

Mechanics' Liens in the Mowat Era

Margaret E. McCallum*

In the past decade, legal history has moved beyond studies of cases, lawyers and judges to the consideration of law in its social, political and economic context. Drawing on accounts of the activities of organized labour, debates in the Ontario Legislature, articles in legal journals and decisions in court cases, this article examines the political and ideological importance of mechanics' lien legislation in Ontario from 1873 to 1896.

Mechanics' lien legislation provided a remedy not available at common law to unpaid construction workers and building supply dealers, by permitting them to register their claim as a lien on the real property to which they had contributed their labour or materials. The legislation, which was passed in response to a clearly articulated labour demand, was criticized as class legislation, largely because its short title obscured its importance for tradesmen as well as workers. Because the legislation interfered with rights acquired by contract or through the ownership of property, the courts viewed it with disfavour and interpreted it narrowly, making little effort to understand and implement the intent of the Legislature. The legislation survived, however, because it did not challenge central ideological constructs of the day.

Depuis une dizaine d'années, l'histoire judiciaire est passée de l'étude des procès, des avocats et des juges à celle de la loi dans son contexte social, politique et économique. A partir de comptes rendus des activités des syndicats ouvriers, de débats au Parlement ontarien, d'articles de revues juridiques, et des décisions prises dans les causes portant sur le privilège foncier des constructeurs et des fournisseurs de matériaux de construction, cet article se propose d'examiner l'importance de la dimension politique et idéologique de la loi sur ce privilège, en Ontario de 1873 à 1896.

Cette loi sur le privilège foncier des constructeurs et des fournisseurs de matériaux de construction apportait une solution non prévue dans le droit coutumier, à la non-rétribution des ouvriers et des fournisseurs concernés, en leur permettant d'enregistrer leur réclamation en tant que contribution foncière en termes de travail effectué ou de fourniture de matériaux. Elle répondait à une demande syndicale clairement formulée et fut critiquée comme étant une loi d'exception par rapport au droit coutumier, principalement parce que son titre abrégé masquait son importance pour les fournisseurs comme pour les ouvriers. Par ailleurs, étant donné qu'elle interférait avec les droits acquis par contrats ou par droit de propriété, les tribunaux la voyaient d'un mauvais œil et l'interprétaient de façon étroite, faisant peu pour la comprendre et la mettre en vigueur selon l'intention originelle du Parlement. Cependant, elle ne remettait pas en cause les conceptions idéologiques essentielles de l'époque; c'est pourquoi elle survécut.

For over a century, the dominant assumptions of enlightened American legal thought have been those of evolutionary functionalism. In legal history based on these assumptions, societies seem to develop naturally along an objectively determined evolutionary path. Movement along the path is progress, and leads to greater good for all; the legal system is functionally responsive to the needs of progress. The legal system, therefore, is not a human creation, the product of political choices made by its managers, but the product of a determined and beneficent social progress. In contrast, Marxist and other critics question the assumption of progress, and deny the existence of universal needs, emphasizing instead the conflicting desires of society's members, as expressed by interest groups or classes.

* Margaret E. McCallum is a post-doctoral fellow at York University.

Comparative and historical studies cast doubt on the functionalism of any particular legal response, demonstrating various legal responses to the same general needs, and law's remarkable resilience to change despite changes around it. The debate and criticism have forced conscientious legal historians to look beyond their box of distinctively legal materials and to consider the relationship of law to society. Law and society, however, are not separate categories, as in the outmoded base/superstructure metaphor. Rather, in E.P. Thompson's often quoted phrase, law is "imbricated" at "every bloody level," maintaining the existing social formation by inhibiting our ability even to conceptualize alternatives. From the perspective of the critics, law is not a neutral mechanism for determining the efficient allocation and development of a particular society's productive forces, but an arena in which contending social classes struggle for dominance.¹

Legislative reforms which give new rights to a subordinate class reflect both the strength of that class and the necessity for the state to maintain the illusion of law as a response to the needs of the whole society. To ensure its continuance, the governing party in a liberal democracy must secure the votes of the majority, and so must enact legislation with an eye to the next election. The extent to which a subordinate class can secure its demands for legislative reform, however, depends largely on the degree of fit between the legislation demanded and the dominant ideology.² The enactment of mechanics' lien legislation in the Mowat era in Ontario provides one example of the complex interweaving of law reform, ideology, and political opportunism.

Historians define the Mowat era as the period from 1872 to 1896 when Oliver Mowat was leader of the Ontario Reform (Liberal) party and premier of the province. In these years, the "triumphant march of industrial capitalism" transformed an essentially rural province to one with a diversified industrial economy. In 1871, eleven per cent of the province's population lived in municipalities of over five thousand; by 1891, twenty-three per cent. Large factories using steam-powered machinery and employing hundreds of workers had become, if not common-place, at least of common concern. Growing agrarian anxiety about the pace and direction of change contributed to the short-lived success of the Patrons of Industry, a farmers' political party which elected seventeen members in the Ontario election of 1894. The farmers turned to politics in despair of being properly represented by the two old parties, who seemed to be catering to urban interests in general and monopolists, professionals, and the railways in particular.³

Farmers were not alone in feeling that their world was changing in ways that threatened them. Frequent business failures confirmed the belief of merchants and industrialists that they operated in a hostile environment. After the financial panic of 1873 and the ensuing years of severe recession, the recovery in 1879-80 was more readily discernible

1. Robert W. Gordon, "Critical Legal Histories", *Stanford Law Review*, 36 (1984), pp. 57-125. In this comprehensive review of current writing in legal history, Gordon defines evolutionary functionalism and provides a field guide to nine critical variations and sub-variations. After discussing the shortcomings of the variations, he analyzes the elements of a more general critique. The quotation from Thompson is on p. 123. For a critique of the base-superstructure metaphor, see Hugh Collins, *Marxism and Law* (London 1982), pp. 19-20, 33-34 and 77-90.

2. Collins, *Marxism and Law*, pp. 47-52.

3. Quotation from Gregory S. Kealey, *Toronto Workers Respond to Industrial Capitalism 1867-1892* (Toronto 1980), p. 18; population figures from Census of Canada, 1891, v. 1, Table VII; Gregory S. Kealey and Bryan D. Palmer, *Dreaming of What Might Be: The Knights of Labor in Ontario, 1880-1900* (Cambridge 1982), pp. 28-36 and 54-55; S.E.D. Shortt, "Social Change and Political Crisis in Rural Ontario: The Patrons of Industry, 1889-1896" in *Oliver Mowat's Ontario*, Donald Swainson, ed. (Toronto 1972), pp. 211-35.

to historians than to contemporaries. To those suffering through it, the renewed recession of the mid-1880s seemed a continuation of the bad times that had plagued the country since shortly after Confederation. Railway building and protective tariffs were the federal Conservative's panacea; others hoped to manage the new industrial order through a variety of reforms including temperance, public secular education, a tax on land values to replace all other taxes, as advocated by Henry George, or municipal ownership of utilities.⁴ Businessmen sought reassurance in "the flight from competition," with organizations to promote tariff protection and gentlemen's agreements about prices and profit margins. Labour sought strength in organization, sending out new waves of anxiety. In their wake, and mindful of events in the United States, newspapers proclaimed the virtues of cooperation between labour and capital, businessmen made further gentlemen's agreements to fight strikes and boycotts, and governments sought ways to keep the peace. In this context, law could be a powerful tool for defining, asserting and protecting the rights of various social classes in a still fluid social formation.⁵

