Recommendations for Further Legislative Reform to Ontario's *Construction Act*

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with approximately 16,000 members, practicing in every area of law in every region of the province. We provide updates and education on every area of the law to combined audiences of 20,000 lawyers annually. The members of our 40 practice sections include leading experts in their field who provide practical advice to government and other decisionmakers to ensure the economy and the justice sector work effectively and efficiently to support access to high-quality justice for Ontarians.

This submission has been prepared by the OBA's Construction and Infrastructure Law Section ("**Section**"). Members of the Section represent a broad cross-section of industry stakeholders, including owners, general contractors, sub-contractors and suppliers, lenders and insurers, government, and homeowners. Our members have analyzed and aided decision makers over the years on several important legislative and policy initiatives in the construction and infrastructure sector.

Summary

In 2018, Ontario's then-*Construction Lien Act* underwent an extensive overhaul to keep pace with the modern commercial realties faced by Ontario's booming construction industry. The 2018 amendments were the result of broad consultation between the provincial government and industry stakeholders, including the Ontario Bar Association ("**OBA**") as representative of Ontario's construction and infrastructure lawyers.

Over the past 5 years, Ontario's construction bar has observed the effect of these amendments in practice. Some amendments have functioned well as intended, while others have resulted in unintended consequences that suggest the need for further reform. The OBA is pleased to provide the following submission, in which we identify ongoing legal challenges presented by the ***Construction Act*, R.S.O. 1990, c. C.30,** and suggest legislative solutions. By addressing these ongoing legal challenges, this government has an opportunity to complete the work undertaken in 2018 in creating a modern legislative framework for resolving construction payment disputes efficiently and economically.

Comments

Recommendations for Amendments to the *Construction Act*

Section 1.1(2.1)			
Section	**Subject**	**Issue**	**Recommended Solution**
1.1(2.1)	Prompt Payment	Prompt payment does not apply to the portion of an AFP/P3 project agreement that provides for operation and maintenance of the improvement by the SPE, or between the SPE and the contractor any other subcontract that pertains to the operation and maintenance. The issue is that the operation and maintenance portion of the project agreements generally require true "construction" work and not just operation and maintenance. For example, on an LRT project, the trackwork may need to be replaced in year 20 – which work may be exempt from prompt payment, depriving the subcontractor of rights available to other construction subcontractors.	**Legislative Reform** Section 1.1(2.1) 1. Of the *Construction Act* should be amended to clarify that if the work performed by the contractor or subcontractor otherwise constitutes "services or materials" to an "improvement" – which now includes capital repair, that Part I.1 will apply.

Section 2(4)			
Section	**Subject**	**Issue**	**Recommended Solution**
2(4)	Multiple Improvements	Section 2(4) states that, if more than one improvement is to be made under a contract, and each of the improvements is to lands that are not contiguous, then, if the contract so provides, each improvement is deemed to be under a separate contract for	**Legislative Reform** Section 2(4) of the *Construction Act* should be amended to require the contractor to provide notice to subcontractors at the outset of a subcontract in cases where s. 2(4) is triggered (possibly with contractor to bear

Section 2(4)			
Section	**Subject**	**Issue**	**Recommended Solution**
		purposes of Section 2 (substantial performance). There is a problem because subcontractors have no way of knowing whether the contract so provides, unless the owner or contractor discloses this information. Without this information, subcontractors may be unaware of lien periods and holdback release dates.	the holdback risk if such notice is not provided). Section 2(4) of the *Construction Act* should be amended to clarify that the deemed terms of the contract flow through and are binding on all subcontracts. Section 39 of the *Construction Act* should be amended to require disclosure of this information upon request. Substantial performance forms prescribed by regulation should be amended to address this issue.

