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October 16, 2015

Construction Lien Act Expert Review
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King St West
Toronto, ON M5H 3Y4
Attention: Mr. Bruce Reynolds and Ms Sharon Vogel

RE: Report on Considerations and Recommendations for the *Construction Lien Act* Expert Review

Dear Bruce and Sharon:

On behalf of the Ontario Bar Association's Construction and Infrastructure Law Section Executive, the OBA Committee on *Construction Lien Act* Reform is pleased to submit to the Construction Lien Act Expert Review the attached Report on Considerations and Recommendations.

The Report is a product of the enthusiastic efforts, and unanimous support, of the entire Section Executive, and is submitted to the Review in response to your call for comments from stakeholders in your Information Package dated July 15, 2015. The process we undertook in preparing the Report is outlined in the Report.

The Section Committee undertook its own efforts to solicit views and opinions among the membership of the Section and the OBA. In this effort, we specifically reached out to the OBA Bankruptcy and Insolvency Section to solicit its views on our draft report and recommendations regarding the trust and the holdback provisions of the *Construction Lien Act* and anticipate providing those two sections to the Review early next week. We will re-submit the full Report to the Review at that time with those sections inserted. We did not want to hold up delivering the completed portions of the Report to you though.

We look forward to discussing our Report with you at our consultation meeting on October 22, 2015 from 9:00 a.m. to 1:00 p.m. at your offices. Further to our discussions with James Little, we understand that the Review is open to the Section Committee setting an agenda for the consultation meeting, and to the Section Committee inviting other members of the Section Executive or members of the OBA who assisted in the preparation of our Report. Accordingly, we attach a proposed Agenda for our consultation meeting with the Review. We welcome any feedback or proposed revisions to the proposed agenda as you think fit. After you review our Report, you may have a better sense of what subjects may require more or less time than we allocated, or on what subjects you would like to focus more. You will note that the Agenda is tight, but that we have reserved some time for general discussions and questions the Expert Review may have.

Given the number of OBA members involved in preparing our Report, we would greatly appreciate it if the Review could provide us with a list or draft list of questions you intend to ask prior to the meeting. This will facilitate our preparation and enhance the discussion at the meeting.

The entire Section Executive appreciates and applauds the enormous efforts already rendered by the Review in assisting the Province in its nascent efforts to reform the Construction Lien Act. Our hope is that you will find our Report of assistance to you in your process.

Please do not hesitate to contact either Ted (416-369-7106; tedbetts@gowlings.com) or Derek (416-596-1177; df@freemanlaw.ca) if you have any questions or comments, or if we can be of any further assistance to you in your review.

Best regards,

Ted Betts
Co-Chair
OBA Committee on CLA Reform

Derek Freeman
Co-Chair
OBA Committee on CLA Reform

c: Andrea Strom, *Ministry of the Attorney General*
Christopher Cheung, *Ontario Bar Association*
Brendan Bowles, *Chair, Construction and Infrastructure Law Section Executive*

OBA Construction & Infrastructure Section Executive
***Construction Lien Act* Reform Committee**

Review Consultation Meeting Agenda

Meeting Date and Time: October 22, 2015 – 9:00am to 1:00pm

Meeting Location: Borden Ladner Gervais LLP
Scotia Plaza Tower, 40 King St W
Toronto, ON M5H 3Y4

Time		Subject	Attending/Invited
9:00-9:20	20 min	Introductions/Overview	Committee
9:20-9:50	30 min	Prompt Payment	Committee, T.Robinson, M.Sanford
9:50-10:20	30 min	P3/Infrastructure	Committee, Y.Fushman
10:20-10:50	30 min	Disputes Procedures	Committee, M.Swartz, C.DeMarco
10:50-11:00	10 min	Break	
11:00-11:30	30 min	General Procedures	Committee, J.Cosentino
11:30-11:50	20 min	Trust Provisions	Committee, J.Quigg, K.Groulx
11:50-12:10	20 min	Holdback	Committee
12:10-12:40	30 min	Condominiums, Subdivisions and Leasehold Liens Crown/Public Lands Liens Home Renovations	Committee, D.Capannelli, T.Rotenberg, R.Wong
12:40-1:00	20 min	Concluding Comments/Discussions	Committee

Total: 4 hours

Note: Final attendees will be confirmed prior to the meeting. Some attendees will only be able to attend via conference call.

The Voice of the Legal Profession

Report on Considerations & Recommendations to the *Construction Lien Act* Expert Review

Date: October 16, 2015

Submitted to: *Construction Lien Act* Expert Review

Submitted by: The Ontario Bar Association, Construction and Infrastructure Law Section

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Introduction and Background

In February of 2015, the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure (the "**Ministries**") initiated an expert review (the "**Review**") of the *Construction Lien Act* (the "**Act**"). The Review involves an examination of the effectiveness of the Act in achieving its policy objectives within the modern context, and will address the issue of promptness of payment and the effectiveness of dispute resolution under the Act. A fundamental aspect of the Review is its inclusion of broad industry consultation.

In the July 2015, the Review issued the "Expert Review of Ontario's *Construction Lien Act* Information Package" (the "**Information Package**") and invited certain construction industry stakeholders, including the Construction and Infrastructure Law Section (the "**Section**") of the Ontario Bar Association (the "**OBA**"), to provide comments on the Act and suggest possible areas of review, reform and modernization for the Review to consider in preparing its recommendations to the Ministries.

The Act governs and regulates the construction sector and its participants like few other statutes. It has functioned reasonably well since its replacement of the *Mechanics Lien Act* in 1983; however, a number of significant developments in the construction industry have resulted in the need for its review and modernization. The Section applauds the efforts of the Ministries and the Review to review and modernize the Act. The time is well overdue.

The OBA appreciates the opportunity to provide comment on the Act to the Review. This represents a historic opportunity to modernize a critical piece of legislation to the legal practices of our members and their clients in the construction industry.

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents over 16,000 lawyers, judges, law professors and law students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist the legislature with a number of legislative and policy initiatives each year – both in the interest of the profession and in the interest of the public. This Report was prepared by the Section, which has over 450 members comprised of the leading barristers and solicitors involved in construction and infrastructure law issues. Members of the Section represent a broad cross-section of industry stakeholders, including owners, general contractors, sub-contractors and suppliers, lenders and insurers, governments and homeowners.

Scope of Report and Recommendations

As part of Phase 1 of the Review's process, the Review solicited initial input on the preparation of a substantive issues list. Anticipating the Ministries review of the Act, in January of 2015, the Executive Committee of the Section struck a committee (the "**Section Committee**"), co-chaired by Ted Betts and Derek Freeman, to consider reforms to the Act and how the Section and the OBA could be of assistance to the Review in preparing its recommendations to the Ministries, as well as to our members and the public at large.

The Section Committee met with the Review in March 2015 and responded to the Review's solicitation for initial comments on April 15, 2015 by submitting a collection of proposals and recommendations the Section Committee had received from members of the OBA. These were not proposals and recommendations of the OBA or of the Section, but were a reflection of the opinions of members who submitted them to us. We were pleased to see many of the suggestions from our members reflected in the Information Package.

The Section Committee was also pleased to see that the Information Package is comprehensive and provides a detailed analysis of the issues facing our members, the industry and the Act. The Information Package provides the industry with a very good starting point for consultation with stakeholders, including the Section, as part of Phase 2 of the Review's process. We are hard pressed to think of any significant issue not raised by the Review.

Some stakeholders may take the opportunity of the consultation process to advocate for particular reforms that may benefit parties and interests they represent. This is to be expected, but that is not the approach the Section Committee has taken. The OBA and the Section have a mandate to represent all of our members. In providing commentary and submissions on matters of public interest or of interest to our members, we take into account the opinions of all members and strive for a consensus position that is generally accepted. In the construction industry, this is never easy as our members are legal representatives for all industry participants. Where a consensus position is not clear, we will still undertake commentary from a neutral position that is nevertheless helpful by providing technical legal analysis to the matter.

With that in mind, the Section Committee decided to focus on provisions of the Act, and perceived problems or issues with the Act, that prioritized three types of concerns:

1. The issue is broad and significant in scope, affecting many of members serving different parts of the industry,

2. The issue is relatively limited in scope, affecting a much smaller group of individuals and companies, but having a great impact on that group, especially where there is not clear or strong public advocacy for the group or issue, or

3. The issue is very technical in nature and our expertise as lawyers reviewing a statute can have a material impact and benefit to our membership, the industry and the public at large.