Mechanics' lien legislation threatened to reduce the rights of property owners and mortgage holders by granting rights to workers, suppliers and contractors in the construction industry. In concept, the mechanics' lien is quite simple: those who have contributed labour or materials to the construction or repair of a building may collect unpaid wages or bills by selling the land on which the building stands. The mechanics' lien is analogous to the lien available at common law to some one who made or repaired an article for some one else. Until he received payment, the artisan had a lien on the article for the amount owing. Possession was a necessary condition for claiming the lien; if the artisan lost possession of the article, he lost his lien. The common law lien could not be claimed against land or the buildings on it, however, because as between the claim of the owner to exclude others from his property and the claim of the artisan to remain in possession until he was paid, the law upheld the claim of the owner.⁶

The unpaid construction worker or building supply dealer therefore had to rely on a lawsuit against the property owner, with all the attendant disadvantages of litigation — expense, delay, loss of income while attending court, uncertainty of outcome, and costs and delays in collecting on a judgement. But for most construction workers and suppliers, the nature of their industry made a lawsuit impossible. Most people wanting some construction done on their property do not hire all the workers and purchase all the supplies themselves, but leave this in the hands of a person hired to look after the entire project. This person is called the contractor; it is he who purchases the materials and hires workers from the various building trades for specific aspects of the project. Often the contractor

4. Michael Bliss, "'Dyspepsia of the Mind': The Canadian Businessman and His Enemies, 1880-1914" in *Canadian Business History: Selected Studies, 1497-1971*, David S. Macmillan, ed. (Toronto 1972), pp. 175-91; W.T. Easterbrook and Hugh G.J. Aitken, *Canadian Economic History* (Toronto 1980), pp. 392-94; P.B. Waite, *Arduous Destiny: Canada 1874-1896* (Toronto 1978), pp. 74-77; Paul Rutherford, ed., *Saving the Canadian City: The First Phase 1880-1920* (Toronto 1974), pp. xi-xv; T. Phillips Thompson, *The Politics of Labor* (Toronto 1975), introduction by Jay Atherton, p. viii.

5. Michael Bliss, *A Living Profit: Studies in the Social History of Canadian Business, 1883-1911* (Toronto 1974), pp. 33-54; S.D. Clark, *The Canadian Manufacturers' Association* (Toronto 1939), pp. 5-7; John Battye, "The Nine Hour Pioneers: The Genesis of the Canadian Labour Movement", *Labour/Le Travailleur* 4 (1979), pp. 35-37 and 45-46; Kealey, *Toronto Workers*, pp. 91-92. For an analysis of class structure and changing inter-class alliances in Canada, see Paul Craven and Tom Traves, "Politics of the National Policy, 1872-1933", *Journal of Canadian Studies*, 14 (1979), pp. 14-38.

6. William Bernard Wallace, *Mechanics' Lien Laws in Canada* (Toronto 1905), pp. 1-2 and 32-39.

subcontracts all or part of the project, for example, the brickwork or the plumbing. The subcontractors in turn hire their own labourers and purchase their own materials. A typical construction project, then, usually involves tiers of contractual relationships, with the owner dealing only with the contractor.⁷

Consequently, most construction workers or building supply dealers could not sue the owner of the property to which they had contributed labour or materials because they had no contract with him. Their remedy was against the contractor or subcontractor who had hired them or who had purchased the materials, even though it was the owner who had benefited. Mechanics' lien legislation, therefore, had to overcome two common law barriers to a lien on real property: the doctrine that defined a lien claim as a claim based on possession, and the doctrine of privity of contract, which insulated the owner against claims from those with whom he had no direct dealings.

In contrast to the simplicity of the concept, mechanics' lien legislation is quite complicated. Ontario and Manitoba were the first jurisdictions in Canada to enact lien legislation, both in 1873. The precedents came from the American states and civil law jurisdictions, like Quebec, not from English common law. The Ontario Act was amended frequently, and in common with other nineteenth-century legislation, often rather carelessly, without sufficient consideration of the relationship of the amendments to existing statutory provisions. Table 1 provides a summary of the major provisions of the legislation in 1873 and 1896, when the Mowat government enacted a comprehensive revision and consolidation of the previous patchwork.⁸

In general, mechanics' lien legislation gave building trades workers, contractors and building supply dealers a claim against any real property which had been increased in value by their labour or materials. This claim could be registered against the title to the property with a minimum of expense and legal formality; once registered, it gave the unpaid worker, contractor or dealer some security for the debt, analogous to a mortgage. The lien claim was enforced by a lawsuit, but under special rules of procedure to simplify and expedite the action. In addition, mechanics' lien legislation often required the owner of the property to retain a specified percentage of the money owing to the contractor, in order to pay subcontractors, wage-earners or building supply dealers if the contractor defaulted on his obligation to do so. This money was called the holdback, and could be paid to the contractor on the expiration of a specified number of days from completion of the project, unless in the interim the owner was notified of the existence of lien claims. An owner who failed to retain the holdback was personally liable for the contractor's unpaid wages or material bills, up to the amount that should have been held back.

7. Kevin P. McGuinness, *Construction Lien Remedies in Ontario* (Toronto 1983), pp. 8-9 and 14-15.

8. Lawrence M. Friedman, *A History of American Law* (New York 1973), p. 214; Wallace, *Mechanics' Liens*, pp. 2-3; D.N. Macklem and D.I. Bristow, *Mechanics' Liens in Canada* (Toronto 1978), 1; Statutes of Manitoba 1873 c. 31. The Ontario mechanics' liens statutes of the Mowat era are: Statutes of Ontario 1873 ch. 27; 1874 ch. 20; Revised Statutes of Ontario 1877 ch. 120; S.O. 1878 ch. 17; 1882 ch. 15; 1884 ch. 18; R.S.O. 1887 ch. 126; S.O. 1890 ch. 37 and 38; 1893 ch. 24; 1895 ch. 13; 1896 ch. 35. In addition, Bill 134, introduced in the 1880 session by Alexander Morris, Conservative member for Toronto East, died in committee. There is unfortunately no trace of this bill in the Public Archives of Ontario. Morris was the former Chief Justice of the Court of Queen's Bench in Manitoba, and had practised law in Montreal with lawyers working in Quebec's Civil Code. R.C.B. Risk, "The Golden Age: The Law about the Market in Nineteenth-Century Ontario", *University of Toronto Law Journal*, 26 (1976), p. 332, concludes for a slightly earlier period that hurried and ill-considered legislation was characteristic.

Ontario's mechanics' lien bill was introduced by Adam Crooks, Provincial Treasurer, in January 1873. As Attorney-General, he had sponsored a similar bill in the previous session. Crooks maintained that the new bill had been improved after consideration of the statutes in force in the United States.⁹ Prior to the introduction of the bill, the Toronto Trades Assembly wrote to Crooks for a copy, in preparation for a mass labour meeting to discuss proposed provincial legislation. The TTA had been organized in 1871 as a central body to handle common concerns of the various unions in the city. Although the building trades had not participated in its formation, they quickly joined.¹⁰

At the mass meeting, held in Toronto on 12 February 1873, two unionists from Ottawa, D. Robinson, a stone-cutter, and D.J. O'Donoghue, a printer, moved a resolution asking for amendments to the mechanics' lien bill so that all classes of labourers could collect, in a summary manner, wages owing even for one day's work, something not possible with a fifty dollar minimum for a lien claim, and the exclusion from the bill of those not contracting directly with the owner. Both speakers complained that the bill as it stood was an insult to workingmen's intelligence, promising much but providing nothing. O'Donoghue, referring to the political importance of the workingman, called on the framer of the bill to prove that he sincerely intended to benefit mechanics by bringing them within its provisions. In that way, he could refute any charge that the bill was merely "bait to catch the electors." The proposed resolution passed unanimously; that some of the legislators had heeded the speeches was apparent the following week on third reading of Crooks' mechanics' lien bill.¹¹

M.C. Cameron, Liberal-Conservative leader of the Opposition, opened debate with an amendment providing for a five dollar instead of fifty dollar minimum for lien claims. In a stirring speech which revealed his ignorance of the contents of the bill, which did not apply to subcontractors or workers hired by the contractor, Mowat declared himself prepared to go to any length to prevent an employer from cheating an employee of his wages; if the bill would pass with no limit, all the better. So the limit was eliminated, and the lien bill passed third reading by a vote of sixty-one to ten. More Conservatives voted with the government than against it, and four Liberals joined the Opposition nays.¹²

Clare Pentland argued that the 1873 Mechanics' Lien Act was the government's reward to the TTA for muffling its opposition to the Canada Car Company's employment of inmates of the province's Central Prison. Although such a specific deal is unlikely, debate on mechanics' lien legislation provided both sides of the Legislature with opportunities to appeal for labour support.¹³ The bill that became law, however, was not really a mechanics'

9. PAO, "Newspaper Hansard", Debates of the Ontario Legislature, January 28, 1873. James P. Trow, member for South Perth, introduced a mechanics' lien bill in the 1868-69 session; 2,000 copies were printed, but the bill died in committee after second reading. See *Journals*, Ontario Legislature, November 13, and December 3 and 9, 1868; also PAO, RG 49 I-7-H, Original Bills 1868-69, #35.

