(ii) with leave to the applicant to sell with the sheriff's consent,
(iii) with leave to the applicant to bid in, or
(iv) with both remedies (ii) and (iii) available.

It is hoped that all of these remedies will be kept in mind by solicitors, and that the special value of private sales will be recognized with greater frequency in relation to conditional sales contract seizures.

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CONSTITUTIONAL LAW—B.N.A. ACT—DISTRIBUTION OF POWERS —THE ASPECT TEST AND THE EMERGENCY DOCTRINE

And God said unto Noah: "Build an Ark of two compartments and into compartment No. 91 place all the large animals and into compartment No. 92 place all the small animals." And Noah accordingly built the ark with its two compartments and placed therein the animals as directed. And God saw what Noah had done and said: "It is good".

But, Behold, some of the small animals in compartment 92 by the process of natural growth and development became big animals whereupon Noah, mindful of the scheme of allocation in the original instructions, transferred these animals to compartment 91. But Lo, divers of the small animals in compartment 92 became afflicted with the malady elephantitis and grew to an enormous size, whereupon Noah, mindful as aforesaid, transferred these animals to compartment 91. But Lo again, these afflicted animals having recovered from their malady were once more reduced to their normal size whereupon Noah, mindful as aforesaid, retransferred these animals to compartment 92. And God was heard to say: "It is good".

And Lord Watson in turn, influenced by the biblical text, declared: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada".

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THE BUILDERS' LIEN ACT—NATURE OF THE LIEN—EFFECT OF THE ACT—PROBLEMS ARISING FROM THE ACT

I. HISTORY OF THE "BUILDERS'" OR "MECHANICS'" LIEN

Suppliers of services and materials for the improvement of real property have a lien on that property. The law relating to this lien has

been tangled and confused, and The Builders' Lien Act[1] embodies the results of the latest attempt to make it rational.

The Act is based upon the Report[2] of retired Chief Judge Nelles V. Buchanan, though it does not embody all of his recommendations and ignores the Commissioners' invitation to abolish the Act.[3] The Commissioner's conclusion is that the Act never would be missed; and indeed that its repeal would have a generally beneficial effect on the building industry. The Report is a workmanlike and valuable piece of work with many useful suggestions and nothing in this article is intended to detract from it.

The "mechanics'" or "builders'" lien[4] has received much attention over the years. The original Northwest Territories Ordinance of 1884 was amended in 1889, 1897, 1898 and 1903. Its successor in the 1906 Statutes of Alberta was amended in one-third of the intervening years to 1967 and was consolidated four times in that period.[5]

The Commissioners on uniformity of legislation in Canada considered the possibility of a uniform Act from 1921 to 1929, from 1943 to 1948, and from 1957 to 1960.[6] At least two other Provinces have held inquiries during recent years.[7]

The Canadian common law jurisdictions deal with the subject by statute, as the common law did not know a lien in favour of suppliers of materials and services for the improvement of real property, though liens on real property were not foreign to it. The Civil Codes do recognize such a lien.[8]

High judicial authority suggests that the Mechanics' Lien Acts are designed to see that the owner "does not get the asset without paying for it,"[9] and that "the land which receives the benefit bears the burden."[10] However, if the only objects were to see that the owner pays the full price and that he does not get a benefit without paying for it, the Acts could so provide and stop there; and in fact this is what the Alberta Mechanics' Lien Act did until 1930,[11] apart from a special provision to protect labourers for their six-week priority. However, they go on to impose a duty to make a holdback, and, by this and other means, to make it quite possible for the owner to pay twice.

A statement which fits Acts better is that "the philosophy of the legislation is that those who have contributed labour and material to the creation or improvement of a building or work should have some

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[1] S.A. 1970, c. 14, as replaced by R.S.A. 1970, c. 35.

[2] Report of the Commissioner, Public Inquiry under the Public Inquiries Act into the adequacy of the provisions of the Mechanics' Lien Act, 1960, dated November 1967 (hereinafter referred to as the Buchanan Report).

[3] Buchanan Report, *supra*, n. 2 at 40-48.

[4] "Builders' Lien Act" is a less misleading name than its predecessor, "Mechanics' Lien Act". At least a footnote, however, should celebrate the proposal of Mr. A. M. Holmes to the Buchanan Commission that it should be called "The Homeowners' Harassment Act". Mr. Holmes found himself obliged to pay out a lien claim after having paid in full for a garage erected on his property and quite understandably felt that he had been put upon.

[5] Buchanan Report, *supra*, n. 2 at 15 and 16.

[6] Report of the Honourable H. F. Thomson (1963) in respect of the Saskatchewan Act; at 3-5 (hereinafter referred to as the Thomson Report).

[7] See Report of Ontario Law Reform Commission (1966) (hereinafter referred to as the "O.L.R.C. Report"). See also the Commission's Supplementary Report (1967). See also the Thomson Report.

[8] Macklem & Bristow, *Mechanics' Liens in Canada* (2nd ed.) at 2.

[9] *Hickey* v. *Stalker* (1924) 1 D.L.R. 440 (Per Meredith C.J.C.P.).

[10] *Scratch* v. *Anderson* (1917) 1 W.W.R. 1340 (Per Harvey J.).

[11] S.A., 1930, c. 7, repealed and re-enacted R.S.A. 1922, c. 182, which had no hold-back provision.

protection against the loss of the contribution they have made to the development of the asset."[12]

The basic principle of the Mechanics' Lien Acts is that people who furnish material or services have a lien on the property improved, which lien is in the nature of a charge enforceable by sale of the property. The owner is required to hold back part of the contract price from the contractor; he is required to make this hold-back available to the holders of liens. The lien, however, is evanescent; it disappears unless noted on the Certificates of Title to the property and unless sued upon within a limited period of time. The Acts give the supplier of goods and services some protection, but very limited protection, at the expense of the owner.

In this article, the author will examine briefly the effect of the Builders' Lien Act upon the owner, prime contractor, subcontractor, workmen, owner of rented equipment, and mortgagee. He will then go on to look at certain aspects of the Act which are important from a practical, if not from a philosophical, point of view.

