

A Proposed Builders Lien Act for the Northwest Territories: Consultation Paper

June 2020

Executive Summary

The Northwest Territories *Mechanics Lien Act* governs the payment relationship between owners, contractors, subcontractors, labourers, and providers of materials on a construction project. It provides a dispute resolution mechanism whereby a participant in a construction project can file a claim against the property being improved and enforce that claim in court, in the event that they are not paid what is owed to them as wages or under an invoice.

Legislation like this has existed in each jurisdiction in Canada for many years. At this point, there seems to be a consensus in Canada that this legislation needs to be updated to meet the realities of the current construction industry. Several jurisdictions have studied this issue in the past few years. Some have pursued reforms and some are in the process of doing so. Based on feedback from stakeholders and consideration of developments elsewhere, it was felt that this would be an appropriate time to consider revising the Northwest Territories *Mechanics Lien Act*.

Our proposal is to replace the current *Mechanics Lien Act* with a new act called the Builders Lien Act. This would be a modern, streamlined act. The intention would be that it would address modern construction practices and be drafted in a clear, concise manner using plain language where possible.

The goal of this paper is to solicit comments from those who are involved in the construction industry in the Northwest Territories. In some cases, a proposed approach is provided based on a perceived consensus among other jurisdictions or practical considerations which apply in the NWT. In other cases, we highlight an issue and provide options. Several issues are highlighted which are issues which have been raised by various interested persons, issues which other jurisdictions are looking at, and potential issues which GNWT has identified. However, the issues considered here are not definitive and we welcome comments on any aspect of the current legislation or suggestions for items to be included in a new act.

Introduction

The *Mechanics Lien Act* (“the current Act”) is the NWT law that allows suppliers of materials and services to construction projects, such as contractors, subcontractors, labourers and suppliers, to make a claim of lien for money they are owed by the owner of a property, in the event of a default in payment. Owners and contractors and any payers under contracts must retain a certain amount from each payment due by them which is known as holdback. Lienholders have a limited time to register their claim against the property and make a claim to the court for repayment. Ultimately, the property may be sold and the proceeds divided among lienholders and other creditors. At common law, a subcontractor or labourer only had a personal remedy against the person they had a contract with. Under this legislation, a subcontractor or labourer would have a remedy against the owner of the property which is benefitting from the services they are providing, even if they do not have a contract directly with the owner. This basic scheme exists in every jurisdiction in Canada, with variations.

Across Canada, lien legislation is in various states of modernization. Lien legislation is not harmonized across the country, although each province has a similar scheme. Like the NWT, most other jurisdictions in Canada originally had a *Mechanics Lien Act*. The first lien legislation in Canada was enacted in Ontario and Manitoba in 1873 with other provinces following after. Since that time some jurisdictions have revised their *Mechanics Lien Act* and renamed it as the *Builders Lien Act*. Others have replaced their *Mechanics Lien Act* with a completely new *Builders Lien Act*. The newest lien legislation in Canada is the Ontario *Construction Act* which came into force in 2017. Several other jurisdictions have updated their legislation from time to time but still retain antiquated provisions in their lien legislation. Other provinces are currently considering changes in this area. The difficulty with amending lien legislation is that there are a number of stakeholders involved, and business practice may quickly outpace legislation.

The Government of the Northwest Territories Department of Justice (the “Department”) proposes to replace the *Mechanics Lien Act* with a new Builders Lien Act (“the proposed Act”). This paper contains a number of major proposed changes the Department is considering. The basic scheme of the Act would remain, with modifications aimed at modernizing the Act. The Department is examining best practices in other jurisdictions to see if there is consensus among the jurisdictions while endeavoring to identify any concerns which are specific to the NWT. In particular, there may be some benefit to being consistent with the western Canadian jurisdictions to the extent possible. The Department benefits from the many reports that have

been written on lien reforms by law reform commissions and experts over the years – in particular the reports issued in Manitoba in 2018 and Ontario in 2016 which survey the current state of the law in this area.¹ Please note that this list of possible amendments is not conclusive or final, and is subject to change depending on priorities identified by the Department, as well as the comments received from the public and other stakeholders. Any sample legislative provisions set out in this paper are examples for discussion purposes and may or may not be incorporated into any future draft legislation. Additionally, nothing in this document represents legal advice and should not be referred to for that purpose.

The Department of Justice is interested in hearing your views on the proposed changes, and would also encourage comments you might like to make on any other aspect of the legislation.

