

**SUPREME COURT OF CANADA**

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| **Citation:** Stuart Olson Dominion Construction Ltd. *v.* Structal Heavy Steel, 2015 SCC 43, [2015] 3 S.C.R. 127 | **Date:** 20150918  **Docket:** 35777 |

Between:

**Stuart Olson Dominion Construction Ltd.,**

**formerly known as Dominion Construction Company Inc.**

Appellant

and

**Structal Heavy Steel, a division of Canam Group Inc.**

Respondent

**Coram:** McLachlin C.J. and Rothstein, Cromwell, Moldaver, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 50) | Rothstein J. (McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon and Côté JJ. concurring) |

Stuart Olson Dominion Construction Ltd. *v.* Structal Heavy Steel, 2015 SCC 43, [2015] 3 S.C.R. 127

Stuart Olson Dominion Construction Ltd.,

formerly known as Dominion Construction Company Inc. Appellant

v.

Structal Heavy Steel, a division of Canam Group Inc. Respondent

**Indexed as:** Stuart Olson Dominion Construction Ltd. ***v.*** Structal Heavy Steel

2015 SCC 43

File No.: 35777.

2015: January 19; 2015: September 18.

Present: McLachlin C.J. and Rothstein, Cromwell, Moldaver, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for manitoba

*Liens — Trusts — Relationship between lien and trust provisions in provincial legislation — By filing lien bond in court in order to vacate builder’s lien, has contractor satisfied its trust obligations with respect to subcontractors who have registered liens against land upon which construction work was being done? — The Builders’ Liens Act, C.C.S.M., c. B91, ss. 4(1), 4(3), 55(2), 66.*

D was the general contractor and S was its subcontractor in respect of structural steel work for a construction project. S filed a builder’s lien against the property upon which the construction work was being done. After filing a lien bond in the full amount of S’s lien claim, D brought an application in the Manitoba Court of Queen’s Bench seeking a declaration that it had satisfied its trust obligations. S then filed its own motion requiring full payment of its past-due invoices, without deduction or set-off, upon D receiving the funds from the owner. The motion judge held that the security in the form of the lien bond extinguished the trust obligations of D pursuant to the Manitoba *Builders’ Liens Act*. The Court of Appeal overturned this holding and concluded that under the Act, subcontractors have two separate and distinct rights beyond the common law right to sue for breach of contract: the right to the statutory trust and the right to file a lien claim against the property.

Held:The appeal should be dismissed.

Ensuring payment of contractors and subcontractors and encouraging liquidity in the flow of funds to them are both significant preoccupations in the construction industry. Construction liens and statutory trusts are statutory remedies which are found in provincial legislation to protect those who provide services or materials to a construction project. The Manitoba *Builders’ Liens Act* is silent as to how these two statutory remedies interact. The text and context of the provisions, as well as the history of the Act, reveal that the trust and lien provisions are two separate remedies that exist independently and may be pursued concurrently under s. 66 of the Act.

The purpose of a lien is to create a charge against the land in favour of contractors, suppliers and workers who can prove their claims. The purpose of the statutory trust is to help assure that money payable by owners, contractors and subcontractors flows in a manner which is in accord with the contractual rights of those engaged in a building project and that it is not diverted out of the proper pipeline. Finding that a trust claim is extinguished by filing a lien bond would undermine this purpose. A lien bond merely secures a contractor’s or subcontractor’s lien claim rather than satisfying it through payment and it does not extinguish the owner’s or contractor’s obligations under the statutory trust. The filing of a lien bond has no effect on the existence and application of the trust remedy. This conclusion is consistent with s. 4(3) of the Act, which provides that the contractor is barred from diverting trust funds for its own use until all subcontractors “have been paid all amounts then owing to them”.

There will never be a requirement for the owner, contractor, or subcontractor to pay the funds at issue to the claimant twice. To the extent that the lien and trust claims are for the same work, services, or materials, payment under the trust will eliminate the equivalent amount payable to satisfy the lien claim. In the present case, S acknowledges that, had D paid the trust monies into court, there could have been a reduction in the amount of the lien bond by an amount equivalent to the monies paid into court. D chose to provide security by way of a lien bond rather than payment of funds into court. It is true that it paid premiums for that bond which are not recoverable, but that is simply the cost of the security which it chose to provide. S will not receive double payment.

