

What We Heard: Consultations on the Mechanics' Lien Act

Digital Government and Service NL

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TABLE OF CONTENTS

INTRODUCTION.....	3
RESULTS.....	4
Online Questionnaire	4
Timelines for Registration of Liens	4
Prompt Payment Framework	4
Dispute Resolution	6
Modernizing Language.....	7
Other Comments.....	8
Written Submissions	8
Lien Processes and Timelines	9
Prompt Payment Framework	9
Dispute Resolution	9
Other Comments.....	9
CONCLUSION	10

INTRODUCTION

The **Mechanics' Lien Act** (the Act) came into effect on June 18, 1970.

The Act allows for the registration of a claim for a lien against real property for work done or to be done, or for materials placed or provided or to be placed or provided on a particular property. A lien prioritizes payments to builders, contractors and construction firms that build or repair structures. Liens also extend to suppliers of materials and subcontractors and cover building repairs. A lien may also be registered by workers employed on a project.

The Commercial Registrations Division in the Department of Digital Government and Service NL maintains a Registry of Mechanics' Liens.

The Act has not undergone significant amendments since it was originally enacted.

Several other provinces and territories have modernized their respective legislation in recent years. The Department began a review of the Act in 2023.

After an initial internal review, the Department identified several aspects to be updated within the Act to reflect current best business practices and to align with other jurisdictions.

This included:

- Timelines for registering liens;
- The need to establish a prompt payment framework;
- The need to establish a process for timely dispute resolution; and
- Modernizing the current language used in the Act.

The Department sought feedback from stakeholders in the construction, business and legal communities regarding changes to legislation.

Starting on May 3, 2024, through the engageNL portal, stakeholders were invited to complete an online questionnaire containing seventeen questions.

Written submissions were also accepted. The deadline for completion of the questionnaire and receipt of written submissions was June 7, 2024.

RESULTS

Online Questionnaire

EngageNL received 100 responses to the online questionnaire. As demographic data was not collected, it is not possible to determine if the responses are representative of any specific industry sectors or populations. The questions were grouped into the four main aspects of the Act that the Department was seeking stakeholder input on.

Timelines for Registration of Liens

The Mechanics' Lien Act currently requires a claim for a lien by a contractor and subcontractor to be registered within 30 days after the completion or abandonment of the contract or subcontract.

Questions 1, 2 and 3 focused on timeframes for registering a lien and to begin a legal action before the expiry of a lien.

Sixty-seven per cent of respondents agreed that the current timelines for registration of a claim for a lien and/or a certificate of action should be modified. When asked for elaboration on the timelines, 57 per cent recommended a 60-day timeline. The second highest supported timeline was eight per cent recommending a 45-day timeline.

Question 3 asked for feedback on the expiration timeline for a registered claim.

Seventy-eight per cent of respondents recommended a 90-day expiration period starting once a lien is registered which aligns with other jurisdictions.

The responses to these first three questions indicate a strong desire to revise the timelines for registering a claim for a lien.

It also indicates a strong desire to adopt longer timelines for registering a lien and for commencing legal action.

Prompt Payment Framework

Prompt payment legislation establishes a regime that manages the risk of non-payment through mandating specific timelines for payment by the owner and contractor, notices of non-payment, payment of undisputed amounts and requiring the contractor to initiate an

adjudication with respect to any disputed payments within a specified timeframe after giving a notice of non-payment to the subcontractor.

Question 4 asked respondents whether the Act should include a prompt payment framework. Ninety-two per cent of respondents responded yes.

Questions 5, 6 and 7 were directed at those respondents who said yes seeking further input on developing a prompt payment framework.

Key elements within a prompt payment framework are a definition of a proper invoice and the regular submission of invoices. Almost 93 per cent of respondents agreed with the definition of an invoice and the information contained, as was proposed in Question 5. Those that did not agree were concerned that the definition is too detailed which could disqualify an invoice with minor errors from qualifying for the lien process.

Questions 6 and 7 were designed to seek feedback on the maximum length of time for the various activities.

In response to Question 6, 54 per cent recommended 28 days after an invoice is received by the owner as the maximum time in which an owner must make payment to a contractor. Thirty-eight per cent recommended 45 days after services are completed or abandoned. Other respondents suggested alternative timelines ranging from 31 days to 60 days. Concerns were also expressed about disputed invoices and interfering with limitation periods for claims for payment through the courts.

