

Date: 20150413
Docket: 13/14
Citation: *Brook Construction (2007) Inc. v. Blackwood
Contractors Limited*, 2015 NLCA 18

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

BROOK CONSTRUCTION (2007) INC. APPELLANT

AND:

BLACKWOOD CONTRACTORS
LIMITED FIRST RESPONDENT

AND:

EMCO CORPORATION SECOND RESPONDENT

AND:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR INTERVENOR

Coram: Green C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G5961

Appeal Heard: February 5 and 24, 2014
Judgment Rendered: April 13, 2015

Reasons for Judgment by Green C.J.N.L.
Concurred in by White J.A.
Dissenting Reasons by Welsh J.A.

Counsel for Appellant: Adam J. Crocker
Counsel for First Respondent: Paul D. Dicks Q.C.
Counsel for Second Respondent: William S. Kennedy
Counsel for Intervenor: Peter E. Ralph Q.C.

Green C.J.N.L.:

[1] This appeal challenges a decision of an applications judge who refused to vacate a mechanics' lien claim on the grounds that the lien claim was made against Crown land, which, it was alleged, is not lienable, and that the lien claimant failed to commence an action against the owner of the property.

Leave to Appeal

[2] As the order made in the Trial Division did not resolve the substantive issues between the parties, it is to be characterized as an interlocutory decision (see *United Food and Commercial Workers, Local 1252 Fishermen's Union v. Cashin* (1994), 124 Nfld. & P.E.I.R. 201 (Nfld. C.A.) at paragraph 30; *Newfoundland Government Fund Ltd. v. Hickman*, 2008 NLCA 56, 287 Nfld. & P.E.I.R. 7 at paragraphs 7-8). It therefore requires leave to appeal pursuant to rule 57.02(1)(a) of the *Rules of the Supreme Court, 1986*.

[3] The fact that there is a separate provision relating to appeals contained in the *Mechanics' Lien Act*, RSNL 1990, c. M-3, section 40 relating to mechanics' lien matters does not change this: *Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32.

[4] In this case, the issues raised and the arguments presented are novel. This Court's discussion of them may clarify the scope and operation of the *Mechanics' Lien Act* and may provide guidance for future cases. Accordingly, I would grant leave to appeal on the basis of the application of rule 57.02(4)(c) as the appeal "involves matters of such importance that leave to appeal should be granted." Additionally, rule 57.02(4)(a) is also applicable, as there is a decision of this Court, *Kitchen Cabinets Ltd. v.*

Pinsent Construction Co. Ltd. and Harmon Corp. (1974), 6 Nfld. & P.E.I.R. 426 (NFSC, On Appeal), which is arguably conflicting with the decision of the applications judge.

Background

[5] The applicant in the court below and the appellant in this appeal, Brook Construction (2007) Inc., allegedly contracted with the Crown to construct a new school in St. Anthony. Brook subcontracted the supply and installation of heating, plumbing and ventilation work to Blackwood Contractors Limited. Blackwood further subcontracted a portion of the supply of materials to EMCO Corporation.

[6] Blackwood ceased work on the project and on November 2, 2012 registered a claim for lien in the amount of \$604,513.84, describing the land on which the work was done as Crown land. EMCO followed suit with a lien claim of \$104,172.66.

[7] Blackwood's lien claim also purported to claim a charge against funds held back under the main contract (the "holdback funds") even though there is no provision in the *Mechanics' Lien Act* for registration of a claim to a holdback.

[8] On November 26, 2012, Blackwood filed a statement of claim in the Supreme Court against Brook alleging a breach of contract. It did not claim enforcement of the lien by sale of the property on which the school was being constructed. Furthermore, it did not name the Crown as a party to the proceeding. It did, however, assert that it brought the action "to enforce the lien as provided for in the *Mechanics' Lien Act*..." without specifying its nature, but in its claim for relief it simply asked that "proper directions be given, inquiries made and accounts taken" and that judgment be entered in the amount of the contract claim plus interest, consequential damages and costs. There was no specific claim to, or for a share of, the holdback funds.

[9] Brook applied under section 26 of the *Mechanics' Lien Act* to vacate Blackwood's claim for lien on the grounds that (i) Blackwood failed to commence an action naming the Crown as the owner of the property; and (ii) one cannot, in any event, claim a lien against Crown land. Alternatively, Brook also offered to post security in the Court so as to obtain the vacating of the lien in that manner if its other grounds were not successful.

The Decision of the Applications Judge

[10] The applications judge refused to vacate the lien on the primary grounds asserted by Brook. Instead, she made an order that the lien be vacated upon Brook posting a bond with the Court for the amount of Blackwood's claim.

[11] In rejecting Brook's primary arguments, the applications judge concluded that even if Blackwood could not be said to be entitled to a lien against the property because of Crown immunity, there was a distinction recognized by the legislation between a lien against the property and a lien against the holdback. In her oral judgment, she concluded:

... I accept the Plaintiff's submission that the *Mechanics' Lien Act* contemplates not only a lien against land but also a lien against the holdback. The fact that a claimant may not be able to claim a lien against Crown lands does not prevent a claim for a lien against the holdback under the provisions of the *Mechanics' Lien Act*.

[12] It followed from this, she reasoned, that if a lien claimant had no right to claim a lien against the property because of Crown immunity, there was no obligation to name the Crown as a defendant in the resulting statement of claim. It further followed that the lien claimed by Blackwood could continue to exist as a claim against the holdback and therefore should not be vacated, because "an action can be taken under the *Mechanics' Lien Act* even where the work was undertaken on Crown lands." She relied on section 12(5) of the *Mechanics' Lien Act*:

The language of section 12(5) of our *Mechanics' Lien Act*, and specifically the reference to there being a charge upon the holdback, is even more so than a trust [which does not exist under the Newfoundland and Labrador legislation], the equivalent of a lien on monies. I agree that the charge against the holdback is separate and distinct from the charge against the land. Both are potential claims under the *Mechanics' Lien Act*, except that for actions against the Crown there is an issue as to whether there is a right to claim a lien against Crown lands.

As a result, the second ground set forth in the Applicant's application does not suffice so as to require the action be vacated. The Plaintiff has a legitimate *Mechanics' Lien Act* [claim] as it has the right to advance a claim under section 12(5) against the Applicant, that there exists a charge against the holdback.

Interventions

[13] EMCO had applied for and was granted intervenor status in Brook's application to vacate the lien in the Trial Division on the basis that EMCO's lien claim as a sub-sub-contractor might be affected if Blackwood lost its lien. (EMCO had not filed a certificate of action as required by the *Act* and accordingly had to shelter under Blackwood's claim if it were to succeed in its own claim). In this Court, EMCO, having been served with the notice of appeal, appeared and was made a party to the appeal.

[14] Although it did not participate substantively in the original application in the Trial Division, the Crown in right of the province applied for and was granted leave to intervene in the appeal.