**Cases Cited**

**Referred to:** *Provincial Drywall Supply Ltd. v. Gateway Construction Co.* (1993), 85 Man. R. (2d) 116; *Canadian Bank of Commerce v. T. McAvity & Sons, Ltd.*, [1959] S.C.R. 478; *L. W. Bennett Co. v. University of Western Ontario* (1961), 31 D.L.R. (2d) 246; *Richer v. Borden Farm Products Co.* (1921), 64 D.L.R. 70.

**Statutes and Regulations Cited**

*Builders and Workers Act*, R.S.M. 1970, c. B90.

*Builders’ Liens Act*, C.C.S.M., c. B91, ss. 3(1), 4 to 9, 4(1), (3), 5, 13, 16, 24(1), 37 to 45, 49 to 51, 55(2), 56(1), 66.

*Builders’ Liens Act*, S.M. 1980‑81, c. 7.

*Mechanics’ Lien Act*, R.S.O. 1950, c. 227.

*Mechanics’ Liens Act*, R.S.M. 1970, c. M80.

**Authors Cited**

Bristow, David I., et al. *Construction, Builders’ and Mechanics’ Liens in Canada*, vol. 1, 7th ed. Toronto: Carswell, 2005 (loose‑leaf updated 2012, release 2).

Manitoba. Law Reform Commission. *Report on Mechanics’ Liens Legislation in Manitoba*, Report #32. Winnipeg: The Commission, 1979.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Manitoba Court of Appeal (MacInnes, Beard and Monnin JJ.A.), 2014 MBCA 8, 303 Man. R. (2d) 122, 29 C.L.R. (4th) 173, [2014] 4 W.W.R. 444, 600 W.A.C. 122, [2014] M.J. No. 14 (QL), 2014 CarswellMan 20 (WL Can.), setting aside in part a decision of Schulman J., 2013 MBQB 48, 289 Man. R. (2d) 194, [2013] 7 W.W.R. 359, [2013] M.J. No. 71 (QL), 2013 CarswellMan 81 (WL Can.). Appeal dismissed.

Dave Hill, Derek Olson and Michael Weinstein, for the appellant.

Kevin T. Williams and Kyla A. Pedersen, for the respondent.