II. THE NATURE OF THE LIEN

The lienholder is a person who does work or causes it to be done, or who furnishes any material "in respect of an improvement," and may be a contractor, a subcontractor, a materialman, a workman, or a renter of equipment to an owner, contractor or subcontractor.

The lien arises when the work is begun or the first material is furnished.[13] Until the lien is registered, it ranks as an unregistered interest under The Land Titles Act and is subject to being defeated upon a change in title[14] or by the priority accorded an advance of mortgage money.[15] If the lienholder does not deal directly with the owner, his lien can be defeated in part by the actions of a third party, namely, by payments made by the owner to the prime contractor in good faith and prior to the registration of a lien.[16]

A lienholder who registers his lien will in most cases bring to a stop the flow of funds from the owner or mortgage lender. He may thereby prejudice himself in the particular case by making money unavailable for payment to him; or he may prejudice his business by making himself unpopular with his customers. He is likely to threaten registration in order to obtain payment,[17] but he is likely to register a statement of lien if he is only in acrimonious dispute with the owner or the contractor, or if he has become convinced that one or the other is in financial difficulties. In the latter event, the project is in a condition resembling bankruptcy.

The lienholder may well obtain payment by threatening to register. He may recover something if he registers when the project gets into difficulties, but in most cases he will not obtain payment of his full claim. Except for the prime contractor, the lienholder's recourse is only against the statutory hold-back plus any amount not advanced to the

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[12] O.L.R.C. Report, *supra*, n. 7 at 4. See also *Wakefield* v. *Oil City Petroleums* [1958] S.C.R. 361-364 (per Rand J.).

[13] Builders' Lien Act, *supra*, n. 1, s.8.

[14] *Hager* v. *United Sheet Metal Ltd.* [1954] S.C.R. 384; 3 D.L.R. 145; 7 W.W.R. (NS) 481.

[15] Builders' Lien Act, *supra*, n. 1, s.9 (2).

[16] *Id.*, s.15 (6).

[17] This procedure is characterized as a "mild form of blackmail" in the Buchanan Report, *supra*, n. 2 at 35 and 43.

prime contractor before registration of the lien. The amount available is therefore likely to be considerably less than the amount of registered liens, hence the builder's lien, though it has its uses, is rarely a security to be relied upon.

It is necessary, therefore, to examine the position of some classes of lienholder under the operation at the Act.

III. EFFECT OF THE ACT

1 The Contractor

The prime contractor is the stepchild of the Act, and in one way, his position is better than the position of other lienholders. He deals directly with the owner, having a lien for the contract price of all the materials and services which he supplies, and is not subject to having his security reduced by advances made by the owner to someone else, though his lien is subjected to mortgage moneys advanced to the owner.

The prime contractor, however, is in a difficult position with regard to liens registered by those who supply materials and services to his sub-contractors. Chief Judge Buchanan was impressed by the need for preventing cumulative hold-backs by the owner, the contractor, the first rank of subcontractors, and so on. He therfore recommended[18] "that the only hold-back required by the Act would be the owner's hold-back, and that the owner's hold-back would constitute a fund to which all lienholders would look for satisfaction of their claims." He thought that this would avoid the "snow ball effect which now exists where there are hold-backs upon hold-backs upon hold-backs, slowing down the flow of money at every stage of the project." Section 15 has been redrafted to achieve this result.

Chief Judge Buchanan's recommendation was designed to change the law as it was declared by the Appellate Division in *C. J. Oliver Ltd.* v. *Foothills Lighting & Electric Ltd. et al.*[19] In that case, the prime contractor had paid the electrical sub-contractor more than the value of the work done by that sub-contractor. However, lienholders claiming through the electrical sub-contractor had registered liens to an amount greatly in excess of the value of the work done under the electrical sub-contract.

The lienholders claimed to be entitled to attach the hold-back made by the owner from the prime contractor. This hold-back exceeded the amount of the liens because it included the hold-back on the whole main contract and not merely the one sub-contract. The prime contractor, however, claimed to be entitled to pay into Court 15% of the value of the work done under the sub-contract and to obtain discharge of the liens (this amount being much less than the total of the liens claimed).

The Appellate Division held that the lienholders had no claim against the owner's hold-back once they had been paid the amount of the contractor's hold-back. The hold-back in the owner's hands was held to be subject to a charge for the amounts recoverable by the lienholders, but only until those amounts (being the amounts which the prime contractor was entitled to hold back) had been paid into Court. In effect, those claiming through the sub-contractor had access only

[18] *Id.*, at 74.

[19] (1966) 54 W.W.R. 37.

to the hold-back which should have been made by the prime contractor, being 15% of the sub-contractor price; they did not have access to the owner's hold-back which was 15% of the main contract price.

Chief Judge Buchanan therefore recommended that the only hold-back be the owner's hold-back, and that all lienholders have access to it.[20] The Builders' Lien Act gives effect to this recommendation,[21] and in the writer's opinion, in so doing, places a solvent prime contractor in a very difficult, if not impossible, position.

Suppose that a contractor employs a sub-contractor, and that that sub-contractor in turn employs sub-sub-contractors and buys materials from materialmen. If the sub-contractor does not pay his bills, the sub-sub-contractors and materialmen will register statements of lien. The liens will attach the "lien fund" which is the statutory hold-back in the hands of the owner plus any other part of the contract price not paid in good faith by the owner to the prime contractor before registration of liens. The amounts recovered by the lienholders from the lien fund will then be deducted from the money which would otherwise go to the contractor, and therefore come from the contractor's pocket. The contractor cannot protect himself by making a hold-back from his sub-contractor, unless that hold-back is 100%. His other alternatives are to see that his sub-contractors' bills are paid in full (a somewhat hopeless endeavour); or by requiring the posting of a performance bond by each sub-contractor. The requiring of a performance bond may often be the only practicable alternative.

If bonds are required more often, small tradesmen, who often cannot obtain bonds, will find business much more difficult. The cost of the bonds will either increase the cost to the owner or will be borne by the contractor or sub-contractor. There may be much to be said for a policy which brings about these results, but the policy has not been adopted as the policy of the Act. Until it is so adopted, it is submitted that it is not correct to expose the prime contractor to liability for more than the sub-contract price.