10. Eugene Forsey, *Trade Unions in Canada, 1812-1902* (Toronto 1982), pp. 91-93 and 105.

11. Kealey, *Toronto Workers*, p. 140; *Toronto Globe*, February 13, 1873, p. 3, "Workingmen's Meeting". According to figures from the Third Annual Report of the Bureau of Industries, Ontario Sessional Papers 1885, #84, 33-41, fifty dollars was close to a month's wages in the building trades.

12. "Newspaper Hansard", February 18, 1873; *Journals*, February 18, 1873; information on party affiliation from *Canadian Parliamentary Guide*.

13. H. Clare Pentland, *Labour and Capital in Canada, 1650-1860* (Toronto 1981), p. 21. Kealey, *Toronto Workers*, p. 140, disputes this view, which Pentland can support only with circumstantial evidence. That Crooks introduced his first bill in the session before convict labour became an issue is circumstantial evidence on the other side. The motive for Crooks' bill was more likely Trow's earlier bill.

lien act, as it applied only to those who dealt directly with the property owner, and did not provide for a hold-back.

In the next session of the Legislature, labour could voice its demands directly through O'Donoghue, who had been elected as a workingman's candidate in a by-election in the formerly Conservative riding of Ottawa. He introduced a new Mechanics' Lien Act, extending the right to claim a lien to those who were not in privity of contract with the property owner. It passed after some minor amendments in committee. The TTA had informed the Legislature of its support for the bill; undoubtedly the government needed no reminding of the provincial election due the following year.¹⁴

Any mechanics' lien legislation which provides a remedy against a property owner to a person with whom the owner has no contract requires some resolution of the conflict between the worker's right to receive his wages and the owner's right to assume that, having paid the contractor, he will not have to pay anyone else. In the 1874 Act, this conflict was resolved in favour of the owner. There was no compulsory holdback, and payments made by the owner to the contractor, in good faith, before receipt of notice in writing of any claims, discharged the owner from liability to other lien claimants. Understandably, O'Donoghue's labour supporters were not satisfied with his Mechanics' Lien Act, which provoked considerable discussion at the 1875 convention of the Canadian Labour Union.

The CLU had been organized two years earlier on the initiative of the TTA. O'Donoghue was among the forty-four delegates from eight Ontario centres who attended the inaugural convention in Toronto in September 1873. At that meeting, the CLU appointed a Legislative Committee which called for a "just and equitable lien law." There was no specific discussion of the Act passed earlier in the year. In 1875, delegates were more precise in their demands: previous payments to contractors should not relieve the owner from claims for wages if the contractor defaulted. Suggestions for protection against dishonest or financially unstable contractors included compelling contractors to put up security deposits or owners to hold back a percentage of the contract price until all wages were paid, and permitting workers to place liens on the work in progress, so that owners would ensure that wage claims were paid before paying off the contractor. The latter provision had been included in the 1873 Act, but dropped in 1874.¹⁵

There were no amendments to report to the CLU at its next convention, even though in the intervening year, "influential deputations" from the executive of the CLU and the TTA had obtained a promise from Crooks that mechanics' liens would receive the attention of the government. The CLU delegates passed a resolution calling for amendments to the Mechanics' Lien Act to provide a worker with a prior claim on any building or enterprise to the extent that its value had been increased by his labour. A similar resolution was passed

14. There is no evidence as to the precedents O'Donoghue used for his bill, which read as a replacement rather than an amendment of the existing Act. *Journals*, November 26, and December 9, 17 and 18, 1874; "Newspaper Hansard", December 9, 1874; PAO, Original Bills 1878, #78.

15. L.E. Wismer, ed., *Proceedings of the Canadian Labor Union, 1873-1877* (Ottawa 1951), pp. 15-16, 27-28 and 46, 50; Forsey, *Trade Unions*, pp. 119-21. The keynote address of the first convention, given by J.W. Carter of the Toronto Painters, indicated the organization's focus on legislative reform: "...the working classes have determined to centralize their energies to promote the adoption of those laws and regulations which must be established for the good and protection of the laborer. You do not meet to create an agitation for supremacy or power, nor to create hostilities between capital and labor; but you do meet for the purpose of disseminating the true principles of unionism; to foster a spirit of common brotherhood throughout the Dominion; to seek the protection of those laws which shall make no distinction of man as man."

at the final CLU convention held in Toronto in 1877. In that year, the Mowat government produced the first Revised Statutes of Ontario, a consolidation of legislation enacted since Confederation. The revised Mechanics' Lien did not address any of the CLU demands, and reinstated the provision for contractual waiver of the right to a lien, the elimination of which had been O'Donoghue's main contribution in 1884.¹⁶

The holdback suggested by the CLU was finally enacted in 1878, after both O'Donoghue and William Robinson, Conservative member for Kingston, introduced private members' bills to amend the MLA. Both bills were sent to committee, and it was Robinson's which passed. It was a better bill than O'Donoghue's, as it required the owner to hold back ten per cent of the contract price for ten days after completion of the contract, in case the contractor failed to settle any outstanding claims for wages or materials. O'Donoghue's bill required the owner to hold back funds from the contractor only after being notified of a lien claim.¹⁷

The legislative session of 1878 was O'Donoghue's last as an M.P.P.. Re-elected in the provincial election of 1875 by fifty-two votes, he was soundly defeated in the election of 1879, coming third behind a Conservative and an Independent. Neither the TTA nor the CLU survived the end of the decade, but in 1881, Toronto labour established a new central body, the Trades and Labor Council. In 1882, the TTLC organized a mass meeting to pressure the government for an improved Mechanics' Lien Act. The meeting, held on 18 January, was chaired by Alfred Oakley. He was a stone-cutter, and active in the CLU, the TTLC and Liberal-Labour politics. He and other speakers, including O'Donoghue, detailed section by section the desired amendments. In explaining why the amendments were necessary, Oakley referred to frauds perpetrated against workers building new premises for the *Mail*, Toronto's Conservative daily. Partisan politics probably figured in his choice of that particular example. A unanimous petition from the meeting asking the Legislature to pass the amendments was presented to Mowat on 30 January.¹⁸

At the end of February, Mowat himself introduced a bill to amend the Mechanics' Lien Act; after slight changes in committee, it was given third reading on 9 March. The new Act implemented most of the amendments suggested by the TTLC, but none exactly as requested. Labour had asked that the fee for registering a lien be reduced from one dollar, the equivalent of a half-day's wage, to twenty cents; it was reduced to twenty-five. Instead of permitting a lien to be registered against the title of the owner although another person had actually contracted for the work, the amendment provided for the sole case of a husband contracting for work on land owned by his wife, the specific example cited at the labour meeting. The amendment did nothing, then, for claimants denied a lien because the work had been ordered by a tenant, or by the principal of a corporation when the land was registered in the corporation's name. The holdback period was increased to thirty days from ten, to correspond with the deadline for registering a lien, but the percentage to be retained was left at ten, instead of the thirty which labour had wanted. The general provision for contractual waiver of the protection of the Act remained, but agreements between the owner and contractor could not release the owner from liability for up to thirty days' wages, and

