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Book Review: Mechanics' Liens in Canada, by Maclem and Bristow

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Mechanics' Liens in Canada. By MACKLEM AND BRISTOW. TORONTO: THE CARSWELL CO. LTD., 1962, pp. 476.

Since the first Mechanics' Lien Act in Canada, was passed in Ontario in 1873, Mechanics' Lien Law has been steadily progressing and expanding across the land. The Mechanics' Lien Act was first introduced to expand credit in the growing building industry, while at the same time providing security and protection for the building supplier, the mortgagee and others, who would be vitally concerned with the building project under way.

This new book on Mechanics' Liens in Canada—by Messrs. Macklem and Bristow brings all the law on the subject right up to date. Both of the authors, David I. Bristow and Douglas N. Macklem are young men, who in preparing this text in the year 1962, have brought to their task, not only the talent of knowing their law on the subject, but they have had the advantage of wide experience in the Courts on the subject.

For instance, the full impact of the "trust fund" section in the Mechanics' Lien Act was never fully comprehended until about 1955. That section is Section 3, in the B.C. Act[1] and in the Ontario Act.[2] The case of *Minneapolis-Honeywell Regulator Co. Ltd. v. Irvine and Reeves Ltd. and Empire Brass*[3] was fought right to the Supreme Court of Canada—and it was finally established—that the supplier or other claimant does not require to be a lienholder to participate in any such "trust fund"—and further that "this Trust section is a separate and distinct remedy from the Mechanics' Lien, and is asserted, not against the owner—but against the Contract price in the hands of the Contractor who is primarily liable for the claim".

This case was followed by a series of important cases in Ontario —commencing with In *Re Davidson Co.*[4]—where upon the bankruptcy of the contractor company, there remained a large hold-back in the hands of the owner, a School Board, and although some lien claimants failed to prove their liens, they were permitted to share pari passu, on the balance of the statutory fund—after the lien holders, since they had done work and supplied material to the job and were entitled to protection under the section upon the fund.

Following this there has been a series of cases directed against the bank in each case (the banker for the building contractor): *Fonthill Lumber v. Bank of Montreal*[5] and *Troup v. Royal Bank*[6] where Porter, C.J.O.—stated the principal as follows:

> "The test to be applied is whether the bank manager knew that the customer was committing a breach of trust and he knowingly partici-

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1 R.S.B.C. 1960, c. 238.
2 R.S.O. 1960, c. 233.
3 [1954] 1 D.L.R. 678 (B.C.S.C.); [1954] 4 D.L.R. 800 (B.C.C.A.); [1955] S.C.R. 694.
4 [1957] O.W.N. 223.
5 [1959] O.R. 451.
6 [1961] O.R. 455.

> pated therein. In my view it has not been clearly demonstrated on the evidence that to the knowledge of the bank manager there were unpaid accounts of workmen and for supplies or that they would not be paid. The evidence in this case is clear that at all material times he did not know and therefore could not have participated in any breach of trust. I think that the effect would be the same even if the bank manager had been aware of the provisions of The Mechanics' Lien Act."[7]

The appeal on this Judgment was dismissed by the Supreme Court of Canada in June 1962.[8]

It has been settled law under all the Acts for many years, that rental equipment used on the job—by a contractor or sub-contractor, could not be the subject of a mechanics' lien, because it was not supplied "to be used". But the law now appears to be progressing somewhat again, and on p. 189 of the text the authors note that in *In Re Arthur J. Lennox Contractors Ltd.* (No. 1)—"Smily, J. expressed the opinion:

> ". . . that persons whose claims are for the rental of equipment are not beneficiaries of the trust fund since the protection given by the Act is only for work done and materials supplied."[9] He did say, however, that if the claim for work done by the workman, who had been supplied with the equipment and had worked on the job in connection with it, could be separated from the claim of the lessor for the actual rental of the equipment it would seem reasonable to allow such a claim as one for work done within the meaning of the Act."