¹ Manitoba Law Reform Commission, *The Builders Liens Act: A Modernized Approach* (Consultation Paper), February 2018, available at:

http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_feb2018.pdf;

Manitoba Law Reform Commission, *The Builders Liens Act: A Modernized Approach* (Final Report #136), November 2018, available at: http://www.manitobalawreform.ca/pubs/pdf/136-full_report.pdf;

Ontario Ministry of the Attorney General and Ministry of Economic Development, Employment and Infrastructure, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, April 30, 2016, available at:

https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/.

Proposed Changes to *Mechanics Lien Act*

1. Naming the Proposed Act the *Builders Lien Act*

We would propose that the new act be called the Builders Lien Act instead of the *Mechanics Lien Act*.

In common parlance, the meaning of the term “mechanic” has changed since this legislation was introduced. Formerly, a mechanic was a person who worked on a building. Now, the word mechanic would suggest to most people, especially lay people, an individual who repairs vehicles. Those individuals have remedies under different legislation. We would propose that calling the new legislation the *Builders Lien Act* would be more suggestive of the subject matter and would likely stay current for some time.

All provinces have similar legislation. At one time, these statutes were all called the “Mechanics Lien Act”. A number of Canadian jurisdictions have now replaced their *Mechanics Lien Act* with a *Builders Lien Act*. Five jurisdictions still call their legislation the *Mechanics Lien Act*. One notable exception is Ontario, which calls its legislation the *Construction Act* (formerly the *Construction Lien Act*). Calling the new NWT Act the *Builders Lien Act* would be consistent with other jurisdictions, and would help to indicate the application of the Act which may assist lawyers and individuals from other jurisdictions who may be researching their obligations under the law of the Northwest Territories.

The new title would also indicate that this is a new Act distinct from the current *Mechanics Lien Act*, which may continue to apply to some pre-existing claims.

Questions:

- a. What do you think the new Act should be called? Would you agree that “Builders Lien Act” is an appropriate title?

2. Application of the Act and Definitions

There is some ambiguity in the current Act, and we would propose to clarify the application of the legislation. The goal of the Act would remain the same, but we feel that it would assist the public if the scope of the Act was better defined. In other jurisdictions there has been litigation on these issues. That has not been a trend in the NWT, but we feel that unnecessary litigation could be avoided by simply defining a number of key terms.

Currently, the Act applies to ‘doing work on a building or erection.’ This is overly broad and could refer to any number of things. We propose defining the term “improvement” similar to how Saskatchewan has defined improvement at s. 2(1)(h) of their *Builders Lien Act*. We would propose a similar section to the following:

“improvement” means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:

- (i) landscaping, clearing, breaking, excavating, digging, drilling, tunneling, filling, grading or ditching of, in, on or under land;
- (ii) the demolition or removal of any building, structure or works or part thereof; and
- (iii) services provided by an architect, engineer or land surveyor;

This definition of improvement would also include services provided by an architect or engineer or a surveyor, all of which are expressly covered in the Act. In addition to Saskatchewan, British Columbia and Ontario include architects and engineers in their legislation.² Some provinces do not include architects specifically in their legislation and this has been a subject of dispute elsewhere. In Manitoba, architects are excluded from the application of the *Builders Lien Act*. In its November 2018 report, the Manitoba Law Reform Commission recommended that the Act should be limited to those participating in the actual construction process and that architects and engineers should not be included in proposed amendments in that province because they benefit from a direct contractual relationship with their client and can pursue remedies based on that contract, unlike others involved in construction projects.³ However, it is possible that there could be situations where that might not be the case and being a lienholder could be beneficial, such as where they are retained by someone other than the owner of the property. Courts have also sometimes interpreted lien statutes as including architects where they were not specifically excluded, though it has generally been held that an architect does not have a claim where they had prepared plans but no construction had taken place.⁴ By adopting the above definition of improvement, the Act would contemplate that a lien would be available for an intended improvement that has not yet been started or completed.

² British Columbia *Builders Lien Act*, S.B.C. 1997, c. 45 (“British Columbia Act”), s. 1(1); Ontario *Construction Act*, R.S.O. 1990, c. C.30 (“Ontario Act”), s. 14(3).

³ Manitoba Law Reform Final Report, *supra* note 1, page 29.

⁴ For example, *Peter Hemingway Architect Ltd. v. Abacus Cities Ltd.*, 1980 ABCA 182.

The Act allows for a lien for providing “materials.” The Act does not define materials. We suggest defining materials to mean “movable property which is intended to become part of the improvement or that is used to directly facilitate the making of the improvement.”

