the work is done or the material is furnished and

(a) the work was completed or the last materials were furnished on the . . . . . day of . . . . . 19.....,

or

(b) the work is not yet completed or the materials are not all yet furnished.  
(strike out inapplicable clause).

The amount claimed due or to become due is . . . . . dollars. The following is a short description of the land to be charged (set out concise legal description).

The address for service of the said . . . . . is . . . . ., in the Province of Alberta.

Dated at . . . . . this . . . . . day of . . . . ., 19.....

(Signature of Claimant)

[1960, c. 64, Schedule, Form 1; 1963, c. 34, s. 5]

FORM 1 - Unchanged.

FORM 2 - New Form 2 referable to section 27A (former section 56) to be drafted for use when registration concerns minerals and is to be filed with the Department of Mines and Minerals of the Province of Alberta.

Form X 3

FORM 3

(Section 27) & 27A

AFFIDAVIT VERIFYING CLAIM

I, ... of ... in the Province of ... (Occupation) ..., named in the above or annexed statement, make oath that the said claim is true.

or

I, ... of the ... of ... in the Province of ... (Occupation) ... make oath and say:

- (1) That I am the (assignee) agent of the above named claimant and have full knowledge of the facts set forth in the above or annexed statement.
(2) That the said claim is true.

SWORN before me at ... of ... in the Province of Alberta, this ... day of ... 19 ... (A Commissioner for Oaths)

or

Province of Alberta } We, ...
Canada } of ...
To Wit: } in the Province of ...

(Occupation) ... named in the above or annexed statement make oath and each for himself makes oath that the said claim so far as it relates to him, is true.

SWORN before me at ... in the Province of Alberta SEVERALLY this ... day of ..., 19 ... (A Commissioner for Oaths)

[1960, c. 64, Schedule, Form 2]

FORM 4 - An affidavit verifying claim, but based on information and belief, in conformance with new subsection (6) of section 27, to be drafted and numbered as FORM 4, present FORM 4 being struck out as no longer necessary in view of contents of new sections 34 and 36.

Form X 5

FORM 3 5  
(Section 29)

NOTICE OF CHANGE OF ADDRESS FOR SERVICE

To the Registrar of the ..... Alberta Land Registration District:

Take notice that I hereby change my address for service as stated in my statement of lien (or in my last registered notice of change of address for service) dated the ..... day of ....., 19....., and registered in the land titles office for the ..... Alberta Land Registration District on the ..... day of ....., 19....., as No..... affecting the land described as follows:

and appoint..... in the Province of Alberta as my address for service.

Dated at the ..... of ..... in the Province of Alberta, this ..... day of ....., 19.....

.....  
(Signature of Claimant or his Agent)

[1960, c. 64, Schedule, Form 3]

FORM 5 - The present FORM 3, unchanged.

Form X 6

FORM ~~5~~ 6  
(Section ~~35~~) 36

CERTIFICATE OF LIS PENDENS

To the Registrar . . . . . Alberta Land Registration District:

This is to certify that proceedings have been taken in court to enforce a certain lien filed by . . . . . against . . . . . (here describe lands), which lien was filed pursuant to *The Mechanics Lien Act, 1960*, on the . . . . . day of . . . . ., 19 . . . . . and registered as D.B. No. . . . .

Dated at . . . . . this . . . . . day of . . . . ., 19 . . . . .

. . . . . (Clerk of the Court)

[1960, c. 64, Schedule, Form 5]

FORM 6 - Former FORM 5, made referable to new section 36.

Present FORM 6 struck out as no longer necessary in view of the contents of new sections 34 to 36.

Form 9

FORM 9

(Section 41)

## NOTICE TO PROVE LIEN

To \_\_\_\_\_  
(Name of lienholder)

Take notice that the undersigned hereby requires that you prove your Mechanics' Lien, registered on the \_\_\_\_\_ day of \_\_\_\_\_ A.D. 19\_\_\_\_ as Instrument No. \_\_\_\_\_ against the following lands:

(Land Description)

And further take notice that unless within fifteen days from the date of service of this Notice upon you, you file an Affidavit giving detailed particulars of your said Mechanics' Lien pursuant to section 41 of The Mechanics' Lien Act, your said Mechanics' Lien will cease to be valid.

Dated at \_\_\_\_\_, in the Province of Alberta, this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 19\_\_\_\_\_.

\_\_\_\_\_  
(Name of person giving Notice)

FORM 9 - A new Form, Notice to Prove Lien, required to meet the provisions of new section 41.

Form 7

FORM 7

(Section ~~27~~) 36

DISCHARGE OF ~~CIXAMXOT~~ LIEN

To the Registrar of the ..... Alberta Land Registration District:

I, ..... acknowledge to have received all the moneys due or to become due under the claim of lien made by ..... as lien claimant, upon the following land, that is to say:

..... which said statement of lien bears the date the ..... day of ....., 19 ....., and was registered in the land titles office for the ..... Alberta Land Registration District at ..... minutes past ..... o'clock in the ..... noon of the ..... day of ....., 19 ....., in book number ..... at folio number ..... as instrument number .....

And Declare that the said claim of lien has ..... been assigned or transferred ..... and that I am entitled by law to receive the money.

Wherefore the said claim of lien is hereby wholly discharged.

In witness whereof I have hereunto set my hand this ..... day of ....., 19 .....

Witness:

[1960, c. 64, Schedule, Form 7]

FORM 7 - Present Form 7, now made referable to section 36 and amended as to title.

FORM 8 - New Form, Partial Discharge of Lien, to be drafted and made referable to section 36.