16. Wismer, *Proceedings*, pp. 64-65, 72 and 83.

17. PAO, Original Bills 1878, #69 and #77.

18. Roderick Lewis, *Centennial Edition of a History of the Electoral Districts, Legislatures and Ministries of the Province of Ontario, 1867-1968* (Toronto 1967); Forsey, *Trade Unions*, p. 407; Kealey, *Toronto Workers*, pp. 217-18 and 327; *Globe*, January 18, 1882, p. 10, "Mechanics' Lien Law"; January 31, 1882, p. 8, "Mechanics' Lien Law".

this lien was to be paid out of the holdback before payment was made on any other lien claims.¹⁹

As in 1873, agitation for mechanics' lien legislation preceded the formation of what purported to be a national trade union federation. The Canadian Labour Congress met once, in 1883, with delegates attending from Oshawa, Belleville, St. Catharines, Port Dalhousie and Toronto, where the meeting was held. In 1886, the organization reconstituted itself as the Trades and Labor Congress of Canada, one parent of today's Canadian Labour Congress. The mechanics' lien was discussed at TLC conventions in 1887, 1889-93 and 1896. The subject was also raised at meetings of the Ottawa and Toronto Trades and Labor Councils. All three organizations, and probably others, maintained intermittent pressure for reform of the lien law through meetings with members of the government, and in the case of the Ottawa Council, by demanding amendments at a mass meeting held prior to the provincial election of 1890.²⁰

The legal historian committed to a functionalist explanation of the relationship of law to economy and society views the mechanics' lien as a necessary inducement to contractors who without it would be reluctant to risk their capital in building projects. Hurst described the analogous woodsman's lien on cut timber as a solution to the problem of "bootstrap finance" in Wisconsin logging operations. Logging bosses often could not pay the winter's wages until the logs were driven to market in the spring thaw, so the Legislature gave woodsmen a lien on the logs as security for their wages. Unlike the common law lien, the log lien was not dependent on the woodsman retaining possession, because that would make sale of the logs, and payment of the wages, impossible. Similarly, Friedman described the mechanics' lien as a pro-labour statute that also helped the property owner, by giving him some collateral to offer those who increased the value of his land through their contribution of labour or building materials. Like Hurst, Friedman viewed statutory liens as instrumental to economic development.²¹

For Mowat and his contemporaries, the Mechanics' Lien Act was also a way to win votes from working men. We lack adequate figures on the extent of the working class franchise before 1888, when the Mowat government granted universal male suffrage in provincial elections, but we can surmise that the labour vote was considered to be significant from the amount of attention accorded labour issues. Certainly the Liberals hoped that the Mechanics' Lien Act would help to counteract any labour support that the federal Conservatives had garnered with the Trade Unions Act, 1872. Indeed, the Liberals' success in attracting working class voters without sacrificing their traditional rural base enabled them to remain in power in Ontario until after the turn of the century, when their inadequate response to the new issue of hydro-electric power permitted the Conservatives to secure an even more durable majority.²²

19. *Globe*, January 31, 1882, p. 8; *Journals*, February 28, March 7 and 9, 1882. Average weekly earnings for nine building trades in 1884 were \$11.98, according to figures collected in April and October in nineteen Ontario centres. See Ontario Sessional Papers 1885 #84, Third Annual Report of the Bureau of Industries, pp. 33-41.

20. *Proceedings of the Trades and Labor Congress of Canada 1883-98*, 1887, 51; 1889, 23; 1890, 29; 1891, 23; 1892, 27; 1893, 8; Forsey, *Trade Unions*, pp. 403-7.

21. J. Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, Mass. 1964), pp. 407-9, 479-80; Lawrence Friedman, *American Law*, pp. 214-5.

22. Donald Creighton, "George Brown, Sir John A. Macdonald and the 'Workingman'", *Canadian Historical Review*, 24 (1943), p. 376 observes that contemporaries commenting on the 1872 federal election

But to say that the Mowat government passed mechanics' lien legislation to get the labour vote only raises further questions. On their many pilgrimages to the Legislature, representatives of organized labour asked for much more than they received. Even the mechanics' lien was not all that labour wanted. Mowat's practice of "making two bites of a cherry," exemplified in the successive amendments to the Lien Act, met some but not all of labour's demands. Why, then, did the Mowat government provide for a mechanics' lien, but not for, say, the nine-hour day? And why was the Mechanics' Lien Act of 1873 expanded and improved while two other "pro-labour" statutes enacted in the same session, one to facilitate profit-sharing and the other to provide for the arbitration of labour disputes, languished in limbo except during election campaigns? Then they were featured along with the Mechanics' Lien Act in pamphlets entitled "The Progressive Labor Legislation of the Mowat Government" or "Ontario: The Record of the Mowat Government, 22 Years of Progressive Legislation and Honest Administration."²³

Part of the explanation lies in labour's success in articulating a clear demand for particular legislation and amendments when the government was likely to listen. In contrast, despite frequent discussion of arbitration legislation, labour could not decide what it preferred; therefore, the legislation it got was unsatisfactory and seldom used. Equally important, labour could appeal to a general sympathy for workmen and their families who had been defrauded by dishonest contractors. In making their demands, unionists were careful to point out that lien legislation would not hurt the responsible contractor: the same argument was made in the Legislature. In part, the mechanics' lien legislation was acceptable because it was directed against certain irresponsible individuals whom everyone could recognize as a threat to business stability and prosperity. In at least three of the years of the Mowat era, half of the net liabilities of failed businesses were owed by the building trades. The amounts involved ranged from \$179,000 to over \$1,200,000, certainly enough to cause repercussions all along a chain of credit.²⁴

considered it the first in which the industrial classes of Canada were the chief interest. Mark Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective", *Ottawa Law Review*, 16 (1984), pp. 291-96 outlines Macdonald's political motives for introducing the Trade Unions Act, and concludes that these were the predominant factor in its passage. A. Margaret Evans, "Oliver Mowat and Ontario, 1872-1896: A Study in Political Success", Ph.D. thesis (University of Toronto 1967), pp. 118-9, concludes that the labour vote won some ridings for the Liberals. For a federal focus, see Desmond Morton, "The Globe and the Labour Question: Ontario Liberalism in the 'Great Upheaval', May 1886", *Ontario History*, 73 (1981), pp. 19-39; Bernard Ostry, "Conservatives, Liberals and Labour in the 1870s", *Canadian Historical Review*, 41 (1960), pp. 93-127; also "Conservatives, Liberals and Labour in the 1880s", *Canadian Journal of Economics and Political Science*, 27 (1961), pp. 141-61. On the Conservatives, see Joseph Schull, *Ontario Since 1867* (Toronto 1978), pp. 150-55 and Charles W. Humphries, *The Sources of Ontario "Progressive Conservatism 1900-1914"*, Canadian Historical Association, *Historical Papers*, 1967, pp. 118-29. See Kealey, *Toronto Workers*, p. 367 n. 4, for a concise description of changing Ontario franchise requirements.

23. Quotation from A. Margaret Evans, "The Mowat Era, 1872-1896: Stability and Progress", in *Profiles of a Province* (Toronto 1967), pp. 98-9. The election pamphlets are available at the Metropolitan Toronto Library. The Evans Ph.D. thesis, cited *supra*, devotes Chapter III to a very uncritical account of the Mowat government's labour legislation. Forsey, *Trade Unions*, provides a catalogue of labour demands under the index heading, "Subjects Discussed by Unions".