We suggest amending the current definitions of “contractor” and “subcontractor” to exclude labourers. The current definition of contractor could very well include a labourer. Labourers and contractors have different remedies available to them and it would be helpful to clarify the separation between them. As wage earners, labourers currently have priority over other liens for 30 days of wages in this jurisdiction. Labourers also do not have obligations to others as contractors and subcontractors do, such as the obligation to maintain a holdback. Therefore, we feel it would be beneficial to emphasize this separation, consistent with Alberta and Saskatchewan.⁵

The current definition of labourer includes references to specific professions. We suggest amending the definition of labourer so it is more neutral and will retain its meaning if terminology changes. We would propose that the definition of labourer be ‘a person employed for wages in any kind of labour whether employed under a contract of service or not.’ This is similar to the Alberta, Saskatchewan and New Brunswick definitions of labourer.⁶

Questions:

- a. Are there other terms that need to be defined?
- b. What should the definition of improvement include? What should it not include?
- c. What should the definition of services include? Is there anything that shouldn’t be included?
- d. Should surveyors, engineers and architects be included in the Act? Are they already protected by other contractual remedies?

3. Time Period for filing liens

The Department is considering whether the time period for preservation of a lien by filing it in the Land Titles office should be extended to 60 days. The current legislation requires that a lien be

⁵ Alberta *Builders Lien Act* R.S.A. 2000, c. B-7 (“Alberta Act”), s. 1(b); Saskatchewan *Builders Lien Act* S.S. 1984-85-86, c. B-7.1 (“Saskatchewan Act”), s. 2(1)(b).

⁶ Alberta Act, s. 1(e); Saskatchewan Act, s. 2(1)(i); New Brunswick *Mechanics Lien Act* R.S.N.B. 1973, c. M-6 (“New Brunswick Act”), s. 1.

filed in the Land Titles Office within 45 days after the last day on which work is performed or where credit is extended. It is the same in Alberta and British Columbia.⁷ In Manitoba and Saskatchewan, a claim for lien must be registered within 40 days of the contract being completed or abandoned.⁸ Ontario recently extended its time period to 60 days, which is the same as Nova Scotia and Prince Edward Island.⁹ In its review of their *Construction Act*, Ontario found that 45 days does not necessarily correspond to current business practices.¹⁰ The Law Reform Commission of Nova Scotia came to the same conclusion in their 2003 review of that province's *Mechanics Lien Act*.¹¹ One implication of this change is that the holdback period would have to change so that it matches.

Questions:

- a. Does the current time period of 45 days give enough time to assess if the amount will be paid?
- a. Is 45 days consistent with current business practices in the NWT?
- b. Would 60 days be more reasonable?
- c. Would another time period be better?

4. Perfection of Liens

To perfect a lien a person must commence an action and file a certificate of pending litigation in the Land Titles Office. The current time limit is 45 days from the last day of the preservation period. This is among the shortest periods in the country. Manitoba has the longest period to perfect a lien at two years from the date of registration.¹² Alberta also has a longer time limit at 180 days.¹³ In the interest of allowing time to bring an action but also encouraging individuals to be proactive in pursuing their claims, we believe that 90 days would be reasonable. A longer period may encourage individuals to wait too long to commence an action, while a shorter

⁷ Alberta Act, s. 41(1)-(2); British Columbia Act, s. 20.

⁸ Manitoba *Builders Lien Act* R.S.M. 1987, c. B91 ("Manitoba Act"), s. 43-44; Saskatchewan Act, s. 49.

⁹ Ontario Act, s. 31(2); Nova Scotia *Builders Lien Act*, R.S.N.S. 1989, c. 277, s. 24; Prince Edward Island *Mechanics Lien Act*, R.S.P.E.I. 1988, c. M-4 ("Prince Edward Island Act"), s. 24

¹⁰ Ontario report, Chapter 4, section 2.1. Available at:

https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/#_Toc450127237

¹¹ Law Reform Commission of Nova Scotia, *Builders Liens in Nova Scotia: Reform of the Mechanics Lien Act* Final Report – June 2003, 23-24. Available at:

<https://static1.squarespace.com/static/5bc6671f0490795182e54b80/t/5bc686980d9297f4c4ab49bb/1539737241571/Builders%27+Liens+%2B+Mechanics%27+Lien+Act+-+Final+Report.pdf>

¹² Manitoba Act, s. 49(2).

¹³ Alberta Act, s. 43(1).

period may encourage unnecessary litigation. This period is consistent with Ontario, Yukon, Newfoundland and Labrador, New Brunswick, Nova Scotia and Prince Edward Island.¹⁴ Ontario previously had a 45-day limit, but extended it to 90 days in 2016. Taking into account the proposal to extend the preservation time limit to 60 days, there would be a total of 150 days to perfect a lien.

