The Voice of the Legal Profession

Ontario Regulations to be made under the *Construction Lien Act*

Date: March 8, 2018

Submitted to: Ministry of the Attorney General

Submitted by: Ontario Bar Association

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Introduction

As part of the process of modernizing the *Construction Lien Act* (the "**Act**"), the Ontario Bar Association (the "**OBA**") has provided submissions to and met with the Ministry of the Attorney General, the Ministry of Economic Development, Employment and Infrastructure and the Expert Review. In August 2017, the OBA, Construction and Infrastructure Law Section (the "**Section**"), submitted its comments on Bill 142 and the proposed amendments to the Act.

On December 12, 2017, Bill 142 received Royal Assent, with certain provisions, including definitions and other non-substantive amendments, coming into force that day. It is contemplated that the amendments to modernize the construction lien and holdback rules will come into force on July 1, 2018 and the amendments related to prompt payment, adjudication and liens against municipalities will come into force on October 1, 2019.

The Ministries, the Expert Review and the expert Advisory Group have developed four draft regulations to support the amendments to the Act: Forms; Procedures for Actions under Part VIII; General; and Adjudications under Part II.1 of the Act. In February 2018, consultation drafts of the regulations were posted on Ontario's Regulatory Registry to allow for feedback from the industry.

The OBA appreciates the opportunity to provide comment to the Ministry of the Attorney General regarding the Regulations to be made under the Act.

The OBA

The OBA is the largest voluntary legal association in Ontario and represents over 16,000 lawyers, judges, law professors and law students. This submission was prepared by the Construction Lien Act Amendments Committee of the OBA's Construction and Infrastructure Law Section ("the **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.

1. Transition and Timing

As a general comment on timing, the OBA understands that the sections of the Act related to holdback are to come into force on July 1, 2018. However, there are holdback issues which will trigger adjudication, which provisions are not set to come into force until October 31, 2019. For example, section 27.1 of the Act contemplates that a contractor may refuse to pay the holdback if the owner refuses to pay the contractor, the contractor refers the matter to adjudication, and the contractor notifies the subcontractors. It is unclear how the holdback rules, specifically those related to non-payment, are to operate

if the adjudication amendments are not yet in place. Clarification, or transitional provisions by regulation may be appropriate in respect of these matters.

2. Forms

The OBA supports any measure that will reduce confusion in the industry as to the information, including important notices, which must be given or published under the Act. We have collected the following comments on the proposed forms:

2.1 Form 1.2 is the form for notice of non-payment from a contractor to a subcontractor under subsection 6.5(5) of the Act. It is suggested that the word “submitting” at the end of the form be replaced with “giving”, consistent with the language in subsection 6.5(5).

2.2 Form 1.4 relates to notice of non-payment under subsection 6.6(6) of the Act. We have the same comment as above with respect to using the word “giving” instead of “submitting” in the last paragraph of the form.

2.3 Form 8 differs from the Form 9 (CSP) and Form 10 (Certificate of Completion of Subcontract) in that it does not require the person filling out the form to state “A. Identification of premises for preservation of liens” or “B. Office to which claim for lien must be given to preserve lien”. Form 8 should also contain this part of Form 9 and 10 as the purpose of the notice of termination is also to trigger lien periods and assist lien claimants in determining whether to give or register its lien and identifying the correct lands.

2.4 Form 13 relates to the notice of preservation of lien against condominiums. However, the title of the form does not specifically refer to section 34(9), which may be of assistance to claimants, and we recommend adding this information.

2.5 Form 23 relates to the judgment of reference to Small Claims Court. We deal with this below in section 4.4.

3. Procedures for Actions under Part VIII

We have the following comments with respect to the procedures for actions under Part VIII of the Act:

3.1 Section 55(2)(a) of the Act previously allowed counterclaims to be advanced in respect of any claim (not limited to the subject improvement) whereas section 55(2)(b) limited crossclaims to claims in respect of the improvement. Section 55(2)(a) and (b) have been repealed and replaced with section 2 of the new Regulations, which is silent on the improvement issue. We question whether it is intended that both counterclaims and crossclaims may now be in respect of any

claim, including those related to other improvements, and whether this may lead to litigation which is not summary in character. We recommend clarifying this issue in the regulations.