Some ingenious expedients have been suggested for the prime contractor. He may ask his sub-contractor to produce assignments of lien rights in favour of the prime contractor from the sub-sub-contractors, materialmen who supply the sub-contractor, and so on. The separation of the right to receive money from the right to the security for the money seems artificial and it may be held to infringe Section 3 of the Builders' Lien Act, which avoids an agreement by any person that the Act does not apply or that the remedies provided by it are not to be available for his benefit. Alternatively, the prime contractor may ask the sub-sub-contractors and materialmen to indemnify the prime contractor against the registration of liens by them. As this device seems equally open to attack, neither of these devices should be relied upon.

An owner who acts as his own contractor is not subject to the same problem. His obligation is to make a hold-back upon each contract into which he enters. A person claiming through his electrical contractor

[20] Buchanan Report, *supra*, n. 2 at 74-75.

[21] Builders' Lien Act, *supra*, n. 1, s.15.

cannot claim on the hold-back under the plumbing contract.[22] The result is not unlike that in the *C. J. Oliver* case which, as stated above, has been reversed by the Builders' Lien Act in cases where the owner and prime contractor are different people.

2. The Materialman

The materialman has been one of the chief protagonists of our Act, and one of its chief beneficiaries. He has a lien for materials delivered, and can file it within thirty-five days of delivery of the last material. He has been given, and under the Builders' Lien Act seems to retain, the benefit of the proposition that the furnishing of even trivial materials will maintain, and even revive, the lien.[23] The principal restriction is that he cannot revive a lien under one contract by delivering materials under a second[24] (though one lien can include materials furnished under more than one contract).[25]

The materialman is given a further special advantage in that he is given a separate charge on material until it is incorporated in the improvement.[26] The Appellate Division (disagreeing with the Ontario Courts)[27] held in *Western Caissons (Alta.) Ltd.* v. *Bower el al. and Amfab Products Ltd.*[28] that this charge does not depend on registration, that it defeats execution creditors, and that the materials are not subject to other liens under the Builders' Lien Act. The Appellate Division, however, held that the charge was not enforceable by seizure nor (notwithstanding the predecessor of Section 45(4)) in proceedings under the Act; and it may be some time before the materialman finds the "proceedings which", in the words of Allen J.A., "may be appropriate to establish and enforce the 'charge'", following which, "it may then be necessary to again resort to the proceedings in the present mechanics lien action to determine its status and rights" under the Act.

3. The Wage-Earner

The wage-earner is given more protection than any other lienholder, in that he has priority to the extent of six weeks' wages over all claims on the statutory hold-back.[29] The desire to protect him seems to have been one of the principal motives for the enactment of mechanics' lien legislation[30] as the earlier names of the Acts indicate.[31] However, wage-earners now rarely take advantage of the protection of the Act, as they usually have more effective and less difficult remedies for the payment of their wages.[32]

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[22] If the Act is literally construed the owner-contractor should make a hold-back from each workman and materialman, as in each case the owner-contractor is "liable on a contract under which a lien may arise" within Section 15(2). It is unlikely that people will act on this construction in the future as they have not done do in the past.

[23] *Emco (Western) Ltd.* v. *Carillon Investments Ltd. et al.* (1962) 39 W.W.R. 432 (Man. C.A.).

[24] *Hectors Ltd.* v. *Manufacturers Life Insurance Co. et al.* (1967) 60 W.W.R. 428 (S.C.C.)—(the doctrine of the "prevenient contract").

[25] *Starlite Towers-Saskatchewan Drive Ltd.* v. *Emco Ltd.* (1970) 72 W.W.R. 236 (S.C.C.) adopting the majority reasons (1970) 70 W.W.R. 3.

[26] Builders' Lien Act, *supra*, n. 1, s. 14 (2).

[27] *Re Northlands Grading Co.* [1960] O.R. 455 (C.A.).

[28] (1969) 71 W.W.R. 604.

[29] Builders' Lien Act, *supra*, n. 1, s. 10.

[30] Buchanan Report, *supra*, n. 2 at 40-41.

[31] For example, the original Northwest Territories Ordinance according to the Buchanan Report, *supra*, n. 2 at 15, was "to establish liens in favour of mechanics, machinists and others". The Builders' Lien Act is "An Act respecting liens of Builders, Material Suppliers, Wage-earners and others."

[32] The Buchanan Report, *supra*, n. 2 at page 41, refers to the Alberta Labour Act, The Master and Servants Act, The Industrial Wages Security Act, The Public Works Act and other statutes.

4. The Owner of Rented Equipment

The Builders' Lien Act[33] gives a lien to "a person who rents equipment to an owner, contractor or sub-contractor for use on a contract site." As he is deemed "to have performed a service", he has a lien "for a reasonable and just rental of the equipment while used on the contract site." Presumably the section will be interpreted to mean that the service is not the act of renting the equipment, but rather the service performed by the equipment. If so, there may be a question as to whether equipment which has arrived at a site is being "used"; presumably the question will be settled by the Court in each case on a common sense basis. The "reasonable and just rental" will also have to be settled by the Court; the lien is not for the contract price though under ordinary circumstances the contract price will probably be a major factor in determining the "reasonable and just rental."

It is not apparent when the lien will arise, and two suggested possibilities are when the equipment reaches the site, or when the equipment starts to work.[34] Again, the commencement of the statutory period is unclear, but the writer suggests it will probably commence on the last day any of the equipment works.[85]

5. The Owner

The owner's position is not greatly affected by the new Act. He is still obliged[36] to retain for the statutory period an amount equal to 15% of the value of the work actually done, the value to 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. He is declared to be not liable under the Act for more than the amount of the "lien fund", which is the percentage retained by him plus any amount payable under the contract which has not been paid by him under the contract in good faith prior to registration of a lien, subject to the new provision for progressive hold-backs which will be discussed later. The statutory obligation overrides contracts.

Two changes from the previous Act appear in these provisions. The first is minor. Under the previous Act[37] the hold-back was 20% where the value of work done did not exceed $15,000.00. The hold-back, now always 15%, is a sensible simplification.