Questions:

- a. Is 90 days a reasonable time limit for perfection of a lien? Is it too long? Is it too short?

5. Court remedies for discharge of a registration

Some concerns have been raised about situations where an individual has filed a claim of lien or a certificate of *lis pendens* but has not followed through. Our current Act does not provide remedies for this. The only way that a lien can be removed is for the original claimant to file a discharge, but if they are unavailable or uncooperative there is no remedy for the owner.

In other jurisdictions, a perfected lien may expire if it is not set down for trial in a certain amount of time. This is usually one year or two years after the action was commenced. We would propose that after two years of the certificate of *lis pendens* being registered, the lien action would expire. Any party could then apply to dismiss the action and have the registration of the claim for lien and the certificate of *lis pendens* vacated unless a party demonstrated a valid reason for the delay. The lien would then be removed from the title when a copy of the judgment was filed with the Land Titles Office. This would encourage timely resolution of disputes, and ensure that abandoned claims do not remain as a charge on titles. Ontario, Saskatchewan, and Alberta each have some variation on this approach.¹⁵

Other jurisdictions also grant a general power to the courts to order that a registration of a claim of lien or a certificate of *lis pendens* be vacated.¹⁶ In some jurisdictions, this also extends to lien registrations that are deemed to be frivolous or vexatious.¹⁷ We would propose to include similar remedies in any new Act to account for unusual situations that may arise.

¹⁴ Ontario Act, s. 36(2); Yukon *Builders Lien Act*, R.S.Y. 2002, c. 18 s. 22; Newfoundland Act, s. 24(1); New Brunswick Act, s. 27; Prince Edward Island Act, s. 27.

¹⁵ Ontario Act, s. 37, s. 46; Saskatchewan Act, s. 55; Alberta Act, s. 46(2)

¹⁶ Saskatchewan Act, s. 60

¹⁷ Ontario Act, s. 47.

Questions:

- a. Is this necessary in the NWT?
- b. Are any other remedies required here?

6. Trust Provisions

We propose to add the concept of trusts to the Act. Most of the jurisdictions that have updated their legislation in recent years have incorporated this concept into their legislation. The intention of the trust provisions is to ensure that funds to be used for the improvements are in fact used for that purpose. This is an additional remedy that is distinct from the lien provisions, and there are a few key differences between the two remedies. Although the trust provisions do not create an interest in land, they may apply in situations where a lien may not be applicable. The cause of action for breach of trust would not be affected by the expiration of the time to file the lien. As well, unlike a lien, a beneficiary of a trust may only claim against their direct trustee, so that each payer under the contract only becomes a trustee for its payee.

Under this scheme, owners, contractors, and subcontractors would each be trustees or payers. The owner would be the trustee of any sums they receive to finance a construction project. If there is no financing, all money in the hands of the owner or any money received by the owner for payment under the contract would constitute a trust fund for their beneficiaries. In turn, the contractor and subcontractor become trustees of all sums received by them under the contract for their beneficiaries. In Saskatchewan, the beneficiaries for owners, contractors and subcontractors include subcontractors who have subcontracted with the payer, people who have provided materials and services to the payer, and labourers who have been employed by the payer.¹⁸ Each payer would be prohibited from converting trust funds to their own use until their beneficiary was paid. Similar to Ontario and Saskatchewan, a trustee would be allowed to retain from trust funds an amount that is equal to any outstanding debts, claims or damages that the beneficiary may owe the trustee.¹⁹ A trustee could also retain an amount where they have paid a beneficiary out of money that is not subject to a trust. The same would also be true where a trustee had paid a beneficiary from borrowed money.

¹⁸ Saskatchewan Act, s. 6-8.

¹⁹ Ontario Act, s. 12; Saskatchewan Act, s. 13.

The Act would also include a procedure for applying to the Court for direction where there is any dispute about a trust fund. This may be similar to section 17 of Saskatchewan's *Builders Lien Act*, which states:

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

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

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

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

The Act would also include penalties for breaching the trust by appropriating trust funds or converting any funds constituting a trust in a manner that is inconsistent with the trust. Any offences under the Act would apply to individuals and corporations. Where a corporation is a trustee, liability would extend to every director or officer of a corporation who has knowingly participated in or condoned an offence. In Manitoba and Saskatchewan, the penalty can be a fine of up to \$50,000 or two years imprisonment.²⁰ The penalty in British Columbia is \$10,000 or two years imprisonment.²¹

Common law equitable remedies would still apply, such as a civil claim for breach of trust. We would propose that the Act contain an express statement to this effect. Individuals, corporations, and officers and directors of a corporation could also be liable in a civil action.