With those parameters as our guide, in this Report, the Section Committee provides the Review with commentary on the following issues:

1. Prompt payment
2. P3/Infrastructure
3. Dispute Resolution Procedures
4. General Procedures
5. Trust Provisions
6. Holdback
7. Condominiums, Subdivisions, and Leasehold Liens
8. Crown/Public Land Liens
9. Home Renovations

In the Spring of 2015, the Section Committee struck nine separate subcommittees to review and more clearly identify central issues in these nine areas, including problems with the current legislative scheme, research and providing comparative analysis from other jurisdictions, as applicable, and providing possible solutions or specific recommendations for reform where doing so was consistent with our mandate of representing all of our members and putting forth consensus positions. A list of the subcommittees and their chairs are attached in Appendix 1.

Our objective in submitting this Report to the Review is to be of assistance to you in preparing your recommendations by providing commentary and recommendations based on the collected experience of the Section Executive and other participants in our review of the Act.

We look forward to discussing this Report and the reform of the Act with the Review at our consultation meeting on October 22, 2015.

General Comment – "Non-Uniformity of Applicability"

In the process of the Section Committee's review, one particular comment was repeated often, to

the degree of being a general theme or an overarching observation regarding any reform of the Act.

Many of the issues and concerns with the existing Act arise from its "one size fits all" approach to construction projects. The difficulties of applying a single legislative regime to a vibrant, ever changing industry that impacts every aspect of life for Ontarians are readily apparent when one considers how the Act applies to every kind of project from small home renovations to complex, billion dollar, multi-phased, multi-year P3 projects, *and everything in between*.

Our view is that any reformed or new construction lien statute should embed an appreciation and flexibility to vastly different types of construction projects, and focus on the inherent risks and vulnerabilities which the Act is intended to address, rather than striving for the ease of uniformity. The Section Committee's research in each subject matter considered in this Report indicates that distinguishing construction projects based on size, scope and type are common in many other jurisdictions, even if difficult to draft.

A corollary of avoiding unnecessary uniformity is ensuring any reformed Act also provides flexibility for the future. Since the Act was first adopted in 1983, many different project structures have evolved that do not fit well within the framework of the Act. An approach that allows for legislative adaptation would be beneficial to the industry, the economy and the public.

The Section Committee recommends that the Review consider the use of regulations to provide for the flexibility and adaptability of any reformed Act and how it will apply to different types of construction projects and construction parties. Regulations are easier to revise and update more frequently than legislative amendments, while maintaining the important requirements of transparency and consultation. The use of regulations to specify the projects and parties to which the law applies, and does not, is reasonably common.

Subject Matter Commentary

1. Prompt Payment

The issue of prompt payment has been widely considered and debated in the context of the proposed Bill 69*, Prompt Payment Act*, 2013. As part of the Review's work, it is anticipated that consideration will be given to either incorporating provisions of Bill 69, or principles of prompt payment, into recommendations for reform of the Act.

Given the extensive publications outlining issues and opinions regarding prompt payment, the Section Committee focused its review on what it feels are the key issues to be considered and addressed in the course of assessing reform of the Act. The Review may also want to consider the Section's detailed technical analysis of Bill 69 as set out in the Section's submission to the Ontario

Standing Committee on Regulations and Private Bills on March 10, 2014. A copy of that submission is attached as Appendix 2 for the Review's consideration and ease of reference.

Having reviewed various publications and comparative information from other jurisdictions, the Subcommittee on Prompt Payment Reform views the following as key issues.

1. **Proper identification of affected parties**: Instituting general prompt payment reform that applies equally to all stakeholders in a construction project may be problematic. The impact on all parties to construction projects – owners, contractors, subcontractors, material suppliers, sureties and lenders – should be considered and weighed before recommendations on the scope of any prompt payment reform are made. If prompt payment concerns are isolated to certain stakeholders, legislative amendment to relation-ships that do not have widespread payment concerns, or where other stakeholders are adversely impacted by those changes, may be unadvisable.

   We note that the issue of prompt payment in many jurisdictions with prompt payment regimes (none of which are located in Canada) appears to be primarily focused on con-cerns related to payments by general contractors/contractors to their subcontractors and material suppliers, and providing protections to ensure that money flows to sub¬contractors and suppliers without undue delay. For example, several States, such as Hawaii and Ohio, have prompt payment legislation that applies to general contractor and sub¬contractor relationships, but not to owner and prime contractors.

   The impact of prompt payment should be considered on each of the below stakeholders, in order to ensure unintended consequences are avoided.

   (a) Owners;

   (b) Contractors;

   (c) Sureties; and

   (d) Lenders.

   For example, regarding sureties, defaults in strict prompt payment requirements may lead to increased bond claims. Regarding owners, the ability to pay is often linked to draws from a lender, and the owner often has no control over the timing of such draws.

2. **Proper Identification of Review of Work and Timeliness of Same**. Much of the prompt payment legislation (in the United States) provides that payment will be made upon approval of the work. Specifically, Illinois' *Prompt Payment Act* provides a guarantee of prompt payment to both contractors and subcontractors if the work is performed in

accordance with the contract and the owner approves of the work – "If a contractor has performed the work according to the contract, and the work has been accepted by the owner, the owner must pay the contractor within 15 calendar days of approval". If we are to incorporate such terms in a revised/reformed Act, much consideration would have to be had to the timing of the review of work, who has the responsibility of approving same, the timeliness of that review and what certainty exists that funds would flow following a review.

3. **Exceptions to prompt payment**. Mandating prompt payment could have unintended consequences in specific circumstances such as in set-off claims or good faith disputes over payment, which should be considered. Grounds upon which payment may be withheld should be included in any prompt payment scheme that is proposed for incorporation into the Act. The PPA, as drafted, contemplates the potential for withholding payment, but only where a payment application is disapproved or amended, and otherwise as permitted by the language of the Act. The impact of the language proposed appears to heavily curtail the ability to assert set-off claims or otherwise withhold payment in legitimate circumstances of dispute.

   Regarding set-off claims, the current legislative regime under the Act limits the value of a claimant's lien and breach of trust rights by a payer's set-off claims. Prompt payment legislation will need to take into account the impact of set-off claims for deficiencies, defects, or other issues. For example, what are the consequences when a defect is discovered prior to payment and a payment is to be made in accordance with prompt payment requirements, where such defect gives rise to a dispute over payment and a potential set-off claim?

   How and under what circumstances a payer may be excepted from otherwise mandated payment requirements is a central consideration. We note that Texas's *Prompt Pay Act* (Tex. Prop. Code Ch. 28) permits an owner to withhold payment if there is a good-faith dispute over the amount owed. One itemized exception to payment is "a dispute regarding whether the work was performed in a proper manner." (Tex. Prop. Code § 28.003(b)).

   Clear language regarding the exceptions to prompt payment requirements should be considered. Many jurisdictions outline particular circumstances in which a bona fide dispute has arisen justifying non-payment or a right to withhold payment, such as:

   - unsatisfactory job progress;
   - disputed work;
   - defective construction work that has not been remedied;

- property damage to owner, contractor, or subcontractor;
- liquidated damages;
- third party claims that have been filed or will reasonably be filed;
- additional holdback in the event of unsatisfactory work progress in the latter portions of a project;
- failure of the contractor, subcontractor or sub-subcontractor to make timely payments for labour, equipment or materials;
- evidence of property damage to the owner, contractor or subcontractor;
- reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; and
- reasonable evidence that the contract work cannot be completed for the unpaid balance of the contract.

4. **Exclusions from scheme**. In addition, it should be considered whether prompt payment will apply to all construction or whether there will be exclusions. In Alabama, for example, the Prompt Payment Act does not apply to (1) residential home builders; (2) buildings intended for residential purposes which consist of 16 or fewer units; (3) contracts or subcontracts in the amount of ten thousand dollars ($10,000.00) or less; and (4) contracts with state or local governments.

   As noted in Part 2 of this Report, P3 projects and other large or non-conventionally structured projects present unique difficulties when attempting to apply a single, general prompt payment regime. Likewise, very small or home projects, and conventional project structures with milestone payment regimes or other payment processes design to properly allocate project risk. The Review should consider appropriate exempts for different types of construction projects and project structures, with a view to balancing protections with flexibility and adaptability in the market.

5. **Consequences of default in prompt payment**. The Review should also consider what appropriate consequences may flow from default in prompt payment, such as statutory interest or penalties. However, the interaction between consequences and exceptions to prompt payment will also need to be carefully considered. For example, the application of statutory interest where non-payment arises from a good faith dispute regarding work completed may be inequitable.

6. **Notice of Disputed Payment Request**. The Review should also consider whether it would be appropriate to require an owner to notify a contractor or subcontractor within a specified period of time of its receipt of a request for payment which the owner disputes. In addition, it should also be considered whether a contractor or subcontractor should be required to notify a subcontractor or sub-subcontractor within a specified period to time of its receipt of a request for payment which the contractor or subcontractor disputes.

