TORONTO TRANSIT COMMISSION

WRITTEN SUBMISSIONS ON

EXPERT'S REVIEW OF THE CONSTRUCTION LIEN ACT

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Overview and General Comments

TTC is a publicly funded organization and, significantly, is one of the larger buyers of construction in the Province of Ontario. As at March 2014, TTC was in the process of building construction projects with a value in excess of $3.5 billion dollars. TTC is also unique in that it largely self-manages its construction and does not rely on payment certifiers.

Subway and transit infrastructure are cited in the Information Package as projects affected by the Ontario Construction Lien Act and many of the issues under consideration for this review are ones experienced by TTC on its construction projects.

In this submission, TTC has provided comments on the issues set out in the Information Package in a detailed chart that follows. An overview of these comments is below.

Liens Ought Not Attach to Municipal Lands

The Act already ensures that liens do not attach to Crown lands, railway right of ways and public highways. Many issues raised by the Information Package can be solved if liens in respect of municipal lands attach only to holdbacks rather than their premises.

There are good public policy reasons why property used by or critical to the public (i.e. subway station, a water treatment plant, City Hall, a public park, etc.) should not to be sold to satisfy a lien claimant, privatizing such facilities with questionable effects on access or interfaces. Attachment to holdback funds would be sufficient to protect contractors and subcontractors. Municipal property should be treated the same as Crown property – liens should not to attach to municipal land.

This would benefit tax payers who use the facilities being built and would also assist lien claimants because:

1. Subcontractors are equally secured by holdback even if not by land;
2. Lien preservation would be simplified:
    a. it would be clear that liens in respect of complicated projects (i.e. transit, subway, etc.) and projects that include both "attached" lands and "do not attach" lands should be delivered, reducing the use of both registration and delivery of liens when uncertainty occurs;
    b. the incompatible distinction in description of premises between Part A *or* B in Form 6 (Certificate of Substantial Performance) and Form 7 (Certificate of Completion of Subcontract) in the above scenarios would be resolved; and

3. Lien enforcement would be simpler – attachment to cash holdback rather than a forced sale of public land would allow easier enforcement of valid liens.

Furthermore, the concerning issues raised in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*[1] would be avoided in cases where the claim for lien has not been vacated.

Prompt Payment, Set Off and Mandatory Release of Holdback

TTC does not oppose the concept of prompt payments to contractors for amounts they are entitled to. However, mandatory release of holdback and most importantly removal of a trustee's set-off rights cannot be included in any version of prompt payment or the Act.

The goal of prompt payment is to ensure *when in time* amounts owing should be paid. But prompt payment should not determine *what amounts* are payable. Any provisions under consideration must be balanced so that the timely completion of public projects and use of tax payer funds are not at significant risk or allow contractors to be paid money they are not entitled to.

Moreover, provisions under consideration must be flexible. Terms that are best for one project, may not be best for another. It should not be the Act which prescribes minutely specific payment terms. The parties are those best able to determine what terms are best for their project.

Early Release of Holdback/Mandatory Certification of Subcontracts

Mandatory certification of subcontract is only desired if there is a corollary release of holdback on that subcontract. However, early release of holdback should not be mandatory but optional, as it currently exists in the Act. This is another attempt to remove a trustee's right of set-off and any avenue to dispute funds once lien periods have expired.

Furthermore, this situation unfairly favours early subcontractors over later subcontractors in cases when the holdback on the prime contract is less than the aggregate total holdback on the subcontracts.[2]

False Claims Provisions would be a Check on Prompt Payments

The United States (and many individual states) have enacted a False Claims Act which provide penalties against any party who under a contract with the government knowingly makes a false claim for money or property from the US government and applies to contracts undertaken directly with the US government or those that in part receive federal funding.[3] While the US False Claims

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[1] 2013 ONSC 7505 (CanLII) at para. 86-104.