We would propose a two-year limitation period for a civil action for breach of trust. Ontario has a two-year limitation period.²² In Saskatchewan, a trustee is discharged from his obligations as trustee and no action may be commenced to enforce the trust on the expiry of two years after a contract is abandoned or completed.²³ The limitation period in British Columbia is one year after the completion or abandonment of the head contract, or if there is no head contractor, one year after completion or abandonment of the improvement.²⁴ We believe two years would be more

²⁰ Manitoba Act, s. 7; Saskatchewan Act, s. 18.

²¹ British Columbia Act, s. 11(2).

²² Ontario Limitations Act, 2002, SO 2002, c. 24, Sch. B, s. 4.

²³ Saskatchewan Act, s. 19.

²⁴ British Columbia Act, s. 14.

appropriate in the NWT because this would be consistent with the limitation period for lien actions proposed in part 5 above. The reason for providing a short limitation period is to encourage quick resolution of disputes and to reduce uncertainty.

Questions:

- a. Is a trust regime needed in the Northwest Territories?
- b. When should funds be retained and by whom?
- c. What should the penalties be for breach of trust?

7. Substantial Performance and Deemed Completion and Finishing Holdback

Currently, the Act says that the holdback is released when the contract is completed. A payer must withhold 10% of the contract price until 45 days after the completion of the project. Completion is not defined, nor is there any guidance on who determines when a contract is completed. Other jurisdictions define when a contract is finished, and provide a holdback for any work left to be completed after a contract has been substantially completed.

We propose changes to the Act to introduce the concept of “substantial performance”, and to add a ‘finishing holdback.’ This would allow for release of holdback funds, even though there may be a small amount of work left to complete.

Substantial performance is a common term in lien legislation, and it is well defined in other jurisdictions. It appears that there is some consistency among the jurisdictions on the requirements for determination of substantial performance. Ontario, British Columbia and Alberta all provide that a contract is substantially complete when the cost of completion is a certain dollar amount. In Ontario, this is 3% of the first \$1,000,000, 2% of the next \$1,000,000 and 1% of the balance of the contract price.²⁵ In Saskatchewan, British Columbia and Alberta this is 3% of the first \$500,000, 2% of the second \$500,000, and 1% of the balance of the contract.²⁶

Among the jurisdictions which have this concept in their legislation, most have a certificate of substantial performance which is filled out by a person or persons indicated in the Act. In Ontario, this must be by an architect, engineer, any other person upon whose certificate payments are made under a contract or subcontract, or if there is no payment certifier, the

²⁵ Ontario Act, s. 2(1).

²⁶ Saskatchewan Act, s. 3(1); British Columbia Act, s. 1(2); Alberta Act, s. 2.

owner and contractor may make the determination jointly.²⁷ British Columbia is similar to Ontario.²⁸ Saskatchewan and Manitoba provide that a payment certifier is an architect, engineer or other person upon whose certificate payments are made.²⁹ Given the geography of our jurisdiction, we may have to consider who would be the most expedient person to fill out the certificate. Perhaps the Ontario method of specifying certain individuals but also allowing an owner and contractor to agree would offer more flexibility so that these certificates could be completed in a timely manner – especially if we were talking about a project in a remote location.

We are considering adding a section similar to some other provinces to deal with substantial performance in situations where the improvement is being used for the purpose for which it is intended, and an improvement cannot be completed for reasons beyond the control of the contractor, or for situations where the owner and contractor agree not to complete the improvement expeditiously. In those cases, the price of the remaining services to be supplied would be deducted from the contract price to determine substantial performance. This would provide some additional flexibility. The section could look similar to this:

1. For the purposes of this Act:

(a) where the improvement or a substantial part of it is ready for use or is being used for the purposes intended, and the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or the subcontractor; or

(b) where the owner and contractor agree not to complete the improvement expeditiously;

the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Once a certificate is posted, each payer would have 60 days to make payment of the holdback.

For certainty, we would also propose that a contract be deemed complete when the price of completion or the price of the final services or goods to be completed is not more than 1% of the contract price.

²⁷ Ontario Act, s. 1(1), s. 32(1).

²⁸ British Columbia Act, s. 7(1).

²⁹ Saskatchewan Act, s. 2(1); Manitoba Act, s. 1(1).

To address situations where there may be finishing work left after a contract has been largely completed, many of the jurisdictions with more modern legislation have two holdbacks, which are the initial holdback and a second holdback which applies to the work completed after the certificate of substantial performance. This is most commonly called the ‘finishing holdback.’ This extends the same protections to those who provide materials, services and labour in the later stages of the contract, as are available to those who had provided materials, services and labour in earlier stages.