Section 6.1			
Section	**Subject**	**Issue**	**Recommended Solution**
6.1	Prompt Payment	Lack of clarity about what it means for a proper invoice to identify, "the authority, whether in the contract or otherwise, under which the services or materials were supplied" – e.g., is it sufficient to refer to the contract as a whole, or is more precise detail required? Layperson may not understand "authority" and the term is not defined.	Either **Legislative Reform** or leave for judicial interpretation. If legislative reform option is pursued, use alternative (clearer) language instead of "authority."
6.1	Prompt Payment	Unlike *Federal Prompt Payment for Construction Work Act* (s. 9), there is no requirement on contractors to include the amounts invoiced by subcontractors in its proper invoice.	**Legislative Reform** Section 6.1 should be amended to require the contractor to carry a subcontractor's invoice in the proper invoice, to give notice when the proper invoice is given, and/or (if the

Section 6.1			
Section	**Subject**	**Issue**	**Recommended Solution**
		There is very limited ability for a subcontractor to know if its invoice was carried or whether the contractor was paid. It is therefore difficult for the subcontractor to enforce prompt payment obligations.	subcontractor's invoice is disputed) give the subcontractor a notice of non-payment.
6.1	Prompt Payment	There is no obligation for the contractor to tell the subcontractor when the contractor got paid, and thus the subcontractor cannot easily tell whether the contractor is paying on time.	**Legislative Reform** See above.
6.1	Prompt Payment	If a contractor does not carry its subcontractor's invoice in its proper invoice to the owner, there is no requirement for the contractor to give notice of non-payment to the subcontractor.	**Legislative Reform** See above.

Section 6.3			
Section	**Subject**	**Issue**	**Recommended Solution**
6.3	Prompt Payment	Unlike *Federal Prompt Payment for Construction Work Act* (s. 9(5)), there is no requirement for a contractor to advise subcontractors of the date the owner received the proper invoice (to allow the subcontractor to estimate the likely date of receipt of payment and due dates for payments downstream).	**Legislative Reform** See above re s. 6.1.

Section 6.5			
Section	**Subject**	**Issue**	**Recommended Solution**
6.5	Prompt Payment	If owner pays before day 28, it is not clear when the contractor has to give notice of non-payment downstream – payment must occur within 7 days but notice of non-payment to the subcontractor may be as late as day 35.	**Legislative Reform** Amend Section 6.5 to require the contractor to give a notice of non-payment within 7 days of payment from the Owner.
6.5	Prompt Payment	There is an inherent issue with prompt payment in that a subcontractor's payment mechanism and schedule of values may not align with the contractor's payment mechanism and schedule of values. Therefore the "flow-through" concept of prompt payment falls apart.	**Legislative Reform** Modify the prompt payment provisions to create an independent prompt payment obligation at each tier of the construction pyramid. The flow-down of owner notice of non-payment can still apply/be incorporated. This solution would also resolve a number of the prior issues raised above. Please note that this proposed reform would require a significant structural change to the *Construction Act*.

Section 13.5(3)			
Section	**Subject**	**Issue**	**Recommended Solution**
13.5(3)	Adjudication	The adjudication period may expire with the owner before it does with a subcontractor. This could lead to a situation where the contractor is in an adjudication with the contractor but cannot bring the owner in.	**Legislative Reform** Modify 13.5(3) such that the trigger is if all subcontracts are completed, or, if there are no subcontracts, after the contract is completed.

Section 13.5			
Section	**Subject**	**Issue**	**Recommended Solution**
13.5	Adjudication	Non-application of the *Limitations Act* to adjudications. This could allow a party to bring an adjudication and obtain a determination on a matter notwithstanding that the matter is statute barred (if it were pursued in court).	**Legislative Reform** Add a section, consistent with section 52(1) of the *Arbitration Act*, which provides that the law with respect to limitation periods applies to an adjudication as if the adjudication were an action and a claim made in the adjudication were a cause of action. However, it will need to be clear that the adjudication does not stop the limitations period from running.

Section 13.12			
Section	**Subject**	**Issue**	**Recommended Solution**
13.12	Adjudication	S. 13.12(1) sets out the powers of an adjudicator, none of which include the jurisdiction to rule on their own jurisdiction. Item 7 provides for "Any other power that may be prescribe", but the regulations do not provide for the jurisdiction to rule on their own jurisdiction (and query whether this can be done by regulation in any event). Further, this can become an issue on judicial review.	**Legislative or Regulatory Reform** Amend Section 13.12 (or, if applicable, the regulations) to add a competence-competence principle consistent with sections 17 (1), (2), (3), and (5) of the *Arbitration Act.*

Section 13.18			
Section	**Subject**	**Issue**	**Recommended Solution**
13.18	Adjudication	Unlike the *Arbitration Act* which simply provides for a party to bring an application to set aside the award, the *Construction Act* provides for setting aside on judicial review. Yet the grounds are substantially similar to those in the *Arbitration Act*. The issue created relates to standard of review. The standard of review in judicial review is, generally, one of reasonableness and not correctness. However, the grounds listed are, generally, not issues related to the underlying decision of the adjudicator and therefore there is nothing to "review".	**Legislative Reform** Remove the "judicial review" process and allow the matter to be brought as a simple application, even if leave is still required.