The judgment of the Court was delivered by

Rothstein J. —

1. Introduction
2. Ensuring payment of contractors and subcontractors and encouraging liquidity in the flow of funds to them are both significant preoccupations in the construction industry. In addition to common law remedies, two statutory remedies have been developed in provincial legislation to protect those who provide services or materials to a project: construction liens (also known as mechanic’s or builder’s liens) and statutory trusts.
3. This case requires the Court to consider the interaction between these two statutory remedies in the Manitoba *Builders’ Liens Act*, C.C.S.M., c. B91 (“*BLA*” or “Act”). Specifically, by filing a lien bond in court in order to vacate a builder’s lien, has a contractor satisfied its trust obligations with respect to the subcontractors who have registered liens against the land upon which the construction work was being done?
4. The *BLA* is silent as to how these provisions interact. However, the text and context of the provisions, as well as the history of the Act, reveal that these are two separate remedies for unpaid persons who have done work, provided services, or supplied materials for a construction project. Registering a lien bond does not relieve a contractor of its trust obligations under the *BLA*. This appeal should be dismissed.
5. Facts
6. In December 2010, Dominion Construction Company Inc. (“Dominion”, now known as Stuart Olson Dominion Construction Ltd.) was hired by BBB Stadium Inc. (“Owner”) as general contractor to construct Investors Group Field, a new football stadium at the University of Manitoba. In April 2011, Dominion entered into a subcontract with Structal Heavy Steel (“Structal”) under which Structal would supply and install steel for the structure, roof, bleachers, and wall of the stadium for $44,435,383.
7. Beginning with the April 2012 billing, Dominion withheld payment from Structal, originally citing the Owner’s delay in paying Dominion. However, in August, Dominion advised that it was using the unpaid amounts for back charges it claimed resulted from delays attributable to Structal.
8. On September 7, 2012, Structal registered a builder’s lien against the property totalling $15,570,974.53 — $3,538,029.97 for past-due invoices; $633,885.28 for invoices falling due on October 1, 2012;[[1]](#footnote-1) $3,331,500.69 for statutory holdback, and an $8,067,558.59 delay claim. On October 22, 2012, Dominion filed a lien bond in the full amount of the builder’s lien in the Manitoba Court of Queen’s Bench. This bond provided that if Dominion did not satisfy any lien judgment against it, the surety of the bond would pay, up to a maximum, the amount of the judgment.
9. Structal approved the bond and vacated its lien. Dominion continued to receive progress payments from the Owner. Structal asserted that Dominion was required to comply with the trust provisions of the Act.
10. Nonetheless, Dominion refused to make further payments to Structal, maintaining that it had a set-off against the monies claimed by Structal, that there was no breach of trust, and that Structal was fully secured by the lien bond.
11. Structal responded by requesting that the Owner withhold a $3,538,029.97 payment from Dominion or face an action for violating the trust provisions of the *BLA*. The Owner obliged and Dominion brought an application in the Manitoba Court of Queen’s Bench seeking a declaration that it had satisfied its *BLA* trust obligations to Structal. If granted, it could pay the amount the Owner was withholding to other trust claimants and, once satisfied, to other creditors. Structal then filed its own motion requiring full payment of its past-due invoices, without deduction or set-off, upon Dominion receiving the funds from the Owner.
12. Schulman J. of the Court of Queen’s Bench ruled that the lien bond secured Structal’s trust claim, whereupon the sum of $4,171,915.25 was paid by the Owner to Dominion on account of Structal’s completed and certified work (R.F., at para. 19). Dominion used these funds to pay other contractors and itself. Structal has paid all its subcontractors in full from its own resources ($3,950,849.26 in payments) and its subcontract has been certified for payment.
13. Lower Court Decisions
    1. Manitoba Court of Queen’s Bench, 2013 MBQB 48, 289 Man. R. (2d) 194
14. In the Court of Queen’s Bench, Schulman J. ruled that Dominion’s filing of the lien bond extinguished its trust obligations to Structal under the *BLA*. He wrote that there is no indication in the *BLA* “that a general contractor in the position of [Dominion] should pay the amount in issue twice, once in vacating the lien and another time in securing the trust” (para. 18). It would be “commercially unreasonable and contrary to the intention of the legislation to require [Dominion] in effect to pay $8,000,000 to secure payment of Structal’s claim for $4,000,000” (para. 18).
15. Schulman J. maintained that the lien bond filed by Dominion “stands in place of the lien, securing the sum of money claimed by Structal” (para. 17). As such, the lien bond filed by Dominion had extinguished its statutory trust obligations to Structal, and “upon receipt of the progress payment in question in this case [Dominion] may disburse the funds without being in breach of the trust provisions of the [*BLA*]” (para. 24).
    1. Manitoba Court of Appeal, 2014 MBCA 8, 303 Man. R. (2d) 122
16. Writing for a unanimous Court of Appeal panel, MacInnes J.A. overturned Schulman J.’s holding with respect to the lien bond extinguishing Dominion’s trust obligations to Structal.
17. The Court of Appeal concluded that under the *BLA*, subcontractors have two separate and distinct rights beyond the common law right to sue for breach of contract: the right to the statutory trust and the right to file a lien claim against the property (ss. 4 to 9).
18. MacInnes J.A. allowed Structal’s appeal and set aside the order of the motion judge.
19. Analysis
    1. Nature of the Lien and Trust Provisions
20. Dominion claims that the trust provisions apply only for “sub-contractors whose claims might not be protected by lien” (A.F., at para. 40). Evaluation of this assertion involves consideration of the relationship between the lien and trust provisions of the *BLA*. The application of the trust provisions to those contractors or subcontractors whose claims are protected by a lien is a question of statutory interpretation which can be answered with regard to the legislative evolution, text, and context of the provisions.
21. It is first necessary to outline each of the provisions in their own right.
    * 1. Builder’s Lien
22. The right of lien against the interest of the owner of the land or structure is set out in s. 13 of the *BLA*. This remedy is available to persons who do any work, provide any services, or supply materials

in performance of a contract or sub-contract for any owner, contractor or sub-contractor has, by virtue thereof, a lien for the value of the work, services or materials which, subject to section 16, attaches upon the estate or interest of the owner in the land or structure upon or in respect of which the work was done or the services were provided or the materials were supplied, and the land occupied thereby or enjoyed therewith.

