LAW REFORM COMMISSION OF NOVA SCOTIA

Builders' Lien Act

Final Report - March 2013

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To: The Honourable Ross Landry
Minister of Justice and Attorney General

In accordance with section 12(3) of the *Law Reform Commission Act,* we are pleased to present the Commission's Final Report, ***Builders' Lien Act.***

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The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

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INTRODUCTION & SUMMARY OF RECOMMENDATIONS

This Final Report recommends certain amendments to the Nova Scotia *Builders' Lien Act*.[1] In particular it considers:

a) progressive release of holdbacks to subcontractors as their work is completed;

b) retention of a finishing holdback of 10% of the value of the work remaining after substantial completion;

c) public notice of substantial completion of the project; and,

d) a process to have lien actions heard in Small Claims Court, where appropriate.

These issues were referred for the Commission's consideration by the Attorney General of Nova Scotia, pursuant to section 8(2)(b) of the *Law Reform Commission Act*.[2] The first three matters were initially proposed to the provincial government by the Construction Association of Nova Scotia.

The Commission convened an advisory group in November of 2010.[3] The Commission published a Discussion Paper in March of 2012 setting out its preliminary proposals, and received a number of responses.[4] The Commission now presents its recommendations.

Recommendations:

1. The *Builders' Lien Act* should provide that upon completion of a subcontract, the owner may pay out the portion of holdback funds held in respect of that subcontract, without jeopardy in respect of any other lien, provided that any liens in respect of the work done pursuant to the subcontract have expired, or been satisfied or discharged.

2. Completion of the subcontract should be certified, upon request by the contractor or subcontractor, by an architect or engineer upon whose certificate payment under the contract is to be made, or in the absence of such person by the owner and contractor in agreement, or in the absence of such agreement, by the court.

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[1] *Builders' Lien Act*, RSNS 1989, c 277 (the *Act*).

[2] *Law Reform Commission Act*, SNS 1990, c 17.

[3] See the Appendix for a list of Advisory Group members.

[4] See the Appendix for a list of Discussion Paper respondents.

3. Notice of completion of a subcontract must be given in whatever form is chosen for public notice of substantial completion, in addition to the direct notice to the owner, contractor and subcontractor.

4. The *Builders' Lien Act* should provide for retention of a 'finishing holdback' of 10% of the work remaining to be done following substantial performance, rather than 2.5% of the total contract price. Specifically, section 13(3) of the *Act* should be repealed, and a provision similar to section 22(2) of Ontario's *Construction Lien Act* should be included in its place, except that no certificate or declaration of substantial performance should be required.

5. The *Builders' Lien Act* should require notice of substantial completion, both at the job site and in a designated, publicly available resource or publication such as an on-line registry or trade newspaper, prescribed by regulation.

6. The *Builders' Lien Act* should provide that the Supreme Court may refer the trial of an action pursuant to that *Act* to the Small Claims Court, to be heard according to the ordinary processes of that Court. The reference procedure would be available only for claims which are within the monetary jurisdiction of the Small Claims Court.

7. Small Claims Court adjudicators should be provided with a comprehensive orientation to the Court's new jurisdiction to conduct *Builders' Lien Act* references.

8. The *Builders' Lien Act* should provide that a reference to Small Claims Court may include issues regarding the validity of a lien.

9. The *Act* should provide that a reference to Small Claims Court may include issues of liability in contract and tort, determination of amounts owing, and the allocation of holdback funds.

10. The *Act* should not include, among the issues that may be referred to the Small Claims Court, issues of priority amongst those with an interest in the land, nor the conduct of a judicial sale.

11. The *Builders' Lien Act* should provide for a claim on the basis of the *Act*'s trust provisions to be referred to Small Claims Court.

12. The *Act* should provide that the Supreme Court may refer an eligible claim to be tried in Small Claims Court, upon election by any party to the action.

13. The *Act* should provide that the Supreme Court may give directions for the conduct of the hearing, including reservation of certain issues for its own determination.

14. The *Act* should provide that the reference would be subject to objection by any other party, upon motion to the Supreme Court, or on the court's own initiative.

15. The Supreme Court should adopt a restrictive approach to such objections, so that the opportunity to object to a reference does not become a tool for the routine advantage of wealthier parties.

16. The *Builders' Lien Act* should provide that any party may object to the report of the Small Claims Court adjudicator, by filing a notice of objection within twenty (20) days of the filing of the adjudicator's report.

17. The *Act* should provide that upon any objection to the adjudicator's report, the Small Claims Court shall provide all of the documents and exhibits introduced at the hearing.

18. The *Act* should provide that upon any objection to the Small Claims Court report, the Supreme Court shall consider a motion to adduce fresh evidence on the same basis as the Court of Appeal.

19. The *Builders' Lien Act* should set out the powers of the Supreme Court upon receipt of the adjudicator's report, including each of the items in *Civil Procedure Rule* 11.07(1), as well as the power to re-hear the matter, in whole or in part.

HOLDBACKS

The *Act* requires an owner to hold back 10% from any payment on a building contract for a certain period of time. In the event that a subcontractor, supplier or employee of the general contractor goes unpaid, the unpaid party may register a lien (a security interest) against the property. Once the time period for holding the holdback has passed, the owner may pay the holdback directly to the lien holder in order to discharge the lien.

Successive parties in the contract chain must also hold back 10% of any payment they may make to their subcontractors (such as suppliers and sub-subcontractors), for the benefit of persons even further down the contract chain (e.g., employees).

The holdback is released according to certain milestones set out in the *Act*. The full 10% must be held for sixty days after the time when the contract is "substantially performed". Substantial performance is defined in the *Act* as the time when the work under the contract is ready for use, or is being used, for the purpose intended, and any remaining work can be completed for no more than 2.5% of the contract price. Sixty days after substantial performance, 75% of the holdback may be paid out to the person entitled on the contract. The remaining amount (2.5% of the contract price) may be paid when all of the work to be done on the contract is completely performed, provided no proceedings have been brought to enforce a lien in the meantime.

The sixty days for release of the holdback is consistent with the time for registering a lien against the property, which must be done within sixty days of the completion of the work for which the lien is claimed, or else the lien expires. Once sixty days has passed, in other words, any unregistered liens for work done prior to substantial completion will have

expired, and there is no reason to retain more than the 2.5% in respect of work which may remain to be done to reach total completion.

The holdback ensures that owners are protected against paying twice, in the event that a general contractor defaults in payment to a subcontractor, employee, supplier, etc. The owner is not liable to the subcontractor for any amount beyond the holdback as long as no lien is filed.[5] The owner will be liable to a lien holder, to the extent the lien holder goes unpaid after the lien is registered and notice in writing is given to the owner. But up to the point when the owner has written notice of a lien, he or she may pay the contractor up to 90%, without fear of being liable for more than the 10% holdback to an unpaid subcontractor who registers a lien on the property. In other words, though the lien forms a charge or security on the property for the unpaid amount, once the owner has paid the general contractor, with no notice of a lien, the lien secures only the lien holder's claim to a share of the holdback fund.

Progressive Release

The current *Act* treats the holdback as a single fund, to be released (up to 75%) upon substantial completion of the contract, and fully paid out upon total completion. A subcontractor who completes work early in the project (e.g., foundation pouring) must wait until the end of the project to receive his or her share of the 10%. No interest is payable in the meantime - interest is only payable if the owner delays in releasing the holdback at the appropriate time. But should the *Act* allow an early subcontractor to obtain its portion of the 10% upon completion of its work? The owner would be authorized to release the subcontractor's portion upon completion of the subcontractor's work (and the discharge or expiry of all liens thereunder), without fear of liability to any lien holder who registers a lien later in the project.

Most other provinces provide a right along these lines. In particular, Ontario, British Columbia, Alberta, New Brunswick, Prince Edward Island, Saskatchewan, Manitoba, and Newfoundland and Labrador all make provision for release of a holdback in respect of a particular subcontract in certain circumstances.[6] In Ontario, when a subcontract is certified complete by an architect or engineer or other person upon whose certificate payments are to be made, or in the absence of such person by the owner and contractor in agreement, the owner may pay the portion of the holdback in respect of that subcontract.[7] There must be no lien preserved in respect of the work done pursuant to the subcontract (meaning any liens must have expired, or been satisfied or discharged). In practice, this

[5] See *Atlantic Basement Co v Welland*, (1993) 121 NSR (2d) 440 (Co Ct): owner's liability capped even if the owner had failed to withhold the holdback.

[6] See *Construction Lien Act*, RSO 1990, c C30, s 25; *Builders Lien Act*, SBC 1997, c 45, s 8(1), *Builders' Lien Act*, RSA 2000, c B-7, s 21(2), *Mechanics' Lien Act*, SNB c M-6, s 15(4), *Mechanics' Lien Act*, RSPEI 1974, c M-7, s 14(4), *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 45, *Builders' Liens Act*, CCSM c B91, s 25(4), *Mechanics' Lien Act*, RSNL 1990, c M-3, s 12(2).

[7] *Construction Lien Act*, RSO 1990, c C30, s 25.

means that the holdback would normally be released only after the time for an unregistered lien to expire had passed - but still earlier than the end of the contract in many cases.

The conditions for progressive release are broadly similar in the other provinces that provide for it.

The legislation generally provides that the certificate deems the work to be complete, so that the time for registering a lien runs from the date of the certificate.[8] Thus, the owner can safely rely on it in terms of paying out the holdback. Otherwise, when there was actually work to be done after the certificate, the owner could be liable to a lien filed in time following completion of the work, though out of time if time were to run from the certificate.

The chief concern with such an early release provision, in principle, is that it may disadvantage later subcontractors (e.g., painters). The owner or general contractor may become insolvent at a later stage in the project. As things stand presently, all lien holders share in the entire 10% pot. To the extent that their total claims exceed the available holdback funds, each is disadvantaged by the default, in proportion to the value of their work on the project. But if the holdback fund has been depleted by early payments (in full), there will be a smaller pot left to be divided among the subcontractors left unpaid by the owner or contractor's default, later in the project.

