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CANADIAN BANKERS ASSOCIATION

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DELIVERED BY EMAIL

Mr. R. Bruce Reynolds
Borden Ladner Gervais LLP
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Dear Mr. Reynolds:

Re: Review of Construction Lien Act (Ontario)

Thank you for the opportunity to provide these submissions on behalf of the Canadian Bankers Association (CBA) with respect to the review of the *Construction Lien Act* (Ontario) (Act). The CBA works on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 280,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The CBA also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

Introduction

The CBA is supportive of the review of the Act and in particular, supports changes to the Act which would provide for: more timely payments to contractors for work completed and certified; clarity with respect to the rights of all parties; more efficient mechanisms and processes for resolving disputes and lien claims; and a reduction in the time and costs incurred by all parties.

This letter sets out the CBA's detailed submissions with respect to those sections of the Act and related issues which are a priority for the CBA's members.

Holdback and Release of Holdback (s. 22)

The CBA supports a reduction of the holdback amount and in particular, recommends a reduction from 10% to 5%. The CBA is not supportive of an increase in the holdback amount. The CBA is also supportive of earlier and more frequent releases of holdback including the

release of holdback on a phased basis and the mandatory or automatic release of holdback after a certain period of time and/or upon satisfaction of certain conditions.

The CBA submits that a reduction in the holdback amount combined with earlier and more frequent releases of holdback would be in the best interests of all stakeholders. These changes would result in more funds flowing down the construction pyramid and less funds tied up with owners leading to earlier and/or more frequent payments to contractors, more timely resolution of disputes between owners and contractors, lower risk of holdback deficiencies and lower deficiencies when they do occur. The existing permissive language creates uncertainty, ties up funds unnecessarily, delays payments to contractors who have completed work and added valuable improvements, and often unnecessarily delays dispute resolution and completion of projects for indeterminate periods of time.

The CBA further submits that the conditions or triggering events for the release of holdback should be stated clearly and tied to work, contract and/or project completion rather than arbitrary release dates such as calendar dates (e.g. annually). Further, the CBA does not support automatic "pay-when-paid" or "pay-if-paid" provisions as these would unfairly shift the risks to parties with less negotiating power and would not adequately balance incentives to resolve disputes. The CBA also does not support the addition of a mandatory Certificate of Intention to Release Holdback as this would add an unnecessary step to the process.

Priorities (s. 78)

The CBA supports the existing priority regime in the Act. The CBA submits that the current provisions provide for a fair and adequate balancing of the relative rights of the parties, particularly as between mortgagees and lien claimants such that the interests of the mortgagee are protected to the extent of the value of the real property prior to when the improvements took place and the lien claimants are protected for any deficiencies in the holdbacks which should have been maintained. The CBA strongly opposes any increase in the rights of lien claimants or decrease in the rights of mortgagees under these provisions.

Maintaining the existing provisions (with a lower holdback amount and more frequent and timely releases of holdback) would also ensure that the rights of mortgagees are not eroded which may: limit the availability of general and construction financing and/or increase the costs of borrowing; add to the monitoring costs of lenders which may be reflected in higher interest rates; and add to the reporting costs of owners.

Similarly, the CBA further submits that any changes to the Act should not attempt to address the rights of lien claimants and mortgagees in the context of insolvency proceedings. Not only are rights in insolvency proceedings substantially governed by federal statutes and related case law, but any erosion of a mortgagee's or lender's rights in insolvency proceedings risks limiting the availability of interim or debtor-in–possession financing. This financing is often crucial in funding the completion of unfinished projects, safely securing project sites, the preservation and sale of property and projects, and the insolvency proceedings required to maximize returns for all stakeholders, including lien claimants (see *Royal Bank of Canada* v. *Atlas Block Co. Limited*, 2014 ONSC 3062 and *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756).

The CBA recommends that the references to "written notice of a lien" in ss. 78(4) and (6) be deleted. The CBA submits that a mortgagee's loss of priority should be based on the

registration/preservation of a lien on title to the real property which can be searched on the public record (similar to PPSA registrations) rather than the receipt of a non-uniform written notice which is not registered anywhere and cannot be searched. However, the CBA is supportive of adding a requirement to the Act for lien claimants to deliver written notice to all mortgagees upon registration of a lien on title to the real property, though, as set out above, any loss of priority would not be triggered by the delivery of the notice itself.