24. For a discussion of early Ontario arbitration legislation, see W.S.A. Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada", Ph.D. thesis (University of Toronto 1954), pp. 77-160; "Newspaper Hansard", February 4, 1878, May 11, 1893. A generation later, proponents of a minimum wage for women made the same arguments. See J.W. Macmillan, "Minimum Wage Administration", *American Economic Review* 4 (1928), pp. 248-251. The figures on business failures are derived from tables in the Toronto Board of Trade Annual Reports, available for 1884 and 1886-93 at the Metropolitan Toronto Library.

A second reason for the acceptance of mechanics' lien legislation, therefore, was its recognition and defence of individual rights of private property. Private property and freedom of contract were supposed to offer the individual unlimited scope for gain, providing he worked hard and seized the opportunities created by his enterprise and good luck. Business men and workers accepted the producer ideology which proclaimed that work was the source of all wealth, and that wealth rightfully belonged to those whose labour, mental or physical, had brought it into being. A legal regime dedicated to the protection of private property could offer little to most workers unless it protected their only source of property, their right to receive a wage for their labour. Ideally, the mechanics' lien ensured that those whose labour went into a building received their just recompense, and that the owner was not unjustly enriched through receipt of a benefit for which he had not paid.²⁵

Legal scholars have characterised the changes in the legal system concomitant with the transition from a pre-industrial to an industrial economy as a change from status to contract, i.e., from a system in which one's rights and obligations were imposed by virtue of one's relationships with others to a system in which one's rights and obligations were freely created in the exercise of one's contractual capacity. The change was uneven, incomplete, and partially reversed by statutory protections and restrictions which applied to defined classes of individuals, e.g., imbeciles, women and seamen. The contractarian ideology survived, however, preserved in the common law's insistence that the individual was responsible for his fate, and should be left to make whatever contracts he chose. The role of the law was to enforce contracts, not to assess whether they were in the best interests of those who had made them. Inequality of bargaining power was beyond the law's purview; the law's claim to legitimacy depended on its guarantee of equal rights to all, special privileges to none.²⁶

Mechanics' lien legislation offended liberal legal ideology by giving construction workers and building supply dealers a right based on a particular status, not on any contractual obligation. The offence was mitigated somewhat by the provision for contractual waiver of the right to a lien, but since in theory the construction worker or building supply dealer could demand compensation from the property owner for giving up his lien, the legislation still gave something for nothing. For this reason, the Mechanics' Lien Act was frequently castigated as "class legislation." In debate on the 1873 bill, only Cameron, the leader of the Opposition, remarked that the bill really was class legislation because it applied to contractors, but not labourers. S. Wood, a Liberal from a rural riding, assumed that the title accurately described the bill, and objected to it because the mechanic did not need any greater remedies than other classes: the sympathy of fellow workmen and the employer's self-interested fear of public opinion made the non-payment of mechanics by their masters very exceptional. James Bethune, a Reform lawyer representing Stormont, defended the mechanics' lien by referring to the provisions for merchants under insolvency legislation and the common-law possessory lien. Mowat pointed out the analogy to the landlord's right

25. On the producer ideology, see L.R. Macdonald, "Merchants Against Industry: An Idea and its Origins", *Canadian Historical Review*, 56 (1975), pp. 278-80, and Bliss, *Living Profit*, pp. 27-8; on its rise and fall in Ontario, see Bryan Palmer, "A Culture in Conflict: Skilled Workers and Industrial Capitalism in Hamilton, Ontario, 1860-1914" (Montreal 1979), pp. 98-9, 113-20. Hurst, *Law and Economic Growth*, pp. 408-09, makes the same argument more eloquently for woodsmen's liens.

26. P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979), pp. 523-43; R.C.B. Risk, "The Law and Economy in Mid-Nineteenth-Century Ontario: A Perspective" in *Essays in the History of Canadian Law*, v. I, David Flaherty, ed. (Toronto 1981), pp. 102-03.

to seize his tenant's property for non-payment of rent. Despite the number of lawyers in the Legislature, no one compared the mechanics' lien to the solicitors' lien on clients' property.²⁷

Although politicians and their newspaper supporters used the "class legislation" cry against legislation or political parties of which they disapproved, the statute books were filled with class legislation, as the *Liberal Globe* pointed out in an 1882 editorial defending the Mechanics' Lien Act. The editorial argued that mechanics' lien legislation only made the principal responsible for the debts contracted on his behalf by his agent, as the contractor in hiring workers and ordering supplies was acting for the owner. To rephrase the *Globe* argument in the language of modern economic analysis, mechanics' lien legislation fostered efficiency by allocating the risk of loss if a contractor defaulted to the person most able to prevent the default by choosing a responsible contractor. "Those who live by daily manual labour have no time to inform themselves as to the solvency or honesty of contractors ... If the daily workman could hold the building for wages due, the proprietor, before paying an instalment to the contractor ... would be practically bound to see wages paid." The *Globe* criticized the provisions of the lien legislation permitting contractual waiver of its protections, and approved giving priority to the lien of a worker over the lien of a supplier, because the supplier, like the owner, could check on the business reputation of those with whom he dealt. The editorial concluded that workers needed special protection because they were "liable to be fleeced"; it was up to the Legislature to give them a prior claim "on what their labor produces".²⁸

The *Globe's* support for mechanics' lien legislation may have been completely partisan, but that both Conservatives and Liberals supported the various Mechanics' Lien Acts suggests a third explanation for the Mowat government's solicitous attention to this particular labour demand: mechanics' lien legislation was a politically safe innovation because, despite the charges that it was class legislation, it benefited merchants who sold building supplies as well as workers who sold their labour. Benefits to merchants, however, were not enough to win the approval of the finance, insurance and transportation interests which found expression in the *Monetary Times*. Apparently misled by the title, that journal condemned the Mechanics' Lien Act as another example of the legislative policy that in case of a loss, the rights of all other classes came before the rights of tradesmen. The proposal for a holdback to satisfy lien claims brought a denunciation of lien legislation as "socialistic." Responding with the capitalist's classic cry when faced with government action he disliked, the *Times* warned that in accordance with the laws of political economy, legislation "intended to give an advantage to labour over capital will defeat its own object, because capital will take wings and fly to more secure quarters, and labour instead of having obtained undue advantage, will be in danger of finding itself without employment."²⁹

The legal profession, too, viewed lien legislation with disfavour. The impression from reading reported cases is of a judiciary which accepted the Legislature's handiwork grudgingly. Risk concludes from his analysis of the available cases on employer liability for workplace accidents that, in the context of legal rules favouring employers, judges

27. "Newspaper Hansard", February 18, 1873.

28. The Patrons of Industry had to defend themselves against the class legislation cry. See the speech of J.L. Haycock, chosen party leader after the 1894 Ontario election, in response to the 1895 Budget in "Newspaper Hansard", March 1, 1895. *Globe*, January 20, 1882, p. 4, "Mechanics' Lien Law".