Issues

[15] The essence of Brook's argument on appeal is that the applications judge erred in law in not vacating the lien on the basis that Blackwood had no lien right because the work was performed on Crown land, which is not lienable. In deciding that Blackwood was capable of maintaining a lien claim because it held a lien against the holdback, the judge effectively created a new right – a trust of the holdback monies – that was not recognized in the *Mechanics' Lien Act*. Accordingly, Brook argues, the judge should not have made it a condition of vacating the lien that Brook deposit a lien bond with the Court.

[16] In response, Blackwood argues that when the relevant provisions of the *Mechanics' Lien Act* are read in harmony with the *Interpretation Act*, RSNL 1990, c. I-19, and the *Proceedings Against the Crown Act*, RSNL 1990, c. P-26, the judge was right in concluding that the holdback is subject to a lien separate and apart from any lien against the land. Blackwood argues that it is entitled to maintain that claim and to sue for its enforcement notwithstanding that it is not seeking to enforce the lien against the land and that it is not suing the Crown with respect to that enforcement.

[17] Having considered the matter, I have concluded that Blackwood's argument, though creative, is not sustainable and that the applications judge did err in law in refusing to vacate the lien. My reasons follow.

Considerations

(a) Nature and Extent of the Holdback Provisions

[18] Section 12 of the *Mechanics' Lien Act* provides in pertinent part:

12(1) In all cases, the person primarily liable upon a contract under and by virtue of which a lien may arise shall, as the work is done or the materials are provided under the contract, retain for a period of 30 days after the completion or abandonment of the work done or to be done under the contract 10% of the value of the work and materials actually done, placed or provided, as referred to in section 6 ...

...

(5) Where there is a lien under section 6, the lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the money required to be retained are respectively payable and where there is no lien on the land by virtue of section 5, a claim for work done or materials placed or furnished is a charge upon the amount directed to be retained by this section.

(Emphasis added.)

[19] The holdback required to be maintained by section 12 enables claimants who are not parties to the main contract (and hence with no claim under that contract because of lack of privity) nevertheless to maintain their claims (to the extent of the amount in the holdback fund) as beneficiaries of the holdback fund by creating a lien in their favour on the fund. Without the imposition of subsection (5), the subcontractor would be treated as a third party beneficiary under the main contract with limited rights to access the holdback.

[20] It is clear from section 12 that the statutory holdback is only required to be maintained in respect of contracts “under and by virtue of which a lien may arise” and “[w]here there is a lien under section 6.” Section 6 is the provision that creates the statutory lien. Without its operation, there would be no claim on the land benefitted by the work. The right to the lien on the holdback is parasitic upon the existence of a lien on the benefitted land. The only exception to this requirement is in respect of work done on a public street, road or highway under section 5. In that circumstance, the land comprising the street, road or highway is not subject to a lien “[e]xcept for the purpose of section 12.” In other words, the land comprising the street,

road or highway is notionally made subject to a lien (without the right to claim for its enforcement against the land) but only so that the claimant can assert its lien against the holdback within subsection 12(5) as being a situation “[w]here there is a lien under section 6.” This is the only circumstance recognized by the *Act* where the lien on the holdback is not parasitic on the existence of a lien on the benefitted land.

[21] By contrast, the applications judge held, as quoted above, that “the charge against the holdback is separate and distinct from the charge against the land” and that “[t]he fact that a claimant may not be able to claim a lien against Crown lands does not prevent a claim for a lien against the holdback ...” In concluding that the lien against the holdback is a stand-alone remedy not parasitic upon a lien against the land, she erred in her interpretation of the *Act*.

[22] In coming to her conclusion, the applications judge relied on two New Brunswick trial decisions, *T.J.’s Electric Limited v. SAR Petroleum Inc.*, 2003 NBQB 461, 270 N.B.R. (2d) 317 and *Fowler Brothers Limited v. Morrison*, 2008 NBQB 64, 332 N.B.R. (2d) 386. In *T.J.’s Electric*, the liens claimed against the benefitted property were invalid because the land belonged to the federal Crown, which constitutionally could not be affected by provincial legislation; nevertheless the court held that the trust provisions of the New Brunswick mechanics’ lien legislation were “stand-alone” provisions which could be invoked and enforced even though there was no lien to be enforced against the land. The right to the lien on the trust monies was “completely independent” of the lien on the land (citing Macklem & Bristow, *Mechanics’ Liens in Canada*, 4th ed., (Carswell), section 1, page 2 and 3; and *Canadian Bank of Commerce v. T. McAvity & Sons Ltd.*, [1959] S.C.R. 478, per Rand J. at p. 483). Similar statements were made by Glennie J. in *obiter* in the *Fowler* decision at paragraphs 23-42.

[23] Unlike New Brunswick, Newfoundland and Labrador does not have trust provisions in its legislation. The New Brunswick trust provisions impress with a trust all sums received by a builder, contractor or sub-contractor under any contract in the construction pyramid for the benefit of those contractors, subcontractors, workers and materials suppliers who have worked on or supplied materials to the project. As such, it is a separate security for payment that exists independently of any lien security on the land of the owner. It is not made subject to the existence of a lien on the land as is the case in this province with respect to the lien on the holdback. It was precisely because of a perceived injustice caused by the parasitic nature of

the holdback-lien provisions that the trust amendments in New Brunswick and some other provinces, such as Ontario, were enacted (see the comments of Rand J. in *Canadian Bank of Commerce*, p. 482). In this province, the Newfoundland Law Reform Commission addressed this issue and, while concluding that “[t]he current Newfoundland statute contains no trust provisions,” recommended that the remedies of the lien against the land and the holdback “be reinforced by inclusion of trust provisions” along the lines of the Ontario legislation: Newfoundland Law Reform Commission, *Report on The Mechanics’ Lien Act: Certain Substantive Issues* (St. John’s, NL: NLRC-R3, 1990), Chapter 5 at pages 84-87). No such amending legislation was ever enacted.

[24] Accordingly, I conclude that the New Brunswick cases previously referred to have no application, and the applications judge erred in relying on them for the purposes of her analysis. It follows that she further erred in concluding on an interpretation of the *Mechanics’ Lien Act* that the lien on the holdback was a stand-alone remedy that was not dependent on the claimant being able to establish the existence of a lien on the benefitted land. Inasmuch as all parties – in particular, Blackwood – conceded that Blackwood could not claim a lien against the Crown’s property, the application judge’s errors undermine the basis for her decision to reject the primary arguments of Brook that Blackwood’s claim should be vacated on the grounds that Crown land is not lienable and that Blackwood failed to commence an action against the Crown.

[25] It is therefore necessary to consider these issues in detail and to address Blackwood’s submissions that the interplay between the *Mechanics’ Lien Act*, the *Interpretation Act* and the *Proceedings Against the Crown Act* nevertheless means that Blackwood can assert a claim against the holdback funds.

(b) Failure to Sue the Crown

[26] Following the registration of a lien claim, the claimant is required to commence an action, within a limited time, “to realize the claim”: *Act*, subsection 24(1). One cannot make a claim to “realize” a claim unless it is made against the person from whom relief can be obtained. Thus, if a lien is claimed against land, the claim must include the owner of the land as a party. If the claim is against a fund of money, the claim must include as a defendant the person in whose hands the money is being held.