7. **Waiver**. The Review should also consider whether or not all contracts are deemed to include the prompt payment provisions of the Act (should the Act incorporate such prompt payment provisions), OR whether it is appropriate to permit an owner, contractor, subcontractor, materials supplier, lender, etc. to waive those proposed provisions in the contract, i.e. are contracts permitted to expressly exclude the provisions of the Act, relating to prompt payment? An important consideration would be whether these prompt payment provisions would be mandatory in all construction contracts, or can they be waived. The risks of permitting waiver may militate against it, and the courts may ultimately determine whether waiver is permissible, but we believe that the Review should consider the suggestion of waiver.

8. **Final Payment**. The Review should also consider the timing of final payment, as it is considered in the Act, in its current state, and, if so, what are the requirements relating to completion and acceptance of the work, that will warrant a final payment? Will the contractor, subcontractor, sub-subcontractor and/or material supplier be required to provide anything upon completion of the work to entitle them to final payment? Are there any consequences of payment not being made within that period of time so specified?

9. **Overall Legislative Protection**. In considering prompt payment reform, and in considering the prompt payment legislation of other jurisdictions in particular, the Section Committee encourages the Review to consider the overall legislative protection provided to contractors and subcontractors in other jurisdictions for an accurate and complete comparison. The Section Committee has not conducted any exhaustive review of other jurisdictions, but it has been noted anecdotally that jurisdictions differ widely in their prompt payment legislation and in their lien regimes.

The above are not presented to be an exhaustive list of considerations or suggestions, but rather to highlight key issues/considerations and comparative examples for further assessment by the Review. Although the members of the Section Committee have personal views on the appropriate balancing of interests under a prompt payment regime, the Section Committee has elected to take a more neutral position in this report on recommendations given the broad representation of the OBA and the neutral mandate of the Section Committee.

2. P3/Infrastructure

One of the most impactful developments in the construction industry since the adoption of the Act in 1983 is the proliferation of public procurements through the public-private partnership (P3) model in its various forms. The 1983 Act simply did not contemplate the types of party structures, contract structures, funding processes or project development processes involved in P3 projects. The same can be said in many ways about large scale infrastructure projects of all kinds, as well as large resource and energy projects.

These projects involve many more parties than the traditional owner-contractor-subcontractor pyramid that is reflected in the current Act. They are typically designed and built over many years, in multiple phases, and often at multiple sites. The party in charge of construction and operations of the project (Project Co) does not even have a legal interest in the land on which the project is being built, and so is not an "owner" under the Act. Many of the provisions of the Act are challenged by P3 infrastructure projects, if not undermined. As a result, project participants often simply ignore provisions of the Act which creates the potential for very messy and costly litigated disputes. Disputes themselves are most often settled through private mediation and arbitration so the industry does not benefit from the clarity and consistency that can come from judicial interpretation and rulings.

As a result, the Section Committee believes the Act needs to be modernized in several ways to address P3 and large infrastructure projects.

The Section Committee has the following suggestions for areas of improvements to the Act from the perspective of P3/Infrastructure projects:

1. **Holdback**

   (a) Clarification that if there are no sub-subcontracts below the level of the subcontractor (perhaps evidenced by a certification to that effect from the subcontractor), then no holdback will be required for that subcontract.

   (b) As the Government is the owner of the asset as the Project Agreement counter-party (and is paying out more than 10% of the Project price after the construction phase), funding of the holdback should be not required at Project Co level. There is value for money for the Province in that position.

   (c) To the extent that the Act is amended to require the release of holdback on the day after the expiry of the lien period, any such provision should make an allowance for the current holdback release practice on P3 projects.

2. **Project Structures**

Express recognition of "phasing" of contracts for the purposes of substantial performance and clarification around the issuance of certificates of substantial performance in the context of multi-site projects or so-called "bundled" projects (e.g., police detachments or multiple schools). Project participants should be able to break up, in a contract, a single contract into multiple projects for the purpose of substantial performance, holdback release, and other issues raised by the Act as currently drafted. The lot-by-lot provisions of the Act simply do not address the issue sufficiently.

3. **Definitions**

The definitions section of the Act do not align with P3 projects. The definitions of owner, contract, contractor, contract certification, etc. all need to be updated or bifurcated to align to the P3 model. For example, read literally, the Act defines Project Co as the "contractor" and the DBJV, which is the actual construction general contracting entity, as "subcontractor". In addition, the specific ownership interest that is exposed to construction liens is sometimes unclear within the P3 model.

4. **Adjudication**

To the extent that the Act is amended to allow for adjudication, that process cannot apply to certification of substantial completion at the PA level because lenders will not take the timing risk. Please see our commentary on possible dispute resolution procedures reform in Part 3 of this Report.

5. **No Exemption**

The Subcommittee does not recommend that P3 projects be exempt from the Act for various reasons, including the difficulty of precisely defining a P3 project in a way that accounts for all the variation that currently exists and is likely to emerge in the market, and the fact that although the projects are very large and sophisticated at the top of the pyramid, at the local trade level they are still relatively conventional projects for which those parties would expect normal protections under the Act.

6. **Non-P3 Infrastructure**

Many of the issues raised by large-scale P3 and public infrastructure projects also arise in mining, energy and other large-scale projects, whether private or public in nature. The same issues of phasing and multiple sites arise. In private projects, particularly mining projects, work is often suspended for lengthy periods of time, even indefinitely as finances wane. This leaves contractors and subcontractors vulnerable as they wait for cash to flow, knowing they are effectively helping to fund the project with the statutory holdback, but also leaves owners stuck as it is not permitted to release holdback. The Review should

consider the impact of any reform to the Act on all large-scale projects, not just projects structured on the P3 model.

3. Dispute Resolution Procedures

The Information Package identified, in several parts, a need to consider better, cheaper, faster ways of resolving construction disputes. The membership of the Section is comprised of many construction litigators who strongly concur with this view. Litigating disputes significantly increases costs to industry participants – from the legal and other expert costs to the costs associated with delayed payment pending resolution of disputes – and operate as a barrier to legal justice for many, especially smaller contractors and individuals.

Alternatives abound in other jurisdictions and we hope the Review prioritizes reform of the dispute resolution procedures of the Act and adjudication alternatives.

The Section Committee has the following suggestions for areas of possible improvement to the Act with respect to dispute resolution procedures:

Section	Reference	Considerations and Recommendations
28	Direct payment to person having lien	• Currently, an owner, contractor or subcontractor may make a payment to a lien claimant, on written notice, where no obligation to do so exists. The payment, however, does not reduce the amount that the paying party must retain as holdback under the Act. • There may exist good reason why the proper payer has withheld payment and the paying party under this section takes on that risk if it elects to make payment. • An expedited dispute resolution process should be considered to resolve subtrade claims and, correspondingly, allow the paying party to reduce the amount of holdback that it need retain.

Section	Reference	Considerations and Recommendations
30	How holdback not to be applied	• The "no right to set-off against the holdback fund" could be extended to include situations where there are trust claims and not just preserved liens?
35	Liability for exaggerated claim, etc.	• Currently, this section imposes liability for damages suffered as a result of an exaggerated lien. • Anecdotally, Practice suggests that this provision carries little deterrence. • One solution is for the statute to impose a certain monetary threshold of exaggeration where once that threshold has been reached, statutory damages are automatically triggered. This may serve to deter the registration or delivery of exaggerated liens which, in turn, may facilitate the earlier resolution of disputes. • The Act could include protections against liability for an "exaggerated lien" in circumstances where a General or CM registers a claim for lien which includes the amounts claimed by a sub trade. [I.E., the sub trade with the exaggerated lien might be liable under s. 35, but the General which subsumes that amount into its claim for lien would not face liability for the exaggerated amount.]
44(1)	Vacating lien by payment into court	• It is suggested that there be a legislative amendment to address the SCC decision in *Stuart Olson Dominion Construction Ltd. and*

Section	Reference	Considerations and Recommendations
		Structural Heavy Steel, a division of Canam Group Inc., 2015 SCC 43. Should a contractor who posts security to vacate the registration of a claim for lien be deemed to have satisfied its trust obligations?
50(2)	Trust claim and lien claim not to be joined	• The process would be simplified if the Act allowed trust claims to be joined together with lien claims.
61(6)	Settlement meetings	• It is recommended that Rule 50 of the *Rules of Civil Procedure* be adapted into the Act. • A question is whether settlement meetings being made mandatory before arbitration agreements can trigger arbitration would streamline the process.
67(2)	Interlocutory proceedings	• For larger, multi-party cases it may be efficacious if some interlocutory steps such as affidavits of documents and discoveries be required.
67(3)	Application of rules of court	• The imposition of mandatory mediation would streamline the process.
N/A	N/A	• Should the Review recommend the addition of Adjudication to the Act, that process will need to be carefully dovetailed with the existing lien process. Our Subcommittee has been advised from a reliable source that jurisdictions which provide Adjudication Statutes typically do not have Construction Lien legislation. • For example, the Adjudication process on its own (in the absence of a lien procedure)

Section	Reference	Considerations and Recommendations
		would result in a binding decision during the project that could not be challenged in court until the end of the project. If, however, the claiming party also registered a lien, the Act would require that party to initiate a court action, possibly on the very same issue that was adjudicated, which would be at odds with one of the underlying principles of Adjudication and result in two parallel litigation tracks, resulting in added costs and strain on the judicial system. One option would be to hold the lien action in abeyance pending completion of the project to further the litigation-reducing principle of Adjudication, but consideration of that that option must take into account the resulting deprivation of the defendant's opportunity to have the lien discharged (or cash security or bond, both of which carry costs, returned).