Ontario, Manitoba, Saskatchewan, Alberta and Nova Scotia all have a finishing holdback.³⁰ The jurisdictions differ slightly, but usually where a contract has been declared to be substantially performed but services remain to be completed, the payer is required to retain a separate holdback, which is usually 10% of the price of the remaining supplies or services. In Manitoba, the holdback is 7.5%. We would propose that we use 10% because that would be consistent with the initial holdback.

We would propose that this holdback would be retained until 60 days after the contract is completed, which is the proposed time limit for the filing of liens.

Questions:

- a. What formula would be appropriate for substantial performance for the NWT?
- b. Who should fill out the certificate of substantial performance?
- c. Would a section dealing with situations where the improvement is being used and the project cannot be completed in an expeditious manner be helpful in the NWT?
- d. What formula would be appropriate to determine completion?
- e. Do we need the finishing holdback?

8. Annual, Phased and Segmented Release of Holdback for Large Contracts

The new Act would also allow for release of the holdback on a phased or annual basis for large contracts, if provided for in the contract entered into by the parties. This is done elsewhere, though the definition of a large contract does differ somewhat from jurisdiction to jurisdiction. In

³⁰ Ontario Act, s. 22(2); Manitoba Act, s. 24(2); Saskatchewan Act, s. 43(1); Nova Scotia Act, s.13.

Saskatchewan it is any contract over \$25,000,000.³¹ In Ontario, a large contract is any contract over \$10,000,000.³² We would need to decide on an amount that is appropriate for the NWT.

Questions:

- a. Do we need provisions dealing with the release of holdback under large contracts in the NWT?
- b. What should our definition of large contract be? Is \$25,000,000 too high for the NWT? Is \$10,000,000 too low? Is another number more appropriate?

9. **Set-off**

Subsection 9(5) of the current Act provides that no payments under a contract may be diminished by any set-off or counterclaim. We would propose to add a set-off mechanism for the release of trust funds as noted in part 6 above relating to trust funds. The proposed Act would set out that a lien is limited to the amount owing and that – in determining the amount of a lien – any outstanding debts, claims or damages in the payer’s favour would be taken into account.

The proposed sections would be similar to the following:

1. Subject to the requirement to maintain a holdback, a trustee may retain from trust funds an amount that, as between the trustee and the person they are liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee’s favour of all outstanding debts, claims or damages, that are related to the improvement.

2(1) A lien does not attach so as to make an owner liable for a greater amount than the amount payable by the owner to the contractor.

(2) Where a lien is claimed by a person other than the contractor, the amount that may be claimed is limited to the amount owing to the contractor or subcontractor or other person for whom the services or materials have been provided.

(3) In determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person they are liable to pay, equal to the balance in the payer’s favour of all outstanding debts, claims or damages that are related to the improvement.

This would be similar to sections 13 and 28 of the Saskatchewan *Builders Lien Act*, and section 12 and 17 of the Ontario *Construction Act*.

Questions:

³¹ Saskatchewan Act, s. 46(1).

³² Ontario *Construction Act General Regulations*, s. 5-6.

- b. Is this necessary in the NWT?

10. **Eliminating the Posting of Payroll at Site of Building**

Section 9 of our Act states that no contractor or subcontractor is entitled to receive payment where the contract exceeds \$500 until they post at the construction site a copy of the receipted payroll. The Northwest Territories and Nunavut (which inherited its *Mechanics Lien Act* from the NWT) are the only jurisdictions that still have this requirement. However, with the new trust provisions and the proposed disclosure requirements and protections under other legislation such as the *Employment Standards Act*, this requirement may now be redundant.

Questions:

- a. Do we need this posting requirement in the NWT?
- b. Are other safeguards such as the new trust provisions sufficient?

11. **Condominiums**

Condominiums were not a common form of construction when the current Act was drafted. Some jurisdictions, such as Saskatchewan and Ontario, allow for the application of liens to condominiums in their builders lien legislation.³³ Other provinces, such as Alberta and British Columbia, provide a remedy in their condominium legislation.³⁴

Liens could attach to an individual title or all of the titles issued pursuant to a condominium plan. This would be similar to the Alberta and Saskatchewan approaches. Potential provisions could be similar to this:

1. In this section and in section 2 and 3, 'common elements', 'condominium plan', 'corporation', 'owner', and unit' have the same meanings as in the Northwest Territories *Condominium Act*.
2. Where services or materials are provided in respect of a unit, any lien that arises is on the estate or interest of the owner in that unit and their share in the common elements and any claim of lien with respect to a unit may be registered as an interest against the owner's title.
3. Where services or materials are provided in respect of the common elements, any lien that arises attaches to the estates or interests of all the

³³ Saskatchewan Act, s. 32(1); Ontario Act, s. 33.1, 34(9).