[27] The ownership of the money is not the determining factor; it is the person who is in custody of or has control over the money, i.e. the person who is obligated to retain the holdback, that is key. Thus, Blackwood's argument that because Brook is due the contract money, including the 10% held back, the holdback is owned by Brook and not the Crown and that it is therefore sufficient to sue Brook, cannot succeed. The Crown is the body who, if the *Act* applies, is statutorily required to "retain" the holdback funds, and it is the Crown, as the body who has possession and control over the money by virtue of holding it back, that would have to be made subject to an order to release the money to Blackwood and not to Brook pursuant to the contract. This view is inferentially supported by subsection 22(5) of the *Mechanics' Lien Act* which sets out the persons to whom notice of a claim to the holdback under subsection 12(5) must be made where there is no lien on the land by virtue of section 5 (the streets, roads and highways exception): the owner, the municipality and "every person in whose hands sums are retained under section 12" (emphasis added). The reason why it is the retainer of the funds who must be given notice is because that is the actor who has control over the money and must be given the opportunity to honor the lien claim. In like manner, it is the same person who must be sued if litigation results.

[28] In its claim for lien, Blackwood claimed a lien against the benefitted land, which it claimed was Crown land. It also claimed a charge against the holdback funds. The holdback funds were monies held back by the Crown pursuant to the main contract with Brook. If they were not held back by the Crown and were instead paid to the payee (Brook) under the contract, they would no longer be holdback funds. Any money held back by Brook in relation to its contract with Blackwood for the benefit of subcontractors, workers or material men of Blackwood would be irrelevant to Blackwood as its claim is in contract against Brook (with whom it is in privity) directly for the total amount claimed, not just the holdback amount, as due and owing under the subcontract. On the other hand, even if the Crown is wrongfully retaining the money as holdback, the Crown in such circumstances is the party who must be subjected to an order for payment.

[29] Thus, even though Blackwood subsequently conceded that it has no lien claim against the land, it must continue to assert, as it does, that it has a claim to holdback money in the hands of the Crown. Either way, it must seek relief from the Crown. Accordingly, even on Blackwood's theory of the case, it must sue the Crown in order to maintain its claim.

[30] Failure to do so, in my view, is fatal to Blackwood's claim as a statement of claim asserting a claim or cause of action under the *Mechanics' Lien Act* against persons from whom the statutory remedies conferred by the Act are being sought. Of course, Blackwood may continue to proceed with its claim for breach of contract against Brook, as that is not dependent on the Act. See section 38 of the Act.

(c) Crown Immunity in the Mechanics' Lien Context

[31] Section 12 of the *Interpretation Act* provides that no provision in a statute binds or affects the Crown or the Crown's rights or prerogatives "unless it is expressly stated in it that the Crown is bound by it." The *Mechanics' Lien Act* does not contain any provision which either expressly or even by implication subjects the provincial Crown to its provisions. Many other provincial statutes do contain such a provision. It follows that none of the provisions of the *Mechanics' Lien Act* apply to the Crown. Without more, therefore, the estate or interest of the Crown could not be subjected to a lien and, as well, the Crown would not be subject to the holdback provisions.

[32] On the above analysis, the position that Crown land is not lienable has been accepted in the case law and by text writers and law reform agencies: *Halsbury's Laws of Canada – Construction*, 1st ed. (Markham, Ontario: LexisNexis, 2013), pages 294-296; David I. Bristow et. al., *Construction Builders' and Mechanics' Liens in Canada*, 7th ed., loose-leaf (Toronto: Carswell, 2005), p. 2-50; Newfoundland Law Reform Commission, *Report*, pp. 73-76. (As well, section 20 of the *Proceedings Against The Crown Act* – which provides that nothing in that Act authorizes proceedings in respect of a claim against Crown property or the seizure, attachment or sale of Crown property – while not dealing with mechanics' liens specifically, could also be said to confirm the non-lienability of Crown property.)

[33] This position of non-lienability of Crown property was essentially affirmed by Furlong C.J. in *Kitchen Cabinets Ltd. v. Pinsent Construction Co. Ltd. and Harmon Corp.* He stated:

[2] ... there is no provision in the Mechanics' Lien Act for its application to the Crown and that consequently by common law, as well as by The Interpretation Act ... Her Majesty is not affected in any way by the Act.

...

[6] ... the Harmon Corporation enjoys the same position as the Crown itself and that no act of the legislature unless it is expressly directed to apply to the Corporation affects its operations. Though I do not think it necessary for the determination of the question before us I am of the opinion that the vesting of the title to the land at Harmon in the Corporation as the agent for the Crown does not create an interest in land which is subject to the operation of the Mechanics' Lien Act.

(Emphasis added.)

See also to the same effect, *Eastern Home Products Ltd. v. Parsons Construction (St. John's) Ltd. Newfoundland and Labrador Housing Corp.* (1980), 112 D.L.R. (3d) 756 (NFSC, TD), paragraphs 15-19, where Goodridge J., relying on what is now section 12 of the *Interpretation Act*, cryptically observed:

[17] There is no provision in the *Mechanics' Lien Act* which expressly states that Her Majesty is bound thereby. Therefore, Her Majesty is not bound thereby.

[34] The Crown immunity rule also applies to other provisions of the *Mechanics' Lien Act*. Thus, the Crown, as the person primarily liable under a construction contract, would not be bound by the requirement under subsection 12(1) to hold back 10% of the value of the work and materials actually done, placed or provided for 30 days after completion or abandonment of the work. See Newfoundland Law Reform Commission, *Report*, pp.75-81; *Eastern Home Products Ltd.*, paragraph 21. While as a practical matter, the Crown may agree as a term of a construction contract to maintain a holdback, its obligation to do so would, under this analysis, arise out of the contract and not from the *Act* (*Eastern Home Products Ltd.*, paragraph 21) unless the Crown voluntarily submitted to the application of the *Act's* provisions: *Re Hillsboro Construction Ltd. (Bankrupt)* (1987), 64 Nfld. & P.E.I.R. 152 (PEISC, TD).

[35] The right of a third party lien claimant to assert a claim on the holdback in those circumstances would have to be made on a basis that does not involve invocation of the *Act*, such as, possibly, on the basis of the assertion and establishment of a constructive trust (*Re Hillsboro* and *Re Crown Construction Co.*, 1979 CarswellNfld 170 [SC], per Goodridge J. at paragraphs 108-113; affirmed on appeal without reference to this point: [1980] N.J. No. 48 (CA) [QL]). Neither the existence of a constructive trust nor a voluntary submission by the Crown to the application of the *Act* has been pleaded or otherwise asserted in this case.

[36] The point that the Crown is not bound by the holdback provisions of the *Act* is reinforced indirectly by the developments in the law in other jurisdictions. In Ontario, for example, the *Construction Lien Act* was amended specifically to provide, while reaffirming that a lien does not attach to Crown “premises,” that it nevertheless constitutes a charge against the holdback fund in the hands of the Crown, thereby assimilating the process involving liens against public streets, road and highways to Crown land generally: RSO 1990, c. C.30, section 16. The law in this province is in the same state as it existed in Ontario before the amendments there. The Newfoundland Law Reform Commission, in Chapter 4 of its *Report*, recognized this distinction and recommended that the *Act* be amended along the lines of the Ontario provisions to make what is now the present subsection 12(5) “applicable to the Crown generally” (p. 81). These recommended amendments were never enacted.

