1982 CarswellNB 205
New Brunswick Court of Appeal

L.E. Shaw Ltd. v. Berube-Madawaska Contractors Ltd.

1982 CarswellNB 205, [1982] A.N.B. No. 210, [1982] N.B.J. No. 210, 105 A.P.R. 374, 138 D.L.R. (3d) 364, 15 A.C.W.S. (2d) 20, 40 N.B.R. (2d) 374

In the Matter of the Mechanics' Lien Act, Being Chapter M-6 of the Revised Statutes of New Brunswick, 1973

L. E. Shaw Limited, (Plaintiff) Appellant v. Berube-Madawaska Contractors Limited and the City of Fredericton, (Defendants) Respondents and S.T.E. Fetterly & Sons Limited and Westburn Industrial Enterprises Ltd., (Lien Claimants) Respondents

Irving Oil Limited, (Plaintiff) Appellant v. The City of Fredericton and Berube-Madawaska Contractors Limited, (Defendants) Respondents

Stratton, La Forest and Angers, JJ.A.

Judgment: June 21, 1982

Subject: Contracts; Corporate and Commercial

Related Abridgment Classifications

Construction law

IV Construction and builders' liens

IV.4 Property or interest subject to lien

IV.4.f Municipal property

Headnote

Construction Law --- Construction and builders' liens — Property or interest subject to lien — Municipal property

Land to be charged — Municipal property — Contractor entering into contract with city for installation of water and sewerage works in subdivision and then abandoning contract -- Plaintiffs filing global liens upon subdivision including liens on city's water and sewer easement interests — Plaintiffs entitled to liens on easement interests — Mechanics' Lien Act, R.S.N.B. 1973, c. M-6, s. 2.

Defendant contractors entered into an agreement with the city for the installation of water and sewerage works in a housing subdivision. After encountering financial difficulties, the contract was abandoned. Plaintiffs filed global liens upon the subdivision including liens on the city's water and sewer easement interests. At trial it was held that it was contrary to public interest to allow such water and sewer lines to be subject to lien judgments. On appeal, held, the appeal should be allowed. Because municipalities were not specifically required by statute to construct sewerage works, such works did not result from deliberate public policy as established by the Legislature. The Act, on the other hand, did represent a specific legislative policy to ensure security for those providing goods and services in construction. The policy choice should therefore be made in favour of giving effect to the liens of plaintiff. S. 2 of the Act provided evidence that this was in accordance with legislative intent.

***La Forest, J.A.*:**

BACKGROUND

1 These cases were argued together and raise the same issue, namely, is a lien under the *Mechanics' Lien Act*, R.S.N.B. 1970, c.M-6 against an easement for water and sewerage works belonging to a municipality invalid as offending against public policy?

2 The claims arose out of a contract between the defendant Bérubé-Madawaska Contractors Limited and the defendant City of Fredericton for the installation of water and sewerage works in the Monteith Subdivision in the city. The contractor apparently encountered financial difficulties; it abandoned the contract and has not defended any of the claims.

3 Nine claims were filed under the *Mechanics' Lien Act* in respect of these works. Of these, seven were against lands that make up streets in the subdivision. Those who claimed under the latter did not appear at the trial to support them, probably because of s.2 of the Act which reads as follows:

> 2 This Act does not apply in respect of a highway or any work done or caused to be done thereon by a municipality, or in respect of material furnished therefor.

4 The plaintiffs L. E. Shaw Limited and Irving Oil Limited in their claims, however, used a global description asserting a lien against all the right, title and interest of the city in a large tract of land including the subdivision, except such portions as are highways within the meaning of s.2. The city holds five storm sewer easements and one water and sewer easement on privately owned lands in the subdivision which would be included in the description of the land in the plaintiffs' claims.

5 What the plaintiffs really seek, of course, is not so much to attach the city's property as to have access to substantial holdback funds retained by the city pursuant to the Act. If their claims for lien fail, they would be in a position of sharing these funds on an equal basis with other lien claimants and creditors rather than having the priority accorded to them by a claim of lien filed under the Act. It would appear, however, that the essence of a mechanic's lien is the right to sell the land under the Act and this raises the issue whether as a matter of public policy the liens should be allowed; see *Westeel-Rosco Limited v. Board of Governors of South Saskatchewan Hospital Centre* (1977), 69 D.L.R. (3d) 334. Before entering into the question whether the plaintiffs Shaw and Irving could establish facts supporting their liens, the trial Judge found it necessary to deal with this issue. Having done so, he concluded that their claims were invalid on the ground of public policy because the sale of the land could result in dismantling a portion of the city's sewerage system.