29. *Monetary Times*, Feb. 8, 1878, p. 931, "Mechanics' Liens"; Jan. 20, 1882, p. 885; March 10, 1882, p. 1108, "Amendments to the Lien Law".

showed a small but significant preference for the injured worker. This preference is noticeable even after taking into account the impact of factors like judges' respect for jury decisions, a general disinclination to dismiss appeals, and a difference in resources between employers and workers which would prevent workers from starting a lawsuit or filing an appeal, while allowing employers to appeal decisions to discourage current and prospective claimants.³⁰

The available mechanics' lien cases are less amenable to this kind of analysis, and the win-loss figures in Table 2 must be used with extreme caution. As Risk explains, counting cases is difficult and accuracy impossible: original court records are incomplete or non-existent, and case reports contain an unknown and changing proportion of all decided cases, with the unusual and difficult cases more likely to be reported than routine ones.³¹ Most reported mechanics' lien cases were not a simple contest between a lien claimant and a property owner, but involved the conflicting rights of several lien claimants, mortgage holders, a subsequent purchaser, or other creditors of lien claimants or the property owner. Courts had to determine which claimants had priority over a limited sum of money, whether that sum was the holdback or the proceeds from the sale of a property under a court order. A decision that a lien existed would be of little benefit if the fund available was so small or the claim ranked so far below other claims that there was no money to pay it. Nor do most case reports provide the information necessary to distinguish between lien claims filed by unpaid construction workers and those filed by contractors or building supply dealers. Probably more cases involved the latter, both because they were more likely to have the resources and confidence necessary to go to court, and because their claims would be large enough to warrant an appeal. Analysis of mechanics' lien cases, then, can tell us more about judges' attitudes to statutory modification of the common law of property and contract than about their sense of *noblesse oblige*.

As Risk argues, in interpreting a statute, judges make choices. "The terms of statutes do not control outcomes, despite a persistent judicial faith in "plain meanings"." Each of several possible outcomes can be supported by an established rule of interpretation. Because the rules are vague and conflicting, "the influence of attitudes and values is inescapable." But an assessment of the values in a body of decisions is even more impressionistic than a tabulated summary of results, and, at best, is based on generalizations supported by citing particularly illustrative cases.³²

In general, in contests between a mechanics' lien claimant and a property owner or secured creditor, such as a mortgage holder, judges were reluctant to adopt an interpretation of mechanics' lien legislation which would put the lien claimant, whether a wage-earner

30. R.C.B. Risk, "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario", in *Essays in the History of Canadian Law*, v. II, David Flaherty, ed. (Toronto 1983), pp. 432-34. There were no juries involved in mechanics' lien cases, but for the legal scholar willing to pursue the subject, the cases might illustrate divergent values in the common law and chancery courts. Prior to the amalgamation of the courts in 1881, mechanics' lien cases involving small sums were heard in the Division or County Courts, and cases beyond their jurisdiction in the Chancery Court. See Margaret A. Banks, "The Evolution of the Ontario Courts 1788-1981", in *Essays in the History of Canadian Law*, v. II, David Flaherty, ed. (Toronto 1983), pp. 504-506, 523-525; R.S.O. 1877 c. 120, s. 12, 13.

31. Risk, "This Nuisance of Litigation", pp. 426-28. The mechanics' lien cases read were those cited in J.F. Smith *et. al.*, *The Digest of Ontario Case Law, 1823-1900* (Toronto 1974, first printed 1903), v. I, columns 3017-3939.

32. Risk, "This Nuisance of Litigation", pp. 443 and 437.

or building supply dealer, in a better position than the secured creditor or property owner.³³ Mechanics' lien legislation was therefore construed as narrowly as possible. For example, a decision excluding railway property from the operation of the Mechanics' Lien Act was given in forty-three words, with no justification or explanation. In a subsequent case of the same issue, a dissenting judge forced the majority to articulate a reason for the holding. Ignoring the wording of the Act, which was broad enough to include railways, the majority decision relied on a weak analogy between lien claimants and execution creditors seeking to enforce a judgement, based on the fact that both derived their rights from a statute. Since railway land could not be sold to satisfy the claims of an execution creditor, the court held that it could not be sold to satisfy a lien claim, either. The Legislature over-ruled this decision in the 1896 Act.³⁴

Although judges had little sympathy for attempts to defeat lien claims because of minor procedural defects,³⁵ they strictly limited a lien claimant's rights and remedies. Over and over again, on a variety of issues, judges declared the principle which they followed in interpreting lien legislation. Horrified at the prospect of a person being held liable for another's debts, they rejected any interpretation of mechanics' lien legislation which would produce such an outcome, unless the Legislature expressed its intention to produce that outcome in completely unmistakable language.³⁶

Thus, although mechanics' lien legislation seemed to create a lien prior to registration of a lien claim against title, subsequent purchasers or mortgage holders were not held liable for unregistered liens existing prior to registration of their deed or mortgage, unless they had actual knowledge of the existence of the lien. Knowledge of work in progress was not sufficient. Even when the mortgage money was paid out in installments as construction proceeded, the mortgage holder's interest took priority over the lien claimant's, unless the lien was registered before registration of the mortgage. In theory, this decision worked no hardship on lien claimants, since they could have registered their lien prior to starting work.³⁷ Critics of this line of decisions, however, pointed out that workmen had neither the time, money or security of employment necessary for them to ascertain who owned the property and to register a lien against it before starting work on each new site just to preserve the priority of a possible future claim.³⁸

33. Lien holders lost to mortgage holders in ten of fourteen cases in which the rights of a mortgage holder were in issue. Of the other four, one dealt with costs, one with a procedural objection which was dismissed because the mortgage holder had not raised it at trial, and two with objections to a claimant's pleadings; the objections were upheld, but with leave to amend. See *Hynes v Smith*, 27 Gr. 150; *Cook v Belshaw*, 23 O.R. 545; *Finn v Miller*, *Canada Law Journal*, 26 (Feb. 1980), p. 55; *Richards v Chamberlain*, 25 Gr. 402; *Reinhart v Shutt*, 15 O.R. 325; *McVean v Tiffin*, 13 O.R. 1; *Jackson v Hammond*, 8 P.R. 157; *Larkin v Larkin*, 32 O.R. 80; *Broughton v Smallpiece*, 25 Gr. 288; *Hutson v Valliers*, 19 A.R. 154; *Bank of Montreal v Haffner*, 10 A.R. 592; *Kennedy v Haddow*, 19 O.R. 240.

34. *Breeze v The Midland Railway*, 26 Gr. 225; *King v Alford*, 9 O.R. 643; S.O. 1896 c. 37, s.2(3), 5.

35. *Bickerton v Dakin*, 20 O.R. 695; *Dufton v Horning*, 26 O.R. 252; *Truax v Dixon*, 17 O.R. 366; *Craig v Cromwell*, 27 A.R. 585; *Bank of Montreal v Haffner*, 10 A.R. 592.

36. *Broughton v Smallpiece*, 25 Gr. 290; *Crone v Struthers*, 22 Gr. 247; *Gearing v Robinson*, 27 A.R. 364; *Goddard v Coulson*, 10 A.R. 1; *In Re Sear and Woods*, 23 O.R. 474; *Jennings v Willis*, 22 O.R. 439.

37. *Richards v Chamberlain*, 25 Gr. 402; *Wanty v Robins*, 15 O.R. 474; *Hynes v Smith*, 27 Gr. 150; *McNamara v Kirkland*, 18 A.R. 271.

38. Proudfoot's dissent in *Hynes v Smith*, 27 Gr. 150; Frank E. Hodgins, "A New Mechanics' Lien Act", *Canadian Law Times*, 11 (1891), pp. 74-81.