[37] It was also suggested that because the public streets, roads and highways exception under section 5 of the *Mechanics’ Lien Act* is not expressly limited to municipalities (as it is in the legislation of some other jurisdictions), it in principle applies to Crown-owned streets, roads and highways, thereby indicating an intention on the part of the legislature to subject Crown land to the *Act*. This argument cannot succeed because first, it assumes the point in issue. It contradicts the Crown immunity principle in section 12 of the *Interpretation Act*, which applies unless the Crown is expressly named; thus, regardless of whether Crown-owned streets, roads and highways are excluded or included by the wording of section 5, they would nevertheless be excluded by the Crown immunity principle. Secondly, even if the intent of section 5 was to apply to Crown-owned streets, roads and highways, the very fact that the legislature only dealt with such matters, and not Crown land generally, strongly suggests, applying the maxim *expressio unius est exclusio alterius*, the *Act* was not intended to apply to other types of Crown land.

[38] Accordingly, were it not for the argument that this position is affected by the *Proceedings Against the Crown Act*, the foregoing analysis would result in allowance of the appeal. The potential impact of that *Act* must now be considered.

(d) Potential Impact of the *Proceedings Against the Crown Act*

[39] The *Proceedings Against the Crown Act* (PAC Act) was enacted in 1973 and brought into force on May 1 of that year. As such, it ante-dates the

Mechanics' Lien Act and the *Interpretation Act*. As a subsequently-enacted statute, it enjoys the presumption that where two statutes are inconsistent, the latter can be said to have implicitly amended the former. This is confirmed by section 28. Furthermore, to the extent that conflicting legislative provisions can be read in harmony, the court should attempt to give both statutory provisions a compatible interpretation so as to avoid treating one statute as implicitly amended by another and so as to permit all provisions to operate without contradicting one another.

[40] The *PAC Act* substantially assimilated the Crown to that of other litigants in respect of certain proceedings alleging liability of the Crown. It removed the procedural impediments of being required to use the petition of right to sue the Crown (section 4), and it removed the immunity of the Crown from suit in tort (section 5). It also made certain other substantive legal and equitable rules, such as contribution and indemnity, and the obligation to pay interest on judgment debts applicable to the Crown (sections 6 and 22). Much of the rest of the *PAC Act* eliminated some differences in procedure affecting suits involving the Crown (sections 7-13 and 25) but preserved or imposed other differences (sections 17, 18, 19 and 27) and also substantially insulated the Crown from certain types of remedial orders that could be made against other litigants, such as injunctions (section 15), recovery of property (section 16) and execution against Crown property (sections 20 and 24).

[41] Section 14 is more general. It provides:

14 In proceedings against the Crown the rights of the parties are as nearly as possible the same as in an action between person and person, and the court

(a) may make an order, including an order as to costs, that it may make in proceedings between persons; and

(b) may otherwise give the relief that the case requires.

[42] It was suggested on this appeal that the effect of section 14 is to modify the operation of section 12 of the *Interpretation Act* and to subject the Crown to a lien on holdback funds under the *Mechanics' Lien Act*. It was further submitted that because the *PAC Act* was not considered by the Court in *Kitchen Cabinets Ltd.*, that case does not settle the question on this appeal.

[43] As a starting point, it must be said that these submissions are inconsistent with the implications of the current jurisprudence. In *Eastern Home Products Ltd.*, for example, it was held that the Crown “has no statutory obligation in respect of ... lien claimants and no statutory right to hold back funds for their benefit” (paragraph 21). Goodridge J. referred to the *PAC Act* and, while not discussing it in detail, certainly indicated he was alive to its potential relevance but declined to hold that it applied to make the holdback provisions applicable to the Crown.

[44] As well, in *Re Crown Construction Ltd.*, this Court upheld a decision of Goodridge J. denying claims by subcontractors to holdback funds in the hands of Memorial University, the project owner. Mifflin C.J.N. wrote:

... For essentially the reasons given by Goodridge, J. we agree with his finding that Memorial University has no estate or interest in the lands occupied by the Marine Sciences Laboratory within the meaning of the *Mechanics’ Lien Act* ... and we also agree with his finding that the funds withheld from the contractor were not impressed with a trust in favour of the sub-contractors.

[45] While there was no extensive discussion of the impact of the *PAC Act* in either *Eastern Home Products Ltd.* or *Re Crown Construction Ltd.*, the cases are still *sub silentio* authority for the proposition that there cannot be a charge on the holdback funds under the *Mechanics’ Lien Act* where there is no lien available on the land of the owner (except, of course, in the case of work performed on a public street, road or highway).

[46] The question to still be addressed is whether, on a careful analysis of the *PAC Act* in relation to the *Mechanics’ Lien Act*, it can be said that the *PAC Act* effectively modifies the law that has clearly been recognized in a plain reading of the holdback provisions of the *Mechanics’ Lien Act* and in the cases that have considered the issue.

[47] The *PAC Act* does not explicitly purport to amend the *Mechanics’ Lien Act* or the *Interpretation Act*. One would have thought that if the legislature had intended to make the Crown subject to the provisions of the *Mechanics’ Lien Act*, either for all purposes or with some restrictions, it would have expressly said so either by a general provision or by enacting specific amendments, such as what Ontario did with respect to trust provisions, and creating a charge on the holdback, as discussed above. In like manner, if the legislature intended that section 12 of the *Interpretation Act* was no longer to have general application such that the Crown could be

bound by statutes even though it is not expressly mentioned in the legislation, it could have passed an amendment to section 12 as a consequential provision in the *PAC Act*.

[48] Can it be said nevertheless that the language of the *PAC Act* implicitly amends them because there is an inconsistency with their provisions? I think not.

[49] In *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*, [1979] 1 S.C.R. 37 (hereinafter, *CIGOL*) it was held that the Saskatchewan equivalent of this province's *Interpretation Act*, section 12 must be read in light of section 17 of the Saskatchewan *Proceedings Against the Crown Act*, RSS 1965, c. 87, the equivalent of section 14 of our *PAC Act*, with the result that interest was payable on a judgment against the Crown in the same way as interest would be payable by a private litigant, notwithstanding that the statutory provision authorizing interest did not expressly state that it bound the Crown. To that extent, the proceedings against the Crown legislation can be said to modify previous legislation that, by virtue of the *Interpretation Act* considered alone, would not have bound the Crown and thereby subject the Crown to liability. The Court also expressed the view that section 17 of the Saskatchewan *Proceedings Against the Crown Act* was not necessarily limited to procedural rights.

[50] In *CIGOL*, a judgment interest statute which by its general language could apply to the Crown but for the presumption of Crown immunity was held nevertheless to apply as a result of the Saskatchewan equivalent of our section 14. The application was relatively straightforward in that case. "Proceedings" against the Crown had been started and judgment obtained. The *PAC* section specifically provided that in such proceedings the court could make an order in the same manner as it could between person and person. Hence, where interest was applicable to a judgment in "proceedings" between private persons, it was also applicable where one of the parties was the Crown.