In response to our discussion paper we also heard concerns that the owner/purchaser may end up bearing the additional costs associated with early release - title searches, a certificate of completion, publication of notices, etc. This is particularly a concern in the residential field as opposed to the commercial, where it is reasonable to expect that sophisticated parties will have anticipated and negotiated such costs. Unsophisticated residential purchasers, on the other hand, may sign a construction contract which obliges them to pay some or all of the costs of early release, before seeking legal advice. As well, depending on the trigger for release of the subcontractor's portion of the holdback fund, there would be a concern if the owner was obliged to satisfy him or herself as to the completion of the subcontractor's work. Owner/purchasers should be entitled to rely on verification by qualified, independent third parties, unless they have agreed otherwise.

We are persuaded that subcontractors should be entitled to early release of the holdback attributable to their work. Particularly in the commercial field, early subcontractors are certainly disadvantaged by what may be an extensive delay in receiving the final amounts due for their work, with no interest payable in the meantime. We have no indication that the provision causes undue problems for owners or later contractors in the other jurisdictions - that is, most other jurisdictions in Canada - where it is in place.

[8] E.g., *Construction Lien Act*, RSO 1990, c C30, s 33(2), (3); *Mechanics' Lien Act*, SNB c M-6, s 15(5); *Mechanics' Lien Act*, RSNL 1990, c M-3, s 12(3); *Mechanics' Lien Act*, RSPEI 1974, c M-7, s 14(5); *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 41(6); *Builders Lien Act*, SBC 1997, c 45, s 8(4).

We recommend adoption of a provision along the lines of section 25 of Ontario's *Construction Lien Act*. At the request of the contractor or a subcontractor, an architect or engineer upon whose certificate payments are to be made may certify a subcontractor's work to be complete. In the absence of such person the subcontract may be certified complete by the owner and contractor in agreement, or in the absence of such agreement, by the court. Upon such certification, the owner would be entitled to pay out the portion of holdback funds held in respect of that subcontract, without jeopardy in respect of any other lien, provided any liens in respect of the work done pursuant to that subcontract had expired, or been satisfied or discharged.

Under this provision, there would be no obligation on the owner to judge that the subcontractor's work was complete - the owner could effectively require a certificate or court order from the contractor before releasing the subcontractor's portion of the holdback fund. As well, the provision would effectively require the contractor or subcontractor to obtain the certificate or order. The owner would ordinarily be liable for the cost of any necessary title search - unless the parties agreed otherwise - but we note that such searches are not particularly expensive or onerous now that they may be done online under the *Land Registration Act*.

We acknowledge that a construction contract might seek to allocate the cost of the certificate, and related expenses, upon the owner, and an unsophisticated owner might accept the contract without knowledge of the provision and without taking legal advice. We agree that in principle, an owner would not normally wish to be liable for expenses in order for a subcontractor to receive an early holdback payment, unless he or she has agreed to do so. It is our view, however, that the *Builders' Lien Act* should not mandate a particular apportionment of such costs, which the parties would otherwise be free to negotiate. If there is a need for better consumer protection in the residential field - and we have heard suggestions to that effect - we consider that to be a separate, much larger issue that deserves its own study.

It is also relevant that in any event we expect the progressive release provision to be rarely used in the field of residential construction, where the delay some subcontractors may experience before being fully paid is generally much shorter than in the commercial field. We have heard that at least in Ontario the provision is rarely used, in part because the cost of the statutory procedural protections (notice, certificate of completion, publication, etc.) often outweighs the minimal debt-service costs of simply waiting until the project is complete.

We would add a provision adopted by some jurisdictions,[9] that upon the issuance of a certificate of completion, notice must be made in whatever form is chosen for public notice of substantial completion (see below), in addition to the direct notice to the owner, contractor and subcontractor. In response to our Discussion Paper we heard concerns that this might be more trouble than it is worth. But the certificate necessarily has the effect of

[9]E.g., *Builders' Lien Act*, RSA 2000, c B-7, s 20; *Builders Lien Act*, SBC 1997, c 45, s 7(4)(c); *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 41(2.1).

deeming all work under the subcontract complete, and it commences the running of time for the subcontractor's suppliers, sub-subcontractors and employees to file a lien. They must have effective notice of their deadline to do so. As well, the public notice system we recommend below should not be expensive or administratively burdensome.

Recommendations:

The *Builders' Lien Act* should provide that upon completion of a subcontract, the owner may pay out the portion of holdback funds held in respect of that subcontract, without jeopardy in respect of any other lien, provided that any liens in respect of the work done pursuant to the subcontract have expired, or been satisfied or discharged.

Completion of the subcontract should be certified, upon request by the contractor or subcontractor, by an architect or engineer upon whose certificate payment under the contract is to be made, or in the absence of such person by the owner and contractor in agreement, or in the absence of such agreement, by the court.

Notice of completion of a subcontract must be made in whatever form is chosen for public notice of substantial completion, in addition to the direct notice to the owner, contractor and subcontractor.

Amount of Holdback after Substantial Performance

The *Act* requires that the owner (and others in succession on the construction chain) retain 2.5% of the contract price following substantial performance,[10] which is meant to cover any liens for work which may be done between substantial completion and total completion (i.e., finishing work). The actual work remaining to be done in this period may be very slight, out of all proportion to the 2.5% of the total contract price that the owner is required to retain, and this period may drag on for some time.

Should the *Act* instead require that at sixty days following substantial performance, the owner calculate a new holdback of 10% of the value of the work actually to be completed, and pay the rest out?

Other provinces use a system along these lines. Not every province requires release of a portion of the holdback fund after substantial performance - only Alberta, Manitoba,

[10] *Builders' Lien Act*, *supra* note 1, s 13(3).

Ontario, Saskatchewan, and Nova Scotia do.[11] But of these, only Nova Scotia requires retention of a portion of the holdback in regard to work that may be already done. In the others, a new holdback is calculated based only on the work remaining to be done, in the same percentage as the original holdback required in each province: 7.5% in Manitoba, and 10% in Alberta, Ontario and Saskatchewan. The Ontario provision is as follows:

> Where the contract has been certified or declared[12] to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44.[13]

In response to the Discussion Paper we heard concern that a provision for a smaller finishing holdback would deprive the owner of leverage to ensure that the project is finished. The concern is that the contractor will have less incentive to complete the project if the finishing holdback to be released upon final completion is smaller than the current 2.5% of the contract price.

We acknowledge the concern, but the finishing holdback is not a measure to give the owner leverage to see the work completed. Rather, it is to ensure that subcontractors are paid and owners are not required to pay twice. The finishing holdback fund represents moneys owed to subcontractors for work they have done, and in our view it should not be artificially inflated for the purpose of serving the owner's interest in seeing the project completed more quickly.

We recommend that section 13(3) of the Nova Scotia *Act* be repealed, and a provision along the lines of Ontario's section 22(2) be included in its place. The owner would

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[11] *Builders' Lien Act*, RSA 2000, c B-7, s 21(1); *Construction Lien Act*, RSO 1990, c C30, s 22(2); *Builders' Lien Act*, CCSM c B91, s 24(2); *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 43(1); *Builders' Lien Act*, RSNS 1989, c 277, s 13(3). Prince Edward Island has a provision for staged release in respect of highway projects over one year, and Newfoundland & Labrador requires staged release in respect of contracts over $20,000,000; see David I. Bristow et al, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed loose-leaf (consulted on 13 February 2012) (Toronto: Carswell, 2005) ch 2 at 82 - 83.

[12] By an architect, engineer or other person on whose certificate payments are to be made under the contract, or in the absence of such person by the owner and contractor jointly, or in case of any refusal or failure by them, by the court; *Construction Lien Act*, RSO 1990, c C30, s 32(1)(1.); s 32(1)(7.).

[13] *Construction Lien Act*, RSO 1990, c C30, s 22(2).

continue to be protected against further liability by section 13(6) of the *Builders' Lien Act*.[14]

We would retain the Nova Scotia *Act*'s deemed trigger for substantial performance, rather than require a certificate or declaration. In response to the Discussion Paper it was suggested that the owner should be entitled to a certificate of substantial completion, to be obtained and paid for by the contractor. Having considered the matter we do not recommend such a provision, which the parties are free to negotiate for themselves if they wish. This would be a significant imposition of a 'one-size-fits-all' solution by statute, in an area where we have heard of little actual difficulty.

Recommendation:

The *Builders' Lien Act* should provide for retention of a 'finishing holdback' of 10% of the work remaining to be done following substantial performance, rather than 2.5% of the total contract price. Specifically, section 13(3) of the *Act* should be repealed, and a provision similar to section 22(2) of Ontario's *Construction Lien Act* should be included in its place, except that no certificate or declaration of substantial performance should be required.

Notice of Substantial Performance

It is not always easy for a subcontractor - particularly one who has finished work on a site - to determine when the first holdback payout should occur; i.e., when the project is ready for use, with no more than 2.5% of the value of the primary contract remaining to be done. The *Act* presently requires information concerning, among other things, the status of accounts between an owner and contractor to be provided to any lien holder upon request, but it does not specifically require disclosure, or public notice, of when "substantial performance" has occurred.

Other provinces do require such notice. In Alberta, once a contractor or subcontractor determines its work to be substantially performed, it may deliver a certificate of substantial performance.[15] The certificate is the trigger (after 45 days with no lien registered) for release of the holdback in respect of the work already done. The notice

[14] "Payment of the percentage required to be retained pursuant to subsections (2) and (3) may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the periods mentioned in subsections (2) and (3) unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as hereinafter provided."

[15] *Builders' Lien Act*, RSA 2000, c B-7, s 19.

must be posted in a conspicuous place on the work site within three days, and failure to do so renders the party liable for any costs and damages resulting from the non-compliance.[16]

In Ontario, the certificate is issued by the supervising architect, engineer, or other person upon whose certification payment is to be made, and must be published in a construction trade newspaper within seven days.[17]

We recommend that Nova Scotia adopt a provision requiring notice of substantial completion, both on the job site and in a designated, publicly available resource or publication such as an on-line registry or trade newspaper. We would leave the particulars of the designated general publication method to regulation, to permit more ready adaptation to changing technology and the needs of the construction industry in this province. For example, it might be useful for the provincial government to maintain a searchable on-line registry, available at little to no cost for users, accessible through the Nova Scotia Construction Industry Compliance Information Portal.[18] For smaller jobs the requirement for general publication (in a trade paper, online registry or otherwise) might be thought of as overkill, but retention of a finishing holdback is only likely to be an issue for contracts over a certain value in any event.

