



BILL NO. 58

Government Bill

*1st Session, 59th General Assembly
Nova Scotia
53 Elizabeth II, 2004*

An Act to Amend Chapter 277 of the Revised Statutes, 1989, the Mechanics' Lien Act

CHAPTER 14
ACTS OF 2004

**AS ASSENTED TO BY THE LIEUTENANT GOVERNOR
MAY 20, 2004**

The Honourable Michael G. Baker, Q.C.
Minister of Justice

*Halifax, Nova Scotia
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**An Act to Amend Chapter 277
of the Revised Statutes, 1989,
the Mechanics' Lien Act**

Be it enacted by the Governor and Assembly as follows:

1 The title of Chapter 277 of the Revised Statutes, 1989, the *Mechanics' Lien Act*, is amended by striking out "Mechanics" and substituting "Builders".

2 Section 1 of Chapter 277 is amended by striking out "Mechanics' " and substituting "Builders' ".

3 Clause 2(g) of Chapter 277 is amended by striking out "mechanic or labourer" in the first and second lines and substituting "person".

4 Section 3 of Chapter 277 is repealed and the following Section substituted:

3 (1) Nothing in this Act extends to any public street or highway or to any work or improvement done or caused to be done thereon.

(2) A lien does not attach to and cannot be registered against the estate or interest in the land of Her Majesty in right of the Province.

(3) Where the circumstances referred to in Section 6 apply to land in which Her Majesty in right of the Province has an estate or interest but Her Majesty is not an owner, the lien may attach to the estate or interest of any other person in that land.

(4) Where Her Majesty in right of the Province is an owner, the lien does not attach to the land but constitutes a charge as provided in Section 13, and this Act applies without requiring registration pursuant to Section 18 of a claim of lien against the land.

(5) Where the owner of a property is Her Majesty in right of the Province, the claim for lien made in accordance with Section 19 or 20 may be served upon the Minister of Justice and Sections 24 to 29 apply *mutatis mutandis*.

(6) Subject to this Section, this Act is binding upon Her Majesty in right of the Province.

(7) Notwithstanding Section 18 of the Proceedings against the Crown Act, no action shall be brought against Her Majesty in right of the Province under this Act unless thirty days previous notice in writing has been served on the Attorney General, in which notice the name and residence of the proposed plaintiff, the cause of action and the court in which it is to be brought shall be explicitly stated.

5 Subsection 4(1) of Chapter 277 is amended by striking out "worker, servant, labourer, mechanic or other" in the second and third lines.

6 Subsection 6(1) of Chapter 277 is amended by striking out “ship, vessel,” in the sixth and in the thirteenth lines.

7 (1) Subsection 13(2) of Chapter 277 is amended by striking out “forty-five” in the fifth line and substituting “sixty”.

(2) Subsection 13(3) of Chapter 277 is amended by striking out “Forty-five” in the first line and substituting “Sixty”.

8 Subsection 16(1) of Chapter 277 is amended by striking out “mechanic or labourer” in the first line and substituting “person”.

9 (1) Subsection 24(1) of Chapter 277 is amended by striking out “forty-five” in the fourth line and substituting “sixty”.

(2) Subsection 24(2) of Chapter 277 is amended by striking out “forty-five” in the third line and substituting “sixty”.

(3) Subsection 24(3) of Chapter 277 is amended by striking out “forty-five” in the third line and substituting “sixty”.

(4) Subsection 24(4) of Chapter 277 is amended by striking out “forty-five” in the third line and substituting “sixty”.

10 Chapter 277 is further amended by adding immediately after Section 24 the following Sections:

24A A person who has registered a lien pursuant to this Act shall give notice of the registration of the lien to the owner of the property referred to in the claim for lien.

24B A failure to comply with Section 24A shall be treated as an irregularity and does not nullify the lien.

11 Section 25 of Chapter 277 is amended by striking out everything after “thereof” in the third line to the end of the Section and substituting a period.

12 Subsection 26(1) of Chapter 277 is amended by

(a) striking out “ninety” in the third line and substituting “one hundred and five”; and

(b) striking out “or in which the claim may be realized under this Act, and a certificate is registered as provided by Section 25” in the last three lines and substituting “and a certificate thereof (Form E) is registered in the registry office in which the claim for lien was registered”.

13 Section 27 of Chapter 277 is amended by striking out “Section 25” in the last line and substituting “subsection (1) of Section 26”.

14 Subsection 29(5) of Chapter 277 is amended by

(a) striking out “Sections 25 and 26” in the first and second lines and substituting “Section 26”; and

(b) striking out “25,” in the fifth line.

15 Subsection 30(4) of Chapter 277 is amended by striking out “25,” in the fifth line.

16 Section 32 of Chapter 277 is repealed and the following Section substituted:

32 (1) Any lien holder may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, by the owner or the owner’s agent, a contractor or a subcontractor.