[51] The situation in the current case does not fit this mould. First, what is being argued here is that the *PAC Act* makes statutory provisions in the *Mechanics' Lien Act* applicable to the Crown regardless of whether "proceedings" have been commenced or might ever be commenced. The respondent is saying that the holdback provisions apply to the Crown and regulate its relationship with others in the construction pyramid from the moment the Crown enters into a construction contract ("the person primarily

liable upon a contract” within the meaning of subsection 12(1)).
“Proceedings” may or may not ultimately result.

[52] Secondly, the argument also requires a conclusion that the *PAC Act* effectively amends the language of subsections 12(1) and (5) to remove the requirement that the holdback obligation is (except in the case of public streets, roads and highways) parasitic on the existence of a lien on the benefitted land (i.e. to excise from the subsections the words “under and by virtue of which a lien may arise” and “where there is a lien under section 6”, as they apply to the Crown). This would effectively accomplish something much more than merely making an existing provision applicable to the Crown.

[53] Thirdly, it would require a conclusion that, notwithstanding the language of the section 5 exception, it can now effectively be applied to Crown land that does not comprise a public street, road or highway. This also would effectively amount to a statutory amendment rather than a mere application of a provision to the Crown. That would involve a change to the scheme contemplated by the *Mechanics’ Lien Act*.

[54] Fourthly, if the *PAC Act* were to make the holdback provisions applicable to the Crown, it should in principle make all of the *Mechanics’ Lien Act* applicable; yet, everyone concedes that section 6 of the *Act* does not, by virtue of Crown immunity, operate to impose a lien on the Crown’s land.

[55] If the intent of the *PAC Act* was to make the Crown subject to all provisions on the statute books (except those specially exempted by section 3) in the same way a private citizen is, all that would have to be done would be to repeal section 12 of the *Interpretation Act*. It is far too much of a stretch to conclude that section 14 of the *PAC Act* was intended to achieve that result, no matter how complex, interrelated and self-contained particular statutory provisions may be.

[56] I conclude, therefore, that section 14 of the *PAC Act* on a true construction cannot be said to have incidentally made the statutory lien scheme of the *Mechanics’ Lien Act*, including the holdback provisions, applicable to the Crown.

[57] Counsel for Blackwood also submitted that subsection 24(2) of the *PAC Act* makes the holdback retained by the Crown subject to claims by Blackwood. Section 24 reads as follows:

(1) No enforcement proceeding, execution, attachment proceeding or similar process shall be issued against the Crown

(2) Notwithstanding subsection (1), a garnishment, attachment, or similar process that is otherwise lawful may issue against the Crown for the payment of money owing or accruing as remuneration payable by the Crown for goods or services.

...

Blackwood submits that subsection 24(2) qualifies section 12 of the *Interpretation Act* to allow the holdback provisions to bind the Crown. I see no merit in this suggestion.

[58] By its terms, subsection 24(2) only applies to a situation where Blackwood sued Brook to judgment and, in execution, sought to attach the money (i.e. the holdback) still owing by the Crown to Brook under the main contract. It is well-known that this provision was intended to make the wages of Crown employees subject to garnishment by a judgment creditor. While it by its terms could theoretically apply to situations other than civil service wage garnishment, it is not possible to extend it to render enforceable a statutory lien on a holdback in a legislative scheme like the *Mechanics' Lien Act*, which, by its terms (in particular subsections 12(1) and 12(5)), which make a charge on a holdback parasitic on the existence of a lien on the benefitted land) cannot apply to the Crown. The claim of a lien on holdback funds cannot be said on any reasonable interpretation to be a "garnishment, attachment or similar process" within subsection 24(2).

Conclusion and Disposition

[59] Accordingly, I reject the argument that the *PAC Act* in some manner qualifies the Crown immunity rule as it applies to the *Mechanics' Lien Act*. The appellant's arguments that the applications judge erred in her interpretation and application of the *Act* have merit.

[60] I would allow the appeal and make an order vacating Blackwood's claim for lien and order that the security posted by Brook, as ordered by the applications judge, be released and returned to Brook.

[61] At the hearing, counsel for Blackwood submitted that if the security were released at this point, Blackwood would be prejudiced. Clearly, Blackwood will now be in a less secure position than it was in with the bond in place. However, that is the inevitable result of my conclusion that the applications judge should have vacated the lien claim and not required the posting of a bond in the first place. Counsel did not elaborate on how any prejudice may have resulted to Blackwood in reliance on the existence of the security. I would, nevertheless, stay enforcement of my decision for a period of 90 days to enable Blackwood to take such other steps as it may consider possible and advisable, by way of amendment of pleadings or pre-judgment attachment or other proceedings, to ameliorate any prejudice resulting from having its security removed at this point rather than at the time of the original hearing.

[62] I would award costs on a party and party basis to Brook against Blackwood in this Court and in the court below. Emco and the Crown should bear their own costs.

J. D. Green C.J.N.L.

I Concur: _____

C. W. White J.A.

Dissenting Reasons by Welsh J.A.:

[63] This appeal involves a question of law regarding the Crown's immunity from the application of the *Mechanics' Lien Act*. A subcontractor submits that, while a lien could not be enforced as against the property of the Crown, this does not preclude access to holdback funds mandated by the *Act*.

[64] The issue arises from the applications judge's decision dismissing the main contractor's application to vacate the lien that was registered by the subcontractor. The contractor seeks leave to appeal and, if granted, appeals that decision.

Background

[65] Brook Construction (2007) Inc. was the main contractor for the construction of a school in St. Anthony, NL. On February 7, 2011, Brook entered into a subcontract with Blackwood Contractors Limited for the supply and installation of heating, plumbing and ventilation equipment and materials. Blackwood, in turn, entered into a subcontract with EMCO Corporation for the supply of plumbing materials.

[66] As of October 31, 2012, Blackwood ceased providing services under the subcontract and demanded payment of \$604,513.84, the amount claimed as owing from Brook. On November 2, 2012, Blackwood registered a claim for lien in that amount against the property on which the school was being built. The lien claim included a charge against funds that had been held back, as would be required under the *Mechanics' Lien Act*, RSNL 1990, c. M-3 (the "holdback funds"). On November 22, 2012, Blackwood filed a statement of claim alleging breach of contract by Brook.

[67] On February 7, 2013, Brook applied to have the lien vacated. On February 27, 2013, in an oral decision, the applications judge concluded that a charge against the holdback funds existed under the *Mechanics' Lien Act*:

... I agree that the charge against the holdback is separate and distinct from the charge against the land. Both are potential claims under the *Mechanics' Lien Act*, except that for actions against the Crown there is an issue as to whether there is a right to claim a lien against Crown lands.

The applications judge went on to order, upon the request and consent of the parties, that the lien be vacated upon Brook posting with the Court a satisfactory bond for the amount claimed by Blackwood.