4. General Procedures

In Part 3 of this Report, the Section Committee considered the dispute resolution procedures of the Act. Many other provisions of the Act provide complex, conflicting or onerous procedures on parties that are often divorced from the practical realities of industry practice.

In this Part 4, the Committee considers areas of possible improvement to the Act with respect to other, non-dispute procedures:

Section	Reference	Comments/Recommendations
2(1)(b)	When contract substantially performed	• The percentages and/or monetary amounts listed in Section 2(1)(b) should be amended, at least to reflect inflation since 1983

Section	Reference	Comments/Recommendations
2(2)	When contract substantially performed	• Consider phased certification of substantial performance to allow the release of holdback after each phase of a project.
2(3)	When contract deemed completed	• Consider amending upwards the percentage and monetary amount listed in Section 2(3).
30	How holdback not to be applied	• The "no right to set-off against the holdback fund" should be extended to include situations where there are trust claims and not just preserved liens.
31(2)(a) and (b)	Contractor's liens	• Consider adding the words "or otherwise terminated" in addition to "the date the contract is completed or abandoned" in 31(2)(a)(ii). • Consider adding as (iii) "the date the contract is otherwise terminated" to 31(2)(b).
32(1)	Rules governing certification or declaration of substantial performance	• Certification of all contracts and subcontracts should be mandatory for substantial completion and full completion where the dollar value is significant. A $1 million threshold is suggested.
32(2)	Contents of certificate/declaration of substantial performance	• Specific additional requirements should be added for inclusion in the certificate/declaration of substantial performance. (e.g. legal description, PINs, specific municipal address). • Consider sanctions for the failure to provide correct and complete information in the certificate/declaration of substantial performance in order to ensure better adherence to the content requirements.
36(4)	Rules re sheltering	• Consideration to be given to removing/abolishing the sheltering provisions. • Alternatively, there should be a requirement for a lien claimant to provide notice of sheltering (or to register a notice of sheltering).

Section	Reference	Comments/Recommendations
37	Expiry of perfected lien	• Consider if the two year limit is appropriate for multi-party, complex cases. • A province-wide Practice Direction should be developed and adopted to simplify, make more certain and bring uniformity to the procedure for obtaining an order for trial or setting down a lien action for trial. • Is clarity required on the issue with respect to the situation where the setting down of one lien action related to an improvement deems that all lien actions are set down? • There should be a notice requirement that mandates notice be given to all lien claimants related to an improvement when an order for trial is obtained or a lien action is set down for trial.
39	Right to Information	• It would be helpful if there were an expansion of the type of information to be provided. (e.g. better particularity to the "state of accounts" so that the value of change orders, credit notes be included; information about leasehold improvements; payment particulars). • Consider a right to increased information and documentation, with copies of payment certificates to be provided as well as documents to substantiate the information provided in the response to the request for information. • It is suggested that there be increased sanctions for the failure to provide a proper and timely response to a request for information? (e.g. costs; dismissal of action; strike defence; make order as is just).
40(2)	Cross Examination	• Consideration should be given to limiting the attendances or duration of cross-examinations and continued cross-examinations, particularly in view of the summary nature of lien actions and the

Section	Reference	Comments/Recommendations
		subsequent discovery process that is often agreed upon/ordered by the court.
41(1) and (2)	Discharge of lien claim by release Withdrawal of notice of lien	• Consider an amendment that permits the withdrawal / release of a lien for a specified dollar amount. • Create a Form that would allow the registration of a partial withdrawal.
44	Security for liens – General Comment	• Some counsel have adopted a practice of asking the court for leave to allow the posting of security where the delivery of a written notice of lien has interrupted the flow of funds and the payer needs to post security even before the lien is preserved. The Act should expressly allow for posting of security in such circumstances. The provision would also have to allow the payer to obtain an order vacating the actual registration of the lien where this occurs based on the security already posted, or declare that any lien to be preserved in respect of the written notice of lien no longer attaches to the premises and shall be preserved by giving the claim for lien to the owner and person to whom the lien claimant provided services.
44(1)	Vacating lien by payment into court	• Consideration should be given to increasing the maximum amount of security beyond $50,000.00. • Please see the general note above regarding section 44.
44(9)	Rules	• It is suggested that consideration be given to amendments that would make it easier to settle with a particular lien claimant in a situation where security has been posted for all liens. • Consider the issue of "pooling" of security and if security should stand only for a particular lien claim.

Section	Reference	Comments/Recommendations
50(2)	Trust claim and lien claim not to be joined	• Consider eliminating Section 50(2) so as to permit the joinder of trust claims and lien claims, to allow for an expedited process.
58	Reference	• Consider allowing a Reference to be permitted to be obtained on a without notice basis, subject to the right to set it aside by an affected person. • Consideration should be given to whether parties can obtain a Judgment of Reference ex parte (similar to the order fixing day, time and place for trial under s. 60) and requiring that the order be served on all persons who would be entitled to notice under s. 60(2).
67(2)	Interlocutory proceedings	• Allow helpful interlocutory steps such as affidavits of documents and discoveries to be permitted in larger cases.
N/A	N/A	• Lawyers dealing with projects across Ontario observe that a significant problem they find on a day to day basis is the difference in the ability to vacate liens in Toronto (1 day) compared to anywhere else in Ontario (up to 2 weeks). This is a significant issue, as it affects cash flows on a project.

5. Trust Provisions

The Section Committee has the following suggestions for areas of possible improvement to the Act with respect to the trust provisions of the Act:

Statute and Case Law Background

Part 2 of the Act specifically imposes three statutory trusts with respect to monies received throughout the course of an improvement. The owner's trust imposes a trust for the benefit of a contractor on all monies received by an owner for an improvement. With respect to the holdback funds, the Act effectively uses the mechanism of the owner's trust to avoid the diversion of the holdback funds after the issue of the certificate of substantial completion, but before the funds

actually reach the unpaid subcontractors. The contractor's and subcontractor's trust imposes a trust for the benefit of any party who supplied services or materials to the improvement at the direction of a contractor or subcontractor on all monies owing to that contractor or subcontractor. Finally, the vendor's trust imposes a trust for the benefit of the contractor or subcontractor on all proceeds of sale, less certain expenses, where the owner's interest in the premises is sold by the owner.

In some cases, these statutory trusts have been found to conflict with the common law test for trusts requiring certainty of intention, certainty of subject matter, and certainty of object. This can be seen in *Royal Bank of Canada v. Atlas Block Co*., 2014 ONSC 3062, 2014 CarswellOnt 3062 ("**Royal Bank**"), a proceeding under the *Bankruptcy and Insolvency Act* (the "**BIA**") in which the court accepted that, pursuant to the constitutional principle of paramountcy, the statutory trusts outlined in the Act do not apply to the provisions of the BIA unless they meet the common law test for a trust. In *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, 2015 ABCA 240 ("**Iona Contractors**"), the majority of the Alberta Court of Appeal held that the holdback funds were impressed with a trust under the provisions of the Alberta *Builders' Lien Act* (the "**Alberta BLA**") that the subcontractors were entitled to those funds by reason of that trust, and that the bonding company was subrogated to those rights of the subcontractors since it had paid the subcontractors' claims. The Alberta BLA trust provisions apply when a certificate of substantial performance is issued. If, in this situation, the holdback funds had been paid by the Airport Authority (owner) to Iona (contractor) or the trustee, under the Alberta BLA the recipient would have held the funds in trust for the subcontractors.

Justice Paperny, the dissenting judge, agreed with the conclusions of the majority, except that Justice Paperny found that there was no certainty of subject matter with respect to the statutory trust created under the Alberta BLA. Accordingly, that trust did not prevail over the federal BIA. In the *Iona* Decision, Justice Paperny, noted that:

> establishing sufficient certainty of subject matter has consistently been the main stumbling block to establishing a builders' lien trust as a valid trust under the Bankruptcy Act. That was the problem identified by the courts in, for example, *Henfrey Samson Belair, Bassano*, and in this case in the court below. In 0409725 BC Ltd., a recent case from the British Columbia Supreme Court, Grauer J noted that the issue of certainty of subject matter is an evidentiary one. That is the case; in *Henfrey Samson Belair*, McLachlin J stated that whether there exists a "trust" under the *Bankruptcy Act* "depends on the facts of the particular case": para 46. Whether certainty of subject matter exists is dependent on the facts and is, to some extent, a function of the statutory language and a question of timing. [*Iona Contractors*, para. 111.]