³⁴ Alberta *Condominium Property Act* s.78 ; British Columbia *Strata Property Act*, SBC 1998, c.43, s. 75.

owners in all the units and the common elements, and any claim of lien with respect to common property may be registered as an interest against the titles issued pursuant to the plan.

We would add a notice requirement for the corporation and each individual who is an owner of a unit.

Some jurisdictions specifically set out a procedure whereby an individual unit owner can have a lien discharged against their unit and their share of the common elements where the lien is filed for work requested by the condominium corporation. In British Columbia, an individual owner can apply to the court for vacate their portion of a lien on the common elements of a condominium by paying into court their proportionate share.³⁵ Ontario has a similar procedure in its new *Construction Act*.³⁶ In Alberta, an individual can pay their portion of the lien to the holder of the lien and demand that the lienholder provide a discharge for their unit and their share of the common property.³⁷ We would probably model the British Columbia and Ontario approach, because many Acts, including the current NWT *Mechanics Lien Act*, already contain a similar procedure allowing a person to apply to a court for an order vacating a lien if they pay the amount of the lien into court as security.

Questions:

- c. Is there a need for liens on condominiums?

12. **Prompt Payment**

Several jurisdictions are considering prompt payment legislation to ensure that contractors and subcontractors and workers are paid on time. The legislation would set out times for payment unless the parties to the contract choose an alternate schedule. To date only Ontario has passed this legislation.³⁸ Saskatchewan has introduced it in their legislature.³⁹ Other provinces are considering this initiative.

³⁵ British Columbia *Strata Property Act*, s. 90.

³⁶ Ontario Act, s. 44(2.1)-(2.2).

³⁷ Alberta *Condominium Property Act*, s. 78(3).

³⁸ Ontario Act, Part I.1 Prompt Payment.

³⁹ *The Builders' Lien (Prompt Payment) Amendment Act, 2018*, available at: <http://docs.legassembly.sk.ca/legdocs/Bills/28L3S/Bill28-152.pdf>.

One issue that must be addressed is when payment is triggered. In Ontario's legislation, a general contractor is required to deliver invoices to the owner monthly, unless the contract provides otherwise.⁴⁰ The delivery of this invoice triggers the process. We would recommend that payment be triggered by delivery of a proper invoice, with proper invoice being defined as one that contains adequate details of the work performed, the period in which work was performed, the amount payable, where payment should be sent and any other information necessary to indicate why the invoice is being provided.

The next step that must be addressed is the time period for prompt payment. Ontario and Saskatchewan chose 28 days from submission of a proper invoice to an owner from a contractor for payment to the contractor and seven days from the date the contractor receives payment in respect of amounts owing between contractors and sub-contractors.⁴¹

Another issue is when payment can be withheld, should there be a disagreement about amount of payment, quantity or quality of services performed and/or goods delivered, and contractor compliance with the contract. These may be determined by the contract, but there may also be common-law rights to set-off funds in certain situations. In Ontario a contractor who disputes the payment of an amount must provide a Notice of Intention to withhold payment within seven days of receipt of a proper invoice, and detail the amount that is being withheld and the reasons for why the money is being held back.⁴²

The other issue that arises is adjudication of disputes about the amount owing or when payments are due. In Ontario the government may set up an Authority for the specific purpose of maintaining a registry of private adjudicators who must meet very specific requirements. Adjudicators in that province must have ten years of relevant work experience in the construction industry, and must complete a training program for adjudicators offered by the Authority.⁴³ This follows on the example of the United Kingdom. There may be logistical reasons why that wouldn't work here, such as a shortage of qualified resident adjudicators who are familiar with northern conditions. The other option would be allowing the parties to apply to court or select an arbitrator they agree upon. In the United States a court model is employed, resulting in a large amount

⁴⁰ Ontario Act, s. 6.3(1).

⁴¹ Ontario Act, s. 6.4(1), 6.5; Saskatchewan Act at s. 5.4(1), s. 5.5(1)

⁴² Ontario Act, s. 6.5(6).

⁴³ Ontario Act, s. 13.1-13.4.

of litigation. We may differ from southern jurisdictions because our courts may not experience the same delays in having matters heard as courts elsewhere in Canada. NWT projects may not be as large or complex as those in other jurisdictions, so we may not require the same level of expertise, and given our smaller population this legislation should not result in the same volume of litigation that would result in larger jurisdictions. Currently, our courts do not see many construction related disputes, and we do not expect that adding an additional remedy would prompt a dramatic rise in litigation.