In response to Question 7 about the maximum time in which a contractor must pay a subcontractor, approximately 54 per cent recommended seven days after the contractor receives payment from the owner, approximately 17 per cent recommended 35 days after the contractor receives payment from the owner and approximately 16 per cent recommended 45 days after services are completed or abandoned.

Other respondents suggested alternative timelines ranging from 14 days to 30 days after the contractor receives payment from the owner.

The responses to Questions 6 and 7 show a clear preference for shorter time periods.

Question 8 was related to the time for a subcontractor to pay a secondary subcontractor and received only two responses; one recommending seven days after the subcontractor

receives the payment from the contractor and one recommending 42 days after the invoice is received by the owner from the contractor.

Disputes over invoices received by an owner may arise that could affect the maximum time periods established for payments to contractors, subcontractors and secondary contractors and allows for deviations from those timelines in the event of a dispute, subject to appropriate notification of a disputed invoice to the applicable parties.

Questions 9, 10, and 11 were designed to seek feedback on notification periods.

Question 9 asked about the maximum time in which an owner must notify a contractor of non-payment due to a dispute for part or all an invoice. Forty-seven per cent recommended 14 days after an invoice is received by the owner and 42 per cent recommended 21 days after an invoice is received by the owner. Other respondents suggested alternative timelines ranging from suggested alternative time periods of seven, 31, 45 or 90 days and immediately.

Question 10 asked about the maximum time in which a contractor must notify a subcontractor of notice of non-payment from the owner. Approximately 48 per cent recommended seven days after the contractor receives notice from the owner and approximately 37 per cent recommended immediately after the contractor receives notice from the owner. Other respondents suggested 28 days and 45 days.

Question 11 asked about the maximum time period in which a subcontractor must notify a secondary subcontractor of notice of non-payment from the owner. Fifty per cent of respondents recommended seven days after the subcontractor receives notice and 40 per cent recommended immediately after the subcontractor receives notice. Other respondents suggested 35 days and 45 days.

While respondents were divided on the recommended non-payment notification timeline, respondents generally favoured shorter notification timelines.

Dispute Resolution

Disputes over amounts included on an invoice or about entitlements to payments may arise between contractors, subcontractors and secondary subcontractors.

Questions 12, 12A and 13 explored potential amendments that could improve dispute resolution. Seventy-five per cent of respondents agreed that the Act should provide for

established timelines for notifications of disputes between contractors and subcontractors or between subcontractors and secondary subcontractors like those as would be established for disputes initiated by owners. While respondents strongly agree that timelines should be established for notifications of disputes between contractors, subcontractors and secondary subcontractors, opinion on what those timelines should be are divided. Only 36 respondents provided input on suggested timelines with most supporting shorter timelines consistent with timelines recommended for the prompt payment framework. Approximately 33 per cent recommended notice period of seven days, 14 per cent recommended 14 days and 11 per cent recommended immediately. Approximately 22 per cent recommended the timeline that would be consistent with the time the owner has to notify the contractor.

Many Canadian jurisdictions have adopted a dispute resolution mechanism as an alternative to the court system. Question 13 sought feedback on whether Newfoundland and Labrador should include an alternate dispute resolution process as an option for disputes involving owners, contractors and subcontractors. Eighty-seven per cent of respondents favour an alternative dispute mechanism indicating strong support for incorporation within the Act.

Modernizing Language

Questions 14 to 16 explore some potential changes to the Act that could improve clarity and interpretation, particularly with respect the title of the Act.

Sixty-seven per cent of respondents recommended a change to the title. Only 31 per cent responded that the title is appropriate as is.

Several new titles were proposed with the most common recommendation being the Constructor's Lien and Prompt Payment Act. Over 46 per cent of respondents supported this new title.

The full list of title recommendations is in the table below.

The Constructors' Lien and Prompt Payment Act	46.38%
The Construction Remedies Act	18.84%
The Constructors Lien Act	10.14%
The Builders' Lien Act	5.80%
The Construction Lien Act	5.80%
The Contractors Remedies and Prompt Payment Act	2.90%
The Builders and Contractors Resolution Act	1.45%
The Mechanic and Construction Remedies Act	1.45%
The Contractors Lien and Payment Act	1.45%

The Goods and Services Lien Act	1.45%
The Mechanic's Lien Act	1.45%
Unsure	2.90%
Total	100.00%

Feedback was also sought about modifying the definition of Registry within the Act to clearly distinguish from the Registry of Deeds.