[68] The claim of lien registered by Blackwood refers to the holdback funds as well as the property and work at issue:

1. Blackwood Contractors Limited, a body corporate incorporated under the laws of Newfoundland and Labrador, claims a Lien upon the Estate and interest of *Her Majesty the Queen in Right of Newfoundland and Labrador* in the under mentioned land, in respect of the following work, that is to say:

The provision of labour, equipment and materials for heating, plumbing and ventilation to construct a school at Elementary Road, in the Town of St. Anthony ... which was provided to and for the benefit of *Her Majesty the Queen in Right of Newfoundland and Labrador*.

...

9. In addition, this lien shall be a charge on holdback funds held with respect to the said land and premises pursuant to the provisions of the *Mechanics' Lien Act*.

[69] The operation of the *Act* where the property is Crown-owned engages issues relating to Crown immunity. In this case, ownership of the property, by the Crown or the School Board, and the effect of ownership by one or the other, have not been argued and determined. In the Trial Division, Blackwood took the position that a lien which could be enforced against the property was not necessary, but rather, as found by the applications judge, there was an independent charge against the holdback funds. On March 8, 2013, Brook applied for leave to appeal the applications judge's decision.

[70] During a preliminary application in this Court, Her Majesty the Queen in Right of Newfoundland and Labrador ("the Crown"), having not participated in the Trial Division proceeding, applied for and was granted leave to intervene in the appeal. In addition, in the Trial Division, EMCO participated as an intervenor. It was determined at the hearing in this Court, and so ordered, that EMCO should be a party to the proceeding.

Issues

[71] The first issue is whether leave to appeal should be granted. The issue raised by the appeal is whether a charge on holdback funds under the *Mechanics' Lien Act* applies in respect of work done on Crown property.

Analysis

Leave to Appeal

[72] This is an interlocutory appeal for which leave to appeal pursuant to rule 57.02 of the *Rules of the Supreme Court, 1986* is required (*Pennecon Energy Ltd. v. Metal World Inc.*, 2013 NLCA 67, 344 Nfld. & P.E.I.R. 32, at paragraphs 5 to 11). Factors to be considered in determining whether leave should be granted are set out in rule 57.02(4), the relevant provisions in this case being clauses (c) and (e):

(c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,

...

(e) the Court is of the view that the interests of justice require that leave be granted.

[73] Consideration of the issues raised in this appeal will provide guidance as to the operation and effect of the *Mechanics' Lien Act*, as well as relevant provisions of the *Interpretation Act*, RSNL 1990, c. I-19, and the *Proceedings Against the Crown Act*, RSNL 1990, c. P-26. Accordingly, I would grant leave to appeal.

The Appeal

Foundation for the Appeal

[74] The parties did not argue and the applications judge did not determine the question of whether Crown immunity applies in this case, depending on whether the property is owned by the School Board or the Crown, and, if by the Board, whether Crown immunity would be engaged. As a result, there is an absence of a factual foundation which ordinarily would be required.

[75] At the instance of the parties, that requirement was waived, and the Court agreed to proceed on the basis that Crown immunity would apply. Assessing whether Crown immunity may be claimed in the context of the *Mechanics' Lien Act* and the extent of such immunity is a question of law involving analysis of the *Interpretation Act* and the *Proceedings Against the Crown Act*, as well as the *Mechanics' Lien Act*. That analysis may be undertaken in the absence of a determination regarding the preliminary issue, though it would have been preferable to have had the foundation laid at the outset with a determination regarding the application of Crown immunity.

Crown Immunity - Relationship between the Interpretation Act and the Proceedings Against the Crown Act

[76] I begin with section 12 of the *Interpretation Act* which provides that the Crown is bound by legislation only where the statute so specifies:

No provision in an Act is binding on the Crown or affects the Crown or the Crown's rights or prerogatives unless it is expressly stated in it that the Crown is bound by it.

[77] This section must be interpreted in light of the *Proceedings Against the Crown Act* which deals with causes of action that may be brought against

the Crown. Section 3 specifies that the Act “does not affect and is subject to” certain enumerated statutes. Those statutes deal with the subjects of taxation, royalties, expropriation, Crown lands, minerals, income support, emergency services and workers’ compensation. Causes of action arising under those statutes would be governed by the relevant statute. The *Mechanics’ Lien Act* is not mentioned. There is, therefore, room for the possible application of the provisions of the *Proceedings Against the Crown Act*.

[78] Turning next to the *Mechanics’ Lien Act*, the analysis begins with Blackwood’s proposition that the Act has two components, a lien against real property and a charge against the holdback funds mandated by the Act. Regarding the former, with respect to Crown-owned property, section 16 of the *Proceedings Against the Crown Act* limits the court to granting declaratory relief:

In proceedings against the Crown in which the recovery of real or personal property is claimed, the court shall not make an order for its recovery or delivery, but instead may make an order declaring that the claimant is entitled as against the Crown to the property claimed or to the possession of it.

Section 20 also imposes limits regarding Crown-owned property:

Nothing in this Act authorizes proceedings in respect of a claim against the property of the Crown or the seizure, attachment, arrest, detention or sale of property of the Crown.

[79] With respect to the holdback funds’ component of the *Mechanics’ Lien Act*, section 24 of the *Proceedings Against the Crown Act* limits legal proceedings that may be taken against the Crown, with certain exceptions:

- (1) No enforcement proceeding, execution, attachment proceeding or similar process shall be issued against the Crown.
- (2) Notwithstanding subsection (1), a garnishment, attachment, or similar process that is otherwise lawful may issue against the Crown for the payment of money owing or accruing as remuneration payable by the Crown for goods or services.
- (3) Notwithstanding subsection (1), a garnishment order may issue against the Crown according to section 4 of the *Public Officials Garnishee Act*.

[80] Blackwood submits that the holdback funds would fall within the exception set out in subsection (2). It is not disputed that, in this case, the

Crown, while submitting that it is not bound by the *Mechanics' Lien Act*, in fact, held back funds which were subsequently paid out.

[81] There are many statutes, at least eighty, both historical and recent, that include a provision such as, "This Act binds the Crown". Such provisions are consistent with the requirement set out in section 12 of the *Interpretation Act*, which presumes that the Crown is not bound by legislation unless the statute so provides. It would have been a simple matter for the legislature to include a similar statement binding the Crown to the provisions of the *Mechanics' Lien Act*. This was not done. It is necessary, then, to consider whether, nonetheless, relying on other considerations, there is a basis for concluding that the Crown is bound by the *Mechanics' Lien Act*, including the requirement regarding holdback funds.

[82] It is a fundamental principle of statutory interpretation that conflict among statutes is to be avoided based on the presumption that the legislature did not intend to enact contradictory legislation. In the result, when there is uncertainty, statutory provisions will be interpreted in a manner that permits all to operate. This principle was referenced by Lamer C.J.C. in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015:

[61] ... There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones: P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991). ...

See also: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at page 38.

[83] Accordingly, in the case of section 12 of the *Interpretation Act* and the *Proceedings Against the Crown Act*, an interpretation, consistent with law, that allows both to operate harmoniously will be adopted.