The notice provision would also apply to a certificate of completion of a subcontract, triggering progressive release of the holdback to an early subcontractor, as outlined above.

Recommendation:

The *Builders' Lien Act* should require notice of substantial completion, both at the job site and in a designated, publicly available resource or publication such as an on-line registry or trade newspaper, prescribed by regulation.

SMALL CLAIMS COURT

Builders' lien actions must be tried in the Supreme Court of Nova Scotia.[19] But many lien actions are for relatively small amounts of money, and concern straightforward issues of

[16] *Builders' Lien Act*, RSA 2000, c B-7, s 20.

[17] *Construction Lien Act*, RSO 1990, c C30, s 32(1)(5).

[18] Online:<http://www.gov.ns.ca/constructionportal/>.

[19] *Builders' Lien Act*, *supra* note 1, s 34(1): "The liens created by this Act may be enforced by an action to be brought and tried in the Supreme Court of Nova Scotia according to the ordinary procedure of that Court, except as varied by this Act"; See also *Small Claims Court Act*, RSNS 1989, c 430, s 10(a): "Notwithstanding Section 9, no claim may be made under this *Act* ... for the recovery of land or an estate or interest therein."

contractual performance and the amounts owed.[20] But for the requirement to bring the action in the Supreme Court, these sorts of cases would be well-suited for adjudication in the Small Claims Court.

Allowing lien actions for amounts under $25,000[21] to be heard in Small Claims Court would improve access to justice for the parties involved. The Small Claims Court is a more expeditious, informal, and inexpensive forum for resolving disputes than the Supreme Court. Parties need not be represented by counsel. The Small Claims Court has a track record of providing generally effective and accessible justice for litigants whose disputes do not typically warrant the extensive processes and procedural protections of an action tried in Supreme Court.[22] Most Small Claims Court adjudicators have been in practice for over twenty years, and a significant proportion of them have been appointed Queen's Counsel.[23] Approximately two per cent of Small Claims Court decisions are appealed, on average, each year, and only about two per cent of appeals are successful, on average.[24]

However, certain issues that may arise in a lien action may be beyond the expertise of adjudicators, and there are constitutional restrictions on delegating jurisdiction from a superior court. As well, some cases may not be suitable for the informal processes of the Small Claims Court. In what follows, we address questions of expertise, institutional capacity and constitutional jurisdiction, and propose a means of taking advantage of the informal, cost-effective and expeditious processes of the Small Claims Court, for appropriate cases.

In summary, we recommend that the *Builders' Lien Act* should be amended to expressly provide for a reference from the Supreme Court to the Small Claims Court, to determine any of the following issues: the validity of a lien, liability and amounts owing. The Supreme Court would retain jurisdiction over the action. Only cases involving a claim under the Small Claims Court monetary limit would be eligible for reference. Either party

[20] From January of 2009 to December of 2011 there were 401 builders' lien claims filed in Nova Scotia Supreme Court. In a sample of 101 of those claims, 52 were for amounts below $25,000, and therefore within the monetary jurisdiction of the Small Claims Court. This suggests an average of approximately 70 claims per year that would be eligible for Small Claims Court adjudication, were it not for the statutory requirement that such claims be brought in Supreme Court.

[21] The monetary upper limit of Small Claims Court jurisdiction; *Small Claims Court Act*, *supra* note 19, s 9(a).

[22] See Marc W Patry, Veronica Stinson, & Steven M Smith, *Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission* (March 2009).

[23] Gavin Giles, "An Enviable Record" (2007) 25:1 *Society Record* 25 at 25.

[24] Figures provided for the province of Nova Scotia between January 1, 2006 to December 18, 2011, by the Prothonotary of the Nova Scotia Supreme Court (Halifax Law Courts). The success rate on appeals may be lower, in fact; slightly less than half of the appeals filed in this time period remain open, without a result being recorded, and in a number of other files the result was unclear. These cases were not factored into the calculation of the rate of successful appeals.

could elect to have the case referred, subject to objection and a decision by the Supreme Court. Having held a hearing pursuant to the Small Claims Court procedures, the adjudicator would deliver a report to the Supreme Court. The adjudicator's report would be subject to objection by a party to the action. The Supreme Court could accept, reject or vary the Small Claims Court's findings, or order a rehearing on one or more matters. The Supreme Court would render judgment in the action and issue the appropriate order, including a determination of any questions of priorities among interest holders in the land, and a sale as appropriate.

We consider this a useful method for taking advantage of the cost-effective, expeditious and informal procedures of the Small Claims Court, for appropriate builders' lien cases. There was general support for this proposal among those who commented on the Discussion Paper.

Lien Action References in Other Jurisdictions

In Ontario, lien claims may be referred to specialized lien masters. The masters do not hand down final judgments; rather, they make a report to the superior court.[25] Formerly, mechanics' lien trials were fully tried by masters, but this was successfully challenged in Manitoba[26] and Ontario.[27]

In *C Huebert Ltd*, the Manitoba Court of Appeal held that section 56 of the *Mechanics' Lien Act*,[28] providing for masters to hear lien claims, was unconstitutional, as it offended section 96 of the *Constitution Act, 1867*. Section 96 was held to bar a provincial legislature from conferring authority which belongs exclusively to federally appointed judges upon provincially appointed officers. The Court held that the hearing of lien trials is an authority that belongs exclusively to federally appointed judges and as such cannot be delegated to provincially appointed masters. In deciding that that the provision was *ultra vires* the province, the Court of Appeal held that:

> Mechanics' lien trials are important judicial proceedings and in that class of cases invariably heard by a Judge of the Superior, District or County Court. The conclusion must be that the jurisdiction conferred on the referee by the reference under the order appealed from broadly conforms "to the type of jurisdiction exercised by the Superior, District or County Courts", and usually exclusively within the jurisdiction of Superior Courts.[29]

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[25] *Construction Lien Act*, RSO 1990, c C30, s 58(1); see also *Builders' Liens Act*, CCSM, c B91, s 78(1).

[26] *C Huebert Ltd v Sharman et al*, [1950] 2 DLR 344 (Man CA) (WL).

[27] *Display Service Co Ltd v Victoria Medical Bldg Ltd et al*, (1958) 16 DLR (2d) 1 (Ont CA) [*Display Service*], aff'd, [1960] SCR 32.

[28] RSM 1940, c 129.

[29] *C Huebert Ltd*, *supra* note 26, at para 26.

In *Display Service* the Ontario Court of Appeal followed the Manitoba Court of Appeal's reasons and held that section 31(1) of the *Mechanics' Lien Act* vested an officer of the Supreme Court with judicial power which could only validly be exercised by a judge of the superior, district or county court. The Court held that the legislation was purporting to confer such power on a master who is appointed by the Lieutenant-Governor in Council, and not by the Governor General.[30] As such, the section was held to be *ultra vires* the province. The Supreme Court of Canada upheld the Court of Appeal's decision, observing that assigning the power of final adjudication over the matter to a master was tantamount to appointing a judge under section 96.[31]

In order to preserve the practice of having masters hear construction lien claims, the legislation in both Ontario and Manitoba was amended to provide that a lien action was to be tried by a judge of the Supreme Court, but on motion the matter could be referred to a master for trial. The master would then provide a report to the Supreme Court for confirmation as opposed to issuing a final judgment himself. As the master could not be said to have the final power of adjudication over the matter, the legislature could thereby avoid the charge that exclusive superior court jurisdiction was being granted to provincially appointed masters.[32]

Today, construction lien legislation in both Ontario and Manitoba provides that a superior court justice can refer a lien action to a master where a master is available in the jurisdiction to hear the matter.[33] It was held in Manitoba, however, that masters may only provide assistance to the court in the same manner that they assist in other types of cases; e.g., resolving interlocutory matters, hearing references of certain issues, taxation of accounts, etc.[34] Though the decision pre-dates the Supreme Court of Canada's decision in

[30] The Court cited the holding in *C Huebert Ltd*, *supra* note 26, that, the provision in the Manitoba *Act* was *ultra vires* as it conferred on the Master "jurisdiction in matters (for example title to land and enforcement of liens thereon granting of injunctions and jurisdiction as to large sums) which conforms broadly to the type of jurisdiction exercised by superior, District or County Courts" see *Display Service, supra* note 27 at para 12.

[31] *Ontario (Attorney General) v Victoria Medical Building Ltd*, [1960] SCR 32 [*Victoria Medical*].

[32] Harvey Kirsh, *Kirsh's Guide to Construction Liens in Ontario*, 2d ed (Markham, Ont: Butterworths, 1995) at 193.

[33] *Construction Lien Act*, RSO 1990, c C30, s 58(1); *Builders' Liens Act*, CCSM, c B91, s 78(1).

[34] *Maitre v Chisvin and Chisvin* (1958), 15 DLR (2d) 120 (Man CA), per the Court: "Sec. 56 is not intended to permit, directly or indirectly, the trial of mechanics' lien actions, or substantial issues in such actions, by the referee. The section is intended to make available to the judges charged with the trial of mechanics' lien actions the assistance of the referee in the same way as the master's services are available to the judges of the Court of Queen's Bench in matters in that court. ... [T]he re-enactment of sec. 56 following *Huebert*'s case was meant to bring about a complete change in the practice and to end the trial of mechanics' lien actions by the referee — directly or indirectly."

Victoria Medical Building, which appears to authorize a reference of the whole substance of a lien matter,[35] Manitoba masters still exercise only a limited jurisdiction.