1. When a lien is registered, it encumbers the land on which the work was done or the structure with respect to which the work was done (*BLA*, s. 13). As the Manitoba Court of Appeal explained in *Provincial Drywall Supply Ltd. v. Gateway Construction Co.* (1993), 85 Man. R. (2d) 116, the purpose of the lien is to “creat[e] charges against the land in favour of those contractors, suppliers and workers who can prove their claims” (para. 47).
2. Because a lien creates an encumbrance on the land, mortgage advances subsequent to registration of a lien are typically stalled when liens are filed. Recognizing this impediment to liquidity, the Act provides for vacating the liens, pending resolution of the validity of the lien claims, if alternative security is posted. Section 55(2) provides that a lien may be vacated upon payment into or the filing of security (typically a lien bond) with the court:

**55(2)** Upon application, a judge may order security or payment into court in an amount equal to the holdback required under this Act as it applies to a particular contract and any additional money payable with respect to that contract but not yet paid but not exceeding the total amount of the claims for liens then registered against a parcel of land and may then order that the registration of those liens be vacated.

1. Section 56(1) then provides that any money or security paid into court stands in place of the land:

**56(1)** Any money paid into court or any security given under subsection 55(2) stands in place of the land against which the lien was registered and is subject to the claims of

(a) the persons whose liens have been vacated; and

(b) every person who

(i) both at the time of filing the application under subsection 55(2) and at the time of filing application for payment out under subsection (3), has a subsisting claim for lien, and

(ii) has registered a claim for lien prior to the time of filing the application for payment out under subsection (3);

but the persons whose liens have been ordered vacated have a first charge on the money or security to the extent of any amount, including costs, found by the judge to be owing to them.

1. The function of the payment of money or security into the court is to take the place of the land in securing the interests of the contractor or subcontractor who registered the lien. The motion judge stated that security paid into court would stand “in place of the lien” (para. 17 (emphasis added)). However, as the Court of Appeal found, the text of s. 56(1) is unambiguous that the security paid into court stands in place of the land against which the lien was registered.
2. When a lien is registered against the land and security is paid into court, the registration of the lien may be ordered vacated. The result is that the land is freed from the lien encumbrance and funds, typically mortgage funds, can flow for further development on the land. The underlying lien claim, however, remains. The only effect is that the security paid into court, rather than the land, is available in the event of a lien judgment in favour of the contractor or subcontractor.
3. The Manitoba Law Reform Commission in its 1979 *Report on Mechanics’ Liens Legislation in Manitoba* (“Commission Report”) had expressed concern that there is “a pressing need to expedite the disposition of claims of lienholders once their liens are vacated from the title” (p. 113). It is a commercial reality in the construction industry that it can prove costly to pay lien bond premiums or to have money tied up in court. The *BLA* signals that lien actions should proceed promptly. Once the lien has been vacated, the claimant’s charge against the money paid into court or against the security given ceases to exist if no action is commenced within 30 days of the lien claimants being given notice to commence their action (ss. 49 to 51).
4. The *BLA* also provides for a statutory holdback. Whoever is primarily liable for payment under a contract (the owner, contractor, or subcontractor) must deduct and retain 7.5 percent of the contract price or, where there is no contract price, 7.5 percent of the value of the work. These funds must be retained for at least 40 days after a certificate of substantial performance is given, the work under the contract has been completed, or the work under the contract has been abandoned, whichever occurs first (s. 24(1)). The holdback is the fund from which lien claims can be satisfied, up to the amount of the holdback. It allows subcontractors to be paid directly from the owner, despite the lack of privity of contract (D. I. Bristow et al., *Construction, Builders’ and Mechanics’ Liens in Canada* (7th ed. (loose-leaf)), vol. 1, at pp. 4-3 and 4-4).
   * 1. Statutory Trust
5. The trust provisions of the *BLA* are found in ss. 4 to 9. They provide that subcontractors, any workers employed by the contractor, and other beneficiaries are to be paid before an owner or contractor can appropriate trust funds for his or her own use.
6. Under s. 4(1), funds received by a contractor on account of a contract price constitute a trust fund for the benefit of