[84] As noted above, section 3 of the *Proceedings Against the Crown Act* makes clear that the enumerated statutes have an overriding effect, displacing the operation of that *Act*. Similarly, there is clarity where the statute specifies that the Crown is bound. However, in circumstances where such clarity is not achieved, it is necessary to consider whether the bar to the application of a statute to the Crown, set out in section 12 of the *Interpretation Act*, may be qualified by the operation of the *Proceedings Against the Crown Act*.

[85] This issue is discussed in *Canadian Industrial Gas & Oil Ltd. v. The Government of Saskatchewan*, [1979] 1 S.C.R. 37. In that case, the Court determined that the *Proceedings Against the Crown Act* operated so as to impose an obligation on the Crown regardless of the absence of a provision in the relevant statute binding the Crown and in light of a provision using the same language as section 12 of the *Interpretation Act*. The question arose when the Court ordered that Canadian Industrial Gas & Oil was entitled to recover from the Crown monies it had paid pursuant to a mineral tax that was declared to be *ultra vires*. At issue was whether the Crown could be ordered to pay statutorily-mandated interest on the monies that had been collected under the tax.

[86] The Supreme Court of Canada answered that question in the affirmative. In reaching that conclusion, the provision of the *Interpretation Act* stating that the Crown is not bound by legislation unless the statute expressly so provides was read in conjunction with the *Proceedings Against the Crown Act*. Ritchie J., for the Court concluded, at page 39:

...

[Section 7 of the *Interpretation Act*, requiring that a statute must expressly state that the Crown is bound] must, however, be read in light of the following express provisions of s. 17(1) of the *Saskatchewan Proceedings Against the Crown Act*, R.S.S. 1965, c. 87, which read as follows:

17(1) Subject to this Act, in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person; and the court may:

(a) make any order, including an order as to costs, that it may make in proceedings between persons; and

(b) otherwise give such appropriate relief as the case may require.

The Saskatchewan *Queen's Bench Act* provided for the payment of interest. Ritchie J. concluded, at page 40:

As s. 17(1) of *The Proceedings Against the Crown Act* provides that where the Crown is a party to the proceedings its rights "are as nearly as possible the same as in a suit between person and person", it follows that it is incumbent upon the Court to require that the Crown make compensation by payment of interest on moneys improperly withheld from the respondent as any other party would be required to do.

[87] The same language as in section 17 is found in section 14 of the *Proceedings Against the Crown Act* in this Province. Prior to the 1979 decision of the Supreme Court of Canada in the *Canadian Industrial Gas & Oil* case, Furlong C.J.N., sitting as a single judge, discussed the *Mechanics' Lien Act* in *Kitchen Kabinets Ltd. v. Pinsent Construction Co. Ltd. and Harmon Corp.* (1974), 6 Nfld. & P.E.I.R. 426:

[4] It is undoubtedly true that Section 14 surrenders certain of the attributes of the Crown as to its liability in the Courts. This can only apply to "actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the corporation". The proceedings under *The Mechanics' Lien Act* are purely of a statutory nature and in effect confer a right to security upon any land upon which a workman has performed labour and is wholly incidental to the possession of an interest in land upon which the work is bestowed.

[5] ... The position of the [Harmon] Corporation is that for the convenience of management the land is vested in its name but in dealing with the land it operates wholly as an agent and not as an owner.

[6] I reached the conclusion then that the Harmon Corporation enjoys the same position as the Crown itself and that no act of the legislature unless it is expressly directed to apply to the Corporation affects its operations. Though I do not think it was necessary for the determination of the question before us I am of the opinion that the vesting of the title of the land at Harmon in the Corporation as the agent for the Crown does not create an interest in land which is subject to the operation of *The Mechanics' Lien Act*.

[88] The *Proceedings Against the Crown Act*, 1973, SN 1973, c. 59, came into force on May 1, 1973. Although the Act was in force at the time when *Kitchen Kabinets Ltd.* was heard in the Trial Division on April 3, 1974, the interaction between that statute, the *Interpretation Act* and the *Mechanics' Lien Act* was not analyzed on the appeal. Given this omission and the later consideration of the same legislative provision by the Supreme Court of Canada in the *Canadian Industrial Gas & Oil* case, I accept the latter as the correct statement of the law. In that case, the Court read the *Interpretation Act* and the *Proceedings Against the Crown Act* together to harmonize the legislation, effectively qualifying the express bar set out in the *Interpretation Act*.

[89] As applied in this case to the *Mechanics' Lien Act*, sections 16 and 20 of the *Proceedings Against the Crown Act* restrict the actions that may be taken in respect of Crown property. As noted above, section 16 provides that the court may not make an order for the recovery or delivery of property

by the Crown, though a declaratory order may be made. Section 20 states that nothing in the *Proceedings Against the Crown Act* “authorizes proceedings in respect of a claim against the property of the Crown or ... sale of property of the Crown”. The result is that the *Proceedings Against the Crown Act* would preclude interference with or the sale of Crown property under the *Mechanics’ Lien Act*. Such relief is, in fact, not sought by Blackwood.

Operation of the Mechanics’ Lien Act

[90] Rather, the question is whether the *Proceedings Against the Crown Act* qualifies section 12 of the *Interpretation Act* such that Blackwood may, relying on the *Mechanics’ Lien Act*, access holdback funds retained by the Crown. This question requires an assessment of the purpose and operation of the *Mechanics’ Lien Act*, including whether, in the absence of an enforcement option in respect of Crown property, the *Act* nonetheless may be engaged, with the limited enforcement option of a charge on the holdback funds.

[91] In *Pennecon Energy Ltd. v. Metal World Inc.*, *supra*, reference is made to one of the purposes of the *Mechanics’ Lien Act*:

[35] ... In *Northern Electric Company Limited v. The Manufacturers Life Insurance Company*, [1977] 2 S.C.R. 762, at page 773, Laskin C.J.C., for the majority, noted parenthetically that the object of mechanics’ lien legislation is “to offer protection to persons doing work or providing services or furnishing materials in respect of any building or improvement”. ...

[92] The holdback fund is intended to assist in that purpose by ensuring that funds will be available to at least partially satisfy liens that may arise. In Bristow, Glaholt, Reynolds & Wise, *Construction Builders’ and Mechanics’ Liens in Canada*, 7th edition (Toronto, ON: Carswell, 2009), the rationale underlying the retention of holdback funds is discussed, at pages 4-3 to 4-4:

Construction projects tend to be pyramidal in structure, with an owner at the apex and contractors, subcontractors, and those claiming under them in descending degree of privity of contract forming the base of the pyramid. ...

Using the Newfoundland and Labrador *Mechanics’ Lien Act* as an example, section 12(1) provides that “the person primarily liable” under any type of contract under which liens may arise must, as the work progresses, retain for a period of 30 days after the completion or abandonment of such work, 10 per cent

of the value of the work, service, or materials actually done, placed, or furnished. Therefore, the holdback must be retained by the person primarily liable on each contract, whether that person is an owner, contractor, or subcontractor, for the benefit of those below that person on the pyramid.

[93] In this case, the Crown concedes that holdback funds were retained in a manner consistent with the requirements of the *Mechanics' Lien Act*. While counsel for the Crown submits that the holdback was the result of a contractual rather than a statutory obligation, the fact of the holdback is consistent with the public policy purpose underlying the *Mechanics' Lien Act*.