In Ontario, the master has all the jurisdiction, powers, and authority of the court to try and completely dispose of the substantive issues in the action.[36] The master may take accounts; determine issues of liability and damages; determine the validity of the lien; determine breach of contract claims; determine competing priorities of persons having an interest in the property; and order the owner's interests be sold.[37] After all statements of defence have been delivered, a motion may be brought before the judge to have the matter heard, in whole or in part, by a master assigned to the area in which the premises upon which the lien is a charge is located. It is rare that the motion will be opposed.[38] After hearing the matter, the master renders a decision in the form of a report, which is served on all parties who took part in the trial and then filed with the court. The report must be confirmed by the judge of the Superior Court. An uncontested report is deemed to be confirmed after the expiry of 15 days from the date the report is served.[39]

Once the report is confirmed or accepted by the superior court justice, it becomes an order of the Court. The claimant may move for an order of sale to realize upon the amounts secured by the lien. Both the *Construction Lien Act*[40] and Manitoba's *Builders' Liens Act* provide the Court with the authority to order a sale of the property and to deal with any issues that arise in the course of the sale.[41] Appeal of the order occurs in the same manner as any other order of the superior court.[42]

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[35] *Victoria Medical Building*, *supra*, note 31, at para 20, per Judson J: "At first glance, it might be thought that the Legislature, which can authorize a judge to direct a reference in the circumstances mentioned in ss. 67 and 68 of *The Judicature Act*, could decide that in a particular case there should be no need of delegation but a direct assignment of function with a consequent simplification of civil procedure. But ... the assignment of the power of final adjudication to the Master goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *British North America Act*. The position of the Master as a referee acting under a judge's order and reporting back to the Court is fundamentally different from his position under the impugned legislation as an independent trier of fact ... ."

[36] *Construction Lien Act*, RSO 1990, c C30, s 58(4).

[37] Kirsh, *supra* note 32, at 194.

[38] Bristow, *supra* note 11, ch 11 at 54.1.

[39] *Ibid*, ch 11 at 54.1.

[40] *Construction Lien Act*, RSO 1990, c C30, s 62(5); *Builders' Liens Act*, CCSM, c B91, s 68(1).

[41] *Construction Lien Act*, RSO 1990, c C30, s 68(5); *Builders' Liens Act*, CCSM, c B91, s 70(1).

[42] In Ontario, appeal lies to the Divisional Court, including an appeal of a decision on a motion to oppose confirmation of the Master's report; *Construction Lien Act*, RSO 1990, c C30, s 71(1)).

The system of relying on masters to decide lien actions depends in part on the specialized expertise of the master. In the Toronto area there are masters appointed specifically to hear such references, and lien actions in Toronto are almost invariably referred to them.[43] While it is seen as a strength of this system that the proceedings are typically streamlined and unencumbered by lengthy pre-trial procedures (the Court must authorize any) the particular expertise of the appointed masters is important to the integrity and credibility of the process amongst litigants. One author summarized the relative advantages of the lien master system as follows:

> ... [I]f used properly [the reference procedure under the *Construction Lien Act*] has most of the advantages of case management and alternative dispute resolution, with few of the disadvantages. As we see it, the advantages of the *Construction Lien Act* references are these:
>
> > 1. The lien Master is an expert neutral third party, with highly developed construction law expertise, paid for by the government;
> >
> > 2. No one is better qualified to ride herd on the lawyers in a case than a Master. Once a Master is seized of a reference, which is usually at the very beginning of a case, they never let go. This gives a strong incentive to lawyers to moderate their positions and prepare carefully on the merits;
> >
> > 3. The lien Master is adept at court procedures and can use them judiciously, to move determinative issues forward and leave incidental issues behind. It must be remembered that leave of the Court is required for most interlocutory matters;
> >
> > ...
> >
> > 5. Although trust claims cannot be joined in a lien action (section 50(2)), they can be brought in a normal civil action and referred to the Master under r. 54.02.. In this way even officers, directors and persons in control can be brought into a reference;
> >
> > 6. The "place of hearing" rule for motions (rule 37.03) does not apply to references after an order is made fixing a trial date (which can be included usefully in the Order of Reference). This allows the Master to fully control procedure on a reference and to expedite resolution.
> >
> > 7. A Master on a reference does not make formal "orders", he makes "directions". These are effective as soon as the Master writes them in his "procedure book". This saves time and assists in case management;

[43] Bristow, *supra* note 11, ch 10 at 25.

> 8. Lien Masters operate on a "fixed trial system", with many pre-trial meetings. Once you start a reference, you know exactly when you will be heard and that you will be heard until you are done;
>
> 9. A Master is not restricted to factual matters, as is [*sic*] the Board members are in the CDAB process. A Master on a reference can punish for contempt, compel witnesses to attend and issue committal orders if necessary. This tends to keep people focussed on the business at hand;
>
> 10. You cannot appeal a Master's report on a reference. You can bring a motion to oppose confirmation of the report on at least three days notice but a judge will only refuse confirmation if there has been an error in principle, an absence or excess of jurisdiction, or a patent misapprehension of the evidence and it is unjust, on all the evidence. In other words, although a Master's report on a reference is not absolutely final, it may as well be.[44]

We may consider this in many ways an ideal arrangement, but it is not clear to us that the Nova Scotia construction law field is large enough to support a dedicated class of construction adjudicators, paid for by the Province. Rather, the choice here seems to be between private arbitration, Small Claims Court, and the Supreme Court. Small Claims Court has some of the advantages of the lien master system in Toronto, but lacks the certainty of the adjudicator's expertise in construction law disputes. In the above account, there is a trade-off of formality for expediency, the acceptability of which derives from the lien master's familiarity with the sorts of issues that arise in construction law cases. A system in which the parties were effectively required to submit to the quick and informal process in Small Claims Court, but without the guarantee of background familiarity and expertise where the case required it, would lack credibility.

Two points are relevant here. First, the trade-off should be more acceptable, as it is in other areas of law, when confined to cases below the Small Claims Court monetary limit. Second, our recommendation is that a Small Claims Court reference procedure should be optional - as we discuss below, the parties should not be required to have the matter determined in Small Claims Court unless one of them elects. And, it should be open to the other party to object to the reference where it can be demonstrated that the matter requires the preparation, procedures, hearing time, and formality of an action under the *Civil Procedure Rules.*

[44] Duncan W Glaholt & John Margie, "Getting Paid: Holdbacks and Other Selected Topics" (Paper delivered at the Canadian Institute, 6th Annual Construction Superconference, Toronto, 1997) online: <http://www.glaholt.com/files/047.pdf> .

Recommendation:

The *Builders' Lien Act* should provide that the Supreme Court may refer the trial of an action pursuant to that *Act* to the Small Claims Court, to be heard according to the ordinary processes of that Court. The reference procedure would be available only for claims which are within the monetary jurisdiction of the Small Claims Court.

References in Nova Scotia

Rule 11 of the Nova Scotia *Civil Procedure Rules* provides that a judge may refer an "inquiry into a question"[45] in a proceeding to a person who is not a judge of the Supreme Court of Nova Scotia. The rule provides that a judge may refer a question in an "action, application, or motion that raises a question within the expertise of a referee".[46] A reference may be made to anyone with the skills or knowledge to determine the question.[47] The judge must give directions to the referee for the conduct of the inquiry and the referee is bound to abide by the rules set out at Rule 11.05(2) of the *Civil Procedure Rules*. In particular, "a referee conducting an inquiry must conduct the inquiry with the same impartiality and independence required of a judge". Rule 11.05(2)(a) also provides that "a referee conducting an inquiry has the same powers as a judge conducting a hearing, except to grant a contempt order".

The drafters of Rule 11 considered that references will be most often used to deal with the passing of accounts, an accounting, assessments of damages, and questions of land title or boundaries.[48] Rule 11 mentions a number of professionals to whom an inquiry may be referred, including, *inter alia*, a chartered accountant, a land surveyor, a medical practitioner, a lawyer, an engineer, a social worker or a psychologist.[49] Other courts and tribunals are not specifically mentioned, but are not excluded.

The Court retains jurisdiction over the matter and is not bound by the referee's report. The judge can decide to adopt the report in whole or in part, reverse the findings, reinstate the reference, and give judgment.[50] A judge may only receive evidence in contradiction of a

[45] *Nova Scotia Civil Procedure Rules*, r 11.01(1).

[46] *Ibid*, r 11.02(d).

[47] *Ibid*, r 11.02(4)(i).

[48] *Ibid*, r 11.03(1).

[49] *Ibid*, r 11.02(4).

[50] *Ibid*, r 11.07(1).

referee's conclusions if the reception of the evidence would meet the requirements for admission of fresh evidence before the Court of Appeal.[51]

References to Lower Courts

There is precedent in Nova Scotia for having the Supreme Court refer matters to another court. In particular, the *Civil Procedure Rules* provide for delegation to the Small Claims Court on the matter of costs in a civil action.[52]

The predecessor to Rule 11 of the *Civil Procedure Rules* was Rule 35 of the *Civil Procedure Rules 1972*. Rule 35, like the current Rule 11, allowed a judge to refer a matter for inquiry and report to a person who is not a judge of the Supreme Court. Unlike Rule 11, however, Rule 35 provided that a reference could be made to "a local judge instead of a referee"[53] for inquiry and report, or for "trial and report".[54]

Rule 35 governed, among other things, applications to local Family Court judges to vary or rescind orders for corollary relief, or for leave to issue an execution order to enforce such an order.[55] Rule 57.30 provided jurisdiction for the Family Court to deal with such applications by issuing a report to the Supreme Court, which was held to be equivalent to the jurisdiction of a referee under Rule 35,[56] and was reviewable as such.[57]

A Family Court judge deciding a matter pursuant to Rule 57.30(9) had the "procedural authority and jurisdiction...to pursue the inquiry as a justice of the Supreme Court would do except for the issuance of a contempt order."[58] However, the Family Court judge's authority was confined to making a report and recommendations on the matter of corollary relief, and did not extend to making orders under the *Divorce Act*.[59] In *Twaddle*

[51] *Ibid*, r 11.07(2).

[52] Rule 77.18 provides that, "A question about costs may be referred to an adjudicator under the *Small Claims Court Act*, in accordance with Rule 11." Small Claims Court adjudicators perform the function of taxing masters with respect to legal fees and costs generally; *Small Claims Court Act*, *supra* note 19, s 9A(1).

[53] *Nova Scotia Civil Procedure Rules* (1972), r 35.05

[54] *Ibid*, r 35.01(1)(a).