[2] This is possible if there is a greater aggregate subcontract price than the prime contract price in cases, for example, where Contractor is completeing the prime contract at a loss in order to gain experience in a certain type of construction or with a certain owner but the subcontractors are not similarly undertaking it at a loss, when the calculation for extras is different in a subcontract than the prime contract or when there is a valid claim by a subcontractor not related to the owner increasing its subcontract price but not the prime contract price.

[3] See the[3] "The False Claims Act: A Primer" *The United States Department of Justice,* online: http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf and

Act is not restricted to the construction industry, judgements and settlements under the False Claims Act have totaled over $5 Billion in 2014 alone.[4] Applied to the construction industry, the False Claims Act has procured a settlement where change orders were inflated for more than what actually incurred by the company and therefore should not have been charged."[5]

False Claims provisions in the Ontario Construction Lien Act would have a dual purpose of enabling Crown and municipal owners to obtain penalties from contractors who make false claims and be a deterant to contractors in making false claims. Overall, this would better protect taxpayer money.

False Claims provisions would prevent the abuse of lien rights and would also logicially be included in the Ontario Construction Lien Act,[6] as a corollary check on prompt payment. When contractors request payments be made more swiftly there is less time for owners to scruitinze those requests for payment. False Claims provisions would provide an additional check on requests for payment and ensure that those being submitted to be paid promptly are legitimate and if they are not, penalties may flow.

Written Notice of Liens

A written notice of lien is a very significant document. It stops the flow of funds on a project and may even require a vacating order. Yet the significance of this document's substance is not reflected in the form of document itself. Many project staff may not even know they have received one. Millions of dollars can be held up by a simple email sent at any time in a project that does not require any certification or swearing, does not allow for cross-examination, or have the protections afforded in section 86.

When the effect is so significant as to stop the flow of funds, the document that does so should require some effort to produce and leave individuals on the project with no questions as to whether the document they are holding is one.

A claim for lien itself is has a very similar significant effect and is only slightly more difficult to preserve than delivery of a written notice of lien. However on the contrary, there is no confusion of what a claim for lien is because it is codified in a Form by Regulation. The definition of "written notice of a lien" in the Act is too informal and does not reflect the current case law requirements for it.

Kayhan M. Fatemi & MatthewLankenau, "A Practical Guide to Establishing or Avoiding False Claims Liability", 24 Constr. Law. 5 (2004). Note this Act is not limited to construction projects.

[4] "Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014" *The United States Department of Justice* (November 20, 2014), online: : http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

[5] "California-Based Granite Construction Company to Pay U.S. $367,500 to Resolve False Claims Allegations" *The United States Department of Justice* (February 8, 2013), online: http://www.justice.gov/opa/pr/california-based-granite-construction-company-pay-us-367500-resolve-false-claims-allegations.

[6] Limited to contracts with the Crown or a municipality.

The "written notice of lien" ought to be removed from the Act entirely. Alternatively, it ought to be a Form required by Regulation.

ADR and Encouraging Settlement

There is no question that ADR is beneficial to disputes in the industry. Most parties often undertake informal negotiations throughout a project which settles many disputes. However, even where that every day negotiation is unsuccessful, the vast majority of cases still go to mediation and settle prior to trial.

But forcing parties to a mediation before the facts, and documents underpinning those facts, are particularized is unproductive. The current cost of litigation is motivation enough for parties to take settlement seriously.

Similarly, how to best approach settlement will depend not only on the type of project, but the nature of the dispute itself and the relationship of the parties. Aribtration may be best in some circumstances, where DRBs are best for others, and mediation in yet others. There are as many factors affecting how to approach settlement as there are disputes.

The parties ought to be the ones to determine how to best approach settlement, not a prescribed system by the Act that will be difficult take into account all these variables and efficiently encourage settlement.

Freedom of Contract is Paramount and Should Be Preserved in the Act

The Act applies to every project within its jurisdiction. It treats a home owner's kitchen renovation as suitable for the same legislative provisions as a multi-billion dollar public infrastructure project. But the Act should never be so prescriptive that it inhibits the industry from innovating.