Questions:

- a. Do we need a prompt payment remedy in the NWT? Is this a common problem here?
- b. Is it already standard procedure in the NWT to address these issues in contracts?
- c. How long should the payment period be?
- d. What should be in a proper invoice? Is it onerous to provide invoices monthly?
- e. How should these disputes be adjudicated? Do you think courts should resolve these matters, or should they be left to arbitrators?

13. Priorities

Section 27 of the current Act addresses priority among lien holders, applying rules consistent with other jurisdictions. We would propose to keep this basic regime, but expand on it to provide greater clarity about priorities.

We would propose to clarify which groups or persons have priority. The Act refers to classes of lienholders, but “class” is not defined or explained in the current Act. The proposed Act would provide that a class is made up of people who have a lien against the same payer and that a lien of a class member has priority over the lien of the payer. Under paragraph 8(c) of the current Act, a labourer has a lien for 30 days of wages which has priority over all other liens under the Act. To be equitable, we would propose to extend that priority to 40 days of wages exclusive of overtime, similar to Saskatchewan and Ontario.⁴⁴

⁴⁴ Saskatchewan Act, s. 75(2); Ontario Act s. 81(1).

We would also propose to address the issue of when a lien has priority over other types of payments. Most jurisdictions provide that a lien will have priority over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments, or after registration of a claim for lien.⁴⁵ Most also provide that a lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued, or made after the lien arises.⁴⁶ We would propose to adopt similar priority provisions.

Questions:

- a. Are there any other changes that need to be considered in respect of priorities?

14. Right to Information

We would propose setting out the right to information of lien claimants, trust beneficiaries, contractors, subcontractors and mortgagees. This would include obligations to disclose and remedies for non-production, which would include an application to the Court. The information to be provided would be set out in very specific terms and could include information about the terms of a contract such as the parties and the contract price, amounts paid under a contract between the owner and contractor, the certificate of substantial performance and other information. It would only be such information as would be required for any of the parties to understand their rights or enforce those rights. This would be similar to section 82 of Saskatchewan's *Builders Lien Act* and section 39 of the Ontario *Construction Act*.

Questions:

- a. What information do parties need to receive?

15. Transitional Phase

We would propose that the proposed Builders Lien Act apply to claims arising after the date that the new Act comes into force and that the *Mechanics Lien Act* would continue to apply to claims that arose before that date. This may be the clearest way to provide certainty, and there is precedent for this approach in Saskatchewan⁴⁷. Section 32 of the current *Mechanics Lien Act*

⁴⁵ See Alberta Act, s. 11(5);, Saskatchewan Act, s. 71(1)-(3).

⁴⁶ As an example, see Alberta Act, s. 11(1);Saskatchewan Act, s. 70(1).

⁴⁷ Saskatchewan Act, s. 105.

allows for a lien for work performed on chattels or movable goods. This section should not be in the new legislation as it is conceptually out of place in a statute concerned with building projects, but section 32 of the *Mechanics Lien Act* should stay in effect until it is addressed in applicable legislation. All other sections of the *Mechanics Lien Act* would be repealed. This would mirror what has been done in Saskatchewan where the similar provision was in effect until it was replaced in other legislation.⁴⁸

16. Consequential Changes

The Department is working on identifying any consequential amendments to other legislation.

17. Plain language

In recent years, there has been a trend towards the use of “plain language” in the drafting of legislation. The department would be viewing the Act with that in mind. For example, Latin legal maxims have been avoided in new legislation. The phrase *pari passu* which means ‘rateably’ or ‘without preference’ appears in s. 27(1) of the current Act. This phrase could probably be eliminated, though the concept of having all lien claims having the same priority would be retained. However, the phrase *pro rata* also appears. That phrase is probably well understood even by lay people and could be kept.

18. Forms

Forms will be reviewed and modernized where applicable.

⁴⁸See Saskatchewan *Mechanics Lien Act*, RSS 1978, c M-7.

How to provide Your Input and Comments

Do you have any other comments on what should be in the NWT's proposed *Builder's Lien Act* legislation? What should be changed? What should stay the same? Why is this important?

You can contact us in the following ways:

By Email:

Emily Ingarfield
Manager of Policy
Department of Justice
Emily.Ingarfield@gov.nt.ca

If you have questions about this process or the consultation paper, please send an email to the Policy and Planning Division at the above address.