[55] *Ibid*, r 57.30(9)

[56] See *MacIntosh (Burke) v Burke* (1986), 73 NSR (2d) 448 (CA), 1 RFL (3d) 370 at 371.

[57] *Nova Scotia Civil Procedure Rules* (1972), r 57.30(12)(a).

[58] *MacIntosh (Burke) v Burke, supra* note 56 at 371.

[59] RSC, 1985, c 3.

v Twaddle,[60] MacDonald JA held that a Family Court judge did not have the jurisdiction to direct a three months' stay of maintenance and that this amounted to making an order in divorce proceedings.[61] On the other hand, in *MacIntosh (Burke) v Burke*[62] it was held that a Family Court judge could direct the parties to attend for a psychological assessment as part of the judge's determination. It was held that such an order was an interlocutory or procedural matter and within the jurisdiction of the Family Court judge acting under Rule 35.

The Supreme Court had broad powers of review of the report of a Family Court judge.[63] Supreme Court review was not confined to errors of law and was broader than an ordinary appeal.[64] The Supreme Court justice could adopt or reject the recommendations of the Family Court, regardless of whether a party had filed a Notice of Objection.[65] Nevertheless, only in exceptional circumstances were the Family Court's findings to be disturbed.[66] As Scanlan J held, in *Gorman v Gorman*:

> While the scope for review is broader than an ordinary appeal I am not prepared to interfere with the recommendation of the Family Court Judge in a case where it is apparent that the recommendation has taken into account the relative finances of the parties and is based on a reasonable application of the law. The review process is subject to less stringent guidelines than an appeal but an objection should only succeed if it has merit. It is not appropriate to set limits on what is a meritorious objection. To say that the review court will fine tune recommendations is to invite a flood of objections and would render Rule 35 useless. Every application to vary would essentially be subject to two hearings.[67]

The purpose of referring corollary relief matters to the Family Court was to ensure that such applications could be dealt with expeditiously. Custody, access and child support issues are issues regularly dealt with by the Family Court and are therefore within the expertise of that court. However, the Supreme Court maintained jurisdiction over the matter, and the Family Court's decision was in the form of a non-binding report. Like the

[60] (1985), 68 NSR (2d) 230 (CA).

[61] *Ibid* at para 37.

[62] *Supra*, note 56.

[63] *Fahey v Fahey* (1987), 79 NSR (2d) 254 (SC).

[64] *Krizsan v Krizsan* (1985), 65 NSR (2d) 169 (CA).

[65] *Ibid.*

[66] *Harding v Harding*, (1992), 111 NSR (2d) 397 (SC).

[67] *Gorman v Gorman*, (1994), 133 NSR (2d) 287 (SC), at para 15.

findings of a referee under Rule 35, decisions of the Family Court had no force and effect unless accepted by the Supreme Court.

Rule 35 was also used to provide jurisdiction to the Residential Tenancies Board to make determinations pursuant to the *Residential Tenancies Act*,[68] upon a reference from the local county court. Section 10A of the *Residential Tenancies Act* provided that an application must be made to the Court. The Court would refer the matter to the Board as a referee of facts.[69] Following the Board's hearing, the Court would review its report and accept, vary, or reject it, or require a supplemental report. The Court could decide any questions or issue referred to the Board on the evidence taken before the Board without having to take additional evidence.[70] The powers of the Board as referee and the county court as the referring court were essentially those provided for in Rule 35. Today, the Small Claims Court has jurisdiction over appeals from the Residential Tenancies Board, and the Board is no longer called upon as a referee to the Court.

Finally, the *Civil Procedure Rules* provide that determining the amount of legal costs to be paid by one party to another, and other disputes having to do with lawyers' fees and disbursements, may be referred to a Small Claims Court adjudicator.[71] The monetary limit of $25,000 does not apply to such matters.[72]

Referring Lien Actions to the Nova Scotia Small Claims Court

Issues in a Lien Action

Builders' liens are creatures of statute. The lien claimant must follow the procedures in the *Act* to preserve and perfect the lien. If not, the lien is open to challenge as being invalid. Challenges to the validity of a registered lien may raise questions of timing (e.g., when the lien was registered, or an action commenced); the ins and outs of contractual performance (e.g., when the work was completed or abandoned); proper identification of the owner of the property and the property itself; and whether or not the lien claimant may claim for the type of work or material provided. If the lien is invalid, the claimant loses the security interest in the land, and is effectively left with only a claim in contract, or on the basis of the *Act*'s trust provisions.[73]

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[68] *Residential Tenancies Act*, RSNS 1989, c 401.

[69] *Tracz v Francis*, [1984] NSJ No 159 (Co Ct), at para 7.

[70] *Residential Tenancies Act*, *supra* note 68, s 10C(5). Section 10C(5)(f) allowed the county court judge to make a number of orders with respect to the tenancy relationship.

[71] *Nova Scotia Civil Procedure Rules*, r 77.16. See *Small Claims Court Act*, *supra* note 19, s 9A(1).

[72] *Small Claims Court Act*, *supra* note 19, s 9A(2).

[73] *Builders' Lien Act*, *supra* note 1, s 46.

Beyond questions of validity, the substance of a lien claim essentially involves issues of contract, with a few twists. The Court must decide issues of liability and resulting damages, such as whether or not the parties contracted for the goods and services, whether or not those goods and services were provided, and whether there were deficiencies in the work. Further, the Court might have to determine the liability of the owner in terms of allocating holdback funds. The Court might also have to decide how much each lien claimant may be owed personally above the amount secured by the lien. The Court may also hear breach of trust claims arising from the statutory trusts created by the *Act*.

By virtue of its security interest, the lien claimant may realize upon an unpaid judgment by forcing the sale of land, in priority to later interest holders. At this point, the Court will have to determine where the lien claimant's interest stands in priority with respect to other liens and interests in the property. It is not often in matters under the *Act*, however, that an action will get to this stage. Most commonly, once the Court has determined the lien claimant's entitlement, the claimant will either realize this amount from money paid into court, or a payment directly from the owner.

It is fair to say that in most cases the bulk of a lien action is concerned with determining familiar contractual disputes; i.e., issues of contract formation, performance and amounts owing. For claims below $25,000, these are typically matters well within the capacity of the Small Claims Court.

Capacity of the Small Claims Court

The Small Claims Court does not presently have the jurisdiction to hear lien claim matters. The Supreme Court has exclusive jurisdiction to hear lien matters arising under the *Act*,[74] and the *Small Claims Court Act* specifically excludes claims for an interest in land from the jurisdiction of the Court.[75] The exclusion of lien cases from the Small Claims Court's jurisdiction was recently confirmed in *Global Paving Contractors Ltd v Cragg*.[76] Coughlan J held that an action brought pursuant to the *Act* could not be transferred to Small Claims Court. First, he held that pursuant to section 34(1) of the *Act*, liens were to be enforced by an action in Supreme Court. Second, the limit on Small Claims Court jurisdiction prevented the Court from dealing with the claimant's requested remedy - i.e., a declaration that the estate and interest of the defendants in the premises be sold and the proceeds of the sale be put towards the plaintiff's claim. Coughlan J. held that this was a claim for an interest in land and therefore the Small Claims Court did not have the jurisdiction to hear it.

[74] *Ibid*, s 34.

[75] *Small Claims Court Act*, *supra* note 19, s 10(a). See, e.g., *Swaine v Hackney*, 2010 NSSM 83.

[76] 2010 NSSC 468.

This is not a matter for simple legislative amendment; as explained above, it is not within the constitutional jurisdiction of the provincial legislature to grant authority over lien trials to an inferior tribunal.

But legislative and constitutional restrictions aside, certain aspects of the lien claim - indeed, in the typical case virtually all of the issues under substantial dispute - are well within the capacity of the Small Claims Court. In the following sections we examine the discrete issues that may arise in a lien action, and their amenability to adjudication by the Small Claims Court.

VALIDITY OF LIENS

In determining whether or not a lien claim is valid, the Court must determine whether or not the lien was registered and perfected in time, and whether or not the correct owner and property have been identified. As well, there may be questions about whether the interests of other interest-holders are subject to the lien, whether the type of work is capable of giving rise to a lien, and other complexities.

There may be significant consequences in finding that a lien is not valid, not only for the lien claimant and the defendant, but for the other persons who have an interest in the property. A finding that a lien is not valid will necessarily result in a smaller pool of claimants with a claim to holdback funds, for one thing.

The Small Claims Court does not regularly deal with questions of property interests in land, but on the other hand, in resolving the validity of a lien claim the Court will most commonly be called upon to determine when the contract was completed or abandoned, or when another of the triggering events in the *Act* occurred.[77] While the evidence on this point may be complex in any given case, it is a fairly straightforward question of fact, which will not necessarily involve any complex questions of property rights.

In determining the validity of the lien the Court may also have to determine if the property against which the claimant seeks a lien is a property interest that is lienable;[78] whether the services and/or materials performed or provided may give rise to a lien;[79] or whether the lien claimant has correctly identified the owner and the property in question.[80] These

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[77] *Builders' Lien Act*, *supra* note 1, s 24; See, e.g., *McLanders Contractors Ltd v Eastern Flying Services Ltd*, (1982), 55 NSR (2d) 449 (Co Ct).

[78] E.g., *Turf Masters Landscaping Ltd v TAG Developments Ltd*, (1994), 135 NSR (2d) 105 (SC) (land not a public street or highway, therefore not exempt from the *Act)*.

[79] E.g., *Walker v Williams*, 2007 NSSM 79, 260 NSR (2d) 251 (consultation services provided by the claimant not within the scope of work for which one could claim a lien under the *Builders' Lien Act*).

[80] E.g., *Four Seasons Roofing Ltd v Lavigne*, 2006 NSSC 402, 250 NSR (2d) 208 (lien registered against wrong property); *Empire Excavators Ltd v TAG Developments Ltd*, (1998) 168 NSR (3d) 309 (SC) (where lien registered against sub-divided property, a misdescription of land will not

seem to us to be matters that in the typical case would be within the capacity of the Small Claims Court, requiring no special expertise.[81] To the extent that there are concerns about adjudicators' familiarity with issues surrounding the validity of a lien, we recommend that training be provided, as part of a comprehensive orientation to the Court's new jurisdiction. We heard support for such training from those who commented on the Discussion Paper.