The parties are the ones best able to determine what works best for their particular project, from payment terms to how best to settle a dispute to fundamental project delivery models.

The Act already provides significant protections specific to the construction industry. It creates a right to encumber an owner's property[7] by a simple declaration and registration – no discovery, no trial. It creates a statutory trust[8] where in nearly every other industry's payables are just unsecured funds. And it prohibits anyone from contracting out of these protections.[9] It even legislatively pierces the corporate veil.[10] Labour and material payment bonds, while voluntary, are also

[7] Allowing a subcontractor to encumber an owner's real property just by stating it has a claim, no judicial assessment or court order is required.
[8] Section 8; elevating ordinary receivables to the level of trust funds, such that the money must only be used to pay subcontractors before anything else.
[9] Section 4.
[10] Section 13; if the trustee is a corporation, any employee can be personally liable if they knew or acquiesced in the corporation's breach of trust.

common on public infrastructure projects and provide subcontractors with yet another layer of payment protection.

In light of these significant protections, specific provisions regarding payment, settlement, bonding, and other matters, are better left to the parties themselves. To do otherwise may restrict the industry from evolving and create complicated questions when the industry inevitably does[11].

[11] For example, how P3 projects fit into the scheme of the Act.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
1.	**Lienability**			
1. (a)	Consider the effectiveness of the definitions of "improvement", "materials", "supply of services" and "owner" • Consider whether definition of "owner" should be expanded or clarified • Consider whether further clarity is required in respect of who can be a lien claimant • Consider whether further clarity is required in respect of other defined terms, such as "services or materials" • Consider lienability related to projects for transportation, railways, universities, colleges and other education facilities.	Clarity needed re "owner", "when materials supplied"	Definition can include an "owner" who does not actually pay any money in respect of a project but will not capture a party who would in all other senses be an "owner" but who does not have an interest in the land, i.e. builds on land they occupy by license. Clarification would be beneficial. The requirement of "immediate vicinity" in the definition for "when materials supplied" in s.1(2)(b) is restrictive by limiting the parties' ability to carry out the contract. Increased flexibility would enhance industry efficiency in project delivery. See also issue 3. 1. Generally (a) – mechanics of preservation of liens.	Improve definition of owner. s.1(1) change def'n of 1.(2)(b) - remove "immediate vicinity" from def'n s.16 replace *"Crown"* with "*Crown or municipality"*, update other sections accordingly (i.e. 34, etc.)

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
1 (a) cont'd	• Consider whether the "price" that is lienable and/or the definition of "services or materials" should be clarified, including amending the definition of "supply of services" to specifically address the issue of damages for delay. • Consider whether the definition of "improvement" needs to be further extended or whether doing so would extend the application of the Act to an excessive number of potential lien claimants; and • Consider the inclusion and/or exclusion of home renovation and other smaller projects in the context of the Act.	Definition of "price" ought not include delay damages.	"Price" already includes services actually supplied to site. Other damages not related to site ought not be secured by the land they were not supplied to. Importantly, speculative damages for lost profit or opportunity should not be borne by lands over which there is no supply. It should not be taken lightly how significant a mark on title and effect on the flow of funds that a lien is.	None should be considered

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
2.	**Holdback and Substantial Performance**			
2. (a)	Consider changing the amount of holdback (from the current 10%)	No position, subject to review of proposed clause	N/A	N/A
2. (b)	Consider increasing the number of dates for the release/early release of holdback, for instance, on phased projects	No position, subject to review of proposed clause	N/A	N/A
2. (c)	Consider making the release of holdback mandatory/automatic after expiration of lien rights, unless there has been early release of holdback • Consider allowing or expressly not allowing early release of holdback upon posting a holdback release bond or some other defined form of security	Strongly disagree	This seeks to remove the right of set-off in s.12. It seeks to remove disputes between parties in a project. It should not be considered in the Act. Owners may be required to pay contractors money they do not owe. This is unjust, ineffective and inefficient. It allows a breaching contractor to get a windfall and the innocent owner to be left with the loss in order to protect an innocent subcontractor. *Innocent owners should not be sacrificed for innocent subcontractors*. Owners will be required to litigate against contractors to reclaim amounts paid to the contractor and the increased legal and other litigation costs will be borne by tax payers if those owners are public bodies.	None should be considered