The holdback, enacted after repeated labour appeals, addressed the intractable problem of ensuring that contractors actually paid their wage and material bills with the money received from the owner. In effect, the holdback was a compulsory security deposit for wage and material bills which the contractor was obliged to leave with the owner on trust for lien claimants. Judges, however, treated the statutory holdback as the owner's security for completion of the contract, with which they were familiar. Owners faced with defaulting contractors were allowed to deduct the cost of completion of the contract from the holdback, before it was made available to pay lien claims. Judicial decisions further limited the protection afforded by the holdback by requiring the owner to retain the specified percentage only from the final payment made on completion of the contract, not from payments made as work progressed. Therefore, if a contractor defaulted, having been paid less than the total of the contract price minus the percentage required for the holdback, the owner was not liable to lien claimants. Since the percentage of the contract price that should have constituted the holdback was no longer owing to the contractor, there was no money for the owner to retain, and no liability to pay the contractor's unpaid workers or suppliers. Wage-earners wanting protection from defaulting contractors could negotiate with their employer for a security deposit, just as the owner negotiated a holdback of a portion of the contract price to be retained as damages if the contractor defaulted on his obligations. If workers lacked the bargaining power to secure such a protection, that was not the concern of the law.³⁹

In the holdback cases, although mechanics' lien legislation created obligations in the absence of a contractual relationship, judges applied contract law thinking and doctrine in interpreting the legislation, arguing that subcontractors and wage-earners derived their rights through the contractor with whom they were in privity of contract, and could have no greater rights than he. In another example of the same approach, an unpaid building supply dealer was denied a lien because the contractor had agreed with the owner that neither he nor his suppliers, sub-contractors or workers would have a lien. Blithely ignoring the realities of everyday business, the court declared it "a matter for investigation by each sub-contractor before he contracts, as to the extent to which his rights may be affected by the contract which may have been made between the contractor and the owner."⁴⁰ This decision was over-ruled by the Legislature in its 1884 amendments to the Mechanics' Lien Act; amendments to clarify the nature and purpose of the holdback waited until the 1896 consolidation of the Act.⁴¹

Judicial interpretation of the word "owner" provides further evidence of efforts to restrict a claimant's right to a lien. The Court of Appeal refused to permit registration of a lien against the owner's title where the work was done at the request of a tenant whose lease provided that completion of the work constituted part payment of the rent. The Court held that the work had been done with the owner's consent, but not at his request. Similarly, an owner who was financing his tenant's building project was held not to be an owner within

39. For a decision on a contractual holdback, see *Burritt v Renihan*, 25 Gr. 183. Robinson, "Newspaper Hansard", 4 February 1878, defended his holdback amendment by citing the existing practice of the owner holding back twenty per cent until the contract was completed. *Reggin v Manes*, 22 O.R. 443; *Re Cornish*, 6 O.R. 259; *Goddard v Coulson*, 10 A.R. 1; *Re Sear and Woods*, 23 O.E. 474.

40. *Forhan v Lalonde*, 27 Gr. 600.

41. S.O. 1884 c. 18, s. 1; S.O. 1896 c. 35, s. 10, 13. For the effect of the latter amendments, see *Russell v French*, 28 O.R. 215. The 1896 Act was sponsored by the Provincial Secretary, J.M. Gibson, who represented Hamilton and was concerned about labour needs in his constituency and in the province. See *Evans, Ph.D.*, p. 93.

the meaning of the Act.⁴² Lien claims were also denied to workers employed by a single contractor but assigned to several different work sites over the same time period, with a day here and a day there, even if the properties were owned by the same person. Unless they apportioned their wage claims among the various sites, they could not claim a lien against any of them. Labour complained about this defect in the legislation, but did not venture to suggest a remedial amendment. Nor did the Legislature provide one, although it did specify that a lien claim could include liens against more than one property.⁴³

Although reported cases on mechanics' liens are sprinkled with peevish comments about the difficulty of interpreting this or that section, few judges were willing to approach their task instrumentally, i.e., to consider the economic and social consequences of a decision, and to analyze common law rules and statutes with an eye to purpose and function, rather than relying on the myth of "plain meanings." In this respect, mechanics' liens cases demonstrate the view of their function adopted by most Ontario judges of the period; they did not make law, only applied it impartially.⁴⁴

Commentators in the legal periodicals shared the judiciary's dislike for mechanics' liens legislation. Not content with pointing out ambiguities and inconsistencies in the Mechanics' Lien Acts, articles in the *Canada Law Journal* called for its repeal, citing its illogicality and inartful drafting, the detrimental effect on business, and the failure to benefit any one but lawyers. *Journal* articles usually implied and often stated that nothing better could be expected from class legislation passed to garner workingmen's votes.⁴⁵ Hodgins, writing in the *Canadian Law Times*, also criticized the poor drafting, and commented that "[c]lass legislation always bears hardly in some directions, and is especially aggravating when it invades the right of free contract." He suggested that some of the problems, however, stemmed from judicial obtuseness, and that freedom of contract having been invaded, the Legislature might as well take the further steps necessary to render the Mechanics' Lien Acts effective. He called for registration of construction contracts so that subcontractors and workers could identify the owner and claim their share of each payment as it came due.⁴⁶ The 1896 consolidation of the Mechanics' Lien Act partially adopted this

42. *Garing v Hunt*, 27 O.R. 149; *Gearing v Robinson*, 6 O.R. 1 (a decision on the R.S.O. 1897 c. 15, s. 2(3), which uses the wording adopted in 1896); *Graham v Williams*, 9 O.R. 458.

43. *Currier v Friedrick*, 22 Gr. 243; *Oldfield v Barbour*, 12 P.R. 554; Wismer, *Proceedings*, p. 72; S.O. 1896 c. 35, s. 17.

44. *Boyd in Re Cornish*, 6 O.R. 259 at 265; *Osler in McNamara v Kirkland*, 18 A.R. 271; Chief Justice Meredith in *Larkin v Larkin*, 32 O.R. 80 at 90. While in the Legislature, Meredith had expressed the opinion that mechanics' lien legislation "leaned in a dangerous direction". See "Newspaper Hansard", 4 February 1878. On instrumentalism, see Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge 1977), pp. 1-3. On the attitude of Ontario judges, see Risk, "The Law and the Economy", pp. 118-23. For contrasting judicial attitudes, see Hurst, *Law and Economic Growth*, 393-94, in which he argued that in Wisconsin, the state Supreme Court worked creatively to give the log lien statutes coherence and direction. William Proudfoot was the notable exception to the Ontario pattern, perhaps in part because the reported cases include more decisions written by him than by any other judge. It was he who wrote the dissent in *King v Alford*, the railway property case cited *supra*. Proudfoot was a Presbyterian and a Reformer, and so sympathetic to the government which enacted mechanics' lien legislation. He had articulated for William Hume Blake, whom Risk describes, in the passage just cited, as distinctive among mid-nineteenth-century Ontario judges for his desire to seek "individualized fairness" in the Canadian context. Biographical information on Proudfoot is from John Charles Dent, *The Canadian Portrait Gallery*, v. III (Toronto 1981), pp. 227-8.

45. *Canada Law Journal*, 30 (Oct. 1894), p. 533; 12 (Nov. 1876), pp. 298-300, "Certainty in the Law"; 13 (Jan. 1877), pp. 8-9, "Mechanics' Lien Legislation".

46. Frank E. Hodgins, "New Mechanics' Lien Act", quotation at p. 74. Also *Canadian Law Times*, 7 (1887), pp. 69-84; 9 (1889), pp. 265-276.

suggestion, in giving lien claimants the right to obtain information from the owner about the terms of his agreement with the contractor. With no provision requiring the owner to identify himself, however, the right was difficult to exercise.

Mechanics' lien legislation continues to provoke lawsuits, critical comments, and attempts at reform. The latest version of the Ontario legislation is the Construction Lien Act, passed in 1983 after extensive public consultation and study. Kevin McGuinness, who drafted the new legislation, observed that although the primary purpose of the lien is to enforce a debt obligation, the judiciary has regarded lien legislation as "distributional," while law reform commissions see it as "facilitative," promoting efficient production in the construction industry through the provision of credit. McGuinness takes the latter view; as noted *supra*, so have legal historians.⁴⁷

That mechanics' lien legislation is more facilitative than distributive undoubtedly contributed to its acceptance, but neither the needs of the economy nor labour organization and pressure are sufficient in themselves to account for the passage and subsequent amendment of the Ontario Mechanics' Lien Act. There is no evidence in the Debates that the legislators considered a mechanics' lien necessary to economic development. With or without the protection of a lien, labourers and artisans had to accept work from contractors, or go hungry. And most contractors could not shop around for the best investment opportunity. Their capital was their expertise in the construction business; it could not be employed mining coal or building ships or railroads. Nor were mechanics' liens the only possible response to problems in the construction industry. For example, nationalization of real property, with all construction undertaken by government employees, would have provided security for wage-earners, building supply dealers and contractors.⁴⁸ Because labour was asking for legislation which infringed on, but did not deny, the rights of private property, passage of the Mechanics' Lien Act was an easy political choice for the Mowat government.