Section 22			
Section	**Subject**	**Issue**	**Recommended Solution**
22	Release of Holdback	The phrase "or as otherwise provided for under this *Act*" is unclear. The legislature should clarify what "otherwise provided for under this *Act*" means. This creates issues such as, for example, if a subcontractor preserves a lien and the contractor vacates the lien by posting security into court - is the lien "otherwise provided for" such that the holdback is now due and payable to the subcontractor despite the contractor having posted security for that holdback (and any other amount of the lien) into court?	**Legislative Reform** Revise relevant provisions to clarify the intent of the provision and address obligatory release of holdback where a lien has been preserved and subsequently vacated.

Section 24			
Section	**Subject**	**Issue**	**Recommended Solution**
24	Retention of notice holdback	Pre-amendments definition of written notice of lien in s.1 was "includes a claim for lien and any written notice given…" Policy rationale was a Written Notice of Lien should be a clear and distinct document. Post-amendments, s.1 was changed to a prescribed form but s. 24 not updated to account for change in definition.	**Legislative Reform** Section 24 should be updated to add "or claim for lien" after "written notice of a lien".

Section 26			
Section	**Subject**	**Issue**	**Recommended Solution**
26	Payment of basic holdback	The amendment of this section to change from "may" to "shall" had unintended consequences and needs to be clarified. The intention of this change was to make it a positive obligation on the Owner to pay HB once it became due after substantial performance, subject to the owners right to withhold under section 27.1. However, this section, as written, makes it an obligation of ALL payers under contracts and **subcontracts** to be required to pay once all liens that may be claimed against this holdback have expired. This means that contractors would be required to pay subcontractors HB funds once the subcontractors had completed their subcontracts and the time had run so that any liens will have expired. However, this creates a number of issues: 1) this circumvents the certification of subcontracts regime under section 25;	**Legislative Reform** The language of the act should be modified such that no lower-tier party is obligated to fund/finance a holdback release. Either the "shall" pay obligation should only apply to the owner, and not to any payor, or there should be a corresponding obligation flowing up the chain which requires holdback to be released from the owner down the chain to the ultimate subcontractor whose lien rights have expired.

Section 26			
Section	**Subject**	**Issue**	**Recommended Solution**
		2) there is NO obligation for an owner to pay the corresponding amounts to the contractor; and 3) the contractor does not have the same withholding right as an owner under section 27.1	

Sections 26.1 and 26.2			
Section	**Subject**	**Issue**	**Recommended Solution**
26.1 and 26.2	Release of holdback on annual or phased basis	There are many forms of contract that don't have a set price at the date the contract is entered into, but the parties can estimate what the contract price is likely to be at that time, and there is no real policy reason these contracts ought not get the same benefit of phased or annual holdback release for this reason.	**Legislative Reform** Amend s. 26.1 and 26.2 of the *Act* to require the contract price, if known at the time the contract is entered into or, if not known, the reasonable estimate of the construction portion of the contract price exceeds a prescribed regulatory threshold.
26.1 and 26.2	Release of holdback on annual or phased basis	Sections 26.1 and 26.2 do not require publication, or create a deadline to lien, before an owner releases holdback on an annual or phased basis. Sections 26.1 and 26.2 do not state that the owner may "without jeopardy" release holdback, unlike after substantial performance. The owner is therefore at risk of claims by subcontractors, who may not be aware that holdback is being released annually or on a phased basis. The result is that it is unlikely that holdback will be released early in longer projects. The purpose of the	**Legislative Reform** Amend ss. 26.1 and 26.2 to require mandatory publishing of the upcoming holdback release, with a deadline to lien. Ideally, make the language of the holdback release provisions of the *Act* consistent by stating that the owner may release holdback "without jeopardy."