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
2. (d)	Consider eliminating the "holdback for finishing work"	No position, subject to review of proposed clause	N/A	N/A
2. (e)	Consider revising the minimum requirements for substantial performance	Agree in part, clarification of s.2(2) would be beneficial	s.2(1) – amounts ought to remain s.2(2) - the amount that is being "deducted from the contract price" should also be deducted from the "cost to complete or correct", to be mathematically consistent.[12]	Add italicized text to s.2(2): ….the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price*, and from the cost to complete the contract or correct any known defect,* in determining substantial performance*, in accordance with (1)*.

[12] This is implicit in the calculation for substantial performance when 2(2) is employed but express clarity would be preferable, see for example, *Soo Mill & Lumber Co. v JJ's Hospitality Ltd*., 1993 ONSC 8584 (Can LII) aff'd 1996 ONCA 931 (CanLII).

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
2. (f)	Consider whether or not to add further specifics to the requirements for a Certificate of Substantial Performance	Agree, clarification required	s.32(2)(e) – the statutory requirement for lot and plan is antiquated and should be removed. Similarly, replacing instrument registration number with property identification number would provide clarity. However, such even such specifics as a property identification number is unnecessary. A concise description of the premises should be sufficient and would further provide clarity where premises are lands to which the lien both attaches and does not attach.[13] Forms 6 and 7 – certain improvements will include premises where the lien may both attach and not attach to the land. The distinction between Part A *or* B should be removed and replaced with one single Part of a concise description of the premises of the improvement applicable to both registered and delivered liens. This description is the only information that is necessary to identify the premises in respect of the project being liened (whether the land or related holdback).[14] See also issue 3. 1. Generally (a) – mechanics of preservation of liens.	s.32(2)(e) - remove "*containing a reference to lot and plan or instrument registration number*" and combine remainder with (f) Forms 6 and 7 - remove A or B distinction, and include: "*identification of the premises of the improvement for the preservation of liens*"

[13] Currently case law holds that failing to includes a legal description and instead including a municipal address is a curable defect under s.6, see *For-Con Construction Ltd. v 1120062 Ontario Inc*., [1998] O.J. No. 3824 (Ont Gen Div), it would be preferable that this is the norm rather than a curable defect.

[14] A party registering a lien will conduct its own property searches to ensure it is registering on the correct parcel rather than rely on the CSP. And Part B, "Office to which a claim for lien must be given", need not be included in the Certificate of Substantial Performance in order to preserve a lien since section 34 of Act and section 1 of R.R.O. 1990, Reg. 175 in combination with simple internet searches easily provide such information.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
2. (g)	Consider introducing a new requirement for a mandatory Certificate of Intention to Release Holdback	Disagree	This would create new and unnecessarily burdensome requirements which seems to duplicate the Certificate of Substantial Performance requirement.	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3	**Preservation, Perfection and Expiry of Liens**			
3. 1. Generally (a)	***Generally*** Consider whether the mechanics of preservation and perfection require any changes • Consider improving alignment with the *Land Registry Act* • Consider termination as a trigger for lien rights expiry	Strongly agree	s.16 and 34 – Municipal property ought to be treated the same as Crown property – liens ought not to attach to land. There is good public policy reason why property used by or critical to the public (i.e. subway station, a water treatment plant, City Hall, public park, etc.) ought not be allowed to be privately sold to satisfy a lien claimant, when attachment to holdback funds would be sufficient to protect contractors and subcontractors. Privatizing such facilities by virtue of a lien enforcement would cause disruption to public use of such premises and their interfaces with public areas, without any public input. The concern regarding cumbersome and ambiguous "public works" and confusing incidental interest of the Crown discussed in Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act in 1982[15] is avoided by making reference to the owner as municipality. Furthermore the impracticalities of liens attaching to a public street or highway or railway right of way equally apply to many municipal construction undertakings, including subway	s.16 replace *"Crown"* with "*Crown or municipality"*, update other sections accordingly (i.e. 34, etc.)