We conclude that questions of the validity of a lien should be among the categories of inquiry that may be referred to the Small Claims Court in a lien action. As explained below, the referring justice could reserve any complex issue of lien validity for *a priori* determination at the Supreme Court.

Recommendations:

The *Builders' Lien Act* should provide that a reference to Small Claims Court may include issues regarding the validity of a lien.

Small Claims Court adjudicators should be provided with a comprehensive orientation to the Court's new jurisdiction to conduct *Builders' Lien Act* references.

LIABILITY AND AMOUNTS OWING

The Small Claims Court regularly hears matters that comprise the substance of the typical lien claim action. The court's substantive jurisdiction includes matters of contract or tort where the claim does not exceed $25,000, inclusive of damages but exclusive of interest.[82] The Court regularly deals with issues that arise in a contract dispute, such as matters of liability and damages, and regularly decides construction disputes.[83] Determining whether or not an owner contracted for the work provided, whether or not the lien claimant provided the goods and services contracted for, whether the work and/or services were deficient, and the amounts owing, are all determinations squarely within the regular capacity of the Small Claims Court. Further, the Small Claims Court is certainly capable of hearing matters in contract and tort that might arise on a defendant's counter-claim - for example, damages for breach of contract and negligence.

necessarily serve to invalidate the lien).

[81] In Alberta, issues of the validity of a lien may be resolved by a pre-trial application before a master: *Builders' Lien Act*, RSA 2000, c B-7, s 53, although in certain cases the matter will be directed for trial. See discussion in *Vinterra Properties Inc v Calabria Interiors Ltd*, (2005) 2005 ABQB 130, 43 Alta LR (4th) 170.

[82] *Small Claims Court Act*, *supra* note 19, s 9(a).

[83] E.g., *Dennis Lively Construction & Backhoe Services Ltd v Beaver Bank Children's Learning Centre Ltd*, 2011 NSSM 53.

Generally, the Small Claims Court should be able to make a recommendation as to the proper determination of claims upon the holdback fund. The distribution of holdback funds will in the majority of cases be straightforward, and require only a consideration of the value of the work supplied by different subcontractor or whether or not the lien claimants are in the same class.[84]

Recommendation:

The *Act* should provide that a reference to Small Claims Court may include issues of liability in contract and tort, determination of amounts owing, and the allocation of holdback funds.

SALE OF LAND AND DETERMINATION OF PRIORITIES

The Small Claims Court does not have regular expertise in ordering the sale of land and determining priorities between judgment creditors and others with security interests in the debtor's land. Section 10(a) of the *Small Claims Court Act* specifically excludes from the Court's jurisdiction claims for the recovery of land or an estate or interest therein.[85]

It has been recently held, however, that the Small Claims Court may order the sale of land and determine priorities in order to satisfy a judgment of the court. In *Atlantic Electronics Ltd (Assignee of) v Dauphinee*,[86] LeBlanc J overturned the decision of a Small Claims Court adjudicator that the Court lacked jurisdiction to grant leave to a judgment creditor to sell the judgment debtor's land free of two prior encumbrances. The adjudicator held that section 10(a) of the *Small Claims Court Act* precluded the Court from hearing matters dealing with interests in land. The adjudicator further observed that Small Claims Court was created as a forum to hear matters in an informal and inexpensive manner and was not the appropriate forum to hear matters dealing with land. He noted that in ordering the sale of land the Court might be expected to deal with issues outside of its regular expertise such as: "issues with respect to priorities between other interest holders, sufficiency of notice to interested parties, the potential disposition of surplus monies, and potentially issues surrounding requests for vacant possession."[87]

LeBlanc J held that the certificate of judgment did not in itself constitute an interest in land; the Court had issued a judgment and that judgment was recorded under the *Land Registration Act*. The substance of the action giving rise to the judgment did not involve interests in land. The decision to allow the judgment creditor to sell the land free of two

[84] *Builders' Lien Act*, *supra* note 1, s 15(3).

[85] *Small Claims Court Act*, *supra* note 19, s 10(a).

[86] 2008 NSSC 190, 266 NSR (2d) 92 [*Dauphinee*].

[87] *Ibid* at para 13.

prior encumbrances could therefore be said to be within the Court's enforcement power – its power to make an order enforcing one of its own judgments – and not its adjudicative power. Section 31(1) of the *Small Claims Court Act* provides that, "An order of the Court may be enforced in the same manner as an order of the Supreme Court."

Regardless of their authority to do so under *Dauphinee*, however, Small Claims Court adjudicators are not regularly involved in determining priorities between persons with interests in land, nor determining the manner of sale, disposition of surplus monies and other issues that may arise on a judicial sale. Disputes as to priorities between lien claimants and other interest holders may give rise to issues that the Court has no regular experience deciding, especially when the Court must determine priorities and relative entitlements between lien claimants and others with an interest in the land.[88] We do not recommend that the Small Claims Court should have jurisdiction to make recommendations on disputed matters of priority amongst interest holders, or to oversee a judicial sale of the property.

Recommendation:

The *Act* should not include, among the issues that may be referred to the Small Claims Court, issues of priority amongst those with an interest in the land, nor the conduct of a judicial sale.

TRUST CLAIMS

Amendments to the *Builders' Lien Act* in 2004 created certain trust obligations. These amendments were based on the trust provisions in the Ontario *Construction Lien Act* and are meant to provide added protection to contractors and subcontractors. Where a contractor or subcontractor has failed to preserve or perfect a lien claim, he or she may still rely upon the trust provisions of the *Act* to claim amounts owing. This may be particularly important in situations in which the owner or the contractor has declared bankruptcy.[89] Pursuant to the *Bankruptcy and Insolvency Act*, moneys subject to a trust do not form part of the bankrupt's estate.[90] As well, in certain circumstances the directors and officers and other agents of a bankrupt owner or contractor can be held personally liable for breach of trust.[91]

In this section we consider whether the Small Claims Court ought to be able to hear a claim arising from the trust provisions of the *Act*. This might be by way of a reference

[88] E.g., *Glasswall Ltd v 2009861 Nova Scotia Ltd*, (1994), 130 NSR (2d) 241 (SC).

[89] Kirsh, *supra* note 32 at 107.

[90] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 67(1)(a).

[91] *Builders' Lien Act*, *supra* note 1, s 44G.

from Supreme Court, or directly by an action brought in Small Claims Court. The issue concerns both the expertise and capacity of the Small Claims Court with regard to trust matters, and also the constitutionality of a direct delegation of jurisdiction.

Superior courts in both Ontario and British Columbia have held that breach of trust claims arising under builders' lien legislation can be brought directly in Small Claims Court, if the claim is a claim *in personam* for damages and is within the monetary jurisdiction of the Court.[92] Ontario's *Construction Lien Act* provides that, "A trust claim shall not to be joined with a lien claim but may be brought in any court of competent jurisdiction."[93] It was held in *Brighton Heating & Air Conditioning Ltd. v Savoia et al.*,[94] that the Small Claims Court was a court of competent jurisdiction. British Columbia's Supreme Court held in *Valley Rite-Mix Ltd v Storrie*,[95] that the exclusive jurisdiction of the Supreme Court under the *Builders Lien Act* was confined to liens and not to claims based upon the trust provisions of the *Act*.

The Nova Scotia *Builders' Lien Act* does not specifically restrict trust claims to the Supreme Court. Section 34(1) of the *Act* states that "liens created by this Act may be enforced by an action to be brought and tried in the Supreme Court of Nova Scotia"; however, the section does not apply to a claim arising under *Act*'s trust provisions.

In *Brighton*, the Court considered that the Small Claims Court was a court of competent jurisdiction to hear a construction trust claim. It expressly rejected an earlier decision, *Domtar Commercial Roofing and Insulation v Exeter Roofing & Sheet Metal Co.*[96] which held that the provincial legislature could not constitutionally confer jurisdiction on the Small Claims Court to grant the declaratory relief sought by the claimant.[97] The Court in *Domtar* reasoned that:

> Construction lien trust claims and declarations would appear *prima facie* in Ontario to have been dealt with by the federally appointed judiciary; outside of Toronto by district court judges and in Toronto by supreme court judges after reference to the provincially appointed masters.
>
> ... [I]n the circumstances the province cannot award the powers of a superior court judge to its own appointee, especially under the Construction Lien Act because

[92] Bristow, *supra note* 11 at 10-26.

[93] *Construction Lien Act*, RSO 1990, c C30, s 50(2).

[94] (2006), 79 OR (3d) 386 (Sup Ct Jus) [*Brighton*].

[95] (1993), 86 BCLR (2d) 312 (SC) [*Storrie*].

[96] (1993), 109 DLR (4th) 443 (Ont Gen Div) (WL)[*Domtar*].

[97] *Ibid*.

> those powers have always been exercised in Ontario by federally appointed judges ..."[98]

The Court in *Brighton* rejected the characterization of a construction trust claim as one for declaratory relief, considering it instead to be strictly a claim for money damages and therefore, within the jurisdiction of the Small Claims Court.[99] Apart from these brief reasons, however, the Court gave little attention to the constitutional issue. Moreover, it is clear that for purposes of assessing constitutionality it is the subject matter of the jurisdiction, and not the particular remedy, that is relevant.[100]

The constitutionality of conferring jurisdiction on inferior courts to hear construction trust claims has yet to be resolved. The matter turns on the three-part test from *Re Residential Tenancies Act (Ontario),*[101] which the Supreme Court of Canada has summarized as follows:

> (1) does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?
>
> (2) if so, is it a judicial power?
>
> (3) if so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?[102]

With regard to construction trusts it is the first step that is most critical to the analysis. There is an argument that construction trust claims constitute a novel jurisdiction; i.e., one that was not in existence at or around the time of Confederation. Construction trust claims did not appear in Canada until 1932 as an amendment to *Manitoba's Builders' and Workmen's Act*.[103] A similar provision was added to Ontario's *Mechanics' Lien Act* in 1942 and to B.C.'s *Mechanics' Lien Act* in 1948.[104] The earliest possible directly analogous jurisdiction was a "trust-like procedure" introduced into Manitoba's *Mechanics' Lien Act* in 1883, which was a precursor to the contemporary construction trust.[105] If construction

[98] *Ibid* at paras 15-16.