Finally the decision of the Supreme Court of Canada (22nd January 1963) setting aside the judgment in *Ace Lumber Ltd. v. Clarkson*[10] seems to have stifled the matter—in that, it was held that the supply of retaining equipment for poured concrete on a rental basis did not give a lien to the supplier as a "person who performs a service" within the meaning of the Act. The learned authors have covered this phase of the law, fully in their text.

There had been many instances in building contract law, where owners, architects and others have been overzealous in retaining the quantum of the statutory holdback under the Act. In the Ontario Act it is Section 11, and it provides in effect that the owner or person primarily liable must hold back at all times 15% or 20% of the value of the work done, or material supplied based on the contract price etc. In all building contracts the provisions of the Mechanics' Lien Act, are sacrosanct and govern. It is not 15% or 20% of each payment under the contract that must be held back—it is as Chief Justice McRuer decided in *Dziewa v. Haviland*[11]—"15% or 20% of the value of the work done or material supplied at the date of such payment based on the contract price". This summation of the law is clearly expressed by the learned authors in their text.

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[7] *Ibid.*, at p. 461.
[8] (1962) 34 D.L.R. (2d) 556.
[9] 38 C.B.R. 97, but see *In Northcoast Forest Products Ltd. v. Eakins Construction Ltd.* (1960) 26 D.L.R. (2d) 251.
[10] [1962] O.R. 748.
[11] [1960] O.W.N. 343.

The status of the mortgagee in competition with Mechanics' Liens cannot be too strongly called attention to, as the authors do in their book. Fundamentally there are only two kinds of mortgages under the act:—"The prior mortgage within the meaning of the Act";[12] and the "subsequent mortgage within the meaning of the Act."[13]

"The prior mortgage within the meaning of the Act", gets its protection, to the extent of the actual value of the land and premises at the time the first lien arose. Since it existed in fact before the first lien arose—that is—the first work was done—it cannot be improved out of the security that it then had, but has security only, of course, to the extent of the actual value of the land and building at that time. *Cook v. Belshaw*[14] and *Cook v. Koldoffsky*,[15] are the fundamental cases to know. But see pages 108 to 111 of the Macklem and Bristow text.

"The subsequent mortgagee within the meaning of the act"[16] is a mortgage which only arises after the first lien arises—and all advances on such mortgage made, without any lien being registered, and without written notice of any lien get full protection as against liens under the Act. The rights and liabilities of the subsequent mortgagee are clearly and succinctly dealt with by the authors on page 114 of the Text.

As to the status of a bonus in "a subsequent mortgage within the meaning of the act", attention should be given to *Ontario Hardwood Flooring Co. v. Dowbenko*.[17] As to a bonus "in a prior mortgage within the meaning of the Act" the fundamental case to which reference should be had is *Gooding v. Crocker*.[18]

The Ontario Act[19] exempts from liens claims, public streets or highways or any work or improvements done or caused to be done by a municipal corporation thereon. This section has been the cause of much futile litigation, and almost downright fraud particularly where sewer sub-contractors and sewer supply houses have done work and supplied material to impecunious general contractors who have taken the job too cheaply or where the contract moneys have been pocketed. There is little or no relief and the practitioner will be well advised to consider carefully Section 17 of the text—"Roads and Streets".

I repeat what has been said by many Judges that too much time is taken up, with evidence on almost routine matters, which could be abridged, to the advantages of all parties, by the use of

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12 R.S.O. 1960, c. 233, s. 7(3).
13 R.S.O. 1960, c. 233, s. 13(1).
14 (1892-93) 23 O.R. 545.
15 (1915-16), 35 O.L.R. 555.
16 *Supra*, footnote 13.
17 [1957] O.W.N. 177.
18 (1926-27), 60 O.L.R. 60; (1926-27), 31 O.W.N. 327.
19 *Supra*, footnote 13, s. 2.

experts by the Court—as under Section 47(3)[20] of the Act. I commend to the practitioner Section 118 of the text "Expert Witnesses".

All in all I have found this text, to be a competent, complete and up to the minute exposition of Mechanics' Liens Law in Canada.

I have read the text carefully, since over the years I have kept up faithfully will all recorded decisions and there is nothing missing. I would not think that any practitioner could possibly practise in the field of Mechanics' Liens without a copy of this text in his library.

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