Justice Paperny, further noted that:

> the Saskatchewan *Builders' Lien Act* is structured differently from the [Alberta BLA]. The owner, as well as the contractor, is made a trustee over all amounts in the owner's hands that are payable to the contractor. Under s 22 of the Alberta BLA, no trust comes into existence until payment is made to the contractor, who is the sole trustee. In this case, the funds were in the hands of the Airport at the time of the bankruptcy (and are still), so no

BLA trust had come into existence. [*Iona Contractors*, para. 114.]

In *Royal Bank*, the court determined that because the statutory trust funds were intermingled with funds from other sources, which were not subject to the statutory trust, certainty of subject matter could not be satisfied (see paras. 46-47 of *Royal Bank*). In *Iona Contractors*, the majority and minority reached opposite conclusions. These decisions raise an issue of great importance to construction law, namely, the enforceability of the trusteeship provisions of provincial lien legislation in the face of federal bankruptcy legislation.

It should be noted that other jurisdictions have taken some different approaches to statutory trusts which may be informative to the Review. See the requirements imposed on trustees under New York law, where they are required to act as "fiduciary managers of the fixed amounts provided for the operation", as described in the paper authored by Duncan W. Glaholt and Markus Rotterdam entitled "*Managing Trust Funds: The New York Model*", 21 CONSTRULR-ART 74, 2003.

Issues to be Considered

Whether the right of the contractor to payment of the holdback funds is subject to trust law: The statutory trust set out in the Act should be amended so as to conform to the requirements for the common law test for a trust to be met.

The trust provisions of the Act should be amended so as to require statutory trust funds to be held separately from funds received from other sources. Consideration could be made to introducing the concept of a mandatory project bank account or a mandatory holdback trust account.

Consideration must be given to the trust provisions being strengthened so as to protect the holdback fund from other creditors.

Consider whether or not additional obligations or duties should be imposed on the trustee of the statutory trust to ensure the funds are properly maintained and accounted for.

6. Holdback

The Section Committee has the following suggestions for areas of possible improvement to the Act with respect to holdback provisions of the Act:

1. **Dealing with set-offs in a fair manner**

   Problem: Currently, the release of holdback is permissive under the Act. The statute stipulates when it is safe for a payer to release holdback funds. The statute does not actually require the funds to be paid out, however, and when the lien period expires the holdback loses its character as such and ceases to be insulated from set-off claims. As a result,

subcontractors and suppliers can be caught off guard where they have waited for the lien period to expire, did not register a lien in anticipation of receiving holdback, only to find out that it is not going to be paid out due to a set-off claim asserted up the chain that was not previously disclosed. Since lien rights cannot be revived when they expire, this may lead to unfairness.

Proposal: One way to deal with this could be to change the wording from being permissive to mandatory – in other words a payer would be required to actually pay out holdback upon expiry of the lien period, provided no liens have been registered. If liens were registered, the holdback would be immune from set-off, so why should it suddenly be at jeopardy once the lien period expires? The answer must be that the statute requires a supplier to actually register a lien in all cases if they wish to protect the holdback. But this approach presents practical problems. The registration of a lien is in reality the first step in a lawsuit, and for business reasons many trades would not wish to routinely preserve a lien if they reasonably believe they are going to receive their holdback anyways. It is doubtful that owners would wish to encourage liens to be registered as a matter of course on every project.

To remedy the unfairness where a set-off claim is notified only after the expiry of the lien period, there should be a requirement to deliver a notice of intention to set-off against the holdback so that suppliers are aware in advance the holdback will not be released upon expiry of the lien period and can make an informed decision on whether to lien.

We did consider the alternative suggestion that the Act could simply prohibit the application of former holdback funds to deficiencies even after the expiry of the lien period. However, this is a more extreme solution that may unduly restrict the parties' freedom to contract. For example, some parties may consider the current arrangement to be preferable over the introduction of an additional, contractual "holdback" fund for deficiencies, which is encountered from time to time.

2. **Ensuring lien and trust claimants can actually collect holdback.**

Problem: Some payers do not actually retain the holdback money and lien and trust claimants are left in a battle with mortgage lenders and other creditors to collect from the land or other assets. Making the payer "pay the holdback twice" will not help if the payer is insolvent. One of the purposes of the Act in requiring the retention of holdback in the first place is to create a fund to assist persons who do not have privity of contract with the owner, and to at least mitigate their losses by creating a relatively modest pool of funds equivalent to 10% of the value of services and materials supplied available in the event of an insolvency. This objective is undermined if the funds are not kept but already spent.

Proposal: To enhance the chances of actual collection, and to solidify the character of the

holdback as a special fund meant to be available at the end of a project for the suppliers of labour and materials, the holdback should be physically retained in a separate account apart from all the other project funds. There should be no co-mingling of the holdback with other funds. This would create more certainty that these funds are trust funds both at common law and under the statute intended to be actually available for distribution to the suppliers of labour and materials at the conclusion of the project. Restricting the need for a segregated account to the 10% holdback will mitigate the administrative burdens of setting up a holdback account on each project. Anecdotally, it is not uncommon even in insolvency situations for a receiver or even Canada Revenue Agency to concede that the holdback should be available for distribution to subcontractor claimants. Where this is done, however, it is done more out of a sense of fairness. Requiring such funds to be kept in a separate account should create certainty for all involved that the holdback funds are intended and actually available for distribution to claimants under the Act.

Another consideration would be to allow payers to provide alternative security for the holdback, i.e., a bond or letter of credit. While this would enhance the chances of collection, it might actually serve to undermine the trust provisions of the Act because the payer would be less likely to actually retain the funds if they have provided alternative security. Indeed, the provision of such security would likely make the payer comfortable using the cash for purposes which may be inconsistent with the trust, thinking they have the "safety net" of a bond in place to satisfy their obligations if things go wrong later. It is likely more consistent with the scheme of the Act to have the holdback funds actually retained in a segregated holdback account, and thereby increase the chances that the holdback will actually be available for lien and trust claimants. However, to the extent bonds or letters of credit are being used in the industry as a stand-in for holdback obligations, it would be useful for the Act to regulate this activity. Further, as suggested below the use of such alternative security for holdback should be considered as a means to allow more frequent recourse to the early holdback release provisions of the Act. The requirement of providing security would incentivize the contractors receiving such payments to disburse such holdback funds in accordance with their trust obligations.

Lastly, having the holdback deposited in a special account would make the prior suggestion regarding assertion of set-off claims more workable. The payer would be required to provide advance notice of their intention to use funds on deposit in the holdback account to rectify deficiencies and reimburse the payer for other damages arising out of the work. If the no liens were registered in response to such notice, or the set-off claims were established in a lien action, the payer would be at liberty to safely deplete the holdback fund.

3. Early Holdback Release

Problem: On a positive note, the Act presently allows for early holdback release. In particular, Section 25 allows for payments reducing the holdback fund in respect of a subcontract for which a Certificate of Completion has been issued under section 33, when all lien rights relating to that subcontract have expired. However, the use of this section is entirely optional and requires the agreement of the payer being asked to release holdback funds. Further, although the application of Section 6 of the Act (i.e. the section dealing with irregularities) to Certificates of Completion is acknowledged, there remains a concern, based upon case law, that Certificates of Completion will be carefully scrutinized. This leads to a perception of risk for any owner who seeks to release holdback early. There is therefore also arguably a disincentive to make use of early holdback release, which is unfortunate for both subcontractors who provide early work to long-term, complex infrastructure projects and owners and general contractors who seek to garner interest among a broad range of subcontractors to provide services and materials to their projects through the availability of commercially attractive terms.

The present solution to this problem is the negotiation of contract terms that are designed to facilitate early holdback release without putting the parties offside the requirements of the Act. Such clauses sometimes contemplate the provision of security for early holdback release through an instrument such as a holdback release bond (unlike the example discussed in the prior section, it is provided by the recipient of the funds in this case). However, these types of arrangements do not entirely alleviate concerns regarding compliance with the Act and many industry members are therefore uncomfortable taking on the perceived risk associated with the use of early holdback release.

Proposal: This is admittedly a difficult issue to address without unduly inhibiting the freedom of parties to negotiate mutually satisfactory contract terms. A compromise solution that may give owners sufficient comfort without introducing unwieldy new processes is the express recognition by the Act of holdback release bonds or other forms of holdback security provided by payees (such as letters of credit), in an approved form, as being compliant with the holdback requirements of the Act. Further, the Act could stipulate that a payer who releases holdback funds in reliance upon such security would not be personally liable for any deficiency in the holdback fund corresponding to the subcontract at issue. Finally, the Act could clarify that an owner who releases holdback early in reliance upon a Certificate of Completion issued by a payment certifier would not be personally liable for any deficiency in the corresponding holdback fund.