6 The plaintiffs now appeal, contending that the trial Judge erred in this conclusion. The city supported the position taken by the appellants, but two other lien claimants, S.T.E. Fetterly and Sons Limited and Westburn Industrial Enterprises Ltd., supported the conclusion reached by the trial judge.

APPLICATION OF ACT TO MUNICIPALITIES

7 Before entering into the question of public policy, I will first dispose of the threshold question whether the Act applies against municipalities at all. This court has consistently acted on the basis that it does (see *Connely v. Havelock School Trustees* (1913), 9 D.L.R. 875; *Groundwater Development Corporation v. City of Moncton* (1971), 3 N.B.R. 798), and this seems to me to be the only reasonable interpretation that can be taken in the light of s.2. Why otherwise would it be necessary to exempt work done on highways by a municipality?

PUBLIC POLICY

8 The extent to which courts should apply the doctrine (or doctrines) of public policy is one that has engendered considerable judicial debate. So much so that Burrough, J.'s description of the doctrine as an "unruly horse" has become a veritable cliché; see *Richardson v. Mellish* (1824), 2 Bing. 229, at p. 252; 130 E.R. 294, at p. 303. But if one must resort to equine metaphors, it would seem to be more accurate to refer to several herds of horses including several that the courts have found necessary to keep firmly in check. For the expression "public policy" is used in different parts of the law to deal with a variety of issues that have at most a rather tenuous connection with one another. In the law of contracts, for example, agreements may, on the basis of public policy, be held void on various grounds of illegality, such as attempting to corrupt public life, or as being otherwise inexpedient in relation to the type of society in which we live, as for instance, contracts in restraint of trade. Similarly under the law of real property certain covenants may be held void as interfering

with the relationship of marriage or, more covertly under the guise of uncertainty, as discriminating on racial or religious grounds. However, courts have shown an awareness that in declaring new grounds of public policy they are really making law and they have rightly been hesitant in extending the doctrine beyond well established grounds.

9 In any event, all of the foregoing instances have one thing in common: they are attempts by the courts to shape the law of contract and of property (laws largely incrementally created by the judiciary over the years) so as to prevent such laws from being used by private individuals and corporations against what the courts perceive to be the public interest. Here, however, we are asked to apply our notions of public policy in the face of an Act of the legislature which, under our system of government, has the primary power to determine public policy. Under such circumstances the power of the courts to act on their own view of public policy must necessarily be of very narrow scope. I leave aside for present purposes the traditional role of the courts, now largely raised to the constitutional level, of applying legislation so as not to interfere unduly with individual rights.

10 In truth, the application of so-called public policy in the context with which we are concerned has been largely confined to attempts by the courts to harmonize different legislative expressions of policy. In this instance, the legislature by the *Mechanics' Lien Act* is clearly seeking to advance a policy of securing payment in priority to other creditors to contractors, labourers and materialmen who have worked or supplied material on an "improvement". That policy the courts have a duty to apply. But what are the courts to do when giving effect to a lien under the Act would result in frustrating the operation of a work or service, whether publicly or privately owned, that has been established by the legislature for the purpose of rendering a benefit to the public?

11 In the absence of legislative direction, what the courts have done is to select the public, or more precisely, the legislative policy that appeared to be dominant. For example, there are cases where courts have held that the *Mechanics' Lien Act* did not apply in respect of a railway, irrigation works or a hospital established by the legislature; see *Crawford v. Tilden* (1907), 14 O.L.R. 572; *Western Canada Hardware Company, Limited v. Farrelly Brothers Limited*, [1922] 3 W.W.R. 1017; *Westeel-Rosco Limited v. The Board of Governors of South Saskatchewan Hospital Centre*, supra. However, courts will not invariably favour the policy inherent in the creation of a public work over that of the *Mechanics' Lien Act*. There are cases where the opposite course has been taken, for example, in relation to school buildings and municipal sewerage systems; see *Connely v. Havelock School Trustees*, supra; *Lee v. Broley* (1909), 11 W.L.R. 38; *Anthes Imperial Limited v. Village of Earl Grey* (1971), 13 D.L.R. (3d) 234; *The Corporation of the City of Hamilton v. Cipriani*, [1977] 1 S.C.R. 169. It would seem to depend, as Martland, J. put it in *Alspan Wrecking Limited v. Dineen Construction*, [1972] S.C.R. 829, at p. 838, "on the usage and purposes for which the property is held"; and, I would add, on the importance attached to such uses and purposes by the legislature.