Sixty-five per cent of respondents agreed the definition should be changed, 19 per cent disagreed with changing the definition and 16 per cent were unsure.

Other Comments

Respondents were asked if they had any other comments or suggestions for changes to or operation of the Act.

Comments include:

- Liens should be automatic to any contract.
- Owners should be notified when a lien is placed against their property.
- There should be a process for removing a lien if technical requirements are not met.
- Liens should be searchable free-of-charge.
- Subcontractors should be able to file liens until final holdbacks are released.
- The process for release of holdbacks should be reviewed.
- Interlocutory third-party proceedings should be possible without consent of the court.
- Additional remedies should be available to contractors where a Substantial Completion Certificate is not able to be certified in court.
- Public bodies should adhere to the Act.
- The Crown should be subject to liens.
- Public works should be protected by surety bonds.
- Government should licence and/or regulate contractors.

Written Submissions

The Department received four more detailed written submissions from stakeholders.

These submissions strongly supported modernizing the Act, while advocating for specific changes, some of which were beyond the scope of the online questionnaire.

Many of the comments focused on the same themes identified by the Department, though a few additional topics were raised.

The comments are summarized below.

Lien Processes and Timelines

- The time limit for registering a lien should be extended to 60 days.
- A 90-day time limit should be considered for major resource development or legislated special projects.
- The expiration period for lien should begin after the lien is registered.
- The priority for wage and benefit claims should be maintained and extended to six or eight weeks of wages (currently it is 30 days).
- Lien processes should align with civil court procedures.

Prompt Payment Framework

Respondents all supported creating a prompt payment framework. The following specific suggestions were also made.

- A prompt payment framework should include a way of segregating undisputed work from disputed work, for which payment is delayed pending adjudication, so that undisputed work can be paid in a timely manner.
- A prompt payment framework should include flexibility to allow for different contractual models and methods of procurement and delivery.

Dispute Resolution

Respondents generally supported creating an alternate dispute resolution mechanism and raised several points for consideration in the design of this system.

- The Act should provide for the identification, training and certification of decision-makers.
- The process should facilitate work proceeding uninterrupted, on time and on budget, as much as possible.
- The process should settle disputes in a professional and timely manner.
- The process should be in addition to the existing recourse to the courts but should not replace it.
- Resolutions should be enforceable on an interim and final basis. One respondent suggested they should be binding and enforceable as a court order.
- The process should aim to promote cooperation and settle disputes based on peer judgement.

Other Comments

In addition to the main themes identified, respondents made the following suggestions.

- Unions and bargaining agents should explicitly be permitted to file liens on behalf of the employees they represent.
- This could be done by amending the definitions of person and/or worker to include a bargaining agent on the worker's behalf.
- Public works and the Crown should be subject to liens.
- Performance and payment surety bonds should be introduced and should be mandatory.

- Trust funds should be maintained.
- The Act should facilitate early release of holdbacks, provided security is in place.
- The rationale for separating large projects under the Act should be reviewed.
- The Act should treat property interests separately from prompt payment provisions.
- Notice requirements for substantial completion should be reviewed.
- The interests of all stakeholders should be balanced.

CONCLUSION

The results showed that respondents strongly desire the Act to be modernized in line with recent changes in other jurisdictions.

Respondents supported longer time periods for registering a lien, with 60 days as the preferred option.

Respondents were near-unanimous in supporting the creation of a prompt payment framework and indicated clear preferences for shorter maximum time periods for payments to contractors (28 days) and subcontractors (seven days).

Opinions on maximum time periods for notification of disputed invoices were somewhat mixed though the preference was generally for shorter timelines.

Stakeholders expressed a strong consensus for creating a dispute resolution mechanism as an alternative to the court system.

There was also support for updating language used within the Act to reflect its current usage and intent.

A variety of other issues with the liens process were raised for consideration as outlined above. The Department would like to thank all participants who took the time to provide input through this consultation process.

The information obtained through this process will be critical in continued analysis of potential amendments to the Act.