Preservation, Perfection and Expiry of Liens (ss. 31, 34, 36 and 37)

While the CBA supports maintaining the current 45-day preservation period, it is strongly supportive of extending the perfection period. The CBA recommends an extension of the perfection period to a minimum of 90 days after the date of preservation. This would provide owners and contractors with additional time to attempt to resolve disputes before the lien claimant is required to commence an action. The CBA strongly opposes a shorter perfection period. The significantly longer perfection periods in other jurisdictions are instructive.

Requiring a lien claimant to perfect its lien by commencing a legal action within 45 days of preservation often forces all parties into litigation too early in the process. Lien claimants have no choice but to commence an action within 45 days of registration therefore, construction lien actions are often commenced even though the parties have not commenced or completed settlement discussions. This adds the costs of drafting pleadings to the process as lien claimants typically commence an action against as many defendants as possible who, under the Act, are not able to deliver a Notice of Intent to Defend under the Rules of Civil Procedure to obtain an additional 10 days to deliver a defence. Delivering pleadings often becomes an ineffectual and unnecessary administrative step which only adds costs and often reduces funds available for settlement or payment to lien claimants.

The CBA supports maintaining the two-year expiry date from the date of commencement of an action under s. 37. If the lien claim process needs to be lengthened then time should be added at the perfection stage and not to the two-year expiry period after perfection. This is a reasonable limit consistent with the two-year time period in the *Limitations Act 2002* (Ontario).

The CBA also supports mandatory steps to attempt settlement prior to or after perfection including mediation and/or arbitration. However, given the lack of judicial and court resources and the need to reduce the time and costs associated with resolving disputes under the Act, the costs of any such steps must be considered carefully, particularly if they are to be borne by the parties. The CBA submits that the participation of mortgagees in mediation or arbitration should not be mandatory and mortgagees should not bear any of the applicable costs.

"price" and "supply of services" (s. 1(1))

The CBA is strongly opposed to the addition of damages to any definition, including "price" and "supply of services" which could permit damages to be included in the amount of a lien claim and registered on title to real property. The threat of damage claims, particularly for delay, is already used, often inappropriately, as leverage in lien claim litigation. Explicitly permitting lien claimants to register liens for damages, particularly given that such amounts are not typically tied to amounts set out in a contract, purchase order or invoices setting out the services and materials provided or other liquidated amount, would create the risk of the registration of significantly higher lien claim amounts for leverage purposes. This in turn would deter or prevent lending by

mortgagees, increase the costs of posting security (through bonds or otherwise) to vacate such higher lien amounts and provide an incentive to add damages to lien claims, even where such a claim is not supported by the evidence. It would also unfairly delay and prevent the release of funds to other lien claimants. A lien claim is, like a mortgage, a secured, priority claim against the real property. It should not be based on contingent, unsecured damage claims particularly where the responding remedies under s. 35 for exaggerated lien claims are an unsecured damage claim.

"owner" (s. 1(1))

The CBA supports clarification of the definition of "owner", particularly given that a lien claimant will name as many potential "owners" as possible when registering a lien on title and commencing an action. The CBA suggests that considerations and factors from the large body of case law could be added to the definition and that the definition of "owner" explicitly exclude non-related party mortgagees.

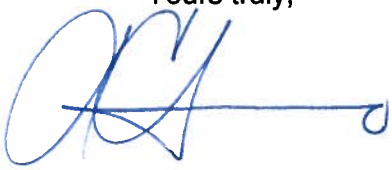
"equipment" and "materials" (s.1(1))

The CBA supports the clarification of the terms "equipment" and "materials" such that they should be limited, and not broadened, and must be directly related to the "improvement" in order to give rise to lienable amounts.

Right to Information (s. 39)

The CBA submits that mortgagees should not have to provide information and records with respect to draw-downs/advances on revolving lines of credit where the draw-downs/advances were made prior to the registration of the lien. Clarity on this point would help avoid the unnecessary time and cost of providing what are often voluminous records of draw-downs/advances on a revolving line of credit which may go back many years.

Conclusion

We wish to thank you again for the opportunity to comment on the review of the Act and we look forward to participating further as specific legislative proposals are considered by the Ontario government. Please contact me if you have any questions.

Yours truly,