3.2 Several comments have been made with respect to subsection 2(2) of the Regulations. It appears to contradict subsection 2(1), which provides that a crossclaim or counterclaim shall accompany the defence. We also received a question as to why and how a motion would be brought before the statement of defence is delivered to seek leave to deliver a crossclaim and counterclaim after the defence is delivered. Subsection 2(2) also appears to preclude making amendments later if leave has not been sought before delivering the defence, which may be unintended. Lastly, there is concern that parties will be added unnecessarily or prematurely, because there won't be enough time to investigate prior to delivering the defence. This will add unnecessary procedural costs and slow the action down. We recommend reviewing these sections to provide clarity on the intended practice and procedure.

3.3 Subsection 2(4) of the Regulations provides that parties have 20 days to deliver their defence, crossclaims, counterclaim or third party claims. While this stems from the former section 54 of the Act, this new regulation could be made clearer particularly in view of the new subsection 2(2) which contemplates that the motion for leave to deliver a crossclaim or counterclaim be brought before delivering a defence. As many litigators have experienced, it is often impossible to have a motion within 20 days due to court scheduling.

3.4 Section 55(1) of the Act formerly stated that a lien claim could be joined with a claim for breach of contract or subcontract. This was interpreted by the courts to mean that the claim to be joined had to be in respect of the same improvement. Section 55(1) has now been repealed. Section 3 of the new Regulations deals with joinder but does not speak to joining a breach of contract claim with a lien claim or the issue of the same improvement. We question if it is intended that a lien claim can be joined with a breach of contract claim in respect of a different improvement or some other non-lien issue (e.g. – engineer's negligence), and recommend clarifying this issue.

3.5 Section 4 deals with third party claims. One comment received was that this section should be broadened to include fourth party claims and subsequent claims, which are not already dealt with in the regulation.

3.6 Subsection 5(5)3 provides that, following noting in default, judgment may be given against the defendant or third party. One consideration is whether it should be clarified that this judgment is not a lien judgment. Under the current Act, while a default monetary judgment may be obtained, a lien claimant must move under Rule

19 to obtain a lien judgment. This clarification in the Regulations would assist many who are unfamiliar with the distinction.

3.7 Subsection 14(2) provides that the court may fix the remuneration of the person who assisted it and direct payment of the remuneration by any of the parties. One comment received is that parties should be expressly permitted to make submissions before an order is made for payment of the fees under section 14.

4. General

We have several comments with respect to the proposed General regulations:

4.1 Subsection 4(2) currently provides that "A person who gives notice of non-payment under Part I.1 of the Act shall take reasonable steps to confirm that the person to whom notice was given received it." This subsection appears to be more stringent than subsection 87(2) of the Act which states that in the absence of evidence to the contrary, a document or notice sent to a person by certified or registered mail shall be deemed to have been received by the person on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays. A comment was received as to the reasonableness of making the non-payment notice provision more stringent than any other notice provision in the Act or Regulations. In our view, these provisions should be consistent. It is also our view that the current wording of subsection 4(2) has a potential to create ambiguity as to what constitutes a "reasonable step". As such, we suggest that the subsection either be removed or that it contain specific deemed receipt provisions to clarify the appropriate practice in this regard.

4.2 Subsection 7(2) requires the owner to "notify" the contractor in writing regarding the publication of the notice of non-payment. Subsections 7(3) and 7(4) then state that the contractor and subcontractor "shall give" a copy of the written notification. We suggest that using "shall give" in 7(2) instead of "notify" would add consistency to the process and clarity to the interpretation of this section.