(2) The information to be provided pursuant to subsection (1) by the owner or the owner’s agent shall include

- (a) the names of the parties to the contract;
- (b) the contract price;
- (c) the state of accounts between the owner and the contractor;
- (d) a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner; and
- (e) a statement of whether the contract provides in writing that liens shall arise and expire on a lot-by-lot basis.

(3) The information to be provided pursuant to subsection (1) by the contractor or subcontractor shall include

- (a) the names of the parties to a subcontract;
- (b) the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor;
- (c) a statement of whether there is a provision in a subcontract providing for certification of the subcontract;
- (d) a statement of whether a subcontract has been certified as complete; and
- (e) a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

(4) Where a person, who is required under this Section to provide information, does not provide the information as required or knowingly or negligently mis-states that information, the person is liable to the person who made the request for any damages sustained by reason thereof.

(5) Upon application, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to the person under this Section and, when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a solicitor-and-client basis.

17 Chapter 277 is further amended by adding immediately after Section 33 the following heading and Sections:

ARBITRATION

33A Notwithstanding the *Arbitration Act*, the *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, a stay of proceedings granted by any court of competent jurisdiction to assist the conduct of an arbitration does not prohibit the taking of any step pursuant to this Act to

- (a) register a claim of lien;
- (b) prevent the expiry of a lien; or
- (c) preserve the land or personal property to which a lien attaches or any estate or interest in land or personal property to which a lien attaches.

33B Notwithstanding the *Arbitration Act*, the *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in Section 33A does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract.

33C Notwithstanding the *Arbitration Act*, the *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction,

- (a) an action to enforce a lien that is commenced by a lien claimant whose contract or subcontract does not provide for arbitration is not stayed by the commencement or continuation of arbitration proceedings between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of the action; and
- (b) no order shall be made directing a stay of an action referred to in clause (a) solely on the grounds that arbitration proceedings have been commenced or continued between other parties with respect to a matter that, in whole or in part, deals with the subject-matter of that action.

18 (1) Subsection 34(1) of Chapter 277 is repealed and the following subsection substituted:

(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.

(2) Subsection 34(2) of Chapter 277 is amended by striking out "county court" in the first line and substituting "Supreme Court of Nova Scotia".

(3) Subsection 34(3) of Chapter 277 is amended by striking out "clerk" in the third line and substituting "prothonotary".

(4) Subsection 34(4) of Chapter 277 is amended by adding “who have complied with this Act” immediately after “question” in the last line.

(5) Subsection 34(6) of Chapter 277 is repealed.

(6) Subsection 34(8) of Chapter 277 is repealed and the following subsection substituted:

(8) The statement of defence may be in one of the Forms G or H.

19 Sections 39 and 40 of Chapter 277 are repealed.

20 Chapter 277 is further amended by adding immediately after Section 44 the following heading and Sections:

TRUST PROVISIONS

44A (1) All amounts received by an owner that are to be used in the financing of any of the purposes enumerated in Section 6, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.

(2) Where amounts become payable under a contract to a contractor by the owner, an amount that is equal to an amount that is in the owner’s hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

(3) Where the substantial performance of a contract has been deemed, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner’s hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

(4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner’s own use or to any use inconsistent with the trust until the contractor is paid all amounts related to any of the purposes enumerated in Section 6 owed to the contractor by the owner.

44B (1) All amounts

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of any of the purposes enumerated in Section 6 constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to any of the purposes enumerated in Section 6 who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor’s or subcontractor’s own use or to any

use inconsistent with the trust until all subcontractors and other persons who supply services or materials to any of the purposes enumerated in Section 6 are paid all amounts related to any of the purposes enumerated in Section 6 owed to them by the contractor or subcontractor.

44C (1) Where the owner's interest in a premises is sold by the owner, an amount equal to

(a) the value of the consideration received by the owner as a result of the sale,

less

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor.

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to any of the purposes enumerated in Section 6.

44D Subject to Section 13, every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to any of the purposes enumerated in Section 6 discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee.

44E (1) A trustee who pays in whole or in part for the supply of services or materials to any of the purposes enumerated in Section 6 out of money that is not subject to a trust under this Act may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust.

(2) Where a trustee pays in whole or in part for the supply of services or materials to any of the purposes enumerated in Section 6 out of money that is loaned to the trustee, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust.

44F A trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to any of the purposes enumerated in Section 6, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to any of the purposes enumerated in Section 6.

44G (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Act,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Act, those persons are jointly and severally liable.

(4) A person who is found liable, or who has admitted liability, for a particular breach of trust under this Act is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances.

21 (1) Section 7 applies to money retained pursuant to Section 13 of Chapter 277 of the Revised Statutes, 1989, the *Mechanics' Lien Act*, for the value of work, services or materials done, placed or furnished on or after the coming into force of Section 7.

(2) Section 9 applies to a lien pursuant to Section 24 of Chapter 277 with respect to an event referred to in Section 24 that occurred on or after the coming into force of Section 9.

22 This Act comes into force on such day as the Governor in Council orders and declares by proclamation.