[99] *Brighton*, *supra* note 94 at para 33.

[100] See *Sobeys Stores Ltd v Yeomans*, [1989] 1 SCR 238 [*Sobeys Stores*].

[101] *Reference re Residential Tenancies Act (Ontario), (sub nom. Residential Tenancies Act of Ontario, Re)* [1981] 1 SCR 714 [*Re Residential Tenancies Act (Ontario)*].

[102] *Reference re Residential Tenancies Act (NS)*, [1996] 1 SCR 186; 131 DLR (4th) 609 [*Residential Tenancies*], at para 74.

[103] RSM 1913, c 20.

[104] See *Minneapolis-Honeywell Regulator Co v Empire Brass Manufacturing Co*, [1955] SCR 694).

trust claims constitute a novel jurisdiction, then they cannot be of the type that were exclusively adjudicated by superior courts at the time of Confederation, and a delegation of such jurisdiction will not offend section 96.

The courts have taken a fairly general view as to the characterization of the type of dispute at issue in section 96 cases, however, and ask only whether that type of dispute is analogous, or conforms broadly to a jurisdiction exclusively exercised by a superior court. In *Residential Tenancies,* for example, the court chose to examine "residential tenancies disputes",[106] and the majority specifically held that this was not a novel jurisdiction, since the adjudication of disputes between landlords and tenants was not new. This was despite detailed reasons from the minority finding that residential tenancies jurisdiction under modern legislation was a novel jurisdiction because of the evolution of such disputes into a distinct subset of landlord tenant law, and the distinctive social policy treatment of the residential tenancy relationship in modern legislation.

This in mind, the power to adjudicate construction trust claims can be said to conform broadly to the power of superior courts over both trusts[107] and construction lien matters[108] at the time of Confederation. While it is true that inferior courts exercised jurisdiction over matters involving debt for relatively small amounts,[109] we have not found any indication that inferior courts at or around the time of Confederation shared a "meaningful concurrency of power"[110] over the type of dispute involved in construction trust claims, broadly considered.

The matter remains in doubt, of course, since we have found no decision which considers the matter in any authoritative way. Much turns on how a court might characterize the type of jurisdiction involved in a construction trust claim, and in turn, how that type of dispute was adjudicated at or around the time of Confederation. Depending on the answer, the third step in the section 96 analysis might also be relevant.[111] The question of

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[105] Duncan W Glaholt, *Construction Trusts: Law & Practice* (Toronto: Carswell Thompson Professional Publishing, 1999) at 2.

[106] See *Residential Tenancies, supra* note 102 at para 81.

[107] DWM Waters, *Law of Trusts in Canada*, 2d ed (Toronto: Carswell Company Ltd., 1984) at 661; *Domtar, supra* note 96. See also *Nolan v Ontario (Superintendent of Financial Services)* (2006), 209 OAC 21, at para 51: "Under the *Constitution Act, 1867*, only a section 96 judge (a superior court judge) has the supervisory jurisdiction at common law and equity in relation to trusts and the jurisdiction to order the rectification of a contract. This common law jurisdiction has been preserved and codified in the *Variation of Trusts Act*, RSO 1990, c V.1, s 1(1)."

[108] *Victoria Medical, supra* note 31.

[109] *Residential Tenancies, supra* note 102 at para 61.

[110] *Ibid* at para 77.

[111] See, e.g., *Sobeys Stores, supra* note 100, in which the majority considered that while jurisdiction over unjust dismissal was exclusively vested in superior courts at the time of Confederation, the

whether the adjudicative power to determine construction trust claims forms only an ancillary part of a broader piece of social policy legislation (i.e., the statutory protection of construction contractors) is not one with a clear answer. Though trust claims under construction lien legislation represent a significant deviation from the common law, *Victoria Medical* considered that the "analogous judicial power" of hearing claims under builders' lien legislation was not "transformed by the new legislative and administrative context in such a way that it is no longer a section 96 power".[112] Construction lien claims have always been adjudicated by the superior or county courts. It may therefore be said that construction trusts are not ancillary to a new, predominantly administrative function.[113]

In short, the applicable Supreme Court of Canada precedents are divided and the court has a great deal of discretion in section 96 cases. Though we expect that the court would uphold inferior court jurisdiction over construction trust claims,[114] we cannot say so with certainty.

Because the constitutionality of conferring jurisdiction over construction trust matters is not clear, we recommend that the *Builders' Lien Act* expressly provide that trust claims arising under the *Act* may be brought before the Small Claims Court as references, similar to builders' lien claims. The resolution of a claim for damages on the basis of the trust provisions of the *Act* will typically require the court to determine whether the defendant received or was owed (in the case of contractors and subcontractors) moneys on account of the contract; whether the plaintiff supplied the materials and/or services; and that the defendant owes the money to the plaintiff for the materials and/or services. Once the existence of a trust is established, the onus is then on the defendant to show that it made the required payments from the trust property.[115] We consider these matters to be generally within the capacity of the Small Claims Court. To the extent that trust claims may raise issues that are novel or unfamiliar, we have recommended above that training be provided to adjudicators, as part of a comprehensive orientation to the Court's new jurisdiction.

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jurisdiction granted to the Labour Standards Tribunal to adjudicate such matters was part of its general administrative role in a comprehensive statutory scheme for the protection of non-unionized workers, and was therefore constitutional.

[112] See *Residential Tenancies*, *supra* note 102 at para 107.

[113] See *McEvoy v New Brunswick (Attorney General)*, [1983] 1 SCR 704; 148 DLR (3d) 25.

[114] Because: (a) we are persuaded that the subject-matter jurisdiction is novel, even having regard to the court's general approach to characterization of the type of dispute; (b) provincial courts and tribunals in practice do presently adjudicate trust matters, including construction trusts, regardless of constitutional concerns; and, (c) the tendency in modern s 96 cases has been to permit inferior tribunals to adjudicate matters when those are part of a broader legislative scheme which significantly deviates from the common law, as with mechanics' liens and construction trusts in particular.

[115] See, e.g., *St Mary's Cement Corp v Construc Ltd* (1997), 32 OR (3d) 595 (Gen Div).

Recommendations:

The *Builders' Lien Act* should provide for a claim on the basis of the *Act*'s trust provisions to be referred to Small Claims Court.

Procedure for a Reference to Small Claims Court

Having considered that many of the matters that will most often be in dispute in a lien action under $25,000 are within the capacity of the Small Claims Court, we are left to decide how such matters should be brought for adjudication in that Court. Certainly, the matter must originate as an action in Supreme Court, given constitutional limits on delegating superior court jurisdiction over lien claims. In the following sections we consider how the substance of a lien action which is appropriate for Small Claims Court adjudication should be transferred to that Court, and the decision of the adjudicator communicated back to the Supreme Court for any further steps in the proceeding.

Transferring a Matter to Small Claims Court

We examine two basic means of having the matter transferred: upon motion of one of the parties, or by default.

Requiring one of the parties to bring a motion to have the matter heard in Small Claims Court leaves the choice of forum directly in the hands of the parties. It would allow the Supreme Court to act as gatekeeper, ensuring that cases which are too complicated or otherwise unsuitable for Small Claims Court adjudication are heard in the appropriate forum. It would also be open to the Court to order that certain matters (e.g., in some cases the validity of the lien) be resolved in Supreme Court, before the remaining matters in dispute are heard by the lower court.

On the other hand, requiring a motion at Supreme Court has access to justice implications. Part of the aim of providing for Small Claims Court jurisdiction to hear actions arising under the *Act* is to allow for builders' lien matters to be resolved simply and inexpensively, without the need for counsel where neither the issues nor the amounts at issue require it. Requiring a motion to have the matter referred to Small Claims Court would present obstacles to that goal, by providing an opportunity for a potentially complex proceeding before a judge of the Supreme Court, in order to determine whether a reference was appropriate.

An alternative is to have all lien actions under $25,000 referred to Small Claims Court as a matter of course. Following the close of pleadings, the parties to a lien action under $25,000 would receive a date for hearing of the merits of the claim in Small Claims Court, and the case would proceed more or less as a Small Claims Court action. The reference would be subject to objection by either party, made upon motion to a justice of the

Supreme Court. Provided that the Supreme Court was vigilant in ensuring that exceptions were rarely made, and only on clear and consistently-applied principles, the default option would preserve, as closely as possible, the ease of filing and pursuing a Small Claims Court action.

The chief difficulty of a default reference option is, of course, that in the normal case the parties will be required to have their matter heard in Small Claims Court, without the benefit of the *Civil Procedure Rules*, and the elaborate rules of evidence of a civil trial in a superior court. Most matters within the Small Claims Court's jurisdiction are not required to be heard there. Rather, the plaintiff has the option of filing a claim there, or the defendant may elect to have the matter transferred.[116]

We prefer to have the parties decide if the Small Claims Court is the appropriate forum. For that reason we recommend that a reference should be optional, at the instance of any party to the action. We would not require the trappings of a formal motion, however, which would in many cases require the assistance of counsel. Rather, the plaintiff or defendant would be able to simply elect to have the matter referred to Small Claims Court at the time of filing the claim, or defence.

The election would be subject to objection, by motion to a justice of the Supreme Court, or on the court's own initiative. The opportunity to object to a reference should not become a tool for the advantage of the wealthier litigant, however. In response to the Discussion Paper we heard concerns, which we share, that the motion to object to a reference could defeat the purposes of granting Small Claims Court jurisdiction. Argued before a Supreme Court justice according to the *Civil Procedure Rules*, such a proceeding might well be beyond the capacity of a self-represented litigant, and increase costs dramatically.

On the other hand, it is important that an action which is genuinely not appropriate for a quick and relatively informal Small Claims Court hearing should not be referred. This is a point not limited to cases under the *Builders' Lien Act*; it applies with regard to Small Claims Court actions generally. Notwithstanding the general presumption in favour of a Small Claims Court proceeding when either party elects to commence or transfer an action there,[117] it is open to the Supreme Court to stay the action in appropriate cases.[118] The courts have been very strict on such applications, acknowledging the important access to justice issues at stake.