At the end of the Mowat era, a legal text described the mechanics' lien as no more than "what necessity and justice demanded in order to protect those who do the work and furnish the materials by which the realty is benefited." This assessment was one which the Conservative Opposition found hard to dispute, especially in the face of public approval of legislation to provide some protection for the labouring classes beyond that which they could secure contractually.⁴⁹ Politicians, like businessmen, readily sacrifice ideological consistency for immediate gains, secure in the knowledge that the judiciary, immune from the electoral process, will prevent too great a departure from the essential values of the common law. Like the Senate, which John A. Macdonald described as that chamber of "sober second thought," the courts would protect property owners from democratic excesses. With mechanics' lien legislation, the Legislature sometimes chose to reverse the court, and in doing so, obtained the political benefits of being a bulwark against reaction. When it let a questionable interpretation stand, it was the judiciary, not the Legislature, which received the opprobrium.

47. S.O. 1983 c. 6; McGuinness, *Construction Lien Remedies*, pp. 17, 81-82.

48. On alternatives to a mechanics' lien act, see Gordon's discussion of Hurst and log liens, "Critical Legal Histories", pp. 110-11.

49. Wallace, *Mechanics' Lien Laws*, p. 8; Evans, Ph.D., p. 82, note press support for labour in the Toronto press in the 1880s. See also Morton, "The Globe", pp. 26 and 33.

No one was completely happy with the process. Although certainty may not be as important to business as legal historians have assumed,⁵⁰ few businesses welcome legislation which necessitates expensive litigation to fix their rights. Better a cumbersome process, however, than too radical a change. Despite its interference with the law of contract, there was nothing radical about mechanics' lien legislation. It did not impose minimum standards for employment contracts or restrict the right to own and develop property. It did not question the worth or validity of the exchange relationship at the core of capitalist law and ideology. Rather, it provided a corrective mechanism for a situation in which strict application of the law of contract produced a breakdown in the exchange relationship. Because of the complex tier of contractual relationships in a construction project, building supply dealers, subcontractors and wage-earners often returned empty-handed from the market, denied the promised price for their commodity through no fault of their own.

In the short-term, the Mowat government hoped to obtain some partisan political advantage from passage of the mechanics' lien legislation. More important, however, were the long-term implications and benefits. Mechanics' lien legislation deflected criticism or questioning of the contractarian ideology by making minor adjustments in the law of contract to achieve a more equitable outcome in the particular circumstances of the construction industry. Such piecemeal reform did not challenge the soundness or equity of contractarian ideology as a whole, and served as evidence that law and the government served everyone. Although enactment of a Mechanics' Lien Act was an indication of organized labour's growing strength, it also revealed labour's weakness. Unable to formulate a radical alternative, labour demanded and was given legislation reinforcing an ideology that, by obscuring the class nature of capitalist society, helped maintain the hegemony of the dominant class.

50. David Sugarman, "Law, Economy and the State in England 1750-1914: Some Major Issues" in *Legality, Ideology and the State* (London 1983), p. 215.

Table 1 A Comparison of the Major Provisions of the Ontario Mechanics' Lien Acts of 1873 and 1896

| Statutory Provision | S.O. 1873 ch. 27 | S.O. 1896 ch. 35 | Notes |
|---|---|---|---|
| Persons entitled to claim a lien | s. 1 – any person doing work upon, or furnishing materials or machinery for any building, erection or mine at the instance or request of the owner, and upon the owner's credit | s. 5 – any person performing any work or service or furnishing any materials for anything from a building to a fishpond for any owner, contractor or sub-contractor | right to lien extended to those not contracted directly with the owner in 1874 |
| Definition of owner | | s. 1(3) – any person, firm, association, body corporate or politic, including a municipal corporation and railway company having any estate in the land at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit the work or service is performed or materials furnished and all claiming under him or whose rights are acquired after the work or service is commenced or material furnished | slightly less detailed definition was first added in 1874, along with definitions of contractor and subcontractor |
| Contractual waiver of the right to a lien | s. 1 – permitted | s. 5 – permitted, but under s. 4, no agreement could affect the right to a lien of a person not a party to the agreement | contracting out not permitted from 1874 to 1877 |
| Time limit for registration of a lien | s. 2 – one month from completion of the work or supplying of the materials or machinery | s. 21 and 22 – 30 days from completion of the work or delivery of the materials | |
| Time limit for bringing a lawsuit to realize a lien claim | s. 4 – 90 days from completion of the work or supplying of the materials or machinery or expiry of any period of credit | s. 23 – 90 days from the same event | |
| Fee for registration of a lien claim | s. 3 – \$1.00 | s. 19 – \$0.25 for the first lien; \$0.10 for each additional lien against the same property | |
| Amount of holdback and period for which owner required to retain holdback | | s. 10 – from each payment, 20% of the value of the work, service and materials actually done or furnished, and 15% where the total contract price exceeded | first holdback provision in 1878 for 10% for 10 days, to be withheld from final payment |

Table 1 (cont.) **A Comparison of the Major Provisions of the Ontario Mechanics' Lien Acts of 1873 and 1896**

| Statutory Provision | S.O. 1873 ch. 27 | S.O. 1896 ch. 35 | Notes |
|--|--|--|---|
| Priority of lien for wages | | <p>\$15,000, for a period of 30 days from completion or abandonment of the contract</p> <p>s. 13 – lien for 30 days' wages had priority over all other liens on the holdback</p> | <p>this special provision for lien for 30 days' wages introduced in 1882, when it was also excluded from agreements made by the contractor to forego any lien claim</p> |
| Priority of lien over prior mortgage | | <p>s. 6(3) – lien has priority over prior mortgage to extent to which selling value of land increased by work or service performed or materials furnished</p> | <p>added in 1874</p> |
| Class actions | | <p>s. 30 – permitted, and any action brought by a lien claimant taken to be brought on behalf of all other lien-holders on same property</p> | <p>added in 1874</p> |
| Amount of costs that could be awarded to successful plaintiff or lien-holder | | <p>s. 41 – not to exceed 25% of judgment plus actual disbursements</p> | |
| Amount of costs that could be awarded against a plaintiff or lien claimant | <p>s. 9 – if lien claimant, "without just cause" claimed sum larger than judged due to him, could be ordered to pay costs and penalty of up to 1/5 of original claim</p> | <p>s. 42 – not to exceed 25% of claim plus actual disbursements</p> | <p>penalty provision of 1873 changed in 1874 to "such costs as the judge or court may think fit to award – 25% limit first introduced in 1890, if costs payable out of proceeds of a sale of land</p> |

Table 2 **Analysis of Reported Mechanics' Lien Cases, 1873 to 1900**

| Category of Case | Number of Decisions For Lien Claimants | Number of Decisions Against Lien Claimants |
|---|---|---|
| Pre-Trial Motion Not Disposing of the Matter | 4 | 4 |
| Trials and Decisions of the Master | 7 | 13 |
| Appeals* | 11 | 22 |
| Decisions on the Right to Appeal | 2 — | |
| Decisions on Costs | 3 | 1 |
| Totals | 27 | 39 |

* Included are appeals from decisions of court officials (Referee, Master or Local Registrar), appeals from the decision of a single judge to a panel of judges at the same level, and appeals to the Court of Appeal. In the Court of Appeal, 7 decisions were for lien claimants, and 4 against.