The second change appears in the reference to registration of the lien. Under the previous Act[38] it was notice in writing which stopped further payments under the contract. The requirement of registration is a good change, as registration is more consistent with the principle of the Land Titles Act. It eliminates doubt as to whether a notice has been properly given and as to whether the notice gives sufficient particulars.[39] On the other hand, an owner must now make a search at the Land Titles Office before each advance unless he is willing to rely on receiving the normal notice from the Land Titles Office.

The owner's payments, if he is to reduce his liability to lienholders,

[33] Builders' Lien Act, *supra*, n. 1, s. 4 (4).

[34] *Id*, s. 8.

[35] *Id*, s. 30.

[36] *Id*, s. 15.

[37] Mechanics' Lien Act, S.A. 1960, c. 64, s. 17.

[38] *Id*, s. 17 (5).

[39] *Direct Lumber* v. *Meda* (1957) 23 W.W.R. (NS) 126 (Buchanan C.D.J.C.); *Bird Construction* v. *Mount View Construction* (1969) 67 W.W.R. 515 (Riley J.).

must be made "in good faith." There appears to be no reason to think that mere knowledge that work is being done, and that liens therefore exist will affect the owner's "good faith".[40] A prudent owner, however, will probably not, for various reasons, ignore a formal written notice.

To the owner, a title search is vital, and, it is submitted imposes no onerous burden on him. There remains however, the problem caused by the lapse of time between the delivery of a statement of lien to the Land Titles Office and its notation on the Certificate of Title. Presumably the time of notation in the Day Book is the effective time of registration.[41] Once the search has been made, the advance should be made immediately so as to avoid further registrations.

6. Special Problems of the Owner

The author submits that the owner in Alberta is faced with a serious problem of interpretation. If his contractor abandons the contract, can the owner set off against the lien fund any excess cost of completion, or any damages due to defective work? Because of rising costs and because of difficulties in arranging completion of something commenced by someone else, the excess cost of completion may be substantial. In other jurisdictions, such damages may be set off, though the set off cannot trench upon the required hold-back.[42] Unfortunately, it is not clear whether there may be a set off in Alberta.

In *Horwitz* v. *Rigaux Building Enterprises Limited*[43] the contractor abandoned the work. The Appellate Division held that the work done was to be valued on a *quantum meruit* basis, and that payments made by the owner to the contractor in good faith without written notice of liens would be deducted. The resulting figure would be the maximum liability of the owner, and to clear his title, the owner would have to pay into Court the amount of valid liens up to that maximum liability.

The Court relied on Section 20 of The Mechanics Lien Act, R.S.A. 1955, chapter 97. That section provided that a sub-contractor might enforce his lien notwithstanding the non-completion or abandonment of the contract by a contractor or sub-contractor under whom he claimed. The section was made subject to the provision that the owner is not to be liable for a sum greater than the sum owing and payable to the contractor. The argument that under the terms of the contract nothing was owing and payable to the contractor was met by deciding that a *quantum meruit* valuation was necessary in order to give effect to the intention of the Legislature.

The owner in the *Horwitz* case apparently did not claim a set off, and the decision therefore lacks some strength as authority for the proposition that no set off can be made. However, the formula is stated by the Court in such terms as to preclude set off, and it is difficult to ignore the decision until it is laid to rest by legislation or judicial decision.

Section 20 of the 1955 Act became Section 41 of the 1960 Act. It has

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[40] *Len Ariss* v. *Peloso* [1958] O.R. 643 (C.A.).

[41] This risk due to lapse of time is minimized at the Land Titles Office at Edmonton by an informal current list of statements of lien filed.

[42] *Macklem & Bristow, supra*, n. 8 at 52, 90 and 100; *Canadian Comstock Co. Ltd.* v. *Toronto Transit Commission et al* [1970] S.C.R. 205.

[43] (1960) 32 W.W.R. 540 (App. Div.).

become Section 41(1) of the Builders' Lien Act,[44] but now applies to "lienholders" and not merely to "sub-contractors", and is no longer expressly subjected to the provision limiting the owner's liability. That liability is limited by Section 15(5) to the amount of the "lien fund", which is composed of two elements. One is the required hold-back; the other is "any amount payable under the contract" which has not been paid. The word "payable" admits of little comfort; the words before the Court in the *Horwitz* case were "owing and payable".

In the opinion of the author the set off is permissible, but it cannot be maintained that law providing such permission has been clearly stated. If no set off is permissible, the owner should require a performance bond from his contractor. He cannot protect himself by holding back money, because a greater hold-back merely provides more money for lienholders. Legislation or judicial decision clarifying this problem is necessary, but until such occurs, the owner should bear in mind the possibility that when he proposes a set off he will be challenged. Even if it is clarified, however, the interest of the owner will still be to have enough money in his hands to complete the contract if the contractor should fail to do so, in addition to the builder's lien hold-back. A performance bond, of course, would in most cases be a satisfactory substitute.

7. The Land Titles Act

The Supreme Court of Canada in 1954 held that a *bona fide* purchaser of land who obtained a clear Certificate of Title was not affected by existing unregistered mechanics' liens.[45] Such a purchaser is not a person "claiming under" the previous owner so as to bring him within the definition of "owner" in the Act and to render his interest subject to unregistered liens. It is of present note that the definition of owner in the Builders' Lien Act is for this purpose identical.[46] The view of the Court in the *Hager* case was that the Land Titles Act is to be applied except as its provisions are repealed, altered or modified by the provisions of the Mechanics Lien Act.[47]

A situation not dealt with specifically in the Builders' Lien Act is the position of a purchaser under agreement for sale. Section 9(4) speaks of an agreement for sale in respect of which a caveat has been filed, and provides that it and any moneys *bona fide* secured or payable there under have the priority of a mortgage; but the section applies only to the seller's interest.[48] There seems to be no reason, however, why the principle of the *Hager* case should not be extended to protect other registered interests. Indeed, the philosophy of that case, and that of the new Act, appears to be that an unregistered lien is like any other unregistered interest, save to the extent that there is specific provision to the contrary in the Builders' Lien Act. Therefore, if a purchaser under agreement for sale protects his position by caveat be-

[44] This section appears to distinguish the law from that applied in *Crown Lumber Co. Ltd.* v. *Smythe et al* (1923) 2 W.W.R. 1019 (App. Div.) which case, if still the law, would settle the matter in favour of the right to set off.