[15] See Duncan W. Glaholt and David Keeshan, *The 2014 Annotated Ontario Construction Lien Act* (Carswell: Thomson Reuters Canada Limited, 2013), Appendix A, pg 683.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
			construction. An amendment to include municipality in s.16 would avoid issues raised in para. 86-104 in *Advanced Construction Techniques Ltd. v. OHL Construction Canada,* 2013 ONSC 7505 (CanLII). Contractors and subcontractors are not prejudiced because subcontractors are equally secured by holdback even if not by land. Lien preservation would be simplified - it would be clear that all liens in respect of these owners' premises should be delivered, reducing the use of both registration and delivery of liens when confusion occurs, which is often, and lien enforcement would be simpler – attachment to cash holdback rather than lands would allow easier enforcement of valid liens as opposed to a forced sale of public land.	
3. 1. Generally (b)	Consider clarifying the release of liens and consider if there are any alternatives to release and discharge	No position, subject to review of proposed clause	N/A	N/A
3. 1. Generally (c)	Consider the effect of posting security and vacating liens on lien claimants (s.44 of the Act)	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3. 2. Preservation (a)	***Preservation*** Consider the length of the preservation period	No position, subject to review of proposed clause	N/A	N/A
3. 2. Preservation (b)	Consider the impact of written notices of lien • Consider "notice of lien claim" on lenders when no lien formally preserved. In such cases, the ability to pay funds into court may be hindered and affect project financing • Consider eliminating written notice of lien	Strongly agree	Concept of "written notice of lien" should be removed entirely. It has the significant impact of halting funds and potential requirement to post security to vacate written notice, but claimant does not need to swear a document, be subject to cross-examination or be subject to the consequence of s.86 costs. The informality of the document makes it too likely that project staff may not even know they have received one. A claim for lien is easy to preserve but comes with significant safeguards, reflective of the significance of a lien. A written notice of lien should be removed from the Act. Alternatively, such a significant concept ought to be formalized in a new Form by Regulation and sections s.24 and 41 ought to be clarified that a written notice of lien is replaced when a lien in respect of that notice is preserved and that "written notice of lien" does not extend the time to lien (any right to holdback will expire under s.34 if not properly preserved). In the further alterntiave, s.1(1) definition requires clarification that it is a written notice of lien is a more formal document, by codifying "ingredients of a written	Remove "written notice of lien" throughout Act entirely. Alternatively: New Form required or amendment to s.1(1) "written notice of a lien" - Add *(c) identifies that the person has a lien*" s.41 - add *(3) "A written notice of lien is deemed to be withdrawn when the lien in respect of that notice is preserved by the person having*

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
			notice of lien"[16] in statute.	*the lien".* s.24 - add new section *(3) "a lien will expire if not preserved or perfected in accordance with this Act whether or not a written notice of lien in respect of it has been received by the payer".*
3. 2. Preservation (c)	Consider the introduction of mandatory certification of subcontract completion rather than the elective option currently provided for under Section 33 of the Act	Strongly disagree However, s. 25, 33(1) and Form 7 clarification required	This is only desired if mandatory release of subcontract holdback then follows, which should not be permitted. Early release of holdback should not be mandatory but optional, as it currently exists in the Act. This is an attempt to remove a trustee's right of set-off and any dispute regarding funds once lien periods have expired. Furthermore, any early release of holdback, though allowable under the Act, unfairly favours early subcontractors over later subcontractors in cases when	s.25 - remove "*in respect of completed subcontract*" and replace with *"in respect of completed subcontract work as valued by the payer".*

[16] See *354628 Ontario Ltd. v Mutic et al*, 1978 ONSC 1594 (Can LII) and *Bestdoor Company Ltd. v Toronto Economic Development Corp*., 2004 ONSC 8353 (CanLII).