(a) sub-contractors who have sub-contracted[ed] with the contractor and other persons who have supplied materials or provided services to the contractor for the purpose of performing the contract;

(b) the Workers’ Compensation Board;

(c) workers who have been employed by the contractor for the purpose of performing the contract; and

(d) the owner for any set-off or counterclaim relating to the performance of the contract.

1. Similarly, under s. 4(2), funds received by a subcontractor on account of a contract price in the subcontract constitute a trust fund for the benefit of

(a) sub-contractors who have sub-contract[ed] with the sub-contractor and other persons who have supplied materials or provided services to the sub-contractor for the purpose of performing the sub-contract;

(b) the Workers’ Compensation Board;

(c) workers who have been employed by the sub-contractor for the purpose of performing the sub-contract; and

(d) the contractor or any sub-contractor for any set-off or counterclaim relating to the performance of the sub-contract.

1. Under s. 4(3), a contractor in possession of trust funds under s. 4(1) cannot appropriate or convert those funds or use them for any purpose not authorized by the trust until

(a) all sub-contractors who have entered into a sub-contract with him and all persons who have supplied materials or provided services to him for the purpose of performing the contract have been paid all amounts then owing to them out of the sum received;

(b) the Workers’ Compensation Board has been paid all assessments which the contractor could reasonably anticipate as arising out of work done by workers employed by him in performing the contract to the extent for which the sum was received;

(c) all workers who have been employed by him for the purpose of performing the contract have been paid all amounts then owing to them out of the sum received for work done in performing the contract; and

(d) provision has been made for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received.

1. The owner is also subject to trust obligations:

**5(1)** Where, under a contract, sums become payable to the contractor by the owner on the basis of a certificate of a payment certifier, any amount, up to the aggregate of the sums so certified, that is in the hands of the owner or received by him at any time thereafter for payment under the contract constitutes, until paid to the contractor, a trust fund for the benefit of

(a) the contractor and all sub-contractors and other persons who have supplied materials or provided services for the purposes of performing the contract or any sub-contract under the contract;

(b) The Workers’ Compensation Board; and

(c) workers who have been employed for the purpose of performing the contract or any sub-contract under the contract.

**5(2)** All sums received by an owner that are to be used in the financing of a structure or improving land, including the purchase price of the land and payment for the discharge or withdrawal of prior encumbrances against the land, constitute, subject to the payment of the purchase price and of payments for the discharge or withdrawal of prior encumbrances against the land, a trust fund for the benefit of the persons mentioned in subsection (1).

1. Like a contractor, the owner may not appropriate or convert trust funds or use them for any purpose not authorized by the trust until

**5(3)** . . .

(a) the contractor has been paid all sums justly owed to him in respect of the performance of the contract; and

(b) provision for the payment of other affected beneficiaries of the trust has been made.

* 1. The Statutory Framework — The Relationship Between the Lien and Trust Provisions