[45] *Hager* v. *United Sheet Metal Ltd. et al.* [1954] S.C.R. 384. The headnote refers to "*bona fide* purchasers of land for value without notice" is not mentioned in the Reasons for Judgment.

[46] Builders' Lien Act, *supra*, n. 1, s. 2 (gp.

[47] *Hager* v. *United Sheet Metal Ltd. et al, supra*, n. 45 at 386. (per Estey J.).

[48] Macklem & Bristow, *supra*, n. 8 at 158, treat the purchaser and not the seller as being in a position analogous to a mortgagee. Payments made by the purchaser before registration of a lien have priority. While policy might suggest that liens might attach the amount payable to the seller, the purchasers' equitable ownership should not be affected.

fore the registration of a builders' lien, his interest should not be subjected to a pre-existing unregistered builders' lien. Similarly, no other valid registered interest should be made subject to a lien which is unregistered or registered subsequent to the interest sought to be defeated.

Nowadays, however, different questions arise. Is is common for a builder to sell a house before it is completed. He contracts to finish it and then to convey it. The buyer has an interest in the house and it is finished for him; he must be an owner under Section 2(1)(g), and the builder must be a contractor. If so, the buyer must make the holdback, and he cannot claim the benefit of the later change of title. A Court might go further and find that the buyer has held out the builder as being the continuing owner. If so, the buyer might be estopped from asserting the fact of his ownership, and his title would then be subject to all liens with no limitation to a lien fund.

8. The Mortgagee

The mortgagee is the chief beneficiary of the changes made by the Builders' Lien Act, by the fact that he is given priority over builders' liens to the extent of mortgage moneys *bona fide* secured or advanced in money prior to the registration of the statement of lien.[49]

The ordinary morgagee's position under the Mechanics' Lien Act, 1960, was unenviable.[50] A lien which arose before the mortgage was registered was prior to the mortgage;[51] and in a building mortgage the first lien (which, since it ranked equally with all liens was taken to confer its priority upon them) might well be that of the contractor or excavator which would arise before construction of the building financed by the building mortgage.

Even if the mortgage was registered before the first lien arose, the liens and the mortgage had to be dealt with in proceedings under the Mechanics' Lien Act, which required a judicial sale. A fraction of the proceeds of the sale was available to the mortgagee. The numerator of the fraction was the value of the mortgaged land immediately before the lien (which was taken to mean the first of the liens remaining at the time of the action) arose: the denominator was the value of the land at the time of the order for sale as determined by the Court. Since the first lien often arose early in the construction of the improvement, the fraction available for the mortgage could be very small. In such cases the liens were virtually guaranteed priority over the mortgage, as the fraction which was available to them was likely to be so large that they would be fully paid out, or receive a much more substantial dividend than the mortgagee.[52]

The authorities under the National Housing Act refused to lend money in Alberta under these provisions. The Province therefore passed legislation[53] to provide that the Mechanics' Lien Act as it stood

[49] Builders' Lien Act, *supra*, n. 1, s. 9(2).

[50] This statement may show a bias resulting from 20 years of trying to devise ways to cope with a contantly shifting group of holders of prior securities who could not with any certainly be located or forced to disclose themselves.

[51] Mechanics' Lien Act, *supra*, n. 37, s. 9.

[52] Very occasionally the Section could work the other way. One aspect of the litigation surrounding the Edmonton Airport Hotel involved two liens. There was no material before the Court to show that these had arisen before the virtual completion of the building, which subsequently went down in value. The mortgagee's share was therefore 100% of the sale proceeds.

[53] National Housing Loans Act, S.A. 1945, c. 6. The provisions relating to National Housing Act mortgages eventually became Section 57 of the Mechanics' Lien Act, 1960. The law that is good enough for the subject in too many cases is not good enough for the Crown.

before the 1943 amendments would apply to National Housing Act mortgages. Even this provision was of dubious value. The National Housing Act mortgage had no priority as to advances after notice of a lien, and it was held that a mortgagee who knew that building was going on and that someone was supplying materials had notice of liens[54] so as to deprive the mortgagee of priority for subsequent advances.

To the mortgage lender, the choices were unattractive. He could refuse to make building loans, or he could make only "completion" loans, that is, loans to be advanced 35 days or more after completion (though here he was pursued by the difficulty of establishing "completion"). Either course would restrict the flow of mortgage funds and inhibit construction. Alternatively he could take other precautions, such as requiring the contractor to take statutory declarations showing what bills were paid, and pay any bills shown unpaid. Often these declarations proved to be inaccurate. Another alternative would be to require the borrower to provide him with waivers of lien signed by all sub-trades and materialmen. This alternative was resisted and the mortgagee could not effectively guarantee that he had located all lienholders or that, particularly in the case of corporate lienholders, he had obtained valid execution of the waivers. The difficulty of assuring priority had an inhibiting effect upon mortgage lenders and an even more inhibiting effect upon their solicitors, through whom advances of mortgage moneys are customarily made. The new Act has materially improved this situation.

9. The "Bona Fide" Mortgagee

It has been suggested that a building mortgagee must see that the builder's lien hold-back is made. The argument is advanced that Section 9(2) protects the mortgagee only if his advances are made *bona fide;* that the mortgagee controls the advances; that the mortgagee knows that by law hold-backs are to be made; and that he is not acting *bona fide* if he does not ensure that the law is complied with. Section 15(6) is said to support this argument, since that section refers to payments made by either the mortgagee or owner "in good faith" so as to reduce the lien fund. Section 17 may also be said to support the argument by providing that the mortgagee authorized by the owner to disburse the mortgage moneys may make the holdback.

Section 9(2) of the Builders' Lien Act reads as follows:

> 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.