Sections 26.1 and 26.2			
Section	**Subject**	**Issue**	**Recommended Solution**
		legislative change was to allow holdback to be released early.	
26.1 and 26.2	Release of holdback on annual or phased basis	Lack of publication requirement prior to release of holdback means subtrades and suppliers have no notice of when to lien.	**Legislative Reform** See above.

Sections 26.1(2) and 26.2(2)			
Section	**Subject**	**Issue**	**Recommended Solution**
26.1(2) 26.2(2)	Release of holdback on annual or phased basis	Sections 26.1(2) and 26.2(2) should state that releases of holdback can occur when "all preserved liens in respect of the contract have been satisfied, discharged or otherwise provided for under this *Act*". (Not "all liens" as currently drafted, since liens exist throughout the contract life.)	**Legislative Reform** Amend these clauses to change the wording to the previous language.

Section 27.1			
Section	**Subject**	**Issue**	**Recommended Solution**
27.1	Release of Holdback (Basic)	No ability under *Act* to retain from holdback if lien preserved (registered on title or delivered) after 40th day from substantial performance.	It is not clear that the *Act* does not allow notice holdback in these circumstances. Section 24 provides for notice holdback "in addition to the holdbacks required by this Part." The fact that the owner can release basic holdback does not mean the owner is prohibited from retaining notice holdback.

Section 27.1(2)			
Section	**Subject**	**Issue**	**Recommended Solution**
27.1(2)	Release of Holdback – by contractor	There is no corresponding right for the contractor to set-off against HB payments to a subtrade for set-off as given to the owner in 27.1(1)	**Legislative Reform** Add the this right for the contractor, and the corresponding obligation to provide a Notice of Non-Payment to the subtrade.

Section 31(6)			
Section	**Subject**	**Issue**	**Recommended Solution**
31(6)	Notice of contract termination	Lien expiry time-frame should commence from the date of publication of termination, not from date listed in the notice of termination. This is particularly important because the requirement to publish does not identify who must publish it.	**Legislative Reform** Act should be amended to provide that the lien expiry time-frame commences from the date of publication of termination, not from date listed in the notice of termination. Consider including a deadline by which publication must occur. The actual date of termination can remain applicable for contractual purposes. The publication date is relevant only for determining the lien claim deadline. This way, the party wishing for the lien preservation period to begin running will publish the notice. Consequential amendments will be required to several subsections of s. 31.
31(6)	Notice of contract termination	Useful to correct the provision entitling any "person whose lien is subject to expiry" to publish a notice of termination of a contract, to make clear that a non-party to the contract cannot terminate the contract.	**Legislative Reform** Helpful change but this would be a minor legislative change.

Section 31(6)			
Section	**Subject**	**Issue**	**Recommended Solution**
31(6) Reg. 303/18, Form 8	Notice of contract termination	Form of notice of termination should not say that it can be used to terminate a subcontract, since the *Act* does not contemplate notice of termination of a subcontract.	**Regulatory Reform** This would be a minor change to the form. The form is wrong.

Section 34(10)			
Section	**Subject**	**Issue**	**Recommended Solution**
34(10)	Expiry of liens	The date that a lien expires is extended when there is an adjudication. However, the owner may not know if there is an adjudication downstream, and thus may release holdback prematurely. Also a subcontractor that is unaware of an adjudication upstream will not know the deadline to lien.	**Legislative Reform** This provision of the *Act* should just be struck and people need to lien. The provision undermines certainty of lien periods, which has been part of the bedrock of the lien regime. Any other solution is too messy.

Section 35			
Section	**Subject**	**Issue**	**Recommended Solution**
35	Liability for Exaggerated Liens	Subsection 35(2) is unclear and when it can apply is similarly unclear. Subsection 35(1) states that a person who preserves a lien that it knows (or ought to know) is willfully exaggerated that they do not have a lien, is liable for damages as a result.	**Legislative Reform** 1. Section 35 should be revised to clarify: That the lien is to be reduced by the exaggerated portion (regardless of good faith) to the proper amount of the lien;

Section 35			
Section	**Subject**	**Issue**	**Recommended Solution**
		Subsection 35(2) goes on to provide that the court may order that the lien be reduced by the exaggerated portion, if it finds that the person acted in good faith. First – it is not clear if the reduction is to the proper amount of the lien or if there is a double reduction (as a penalty), i.e. the exaggerated portion is deducted from the proper lien amount. This confusion is created by reference to Section 17 which provides that the lien is to be the amount actually owed. So if the exaggerated portion is reduced from the lien amount determined in accordance with Section 17, the lien will be reduced from its appropriate amount, by the exaggerated portion. Second – it is not clear how a person could have acted in good faith when they knew or ought to have known that it was "willfully exaggerated" or that they do not have a lien. Third – the *Act* does not address what happens if the person did not act in good faith.	2. What happens in the event that there is a lack of good faith (i.e. willfully exaggerated).