1. The trust and lien provisions of the *BLA* are two separate remedies, with the trust remedy being more wide-reaching. All funds received by the contractor for the general contract are trust funds for not only subcontractors, but also the Workers’ Compensation Board, any workers employed by the contractor, and the owner for any set-off or counterclaim relating to the performance of the contract (s. 4(1)). The lien provisions do not impose obligations on contractors or subcontractors with respect to funds received. Trust funds, on the other hand, cannot be appropriated for other purposes until all subcontractors and all persons who have supplied materials or services have been paid (s. 4(3)(a)). Moreover, pursuant to s. 16 no lien can encumber the interest of the Crown, a Crown agency, or a municipality. There is no similar exclusion with respect to the trust provisions of the Act (see s. 3(1)).
2. The trust provisions were formerly provided for in *The* *Builders and Workers Act*, R.S.M. 1970, c. B90, while the lien provisions were provided for in *The* *Mechanics’ Liens Act*, R.S.M. 1970, c. M80. These two acts were repealed and essentially incorporated into the *BLA*, S.M. 1980-81, c. 7,in 1981 as a result of the 1979 Commission Report (*Provincial Drywall*,at para. 22). However, in consolidating these two acts, the legislature did not expressly delineate how the lien and trust provisions were to interact in situations such as this case, where both remedies are pursued at the same time by a contractor or subcontractor.
3. Dominion asserts that the trust provisions of the *BLA* have a narrow purpose: “. . . to provide security to sub-contractors whose claims might not be protected by lien” (A.F., at para. 40).
4. Neither the text of the *BLA* nor the Commission Report supports Dominion’s assertion (see A.F., at para. 40). The trust remedy originated in a statute that did not provide a lien mechanism and it was not altered to limit its applicability when both were incorporated into the *BLA*. Rather, both remedies exist independently.
5. This Court has recognized the distinct operation of lien and trust provisions. In *Canadian Bank of Commerce v. T. McAvity & Sons, Ltd.*, [1959] S.C.R. 478, Rand J., writing for the majority, held that, under *The Mechanics’ Lien Act*, R.S.O. 1950, c. 227, a provision exempting public streets or highways from the application of the act applied only to the lien provisions, not the trust provisions. Preventing a lien from attaching to a public highway served an important purpose: “. . . the sale of a highway to realize a private debt is not to be seriously contemplated” (p. 481). However, Rand J. recognized that denying the statutory trust to those who work on public highways “would defeat [the] fundamental object of the statute . . . and leave them without any security whatever” (p. 482). He found that “[t]he two securities, that is, the land and the money, are completely independent of one another” (p. 482).
6. Moreover, the *BLA* itself contemplates that the lien and trust remedies may be pursued concurrently. Section 66 provides that “a claim related to a trust fund . . . may be brought or joined with an action to realize a lien”. If the trust provisions only protected those without a lien claim, there would never be concurrent claims and s. 66 would have no application. The legislature cannot be presumed to enact superfluous or meaningless provisions (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 211-12).
7. Nothing in the *BLA* suggests that the lien and trust provisions do not remain as two separate remedies. This is not to deny that a contractor or subcontractor may have both a lien and trust claim and that the funds sought under each remedy may be the same. But this does not change the fact that the claimant has access to both of these remedies.
   1. Does the Filing of a Lien Bond Extinguish an Associated Trust Claim?
8. Dominion argues that where a lien bond has been filed with the court, the bond should stand as security for any potential claim. However, a reading of both the lien and trust provisions of the *BLA* reveals that the filing of a lien bond has no effect on the existence and application of the trust remedy.
9. The purpose of the statutory trust was articulated by the Manitoba Court of Appeal in *Provincial Drywall*: “The trust provisions are designed to help assure that money payable by owners, contractors and subcontractors flows in a manner which is in accord with the contractual rights of those engaged in a building project and it is not diverted out of the proper pipeline” (para. 47).
10. Finding that a trust claim is extinguished by filing a lien bond would undermine this purpose. A lien bond provides no more security than the lien which it displaced: the lien claimant must be successful in the lien action in order to collect the amount secured by the lien bond. If a judgment were to issue invalidating the lien because the lien failed to comply with the requirements in ss. 37 to 45 of the *BLA*, liability under the lien bond would be extinguished. The claimant would then find itself with no access to the funds guaranteed by the bond. Nonetheless, a contractor or subcontractor may still have a trust claim independent of the lien claim; the lien bond would not have secured this trust claim. If Dominion were correct that the mere filing of the lien bond extinguished a contractor’s or owner’s trust obligations, enabling the owner or contractor to appropriate the trust funds for his or her own use, the claimant would be left with no lien claim and no trust monies if the lien claim failed. Such interruption of the flow of funds down the so-called construction pyramid, from the owner to the contractor, to each subcontractor and supplier, is the very problem that the trust provisions were designed to address.
11. Dominion posted security in the court under s. 55(2) of the *BLA*. The text of this subsection speaks only to the lien claim; nothing in this provision eliminates the trust.
12. That the filing of the lien has no effect on the subsistence of the statutory trust is consistent with s. 4(3) of the Act, which provides that the contractor is barred from diverting trust funds for its own use until all subcontractors “have been paid all amounts then owing to them” (s. 4(3)(a)). A subcontractor has not been paid simply by the filing of a lien or by funds or security being posted with the court for the purpose of vacating the lien. A lien bond merely *secures* a contractor’s or subcontractor’s lien claim rather than satisfying it through payment. It does not extinguish the owner’s or contractor’s obligations under the statutory trust.