The first question to be answered is whether the phrase *"bona fide"* modifies "advanced" as well as "secured". It is the author's submission that this question would have to be answered by a Court.

If the advance must be *"bona fide"*, it is submitted that the normal meaning of the words is that ascribed to them by the British Columbia Court of Appeal:[55]

> In my view the expression *"bona fide* secured" in its context here means "in good faith, not as a sham or as a mere paper transaction, not collusively or as part of a

[54] *Atlas Lumber Company Limited* v. *Riehl* (1953-54) 10 W.W.R. (NS) 411 (Appeal dismissed without reference to this point, (1954) 12 W.W.R. 161).

[55] *Casson* v. *Westmoreland* (1961) 27 D.L.R. (2d) 674 at 677 (per Tysoe J.A.).

scheme to defraud anybody, but . . . being in fact what it is in form, a genuine transaction." I have borrowed the words of Cozen-Hardy, M.R. in *Atty-Gen'l* v. *Duke of Richmond*, [1908] 2 K.B. 729 at p. 741, affirmed [1909] A.C. 466.

Further, the lien fund is defined as something to be held back by the owner,[56] not the mortgagee. Section 17, permitting the mortgagee to make the hold-back if authorized by the owner to disburse the mortgage money, would hardly be necessary if the mortgagee were under a duty to make the hold-back.

The mortgage lender may be advancing money to an owner who is acting as his own contractor, or to his assignee, or he may be advancing to an owner who has a main contract with a contractor. In either of these cases there does not appear to be any duty to make a hold-back. He may in other cases be advancing to a contractor under authority from the owner-mortgagor, and it is possible to argue, although the position is not strong, that his position has become identified with that of the owner. It should be noted in passing that both owner and mortgage lender, in cases where the mortgage lender is advancing money under the owner's authority, have an interest in seeing that there is a very clear written statement defining the duty of the mortgagee to the owner with respect to the hold-back, if any.

The mortgage lender will often want to see that those supplying services and materials are paid, because his interest is not served by having a mortgage on a partially completed building which the contractor or owner has abandoned without paying his sub-contractors and materialmen.

Mortgage money advanced after registration of a lien is declared to rank after the lien[57] (subject to a special subrogation right where the mortgage money pays off a registered lien). Any mortgage money which is not prior to liens will presumably be paid from the proceeds of a judicial sale after any liens over which it has no priority, though such money is not mentioned in the scheme of distribution of proceeds.[58] There is some difficulty in reconciling the provisions of Section 47 as to equality of liens within a class with the provisions of Section 9 which put different liens into different relationships with mortgage advances.

There can still be some question as to whether moneys secured by a mortgage are *"bona fide* secured or advanced in money." Interest is probably *"bona fide* secured." Money advanced to pay taxes or insurance is *"bona fide* secured," but may not be advanced in money until after the lien is registered. There is the question of the discount or bonus mortgage. The bonus has survived attacks under the Interest Act and in a proper case may well be said to be either *"bona fide* secured" or *"bona fide* advanced in money;" this seems to be the better view so long as the transaction is not colourable.

Another possible question requiring an answer relates to the sale with a mortgage back. In most cases it appears that the mortgage to the seller would be said to be *"bona fide* secured," and it may also be said to be *"bona fide* advanced in money" under the cases which would indicate that the Court will find a notional advance under the mortgage followed by a notional payment by the mortgagor back to

[56] Builders' Lien Act, *supra*, n. 1, s. 15 (1).

[57] *Id*, s. 9 (3).

[58] *Id*, s. 47.

the seller-mortgagee. The mortgage should therefore have priority over liens which subsequently arise.

If the seller has had an improvement made, the situation would be different. He would be an owner within the meaning of the Act, and it should be possible to register and enforce the lien against his interest under the mortgage.

10. The Seller

As has been said, the Builders' Lien Act[59] purports to treat the seller's interest under an agreement for sale as if it were a mortgage. This is true only of an agreement for sale "in respect of which a caveat has been filed", and so it appears that a seller is in the somewhat odd position of finding it to his advantage to require his buyer to register a caveat so as to protect the seller against the registration of builders' liens. It is not entirely clear why this should be.

Where the seller was responsible for the construction of the improvement which gave rise to the liens, he should not be able to defeat the lien claimant by entering into an agreement for sale. The lien should be registrable against the seller's estate or interest. The seller remains an "owner".

IV. PROBLEMS ARISING OUT OF THE BUILDERS' LIEN ACT

As with many statutes, the Builders' Lien Act has experienced some growing pains. The Act has changed much of the previous law, hence the appearance of practical problems under the Act is not unnatural nor unexpected.

1. Section 9(1)

Section 9(1) of the Builders' Lien Act is new in Alberta, though not original. It reads as follows:

> A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the statement of lien is registered.

This section appears to give priority to an assignment of money due and owing or accruing due, so long as it becomes due before the lien is registered.[60] This would be a derogation from the priority of the lienholder under the Mechanics Lien Act[61] and might make bank financing somewhat easier. However, the appearance may be illusory. Section 15 may require the whole "lien fund" to be disbursed in accordance with Section 47. The lien fund as defined includes all money not actually paid, and Section 47 does not recognize assignments. There is therefore doubt as to whether an assignment of progress payments will defeat liens unless the money is paid out before registration of a lien.

The Section cannot, it is submitted, give priority, or even effect, to an assignment of the hold-back during the time the owner is required to make it. The contractor is not by law entitled to receive it, hence he cannot assign it.

The Section does not specify the subject matter of the assignments to which it refers. It presumably refers to money affected by liens,

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[59] *Id*, s. 9(4).

[60] Macklem & Bristow, *supra*, n. 8 at 181, are not sure the section applies to equitable assignments at all.

[61] In *Oil Well Supply Co. et al.* v. *Bank of Nova Scotia* (1951) 2 W.W.R. (NS) 554 (App. Div.) the bank suffered the usual fate of banks in conflict with Mechanics Lien law, the liens being accorded full priority over a bank assignment.

namely, the lien fund. It does not, however, refer to another important kind of money, that of mortgage proceeds, because they are not a fund to which the lien attaches.