7. Condominiums, Subdivisions, and Leasehold Liens

The Section Committee has the following suggestions for areas of possible improvement to the Act with respect to liening leasehold interests, condominiums, and subdivision lots under the Act.

1. Issues Identified by the Review

As noted at page 23 of the Information Package, delivered by the Review in July 2015, preserving a lien in certain circumstances, such as in the case of condominiums, leasehold interests, and subdivision lots, is proving increasingly difficult.

In the case of condominiums, according to the Information Package, the current preservation mechanism of the Act does not allow for the efficient registration of liens. In particular, it has been noted that such projects carry a disproportionate cost of registration, and of vacating liens, and that issues often arise with respect to title security.

With respect to the enforcement of liens against leasehold interests, the Information Package notes that contractors sometimes assume that an improvement for a tenant creates a right to lien against the landlord. This is not an accurate assumption, however, and unless the appropriate notice under section 19 of the Act has been given to the owner allowing the landlord the opportunity to address its potential liability, or the landlord's conduct has brought it within the definition of "owner" (which requires, among other things, a "request"), such a lien is not valid against the landlord's interest. A second issue that has arisen in the context of leasehold interests is that not all work done for a tenant may be lienable.

Given these issues, the Information Package suggest that contracting parties often look for creative ways to secure their interests, e.g. securing rights pursuant to the *Personal Property Security Act*, R.S.O. 1990, c P.10, or attempting to have a landlord declared "owner" under the Act.

Leasehold interests also carry an inherent difficulty with respect to searching title to locate the actual tenant for the purpose of registering a lien, as many tenants do not register their leasehold interest on title.

In addition, the Information Package notes that section 24 of the Act does not cover payments made by a landlord towards leasehold improvements (although Part II does apply in such circumstances), nor does the right of information under section 39 allow a lien claimant to obtain information about payments due to a tenant or regarding the standing of the lease.

The Information Package does not specifically identify and/or comment on liening subdivision lots.

2. Comments Received by Committee from Members

The Section Committee sought input in relation to the Act and condominium, subdivisions

and leasehold interests, and summarize several of these below for the benefit of the Review.

Section	Comments/Recommendations
Liening Leasehold Interests	
19 24 39	• Improve process for registering liens against leasehold interests. • It can be difficult on a title search to locate the leasehold title, and a commercial lease has no real value except to the actual tenant. The practical problem is that **some** landlords are **preoccupied** with creative attempts to make the freehold owner **not** an "owner" of the leasehold, depending on how much control the landlord exerts over the approval process for leasehold improvements. • Section 24 does not cover payments made by a landlord for leasehold inducements/improvements • Section 39 does not allow a lien claimant to obtain any information about any payments due to the tenant or if the lease is in good standing.
Liening Condominium Units and Common Elements	
	• If possible, having a separate "common elements" parcel for condominium buildings would be advisable. • The costs of registering and then vacating registration of claims for lien is significant, and the title security (a proportionate interest in each unit) is insignificant on a per unit basis.
Liening Subdivision Lots	
20(1)(2)	• The "home buyer" definition and s 20(2) for lot-by-lot liens increase the costs of a lien, and severely restricts its effectiveness. • There is currently no form to allow for multiple liens to be registered as 1 document, increasing significantly the costs to register a Claim for Lien. • A lawyer must search every lot in a subdivision that will be liened to exclude a lien on a lot where title has been transferred to a "home

	buyer". This can be very expensive.

3. **Commentary**

The Section Committee reached a general consensus that there is room to improve and make the process of preserving liens in the context of condominiums, leasehold interests, and subdivisions more efficient and cost effective. Amending the Act to achieve this aim, however, is more problematic. Without ascribing to any one view expressed in this regard as part of the consultation process, the following are a few of the suggestions put forth.

(a) **Condominium Units and Subdivision Lots**

While not requiring an amendment to the Act per se, to call upon the Director of Titles for Ontario to create an index for each new subdivision and condominium with the names of the current owner of a unit or lot, without having to search the title to each unit or lot. Lawyers for lien claimants will then be able to identify the units or lots not registered in the name of a new purchaser (who they will assume will be a "home buyer"), and register liens only against the remaining units or lots.

A statutory form should be created to permit the registration of one document for all the lots included in a lot-by-lot lien, with the requirement that each lot be individually described with all of the information required by section 34(5) of the Act (name of owner and person for whom work done, total amount billed, total owing, and first and last date of work). This will reduce the fees paid when registering multiple lot-by-lot liens, thus making these liens cost effective while still requiring that the correct information be provided.

(b) **Leasehold Interests**

As an alternative to the present section 19 under the Act, a leasehold claim for lien should be limited to the tenant named in a lease and those who fund leasehold improvements - a secured lender of the tenant (which is not common), or a landlord paying a cash allowance to the tenant, typically after the work is done. This change will limit the leasehold lien to the parties who do the actual funding of improvements to the leasehold premises. The secured lender will be defined as the mortgagee of a lease or the holder of a PPSA security. The payer would be required to maintain a holdback for 45 days after completion of the rented premises, and the payers would not be permitted any set offs (such as deficiencies or rental arrears) against the sums to be advanced to the tenant. Because the lien is only against a fund, if it exits, it would not be necessary to register a claim for lien on title to the property;

the lien will be preserved and perfected by serving a Notice of Claim and a Statement of Claim, with the identical procedure used for liens on public highways and Crown Land. As a consequence of this change, section 39 should be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, a lender's security, the funding available from the landlord and lender, and the state of the accounts. A section 24 notice of lien will also apply to leasehold liens.

This proposed alternative appears to be a more effective remedy than a British Columbia-type approach where the improvements done with the landlord/owner's prior knowledge are deemed to be done at their request, unless the landlord/owner files a notice in writing in the prescribed form in the Land Registry Office warning that the landlord/owner's interest in the land described therein will not be bound by a lien in respect of an improvement done on that land. This system, some suggest, only benefits sophisticated landlords, and leaves lien claimants without recourse to any third party fund that the tenant has available to pay for the leasehold improvements.

8. Crown / Public land liens

The Section Committee has the following suggestions for areas of possible improvement to the Act from a Crown/public lands perspective, broken up into three main categories: (1) federal Crown (including First Nations) lands, (2) provincial Crown lands, and (3) Municipal lands. With respect to municipal lands, as you will see in Part 3, we concluded that there did not appear to be material issues to be raised in our Report unique to municipalities and so have not made any recommendations for reform.

1. **Federally Owned Lands and First Nations**

(a) **Lienability**. The current jurisprudence regarding the application of the Act to federal lands considers whether the improvement on Federal lands is undertaken by the Federal Crown itself or by a private entity who is leasing/licensing from the Federal Crown. In cases of leasing/licensing, it also considers the intended purpose and comparison with the core nature of the federal undertaking (for example, see *British Columbia (Attorney General) v. Vancouver International Airport Authority)*. In addition to these case-by-case determinations, there is no lien legislation at the federal level; although see subparagraph 1(c) below relating to First Nations.

A comment was received from an Ottawa-based practitioner that reputable trades either do not bid federal projects, or add a risk premium over city and provincial projects. Some reasons cited were that L & M material bonds do not protect the trades in practice because bonds are sometimes not signed or posted after bids are won, and insurance companies litigate everything even if the bond is proper.

On some federally-regulated projects, we are also aware of cases where the owner acted "as if" the Act applied including in terms of holdback and allowing liens to be registered.

As a result of the foregoing, there can be uncertainty as the lienability of a given project, as subcontractors would usually not be aware whether the lands have been leased by the federal government or whether the work relates to the core undertaking of the federal entity. One suggestion, no doubt outside the scope of this provincial mandate, would be to encourage the federal government to adopt federal legislation to apply to federal projects. Another suggestion is to explore the disclosure of the lienability of projects to ensure clarity of status.

(b) **First Nations Reserves**. Based on various initiatives including P3s, natural resources and in energy development, it is clear that construction activity on First Nations lands in Ontario on the increase. This is a great sign; however, the general principle remains that First Nations lands are not subject to provincial lien legislation. As a result, some projects developed to date on reserve lands have used private contractual mechanisms and leveraged project-specific commercial drivers (such as underwriting by Ontario government agencies) to provide payment assurances to construction contractors. The general observation though is that contractors for various reasons, including non-lienability of reserve lands, charge a premium for construction projects conducted on First Nations reserve lands.