4.3 Section 33.1 of the Construction Lien Act used to provide that a notice of intention to register a condominium shall be published "in a construction trade newspaper at least 5 and not more than 15 days, excluding Saturdays and holidays, before" the condominium declaration is registered. The section has been amended so that a notice is to be published "in the manner set out in the regulations". Although "construction trade newspaper" is defined in the regulations, there is nothing in the regulations about the manner and timing of publication. Form 11 is also silent as to those points. We recommend that the General regulations be revised to include manner and timing of publication, in a similar way to the former Construction Lien Act section 33.1.

4.4 Section 85.1 of the Act sets out a requirement for bonds for public contracts where the contract price exceeds the prescribed amount. Section 11 of the Regulation prescribes the amount to be $250,000 or more. It is not currently clear how this threshold amount would be calculated with respect to contracts for services. One example is a contract for municipal services where rates are agreed upon in advance but services are supplied on an "as needed" basis. Another example is a master services agreement which bundles multiple services over a period of a few years with purchase orders being issued for specific improvements and a known or expressed contract price. In addition, if a contract price is based upon the costs of the work plus a fee, the "contract price" is not known at the time of signing. Are the bonds required if costs and budgets are estimated or projected to exceed the $250,000 threshold? If at the time of signing a contract price is below the threshold, and so no bond is required at the time, but through changes exceeds the threshold, is a bond then required? It is not clear that a bond would be obtainable, certainly not easily or cheaply obtainable, after construction has started, but the language used in the Regulation refers only to the "contract price" and it would be clearer if it stated the "contract price at the time of signing the contract" or some other temporal determination. By tying the threshold to the term "contract price" the regulations appear to assume that the contract is for a single improvement. It is not clear whether a bond would be necessary or when a bond would be required to be issued in these circumstances where each improvement may not reach the threshold but the overall contract likely will. It may be clearer and consistent with the intention of the amendment to tie the threshold to the price of a single improvement and not the "contract price" or to clarify that s. 2(4), which deems separate improvements as being separate contracts, applies to the determination of the "contract price" for the purposes of s. 85.1.

4.5 The amended section 58 of the Act provides that a judge may refer the action to a deputy judge of that Court or to the Small Claims Court Administrative Judge if the action is for an amount that is within the monetary jurisdiction of the Small Claims Court, as set out in section 23 of the Courts of Justice Act. We note that the Courts of Justice Act limits the jurisdiction of Small Claims Court to actions for money or recovery of personal property. There is nothing in the Act or Regulations clarifying whether the Small Claims Court can deal with declaratory relief typically sought in lien actions (e.g. declarations of priority over mortgagees) other than the new Form 23, which states that the deputy judge will determine all questions arising in this action and on the reference and all questions arising under the Construction Act. Another issue that the Regulations (and Act) are silent on is the jurisdiction of the Small Claims Court to deal with breach of trust claims, as per *Concord Trimming Inc v Valley Garden Homes Inc*. [1998] O.J. No. 6350 (Div. Ct.). It would be helpful to clarify the authority of the Small Claims Court to deal with these issues and ensure these references are effective.

5. Adjudications under Part II.1 of the Act

Given the contemplated timeframe for the adjudication provisions to come into force, the OBA understands that these regulations are still under consideration and being drafted. We have collected the following comments on the proposed regulations concerning adjudication to date:

5.1 Certain provisions permit the Authority to make determinations or issue directions or requirements, *viz.* subsections 3(2), 3(3), and paragraph 4(e). We recommend that consideration be given to whether these decisions are in the Authority's sole discretion or subject to reasonableness. In the case of the latter, consideration should also be given to how these decisions of the Authority may be challenged.

5.2 Subsection 3(1) provides that in order for an individual to receive a certificate of qualification to adjudicate, that individual must apply to the Authority in accordance with its procedures. We recommend consideration be given to specifying when the Authority is going to prepare and publish these procedures.