12 It is true that in *Re Shields (Trustee of Estate of Harris Construction Co. Ltd.) v. City of Winnipeg* (1964), 47 D.L.R. (2d) 346, and *Alspan Wrecking Limited v. Dineen Construction*, supra, the courts held a mechanics' lien invalid on the ground of public policy because the property in question was a highway even though no statute providing for the highway was mentioned. There may well have been relevant policy inherent in general highway legislation, however. In any event, it must be remembered that the common law right of the public to pass and repass on a highway is so fundamental that these cases are easily explicable as applications of the occasionally used rule of construction that a statute will not be interpreted as overturning a "deep-seated" principle of the common law in the absence of a "clear, definite or positive" enactment, to use the words of Lord Atkin in *Nokes v. Doncaster Amalgamated Collieries*, [1940] A.C. 1014, at p. 1031. For a discussion, see E. A. Driedger, *The Construction of Statutes*, pp. 158-60. For the most part, however, the cases on "public policy" in this context will arise, as the present case does, where two legislative policies appear to be at odds.

13 In the cases previously mentioned, the legislature had not adverted to the possible conflict with public policy; there was no provision similar to s.2 of the New Brunswick Act. But that section demonstrates an attempt on the part of the legislature to deal with the issue, particularly as it concerns municipalities. By expressly exempting work done by municipalities on highways, it would appear to have assumed that the Act applies to other municipal works. This court has already held that the Act applies to an easement of a municipal water system; see *Groundwater Development Corporation v. City of Moncton* (1971), 3 N.B.R. (2d) 798; affirming (1970), 2 N.B.R. (2d) 941. This court, it is true, did

not expressly deal with this point but it affirmed the judgment of Cormier, C.J., which specifically rejected the argument that the lien was invalid on the grounds of public policy. And the Supreme Court of Canada in *The Corporation of City of Hamilton v. Cipriani*, supra, has held that the Ontario Act, where there is a provision similar to s.2 of the New Brunswick Act, applied to a secondary sewage plant. The court there did not even mention the question of public policy.

14 Quite apart from s.2, the Court of Appeal of Saskatchewan, in which province there is no such provision, held in *Anthes Imperial Limited v. Village of Earl Grey*, supra, that a lien attached to lands on which a lagoon and pumphouse and certain other portions of a municipal waterworks and sewage project were situate. The court rejected the public policy argument. Culliton, C.J.S., speaking for the court, stated: "if the Legislature had desired to exempt a municipal corporation from the provisions of the *Mechanics' Lien Act*, it would have been very easy for it to say so, but this it did not do". This reasoning applies *a fortiori* where as here the legislature has expressly adverted to the relation of the Act to municipalities. In dealing with the *Anthes* case in *Alspan Wrecking Limited v. Dineen Construction Limited*, supra, at p. 838, Martland, J., speaking for a majority of the Supreme Court of Canada in relation to the Manitoba Act where there is no provision similar to s.2, rejected as too broad the proposition that a lien cannot be claimed against municipal property.

15 The trial judge in the present case rightly placed considerable emphasis on the *Westeel-Rosco* case as the latest expression of the Supreme Court of Canada on the subject. But apart from the fact that the court was there dealing with the Saskatchewan Act, which has no counterpart to s.2 of the New Brunswick Act, the hospital upon which a claim for lien was made was specifically constructed pursuant to a statute that gave such control over the hospital to the provincial government that a serious question arose whether the governing board of the hospital was a Crown corporation. The importance of the policy relating to the hospital was evident not only in terms of its implications for the public health; it was also apparent from its close relation to government policy as revealed by the statute. Under these circumstances the court could obviously conclude that a mechanic's lien against the hospital could not be upheld. For if it were, this could ultimately result in the sale of the hospital contrary to clearly enunciated legislative policy. As Ritchie, J. stated at p. 339 in giving the judgment of the court, "any sale of the hospital property in the present case would be clearly contrary to the public interest and should not be permitted".

16 The contrast with the situation in this case could scarcely be greater. We have here a portion of the city's sewerage works apparently constructed as a local improvement with the consent of the neighbouring rate-payers. It affects a limited number of people. Equally important, municipalities are merely authorized to construct or maintain a variety of local works and services; they are not specifically required by statute to do so. Such works do not, therefore, result from deliberate public policy as established by the legislature. On the other hand, the *Mechanics' Lien Act* does represent a specific legislative policy to ensure workmen, contractors and materialmen some security for the goods and services they provide in the course of construction. It requires monies to be set aside for that very purpose and municipalities will ordinarily do so, as the City of Fredericton has in this case. So there is little ground from a practical standpoint to be concerned about the possible sale of municipal lands in the exercise of a right to a lien. The general structure of the two statutory schemes involved, therefore, indicates that the policy choice in circumstances like these should be made in favour of giving effect to the liens of the plaintiffs. Evidence that this is in accordance with legislative intent is also afforded, we saw, by s.2.

17 I would allow the appeal. The actions should be remitted to the trial judge with the instruction that the plaintiffs' liens are not avoided on the ground of public policy. The costs of this appeal should be costs in the actions.

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