



Marc L. Richard
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Dear Sir,

Regarding; Request for Comment on the Small Claim and Simplified Procedure Rules

I am writing on behalf of the Construction Law Subsection of the New Brunswick Branch of the Canadian Bar Association and have provided my comments below with respect to the simplified procedure (Rule 79) and the new small claim rule (Rule 80) in the context of the *Mechanics' Lien Act*. R.S.N.B. 1973 c. M-06

We refer you to Section 33 of the *Mechanics' Lien Act*, which provides:

“33. A lien may be enforced by action in the Court, according to the ordinary procedure of that Court, except where the same is varied by this Act.”

As a result of Section 33 and the Rules of Court, the most expeditious procedures, the small claim or simplified procedures, are not available for actions under the *Mechanics' Lien Act*.

Both the Rule 79 procedure and the draft Rule 80 procedure should be available to lien claimants where appropriate. Mechanics' lien actions were originally intended to be summary in nature and expeditiously tried.

Many lien actions are for the enforcement of a simple debt which do not have complex issues. For example, actions for the Section 15 holdback of 15% under the *Mechanics' Lien Act* are generally simple and should be conducted expeditiously. These are the type of claims that should be tried under a small claim rule as they typically involve small construction projects or residential homes.

For an example of this type of claim, I refer you to the recent decision of Mr. Justice Glennie in *Grasse v. Mazerolle*, 2009 N.B.Q.B. 325. In this case, a claim for approximately \$1,000.00 was tried under the ordinary Rules of Court procedures because a small claim process was not available but the claimant wanted the security of the lien.

An inherent problem with mechanics' lien actions being tried under Rules 79 and 80 is created by Section 38 of the *Mechanics' Lien Act* which deems an action brought by a lienholder or person



claiming a lien to be brought on behalf of all other lienholders on the land in question whose time to bring action has not expired. Therefore, the initial lien claimant may not know whether to file the action under the ordinary, simplified or small claim procedural Rules.

Similarly, the stacking of liens that results from multiple levels of contractors, sub-contractors and material suppliers, will often result in the total exceeding the prescribed amounts for actions where the actual amount in issue is less than the monetary limits contemplated for Rule 79 and 80.

As a result of the issue created by Section 38 of the *Mechanics' Lien Act*, it would be inappropriate to file lien actions pursuant to the small claim or simplified procedure. We are also aware that potential issues also exist with respect to the sale of the property and the timing of multiple lien actions. A Court would also have to maintain jurisdiction to move a matter to the ordinary procedure where appropriate. In exercising the discretion to move a matter into a simplified procedure or small claim, a Court should require evidence as to whether other lien claims may exist.

However, there will be cases for simple liens where Rule 79 and 80 may be appropriate. Rules 79 and 80 should be amended to specifically allow any party to apply on a motion to the Court to have a lien action proceed under Rule 79 or 80. The Rules, and perhaps the *Mechanics' Lien Act*, should be amended to give the Court jurisdiction to allow a lien action to proceed under Rule 79 and 80 when the parties agree or a Court finds these Rules will provide an appropriate procedure.

Yours very truly,

Matthew T. Hayes

Chair – Construction Law Subsection, New Brunswick Branch, Canadian Bar Association