Building mortgages usually provide that the lender need not advance.[62] Mortgage lenders usually do not give legal recognition to assignments, although they often recognize them in practice. Such assignments may become more common because of the priority now given to the mortgage.

2. The Owner

The Act prohibits the owner from paying out the hold-back until the statutory period expires. The effect of judicial decisions is that the smallest thing to be done, indeed the smallest amount of material to be delivered, prevents the period from running and that the doing of the smallest thing and the delivery of the smallest amount of material will continue or even revive the lien.[63] This creates a problem not only for the owner, who has the money, but also for the contractor and the sub-contractor who need the money. The owner is not likely to incur for their benefit the risk of payment, particularly since he usually has the free use of the money until he pays it.

To prevent the aforementioned problem from arising, the Buchanan Report[64] recommended that completion be defined as "substantial performance, not necessarily total performance," and that occupation by the owner and readiness for use be factors in deciding whether there has been substantial completion.

It is the writer's considered opinion that these provisions[66] do not provide a firm foundation upon which an owner should rely. Section 15(2) required the owner to hold back the percentage for the "time limited by section 30." There are four different times limited by Section 30. Only one of them[67] involves the word "completion", and it applies only "in cases not otherwise provided for." The worst problem arises from sub-section 2. A claim for materials may be registered "within 35 days after the last materials is furnished." An owner who pays out on "substantial completion" is therefore subject to the old law as to maintenance and revival of a materialman's lien. It is therefore unnecessary to consider whether liens for the provision of services and liens for wages are subject to the rules relating to substantial completion, but it is far from clear that they are.

Another problem of interpretation arises with the definition[68] of "completion of the contract." In the writer's view, this means any contract, including a sub-contract.[69] However, it can be argued that the

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[62] The mortgagee may sometimes make himself liable to advance: *Frankel Structural Steel* v. *Goden Holdings Ltd.* [1969] 2 O.R. 221 (C.A.) where the subject is discussed.

[63] The leading case is *County of Lambton* v. *Canadian Comstock* [1960] S.C.R. 86 but the cases are legion. References should be made to Section 30 (5) which was a partial but not too successful attempt to deal with this problem: *Vanderwell Lumber Ltd.* v. *Grant Industries et al* (1963) 42 W.W.R. 446 (Farthing J.). Its sense is that the curing of an error or omission does not extend the time for filing of a lien: *J. Mason & Sons Ltd.* v. *Camrose School District #13, 15 et al* (1968) 67 W.W.R. 149 (Sinclair, J.) which indicates a serious flaw in the sub-section.

[64] Buchanan Report, *supra*, n. 2 at 50-51.

[65] Builders' Lien Act, *supra*, n. 1, s. 2 (1) (a) and 2 (2).

[66] *Id.*

[67] *Id*, s. 30 (1).

[68] *Id*, s. 2 (a).

[69] L. D. Hyndman, Q.C., Master in Chambers at Edmonton, has so held in *Nor-way Construction Ltd.* v. *Riteway Masonry Ltd.*, Supreme Court Action 67089, without written reasons.

reference is only to the main contract and not to sub-contracts, as "contractor" is defined to mean the prime contractor, and as "sub-contract" is often used in the Act in distinction from "contract". The tests of substantial completion in Section 2(2) would not always be suitable to sub-contracts, thereby possibly implying that the reference is to the main contract alone.

The most suitable provision would appear to be that the owner hold the hold-back for 35 days after substantial completion of the main contract rather than under the present provision, holding it for the time limited by Section 30.

There appears to be no reason why the owner should not be able to pay out the hold-back upon the strength of a certificate of completion (that is, substantial completion); and that the machinery established for release of hold-backs relating to sub-contracts by Section 16 could be adapted so as to apply to the main contract as well as to sub-contracts.

3. Section 16

Problems of interpretation arise also under Section 16. The intention of this section is to permit partial releases of the hold-back as the sub-contracts are completed.

Evidence before the Buchanan Commission blamed "the unjustified retention by owners, contractors and sub-contractors of hold-back funds" "not only for the slowing of the flow of contract funds but also for needless bankruptcies."[70] The Commissioner therefore recommended the inclusion of certain provisions of the revision proposed in the Thomson Report.[71] These provisions were carried forward as Section 16 of the Builders' Lien Act with only formal changes except for the addition of a subsection covering the situation where there is no "supervisor".

Under Section 16, a contractor or sub-contractor may demand a certificate of completion of "the contract" from the "supervisor" (that is, the architect, engineer or other person on whose certificate payments are to be made under the contract). If there is no supervisor, or if he refuses, the Court may give the certificate. Thirty-five days after the certificate has been delivered to the owner and sub-contractor, the amount to be held back by the owner is reduced by 15% of the sub-contract price[72] and the lien fund is reduced.[73]

Section 16(2) very clearly differentiates between the contract and a sub-contract. In Section 16(3), which is the foundation of the right to demand the certificate, the certificate is to be one of completion of "the contract". It appears a Court would observe that the section is directed to the consequences of completion of a sub-contract and would hold that in this instance "contract" includes "sub-contract". There will remain an unresolved doubt until this is done or until the wording is clarified.

Section 16(5) creates more of a problem of interpretation. When a certificate that a sub-contract is completed is given to the sub-

[70] Buchanan Report, *supra*, n. 2 at 78-79. Presumably the evidence did not concern itself with bankruptcies caused by the justified retention of funds.

[71] Thomson Report, *supra*, n. 6 at 10; s. 13 (1) to 13 (4) inclusive.

[72] Builders' Lien Act, *supra*, n. 1, s. 16 P2p (a).

[73] *Id*, s. 15 (1).

contractor, the "sub-contract and any work done or to be done thereunder and any materials furnished or to be furnished thereunder" are deemed to have been completed. This presumption, however, is only for the purposes of Section 30 and it is only so far as concerns any lien thereunder "of that sub-contractor". It does not affect the lien of any sub-sub-contractor or materialmen claiming through the sub-contractor.