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[116] *Small Claims Court Act*, *supra* note 19, s 19.

[117] *Ibid*.

[118] See generally *Haines, Miller & Assoc v Foss*, (1996) 153 NSR (2d) 53 (SC). See also *Farlow v Hospital for Sick Children*, (2009) 100 OR (3d) 213 (SCJ), at para 20, setting out a list of factors that the court ought to consider where a party argues a case should be heard in Supreme Court rather than Small Claims Court, including: (i) the complexity of the issues; (ii) the importance of expert evidence to a determination of the case; (iii) the need for discovery; (iv) whether the case involves issues of general importance; and (v) the desire for a just and fair determination.

In our view the best solution is to continue to rely on the Supreme Court to hold the line generally in favour of the Small Claims Court. The Court would have to be clear on such motions, as it has been in the past, that where a party elects to have the matter heard there, the Small Claims Court is the presumptive option, unless it can be clearly shown that the matter is clearly not suitable for Small Claims Court adjudication. We observe too that at least with regard to *Builders' Lien Act* references, this is not an either-or proposition. In any given case, the Court could craft the referral order as it saw fit in the circumstances; in particular by giving directions for the conduct of the inquiry, or by reserving certain matters for its own determination, in advance of or following the Small Claims Court hearing and report.

Recommendations:

The *Act* should provide that the Supreme Court may refer an eligible claim to be tried in Small Claims Court, upon election by any party to the action.

The *Act* should provide that the Supreme Court may give directions for the conduct of the hearing, including reservation of certain issues for its own determination.

The *Act* should provide that the reference would be subject to objection by any other party, upon motion to the Supreme Court, or on the court's own initiative.

The Supreme Court should adopt a restrictive approach to such objections, so that the opportunity to object to a reference does not become a tool for the routine advantage of wealthier parties.

Review of the Small Claims Court Report

Under Rule 11, following a hearing a referee issues a report of findings. The report is filed with the Supreme Court and served upon the parties. Rule 11 does not expressly provide a procedure for filing a notice of objection to the referee's report, however.

For lien matters, we recommend that the *Builders' Lien Act* ought to specify a means of objecting to the findings of the Small Claims Court before the Supreme Court. This would be along the lines of the former Rule 57.30(11A), which provided that a party wishing to object to the report of the Family Court could file a Notice of Objection within twenty (20) days of the filing of the report.

Rule 11.05(2)(c) provides that a referee's inquiry must be recorded and the exhibits kept by the referee until they are turned over to the court. Rule 11.06(3) provides that a referee

must "cause all exhibits introduced at the inquiry, a list of exhibits, and a complete recording of the inquiry to be transmitted to the prothonotary," along with the report.

In Ontario, proceedings before the master on a construction lien reference are recorded. However, motion records on a motion to oppose confirmation of the master's report do not necessarily require a transcript of evidence unless a party specifically intends to refer to the transcript of evidence at the hearing.[119] The motion record must contain a copy of the notice of motion; a copy of all affidavits and other material served by any party for use on the motion; a list of all relevant transcripts of evidence; and a copy of any other material in the court file that is necessary for the hearing of the motion.[120]

By contrast, the Nova Scotia *Small Claims Court Act*, section 32(4) requires much less in the way of supporting material on an appeal to Supreme Court,[121] and Small Claims Court hearings are not required to be recorded.[122]

In the case of a reference pursuant to the *Builders' Lien Act* it is not necessary to include a provision like section 32(4) of the *Small Claims Court Act*, providing for a summary report of the adjudicator's decision to be provided on an appeal. The adjudicator will be obliged to render a written report setting out the findings and analysis necessary to decide the issues which are the subject of the reference. To the extent that the Supreme Court requires additional detail on any matter raised in an objection to the report, it may direct the Small Claims Court to provide a supplementary report, as we consider below.

The *Builders' Lien Act* should provide that upon an objection, the Small Claims Court shall provide copies of all of the documents and exhibits introduced at the hearing. We do not recommend that Small Claims Court hearings of builders' lien matters must be recorded.

Rule 11.07(2) provides that "a judge may receive evidence in contradiction of a referee's findings of fact or the referee's conclusions" if the evidence meets the test for the introduction of fresh evidence at the Court of Appeal. The Court of Appeal will admit fresh evidence if it is in the interests of justice to do so, taking into consideration the

[119] Ontario, *Rules of Civil Procedure*, r 37.10 (5).

[120] *Ibid*, r 37.10.

[121] *Small Claims Court Act*, *supra* note 19, s 32(4): "Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision."

[122] See discussion in *Kemp v Prescesky* 2006 NSSC 122, 244 NSR (2d) 67, per Warner J at para 25: "Despite the court professing itself to be 'a court of law and of record', the only record of the proceeding, other than of the claim, defence, judgment, and exhibits, is the summary prepared by an adjudicator in response to an appeal of the adjudicator's decision for error of law, jurisdiction, or natural justice; there is no independent record of the proceedings, as they relate to matters that are appealable."

credibility and relevance of the evidence, and whether it was available at the time of trial.[123] Fresh evidence will only be admitted if the evidence would have affected the outcome of trial, had it been available.[124]

Similarly, in Ontario, fresh evidence is admissible on a motion to oppose confirmation of the master's report only if it meets the test for fresh evidence on appeal.[125]

There is no express provision for fresh evidence on an appeal of a Nova Scotia Small Claims Court judgment. Though the matter may be in some doubt,[126] it has been suggested that the Supreme Court should consider a motion to adduce fresh evidence on the same basis as the Court of Appeal.[127] We recommend that the *Act* should specify that with respect to construction lien references.

Under Rule 11, the Supreme Court has broad powers to review a referee's report on both law and fact.[128] This is in contrast to an appeal of a Small Claims Court judgment, which is limited to errors of law, errors of jurisdiction, or a breach of natural justice.[129]

In Ontario, review on a motion to oppose confirmation of a construction master's report is in the nature of an appeal, and the courts in practice defer to the findings in the report:

> The court hearing a motion to oppose the confirmation of a report on a reference ought not to interfere with the results unless there has been some error in principle demonstrated by the Master's reasons, some absence or excess of jurisdiction ... , or some patent misapprehension of the evidence,

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[123] See *Cummings v Belfast Mini-Mills*, 2011 NSCA 56, 303 NSR (2d) 344, at para 18, quoting *R v Palmer*, [1980] 1 SCR 759.

[124] *Ibid.*

[125] See *Solomon Rothbart Goodman v Davidovits* (1996), 46 CPC (3d) 314; 61 ACWS (3d) 595 (Ont Gen Div).

[126] *Lacombe v Sutherland*, 2008 NSSC 391, 273 NSR (2d) 70, per Beveridge J: "...the *Small Claims Court Act* contains no specific provision setting out a power to hear fresh evidence. I need not decide today if the parties to an appeal from a Small Claims Court adjudicator can adduce fresh evidence other than evidence that may go to establishing a jurisdictional error or a breach of natural justice."

[127] *Foster v Kiehl*, 2001 NSSC 149, 198 NSR (2d) 122, at para 3, citing *Thies v Thies*, (1992) 110 NSR (2d) 177 (CA) at 3.

[128] Upon receipt of a referee's report, among other things, the Court may vary or reverse any finding in the report: *Nova Scotia Civil Procedure Rules*, r 11.07(1).

[129] *Small Claims Court Act*, *supra* note 19, s 32(1).

> and the award should not be disturbed unless it appears to be unsatisfactory on the evidence.[130]

Because the proceeding we envision in Small Claims Court is a reference out of Supreme Court, where the superior court retains jurisdiction over the action, and is not a trial at first instance, we would preserve the broader powers of review which govern the review of a referee's report under Rule 11. We would nevertheless expect the Supreme Court to be just as deferential to the findings of the Small Claims Court as it is with regard to those of a referee, or else risk the efficacy and integrity of the builders' lien reference procedure by opening the door to a re-hearing in every case.

Recommendations:

The *Builders' Lien Act* should provide that any party may object to the report of the Small Claims Court adjudicator, by filing a notice of objection within twenty (20) days of the filing of the adjudicator's report.

The *Act* should provide that upon any objection to the adjudicator's report, the Small Claims Court shall provide all of the documents and exhibits introduced at the hearing.

The *Act* should provide that upon any objection to the Small Claims Court report, the Supreme Court shall consider a motion to adduce fresh evidence on the same basis as the Court of Appeal.

Judgment

Under Rule 11, the Supreme Court may do any of the following upon receipt of the referee's report:

(a) adopt the report, in whole or in part;

(b) vary or reverse any finding stated in the report;

(c) reinstate the reference, and direct the referee to provide a supplementary report;

(d) reinstate the reference, and remit it to the referee, or a new referee, to take further evidence and provide a supplementary report;

(e) give directions for the conduct of a reinstated reference;

[130] *Heyday Homes Ltd v Gunraj*, (2005) 44 CLR (3d) 169 (Ont Sup Ct Jus.) at para 9.

(f) give judgment.[131]

We would provide the same powers with respect to references of builders' lien matters to Small Claims Court. Though we anticipate the power would be sparingly used, the option to reinstate the reference would be akin to ordering a new trial, in cases where the initial proceeding was so deficient as to warrant a new proceeding on one or more of the matters referred for the Small Claims Court's determination. In some cases, depending on the nature of the error and the circumstances, it might well be better for the Supreme Court, in such a case, to re-hear the matter itself, in whole or in part. We recommend that the *Act* expressly include the power for the Supreme Court to re-hear the matter, in whole or in part, in addition to the above list.

Recommendation:

The *Builders' Lien Act* should set out the powers of the Supreme Court upon receipt of the adjudicator's report, including each of the items in *Civil Procedure Rule* 11.07(1), as well as the power to re-hear the matter, in whole or in part.

[131] *Nova Scotia Civil Procedure Rules*, r 11.07.

APPENDIX - ADVISORY GROUP & RESPONDENTS TO DISCUSSION PAPER

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