Note that the jurisprudence under the Act as it currently stands is not clear in some cases as to whether and to what extent the Act applies to First Nation lands. See *Skukowski v. James Conci Holdings (1998)* described in the paragraph below. Another potential avenue for application of the Act may be through section 89 of the Indian Act (Canada) which provides that a leasehold interest in reserve land that has been designated by the First Nations as such can be the subject of a charge and execution.

Adding further to the complexity, under what circumstances can holdback/trust obligations be found to apply to work on federal lands, even though Federal lands cannot be liened? The Act provides for a lien remedy as well as a trust remedy. As noted above, for example, see *Skukowski v. James Conci Holdings (1998)* in the context of First Nations lands; without determining whether the Act applied to the First Nation, the court found that the First Nation had constituted itself a trustee of all of the project funds paid to it by the Federal Crown.

In terms of the implications of Act reform in connection with First Nations reserves, we would recommend that input be solicited by First Nations through umbrella groups such as the Chiefs of Ontario (www.chiefs-of-ontario.org).

(c) **Federal Legislation for First Nations reserves**. At the federal level, the *First Nations Commercial Industrial Development Act (Canada)* should be reviewed as a potential tool that could be used by First Nations groups to ensure the full lien/holdback regime applies on reserves. It permits commercially useful provincial laws, such as those governing environmental protection, development, builders liens and land title registration, to be incorporated as federal law applicable to First Nations land. So far, and based on the regulations passed to date, it has been used for the Fort McKay First Nations, Fort William First Nation, and the Haisla Nation for energy projects.

2. **Provincially Owned Lands**

(a) **Uncertainty: Lien or Serve?** The Act states that liens do not attach to the interest of the Crown in a premises. However, there is considerable uncertainty on whether some types of provincial projects are lienable. Take hospitals for example. In a study covering close to 100 situations, there was an even split of opinion as to whether hospitals in Ontario are liened by land registration or by service, with the result that many lien claimants are now doing both. That is inefficient and a suggestion is to explore the disclosure of the lienability of projects to ensure clarity of status.

(b) **Who to Serve?** Section 1 of Regulation 175 of the Act discusses where lien claims can be served, which varies according to type of provincial governmental body in question. The Regulation provides that, where the contract is with a Ministry of the Crown, the lien should be served on the Director of Legal Services for that Ministry, and for other offices and institutions of the Crown, upon the Chief Executive Officer of the institution. There also appear to be problems in finding the right public entity (e.g. Crown agency, etc.) to serve. This can prejudice the timely filing of the appropriate claim. The current definition of Crown incorporates by reference of the *Crown Agency Act*. Another suggestion is to explore the disclosure of the appropriate public entity.

(c) **Policy Decision**. Should lands for public purpose projects, including P3s and AFPs, be lienable? See *Advanced Construction Techniques Ltd. v. OHL Construction, Canada* (2013 ONSC 7505 CanLII). This is a policy question that The Section Committee did not attempt to answer.

3. **Municipally Owned Lands**

Municipalities sit in a grey zone between private interest and Crown interest: providing essential public services, but not sovereign. The types of assets owned by municipalities have unique aspects that make the applicability of the Act sometimes difficult, such as roads

and utilities, but these have been well addressed in the case law. In considering possible reforms to the Act with respect to municipal lands, we concluded that there did not appear to be material issues to be raised in our Report unique to municipalities that makes the provisions of the Act particularly problematic and so, as a committee representing all sectors of the bar, we have not made any recommendations for reform.

9. Home Renovations

The Section Committee has the following suggestions for areas of improvements to the Act from a home renovation perspective:

1. **Failure to Maintain Holdback**

Problem: Holdback is almost never retained on these projects at any level. Often it does not make sense from a dollars and cents perspective because the value of individual supplier and subcontractor contracts are comparatively low and there is a lack of acceptance of understanding of the need to retain holdback in the sector. It is not healthy for this sector of the industry to be subject to a law that it does not understand and does not follow. There is also the issue of fairness – the trades and general contractors working on such projects accept the benefit of the legislation (right to lien) but not the burdens (holdback).

Proposals: A radical proposal would be to exempt such projects from the Act altogether. There would no longer be any requirement to maintain holdback and the "legal fiction" of the courts imposing holdback obligations on the parties after the fact. Contract terms would be left purely to the market, and the courts if necessary. A less radical proposal would be to penalize subcontractors and contractors who register liens but who have failed to maintain holdback from their own subcontractors and suppliers. This could include the ability to discharge the lien for this reason, or requiring such lien claimants to post security for costs and/or the holdback as a condition to continuing their lien action. The Act already penalizes owners who fail to maintain holdback.

2. **Cost of Litigation**

Problem: The strict deadlines to preserve and perfect liens quickly escalate disputes to a litigious forum with attendant disproportionate costs and procedure that few renovators and home owners can afford.

Proposals: The radical proposal of abolition would solve this in that matters below $25,000 that cannot be resolved would now automatically go to Small Claims Court, while larger disputes would go to Superior Court, but with the more generous two year *Limitations Act* applying, thereby providing the parties with a greater opportunity to resolve their dispute

before going to court.

Whilst contractors and subcontractors would lose the security of a lien, this could be tempered by no longer officially being subject to the holdback regime, and by the fact that in home renovations they will typically have a direct cause of action against the owner of the land anyway. For the bigger payment disputes the contractors would not be without recourse, the *Rules of Civil Procedure* provide for a writ of seizure and sale, and a certificate of pending litigation.

A less radical proposal would be to at least exempt matters below $25,000 from the Act so that at least those matters are kept out of the more expensive Superior Court process. Adopting a form of adjudication could also help by having disputes dealt with in real time during the project, thereby reducing the chances that the disputes will escalate out of control.

3. **Lack of Regulation**

Problem: The business is rife with bad contractors who do shoddy work and fail to honour their commitments. This tarnishes unfairly the good contractors and makes consumer protection difficult.

Proposal: This issue is perhaps outside the scope of the reform of the Act, but there are improvements that could be made to the Act procedures that could help.

One would be to exempt matters $25,000 or less from the Act and require such matters to be pursued in Small Claims Court. Adjudication could be another improvement.

Ultimately the solution likely lies in establishing a Tarion-like regime for the home renovation industry so that good renovators are underwritten and have a demonstrable track record of building and warranty responsiveness, and bad renovators are weeded out. The establishment of such a regulatory scheme would also ideally provide for the establishment of a tribunal to deal with disputes in a proportionate and expedited fashion, again similar to the regime currently in place for new home builders under Tarion where matters are decided by the Licensing Appeals Tribunal, not the courts.

Conclusion

Once again, the OBA and the Section appreciates the opportunity to provide input and assistance to the Review in preparation of its recommendations to the Ministries. This is a significant undertaking that will have a sweeping impact on our industry, and we appreciate the efforts of the

Review to date. We look forward to discussing our Report and reform of the Act with the Review at our consultation meeting scheduled for October 22, 2015.

Appendix 1 - Section Committee and Subcommittees

Section Committee

- Ted Betts (Co-Chair)
- Derek Freeman (Co-Chair)
- Brendan Bowles (current Executive Chair)
- Howard Krupat (former Executive Chair)

Subcommittees

1. Prompt payment
   - Chairs: Todd Robinson and Megan Sanford
2. P3/Infrastructure
   - Chairs: Yonni Fushman and Howard Krupat
3. Dispute Resolution Procedures
   - Chairs: Michael Swartz and Catherine DeMarco
4. General Procedures
   - Chair: Joe Cosentino
5. Trust Provisions
   - Chair: Janice Quigg and Karen Groulx
6. Holdback
   - Chairs: Brendan Bowles and Howard Krupat
7. Condominiums, Subdivisions, and Leasehold Liens
   - Chairs: Dante Capannelli and Ted Rotenberg
8. Crown/Public Land Liens
   - Chair: Richard Wong
9. Home Renovations
   - Chair: Brendan Bowles

Appendix 2 – OBA submission on Bill 69

OBA submission on Bill 69, *Prompt Payment Act*, 2013 (March 10, 2014), attached.

The Voice of the Legal Profession

Bill 69 – *Prompt Payment Act,* 2013

Date: March 10, 2014

Submitted to: Standing Committee on Regulations and Private Bills

Submitted by: The Ontario Bar Association, Construction and Infrastructure Law Section

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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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to provide comment to the Standing Committee on Regulations and Private Bills respecting Bill 69, *An Act respecting payments made under contracts and subcontracts in the construction industry*, 2013 ("Bill 69" or "the Act").

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents over 16,000 lawyers, judges, law professors and law students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist the legislature with a number of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was prepared by the OBA's Construction and Infrastructure Law Section ("the Section"), which has over 450 members comprised of the leading barristers and solicitors involved in construction law issues. 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.

Brief Summary of Bill 69

Among other things, Part I of the Act binds the Crown and amends all contracts entered into after the Act comes into force to comply with the Act.