Section 39(1)			
Section	**Subject**	**Issue**	**Recommended Solution**
39(1)	Holdback / s. 39 disclosure	Section 39 entitles the enquiring party to know whether the contract provides for phased or annual	**Legislative Reform** This can be solved with a requirement to publish completion of a phase or annual period. See ss. 26.1 and 26.2 above.

Section 39(1)			
Section	**Subject**	**Issue**	**Recommended Solution**
		holdback release, but does not require disclosure of the amount of the milestones or when they will occur.	Section 39 could also be amended to provide for disclosure of this information.

Section 85.1			
Section	**Subject**	**Issue**	**Recommended Solution**
85.1	Bonding	How do you calculate the amount of the bond if the contract is a fixed price for mixed maintenance and construction work (e.g., a facilities management contract)?	**Legislative Reform** Amend s. 85.1 of the *Act* to require a bond if a reasonable estimate of the construction portion of the contract price exceeds a prescribed regulatory threshold.
85.1	Bonding	Section 85.1 requires a contractor to furnish the required bonds in the amount of 50% of the contract price. However, the are contracts (particularly IPD or Alliance contracts) where there is more than one party to the contract. In those contract structures, not only is bonding unnecessary (as the owner is responsible for all costs regardless of "fault" or "non-performance") but there will be multiple contractor parties and therefore the bonding on the project could exceed 100% of the contract price. e.g. if there are 5 parties to the alliance, plus the owner, there will be bonds totaling 250% of the contract price.	**Legislative Reform** Amend s. 85.1 to clarify that total bond coverage on the contract needs to be 50%, rather than each contractor requiring to provide 50% bonds.

Section 85.1(3)			
Section	**Subject**	**Issue**	**Recommended Solution**
85.1(3)	Bonding	The language exempts contracts with architects or engineers. However, this suggests an analysis of the party with whom the contract is entered rather than an analysis of the nature of the work in the contract itself. It is understood that the intent of the provision is to exempt contracts for design or other professional services and so the language could be updated to better implement that intent.	**Legislative Reform** Revise the provision to read: *This section does not apply in the case of a public contract for design or other professional services only.*

Section 87.3			
Section	**Subject**	**Issue**	**Recommended Solution**
87.3	Transition Rules	The nature of the transition provisions is such that it remains ambiguous as to which version of the *Construction Act* applies, notwithstanding the fact that it is now almost 2024. This ambiguity leads to parties losing lien rights when they are unaware of the applicable version of the *Construction Act*, and leaves parties unaware of whether prompt payment applies to their contract or subcontract. Further, the inclusion of leases will render the old version of the *Construction Act* applicable for years to come, adding uncertainty into an industry which requires greater certainty as to applicable law.	**Legislative Reform** As was done with Alberta's legislation, we recommend adding a drop-dead transition date which provides that as of XXXX date, the transition provisions no longer apply and the current version of the *Construction Act* applies.

Section 87.3			
Section	**Subject**	**Issue**	**Recommended Solution**
87.3	Transition Rules	What is the meaning of an improvement? Can there be multiple improvements for the purpose of transition rules?	

Section 88 and O.Reg. 302/18, s.3			
Section	**Subject**	**Issue**	**Recommended Solution**
88 and O. Reg. 302/18, s. 3	Regulations & Joinder	Clarification as to whether a trust claim can or cannot be joined with a lien claim as there is conflicting case law on this issue. Section 88 of the *Act* does not provide that Regulations can be made in respect of joinder.	**Legislative Reform** This can be solved by expressly stating the trust claims can or cannot be joined with lien claims and revising section 88 to state that Regulations can be made with respect to joinder.

The OBA would be pleased to meet and discuss this further and answer any questions that you may have.