5.3 Subsection 3(2) provides, at clause 1, that the individual must have at least seven years of relevant working experience in the construction industry. We recommend that consideration be given to whether:

a) this seven years should be within a certain time period prior to the individual's application, as opposed to at any prior time;

b) at least a portion of the 7 years be experience in Ontario (for example, 3 of 7 years); and,

c) at least a portion of the 7 years be experience in Canada (for example, 5 of 7 years, which could include experience in Ontario).

5.4 Subsection 3(2), at clause 1, enumerates certain professions in which relevant experience may have be gained by an individual. We recognize that this is an open-list, but recommend consideration be given to the inclusion of additional professions, including project directors, interior designers, consultants, and adjudicators from other jurisdictions.

5.5 Subsection 3(2) enumerates the requirements and qualifications for an individual to be eligible to be an adjudicator, and we recommend consideration be given to whether the individual must be in good standing with their respective professional association (if applicable).

5.6 Paragraph 5(1)(b) may prove problematic if the Authority seeks to suspend or cancel an adjudicator's certificate of qualification on the basis that the holder is

"incompetent or unsuitable", and we recommend consideration of whether this language should be broader to ensure that the Authority is not undermined if it seeks to remove an adjudicator that is consistently making determinations which are unsupported by the evidence or indicative of bias.

5.7 Subsection 12(1) addresses the minimum information that the Authority will be required to report and we recommend consideration be given to including:

a) the number of requests that the Authority received to appoint an adjudicator;

b) the number of instances in which the Authority failed to appoint an adjudicator within 7 days of receiving a request for an appointment;

c) the average length of time from the adjudicator's receipt of the information required by section 13.11 until the adjudicator's determination;

d) the number and average length of extensions; and

e) the number of determinations not rendered prior to the deadlines (as amended) in section 13.13.

5.8 Subsection 12(2) lists sectors to be reported on, and we recommend that consideration be given to:

f) providing guidance regarding how mixed-use projects should be reported; and

g) subdividing the public buildings sector into education, healthcare, and other applicable subcategories.

5.9 With respect to the Additional Proposals:

a) we request that the draft regulations giving effect to these proposals be circulated for public comment prior to their implementation;

b) the proposals contemplate adding a provision to allow an adjudicator to exercise his or her powers regardless of a failure by a party to comply with a direction or requirement, and consideration should be given to how this would operate if the notice of adjudication is incomplete. For example, whether the adjudicator would have the power to accept the incomplete notice;

c) consideration should be given to circumstances in which a routine dispute evolve into a matter beyond the scope of what adjudication is suited to addressing. For example, a dispute over a "proper invoice" could develop

into an allegation of the consultant's negligence, and in such circumstances the insurers of design professionals would likely balk at having negligence determined pursuant to the adjudication process. In such circumstances, it may be advisable that the adjudication process be terminated;

d) with respect to consolidated adjudications, we recommend consideration be given to:

1. when consolidation is and is not appropriate;

2. clarifying whether an adjudicator's determination regarding consolidation is subject to appeal or judicial review;

3. situations in which one party has not yet brought its adjudication but the same matter has been brought to adjudication by another party and consolidation would be efficient;

4. extending the deadline for the notice of consolidation from 5 days to 7 days after the adjudicator has received the documents required under section 13.11;

5. clarifying whether the deadline for the notice of adjudication is measured from the adjudicator's receipt of documents in the earlier or the later of the adjudications proposed for consolidation; and

6. clarifying which adjudicator has carriage of the consolidated adjudication; and

e) if an adjudicator fails to complete an adjudication, then:

1. we recommend that the Authority should be permitted to take this into consideration for the purpose revoking the adjudicator's certificate of qualification to adjudicate pursuant to subsection 5(1); and

2. we endorse Option 2, which would include a provision addressing the adjudicator's entitlement to be paid a fee.

Conclusion

Once again, the OBA appreciates the opportunity to provide input and assistance to the Ministry of the Attorney General.