Part II of the Act entitles contractors and subcontractors to receive progress payments and to suspend work or terminate a contract if such payments are not made. It also provides that payments can only be withheld if the payer notifies the payee that a payment application is disapproved or amended within 10 days after it is submitted. Limits are imposed on the amount that can be withheld.

Part III of the Act requires owners to provide contractors with certain financial information before entering into a contract. It also entitles subcontractors to receive certain financial information.

Part IV of the Act authorizes the Lieutenant Governor in Council to make various regulations, including regulations that exempt contracts or subcontracts from the application of the Act.

Commentary

Part I – General

The Act deems every contract and subcontract related to an improvement to be amended in so far as is necessary to be in conformity with the Act (s.3), but the Act does not apply to any contract or subcontract prescribed by the regulations (s.2(2)).

While we recognize the objective of the Act is to protect payees, we also recognize that the Act is a departure from the current industry practices and norms and submit that it would significantly curtail contractual freedom of contracting parties on terms – payment, holdbacks and disclosure – that are highly negotiated in the construction industry.

In addition, we question whether it is appropriate or necessary for the Act to apply so broadly to every contract and subcontract related to an improvement in order to achieve the purported objectives of the Act. Many different types of improvements and construction projects are structured in ways in which industry practice makes it difficult to fit within the payment and disclosure regime imposed by the Act. This is particularly so on both very large and very small or residential improvements, on improvements financed by third parties and on public infrastructure works, among others.

It remains to be seen whether the contemplated regulations will provide appropriate exemptions that reflect the diversity of industry payment and disclosure practices for a wide variety of construction projects and contracts.

Part II – Payments

(a) Holdbacks

The Act obliges a payer to pay the value of a holdback within one day after the day the payer is no longer required to retain the holdback under the *Construction Lien Act* (the "CLA") (s.4(2)). The Act also prohibits holdbacks other than those permitted or required under the Act or the CLA (s.4(3)).

While we recognize the dilemma faced by contractors and subcontractors at the end of the lien preservation period and whether they will need to file liens to protect their holdback or trust that payers will release the statutory holdback after the lien period has ended and all liens expired, we also recognize that it is industry practice for payers and payees to reconcile and set-off claims, outstanding balances and deficiencies at the end of a project at the time of the release of holdback. This standard industry practice would be prohibited by the Act.

We also recognize that it is industry practice and quite common for contracts to provide for large final milestone payments, reserve accounts, deficiency holdbacks and other completion and cash flow security that would be prohibited by the Act. The impact of this prohibition upon the choice of contractors by owners and developers or of sub-contractors by general contractors is not clear. There is a concern that owners, developers and general contractors for example may either require more financial security from small and mid-sized contractors (by way of bonds or letters of credit) or simply minimize perceived risks by choosing familiar and larger contractors with strong financial resources and balance sheets. This in turn, arguably, could increase project costs, reduce market competition, or both. It is not clear how the obligation to pay holdbacks within a specified time period, or to make progress payments within a specified time period under section 6, can be reconciled with section 17(3) of the CLA which expressly permits set-offs, as well as common law rights of set-off available to contracting parties in all industries.

It is also not clear how section 12(2) of the Act, which permits the payer to disapprove or amend an application for payment, is reconciled with section 4(3), which provides for an absolute obligation that is not restricted to approved payments.

The CLA establishes a comprehensive holdback regime for improvements in order to protect payees and provide a balance between the interests of project participants. It would seem prudent, therefore, and less confusing to stakeholders to amend the CLA directly, rather than enact a second statute covering much of the same subject matter. This approach would also avoid the risk of there being inconsistencies between the two statutes.

(b) Payments

The Act obliges payers to either make progress payments within statutorily defined time periods of (a) at least 31 days after the first day that services or materials were supplied to the improvement, if the contract or subcontract provides for progress payments, or (b) within 20 days after the day the payee submits its application for payment, in the case of a contractor, and within the later of 10 days after the certificate has been issued by a payment certifier and 30 days after the payee submits its application, in the case of a subcontractor, if the contract or subcontract does not provide for progress payments.

As noted above, the payment provisions curtail the common law and the freedom of contracting parties to negotiate and settle on contract terms. There are many different payment terms and many different types of projects accepted by industry practice, and it is not clear how these are addressed by the Act or whether they will be. Financing arrangements, P3 infrastructure projects, milestone payments, landlord improvement allowances, phased projects, cross-defaults on multiple projects between developers and builders, and small projects with single sum final payments are just some of the types of payment structures and project types where payment timing and structures are established in ways which would be difficult for construction parties to conform to

the Act. While these may be addressed in exemptions in the regulations under section 2(2) of the Act, it is not clear whether regulations will be able to adequately account for the breadth and diversity of payment structures and processes that are common in the industry.

We also note that payment structures are often designed to reflect certain allocations of project risk and the realities of cash flow on the project or in the owner's business, with payment timing designed to recognize this. While most contracts would comply with the payment structure contemplated by the Act, contractual flexibility is lost. The impact of mandating payment structures on the construction industry is not clear and may result in increased project costs as owners and developers require additional performance security from contractors, and contractors, in turn, require it from subcontractors.

(c) Pay When Paid

While section 9 purports to provide payees relief on payment obligations to subcontractors if the payee itself is not paid (pay when paid), the Act actually requires that payee to first suspend work or terminate the contract or subcontract before benefiting from this relief. It is not clear why this should be the case as it seems this will encourage the escalation of disputes and require payees to shut projects down or lien the project, rather than direct parties toward private and summary resolution of disputes. It is also not clear why pay when paid relief would not also be made available to project parties relying upon third party financing or payments.

It is equally unclear that the timeline and mechanics of section 9 will facilitate or encourage the summary resolution of disputes. The timing appears to be very limited in light of the payment regime imposed by section 8(2) of the Act.

(d) Final Payment

The Act imposes an obligation for a payer to make the final payment in accordance with the timing set out in section 11. However, it appears that the time mandated in section 11(4) requires the final payment to be made prior to the end of the lien preservation period. This conflicts with the finishing holdback regime established in the CLA.

(e) Approval of Applications

The Act deems a payment application to be approved by a payee 10 days after it is submitted by the payee unless, before the 10th day, the payer provides the payee with written notice that all or part of the application is being disapproved or amended (s.12).

It seems that there are a number of practical difficulties with this provision. The timing is very limited and there is concern that it does not provide payers – both owners and contractors – with sufficient time to adequately verify the work after an application for payment has been received.

This is particularly so for large, complex or remote projects and those requiring verification by third parties (including, for example, municipal inspectors).

There also seems to be a possibility for a gap in time between when a subcontractor's application could be deemed approved and when a contractor's application could be disapproved or amended in section 12(1).

In disapproving or amending an application, a payer is required to provide a written notice with "full particulars" (s.12(1)(b)). It is not clear what information a payer must provide to comply with this obligation, or who determines the adequacy of this notice, or whether there is an ability of the payer to cure or rectify their notice if the initial notice is found to be inadequate.

Part III – Right to Information

The Act obliges an owner to provide the contractor with financial information prescribed by regulations for the purpose of demonstrating the financial ability of the owner to make payments for work (s.14(1)).

It is not clear what type of information will satisfy an owner's disclosure obligation. The Act contemplates regulations, but these have not been prepared at this time.

The information, by its nature, will be highly confidential and proprietary to the owner. It may also include third parties if the owner is relying upon cash flow from its operations (customer receivables), lenders or landlords. It will also be very personal in the case of individuals and residential improvements and may conflict with objectives of privacy law regimes.

The Act attempts to provide some protection to owners in section 14(6) by requiring that disclosed information be kept confidential and not used for any other purpose. However, it is not clear that confidentiality of such sensitive and proprietary information can be preserved. Claims for breaches of confidentiality are challenging to prove because of the evidentiary difficulty of identifying the source of information leaks and demonstrating specific damage that results. In addition, there is little to no ability to prevent the use of the information by contractors competitively, such as on future bids.

The Act requires ongoing disclosure by the owner, at the contractor's request, and requires payers which are also payees to provide notices to all payees of the receipt of payment. There is a concern that these disclosure obligations will result in undue administrative burdens, particularly on contractors and particularly on large projects. The Act requires that all payees be notified, regardless of whether the payment relates to work performed by a payee. This may result in increased project costs and possibly delays.

In addition, the Act makes disclosing parties liable for all damages suffered as a result of the failure to disclose as required or for any misstatements of information. There is concern that this presents a very great financial penalty that is too open ended.

Finally, section 39 of the CLA addresses financial disclosure obligations of owners. It would seem to be prudent, therefore, and less confusing to amend the CLA directly, rather than by way of a second statute covering much of the same subject matter.

Conclusion

Once again, the OBA appreciates the opportunity to provide comments on Bill 69 to the Standing Committee on Regulations and Private Bills.