Double Payment

1. Dominion submits that unless paying funds into court to vacate the lien does not at the same time satisfy the trust provisions of the *BLA*, where the lien and trust claims are for the same work, services, or materials, a contractor or owner could be required to pay the funds twice. This, Dominion argues, would be in direct contravention of the general principle set out in *L. W. Bennett Co. v. University of Western Ontario* (1961), 31 D.L.R. (2d) 246 (Ont. C.A.), quoting *Richer v. Borden Farm Products Co.* (1921), 64 D.L.R. 70 (Ont. S.C. (App. Div.)), at p. 73, that “[t]he law will never compel a person to pay a sum of money a second time which he has paid once under the sanction of the court” (p. 251).
2. Dominion’s argument blurs the distinction between payment and security. Should an owner or contractor pay funds into or post security with the court in order to vacate registered liens, such funds or security do not constitute payment to the lien claimants.
3. There may be circumstances where a contractor will choose to maintain double security where there are lien and trust claims for the same work, services, or materials, by acquiring a lien bond while still holding trust funds. However, a contractor can avoid double security by paying cash into court pursuant to s. 55(2) instead of depositing a lien bond. The *BLA* provides that any owner, contractor, or subcontractor with trust obligations “shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust” until one of the listed steps has occurred (ss. 4(3), 4(4) and 5(3)). Payment of the trust funds into court to vacate a lien, for the amount of the lien claim implicated by the trust claim, does not constitute an appropriation or conversion of the trust funds. The contractor is doing exactly what the Act requires — ensuring the monies are held in trust for the beneficiary. These funds remain impressed with the trust; should the lien claim fail while the trust claim is outstanding, the cash would continue to be trust funds when returned to the owner, contractor, or subcontractor. So long as the trust funds themselves are deposited with the court, the funds are secure and the trust has not been breached.
4. A lien bond involves only an assurance that the surety will pay the amount of any lien judgment should the lien defendant fail to do so. The bond does not constitute security for the trust claim and does not result in the protection of the actual trust monies at issue. An owner, contractor, or subcontractor who chooses to file a lien bond with the court instead of depositing the funds at issue must maintain the trust fund in addition to the bond.
5. There will never be a requirement for the owner, contractor, or subcontractor to pay the funds at issue to the *claimant* twice. To the extent that the lien and trust claims are for the same work, services, or materials, payment under the trust will eliminate the equivalent amount payable to satisfy the lien claim. In the present case, Structal acknowledges that, had Dominion paid the trust monies into court, there could have been a reduction in the amount of the lien bond by an amount equivalent to the monies paid into court (R.F., at para. 64). Structal’s acknowledgment on this point is logical: there is no need for a lien bond to secure an amount already secured by trust funds paid into court.
6. Dominion chose to provide security by way of a lien bond rather than payment of funds into court. It is true that it paid premiums for that bond which are not recoverable, but that is simply the cost of the security which it chose to provide. Structal will not receive double payment.
7. Conclusion
8. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: Hill Sokalski Walsh Trippier, Winnipeg.

Solicitors for the respondent: Taylor McCaffrey, Winnipeg.

1. The record does not disclose the basis on which an October invoice was predetermined as of September 7, 2012, the date on which the lien was registered. [↑](#footnote-ref-1)