[94] In assessing whether the Crown has a statutory obligation regarding the holdback funds, two questions must be considered; that is, (1) what effect, if any, flows from section 24(2) of the *Proceedings Against the Crown Act*, and (2) does the charge against the holdback funds permit an enforcement option separate from enforcement by means of a charge against the lands?

[95] For convenience, I repeat the relevant parts of section 24 of the *Proceedings Against the Crown Act*:

(1) No enforcement proceeding, execution, attachment proceeding or similar process shall be issued against the Crown.

(2) Notwithstanding subsection (1), a garnishment, attachment, or similar process that is otherwise lawful may issue against the Crown for the payment of money owing or accruing as remuneration payable by the Crown for goods or services.

[96] The legislative intention is that this provision will apply generally to claims against the Crown, binding the Crown in any setting in which it arises. In this case the holdback funds constitute money owing or accruing as remuneration payable by the Crown for goods or services as referenced in subsection (2). As discussed in *Canadian Industrial Gas & Oil Ltd.*, section 12 of the *Interpretation Act*, specifying that a statute must expressly state that the Crown is bound, must be read subject to the operation of section 24(2) of the *Proceedings Against the Crown Act*. The holdback funds mandated by the *Mechanics' Lien Act* and intended for the payment of money owing by the Crown, would fall within the scope of section 24(2).

[97] This leads to the final question which is whether the *Mechanics' Lien Act* contemplates a charge on the holdback funds in the absence of a lien that

would be enforceable against the property. The relevant provisions of the *Act* are sections 6(1), 12(1), 12(5) and 5(1). The general right to register a lien is set out in section 6(1):

Unless a person signs an express agreement to the contrary, where he or she does work upon or in respect of, or places or provides materials to be used in, the making, construction, erecting, fitting, altering, improving or repairing of land, a building, structure or works or the appurtenances to that land, building, structure or works for an owner, contractor or subcontractor, that person has, by doing that work or placing or providing those materials, a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied or enjoyed, or upon or in respect of which the work is done, or upon which the materials are placed or provided to be used, limited, however, in amount to the sum due to the person entitled to the lien and to the sum owing, except as provided here, by the owner.

(Emphasis added.)

[98] Section 12(1) specifies the requirement for holdback funds:

In all cases, the person primarily liable upon a contract under and by virtue of which a lien may arise shall, as the work is done or the materials are provided under the contract, retain for a period of 30 days after the completion or abandonment of the work done or to be done under the contract 10% of the value of the work and materials actually done, placed or provided, as referred to in section 6, irrespective of whether the contract or subcontract provides for partial payment or payment on completion of the work, and the value shall be calculated, upon evidence given in that regard, on the basis of the contract price or, where there is no specific contract price, on the basis of the actual value of the work or materials.

(Emphasis added.)

[99] Section 12(5) of the *Act* provides for a charge upon the holdback funds:

Where there is a lien under section 6, the lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the money required to be retained are respectively payable and where there is no lien on the land by virtue of section 5, a claim for work done or materials placed or furnished is a charge upon the amount directed to be retained by this section.

(Emphasis added.)

[100] Section 5(1) of the *Act* provides for an exception to the attachment of a lien:

Except for the purpose of section 12, the lien given by subsection 6(1) does not attach to a public street, road or highway or to a work or improvement done on, in or to a public street, road or highway.

[101] I begin with section 5(1) of the *Mechanics' Lien Act* which specifies a particular circumstance involving Crown property, when a lien will not attach. It may be that this exception for public streets, roads and highways results from the difficulty in describing the property for purposes of attaching a lien to this type of work. I note that the provision applies to works undertaken by the Province, that is, the Crown, as well as those that may be undertaken by municipalities. If the provision was intended to be limited to the latter, specific language would have been used to achieve that purpose. (See, for example, *P.T. Construction Ltd., Re* (1995), 123 Nfld. & P.E.I.R. 300 (NLTD).)

[102] It is also noteworthy that the section 5(1) exception, while precluding a lien attaching to the property, nonetheless permits a charge upon the holdback funds. That is, work on public streets, roads and highways undertaken by the Provincial Crown would be subject to the section 12(5) charge upon the holdback funds. This exception has implications for the interpretation of the *Mechanics' Lien Act* in respect of other Crown-owned property.

[103] As discussed above, statutes will be interpreted so as to permit them to operate harmoniously. A second relevant principle of statutory interpretation is discussed in Sullivan, *Sullivan on the Construction of Statutes*, fifth edition (Markham, ON: LexisNexis, 2008), at page 244:

... As explained by Noel, J.A. in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, dealing with a series of express exceptions, “if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.”

[104] In this case, section 5(1) of the *Mechanics' Lien Act* deals with a specific exception for a particular type of work on Crown property; that is, the legislation provides for the situation when a lien against Crown property under section 6(1) is precluded, but a charge upon the holdback funds is permitted. If the Crown were not bound in any way by the *Mechanics' Lien*

Act, there would be no need for this exception. It follows, by inference, that a lien may attach in respect of works on Crown property other than roads and highways. However, the manner in which a lien may be enforced in respect of work done on Crown property is limited by the *Proceedings Against the Crown Act*.

[105] Applying sections 16 and 20 of the *Proceedings Against the Crown Act*, a lien under the *Mechanics' Lien Act* could not be enforced as against the property. Encumbering or sale of the property is not an option. To enforce the lien, it would be necessary to look to section 12(5) which provides that “[w]here there is a lien under section 6, the lien is a charge upon the amount directed to be retained by this section in favour of lien claimants”. The net effect is that the person having done work or provided materials in respect of erecting a building on Crown-owned lands has a lien for the price of the work and materials, but the sole enforcement process available under the *Mechanics' Lien Act* would be a charge upon the holdback funds. This interpretation allows the *Mechanics' Lien Act*, the *Proceedings Against the Crown Act* and the *Interpretation Act* to operate fully and harmoniously.

[106] In this case, Blackwood registered a claim for lien specifying the materials and work claimed, identifying the property where the work was done, and claiming that the lien is a charge upon the holdback funds with respect to the work on that property. Assuming that the work was undertaken on Crown property and that the lien was compliant with the provisions of the *Mechanics Lien Act*, Blackwood, while precluded from enforcing the lien by action affecting the property, would have a charge upon the holdback funds.

Summary

[107] I would grant leave to appeal. While it would have been preferable to have a proper factual foundation, the interpretation of the *Mechanics' Lien Act* in respect of work done on Crown property for purposes of this appeal is a question of law which it is appropriate to address here.

[108] Based on the interpretation of the *Mechanics' Lien Act*, the *Proceedings Against the Crown Act* and the *Interpretation Act*, a lien in respect of work done on Crown property, while not enforceable as against the property, is a charge upon the holdback funds mandated by the *Mechanics' Lien Act*.

[109] Accordingly, I would dismiss Brook's appeal. I would remit the matter to the Trial Division for adjudication on the facts. I would award costs on a party-and-party basis to Blackwood as against Brook. EMCO and the Crown should bear their own costs.

B. G. Welsh J.A.