Once a certificate has been issued and delivered, the sub-contractor will lose his lien unless he registers it within thirty-five days. Therefore, if he is alive to the situation, he will require that the contractor pay him in full within 35 days. But the owner cannot pay the 15% of the sub-contract price to the contractor until the 35 days has expired (and perhaps longer, since the owner may not receive the certificate as required by Section 16(1) until later). The contractor will then have to choose between advancing the 15% of the sub-contract from his own pocket or having a lien registered which will stop the whole flow of the contract funds. He will be afflicted with the knowledge that if he does pay, he will be discharging only the lien of the sub-contractor (which would be discharged by the payment anyway).

In the past, the prime contractor has in most cases withheld the statutory percentage from the sub-contractor until the prime contract has been completed and the owners' hold-back released; the sub-contractor has had to elect whether to trust the contractor and allow his lien rights to expire (with some hope that he could perform some small service to revive them if need should arise) or to register a lien. It remains to be seen whether the practice will change. The contractor's argument that registration of a lien will bring everything to a halt will lose some of its effectiveness in view of the protection now afforded to mortgage advances and in view of the machinery set up in Section 16. Contractors generally may be expected to resist the progressive release of hold-backs until it is clear that each release of money brings about a corresponding reduction in the exposure of the contractor to liability. A reduction in the owner's hold-back, as matters now stand, reduces the total amount of the contractor's money which is in jeopardy, but until it extinguishes all liens under the sub-contract, the contractor is not likely to think that it reduces his practical risk. His reaction may well be to stipulate for a contractual hold-back from his sub-contractors; and he may well regard an increased hold-back as being necessary to protect him against his increased liability under the one hold-back concept.

The principle of the progressive release of hold-backs is an important one and can materially improve the situation from the point of view of everyone who wishes funds to flow.[74] Section 16 should therefore be amended so that all doubts are removed.

The "supervisor" is also in some difficulty. It is not entirely clear from the Act whether he should be looking for "completion" or "substantial completion", and, until the point is settled, he may well receive conflicting advice from different legal advisors. If he does not wish to incur the responsibility of giving a certificate, or if he refuses one and turns out to have made a mistake, he may well find himself a respondent

[74] This may not include those owners who would like to finance their operations at the expense of the other parties, and those who would like to have the fund as protection against defective work.

to an application to the Court and he may be subject to the payment of costs. The demand for a certificate may require extra services; and the supervisor, since he is to certify as to completion of contracts rather than functions, will have to spend time reading contracts. It is not clear who is to pay.

It is the author's considered opinion that the progressive release of hold-backs is an important suggestion for improvement. It is to be hoped that the proposed machinery works in practice; and it is to be hoped that if it does not, it is made workable.

4. Time Limit

Although this article will not deal generally with the registration and enforcement of liens or similar matters,[75] reference should be made to one significant change. A registered lien ceases to exist unless within 180 days from the date of registration an action is commenced to realize upon the lien or in which the lien may be realized and a certificate of *lis pendens* in the prescribed form is registered in the Land Titles Office.[76]

The Buchanan Report[77] adopted the principle that 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. The report went on to say that 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 when it is desired to have an action started. The Report said that 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. To remedy this problem, the Report recommended a new section which is the same as Section 32(1), except that the recommended period was 90 days and not 180 days.

It is submitted that the previous situation had some advantages, in that the lien could be used as a cheap form of security by agreement by the lienholder and the owner. The time limit now may well compel litigation which neither party wants.

However, the recommendation of the Buchanan Report was rational and capable of being defended. The difficulty created by the implementation of the recommendations is that we now have the worst of both worlds. The 180 days is too long to give the advantages of automatic compulsion to exercise one's rights or give them up. the benefits of a long term survival of the lien, such as they are, have been lost.

The owner could under the old Act give a notice to the lienholder, and if the lienholder did not start action within 30 days, the lien lapsed. There were some drawbacks in this system, but there were also some occasions when it was most useful. It was quite understandable that the machinery should be dispensed with if the lien would lapse in 90 days without a notice, but there are occasions when it is needed within the 180 day period. The only alternative is an application in

[75] A paper such as that contributed to the Alberta Law Quarterly by W. S. Ross but dealing with the Builders' Lien Act would be most useful.

[76] Builders' Lien Act, *supra*, n. 1, s. 32.

[77] Buchanan Report, *supra*, n. 2 at 92-94.

Chambers, which is more onerous; hence the provision for notice should be restored.

V. CONCLUSION

The Builders' Lien Act is an important step in the search for the proper balance between the interests of the various parties. History suggests that is is not the end of the search. Analysis suggests some improvements in detail. This article has dealt mainly with those aspects of the Act which involve material changes from the previous Act, and has not examined the important improvements in enforcement procedures.

In conclusion, the writer would suggest certain changes in the Act. The first is a matter of policy and is contrary to the recommendations of the Buchanan Report. The second is a matter of policy also, but it does not appear that it is dealt with in the Report. The others, so far as are known are not matters of policy.

These recommendations are:

1. That the contractor should be provided with a means of limiting his liability to the value of materials and services for which he contracts in order to carry out his own main contract. One method of attaining this would be to restore the law as it stood following the *C. J. Oliver* decision, but other ways can be devised.[78]

2. That the Act should be clarified to protect the right of an owner to set off aginst the lien fund the extra cost to the owner of completing an abandoned contract and any damage suffered by the owner due to defective work.[79]

3. That it should be made clear that the owner can pay out the holdback 35 days after substantial completion of the main contract and that all liens arising thereunder are discharged, and that substantial completion of sub-contracts is completion for purposes of the Act.[80]

4. That the machinery of Section 16 should be adapted so as to apply to the main contract as well as to sub-contracts.

5. That Section 16(3) be amended so that is is clear that it includes sub-contracts.[81]

6. That the machinery established by Section 16 be reconsidered in order to make it more efficient.[82]

7. That the provision allowing an owner to serve notice on a lien claimant requiring him to sue or lose his lien be restored.[83]

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[78] Hurlburt, The Builders' Lien Act, *supra*, at 410 - 412.

[79] *Id*, at 414 - 415.

[80] *Id*, at 420 - 421.

[81] *Id*, at 421 - 423.

[82] *Id*.

[83] *Id*, at 423 - 424.

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