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
			the holdback on the prime contract is less than the aggregate total holdback on the subcontracts.[17] Section 25 effectively states the owner ("payer upon the contract") may make payment reducing the holdbacks it has retained *in respect of the completed subcontract*. This is internally inconsistent. An owner does not retain holdback in respect of a subcontract, only a contract. Clarification would be beneficial. s.33(1) - A payment certifier (or owner and contractor jointly) may determine if a subcontract is complete, however an owner/payment certifier does not neccesarily know the subcontract scope. Therefore, the only allowable release ought to be when an owner/certifier receives a declaration of last supply from the subcontractor, and that receipt ought to be wholly sufficient for certifying completion and insulate the owner from any liability in that regard. Additionally, Form 7 does not contemplate early release on a sub-subcontract, despite sections 25 and 33 permitting same by virtue of s.1 definition of subcontract. Clarificaiton would be beneficial.	s.33(1) - add "*(5) a subcontract will be deemed complete for the purpose of certifying subcontract completion if the owner or payment certifier receives a declaration of last supply by the subcontractor"* Form 7 – update.

[17] This is possible if there is a greater aggregate subcontract price than the prime contract price in cases, for example, where Contractor is completeing the prime contract at a loss in order to gain experience in a certain type of construction or with a certain owner but the subcontractors are not similarly undertaking it at a loss, when the calculation for extras is different in a subcontract than the prime contract or when there is a valid claim by a subcontractor not related to the owner increasing its subcontract price but not the prime contract price.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3. 2. Preservation (d)	Consider mechanisms to avoid potential abuse of lien rights • Consider requiring lawyers to endorse construction lien claims, representing that they have inquired into whether the claims asserted are bona fide, or reasonable, or consider having lawyers certify the "reasonable" value of lien; • Consider introduction of new requirement for lawyer to sign a statement prior to the preservation of a lien certifying that the lawyer has inquired into and confirmed the reasonable bona fide amount claimed in the lien.	See 16. (c) NEW TTC Suggestions – False Claims provisions	See 16. (c) NEW TTC Suggestions – False Claims provisions	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3. 2. Preservation (e)	Consider lien registration issues vis-à-vis specific types of properties • Consider the difficulty in registering and enforcing lien rights in respect of registration under the *Condominium Act, 1998,* where the lien claimant either has not been given proper notice of the intention to register as required by the statute or simply does not lien prior to registration. • Consider addressing concerns in respect of enforcing lien rights arising from renovation or construction work performed to the common elements of an already registered condominium. • Consider potential improvement in the process for registering liens against leasehold	Strongly agree	The Act does not address how to preserve a lien when the improvement crosses over lands where the lien both attaches and doe not attach to the land. Niether do Forms 6 or 7 contemplate this scenario (see issue 3. 2. Preservation (c) above) . Clarification would be beneficial. If liens in respect of premises that are municipal property do not attach to lands this can help solve this problem. See issue 3. 1. Generally (a) – mechanics of preservation of liens.	See issue 3. 1. Generally (a) – mechanics of preservation of liens.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
	interests and home renovation projects. • Consider preservation of liens in context of phased projects (section 2 above)			
3. 3. Perfection (a)	***Perfection*** Consider the potential burden that the requirement to perfect within a relatively short time imposes on the court system	No position, subject to review of proposed clause	N/A	N/A
3. 3. Perfection (b)	Consider any alternatives or changes to the perfection requirements • Changing the deadline to perfect and including mandatory steps to attempt settlement prior to perfection; • Adjusting requirements for phased projects	Disagree	A statement of claim is first time particulars of claim are set out, this minimum (perhaps not even the minimum) information required to attempt settlement discussions.	N/A
3. 3. Perfection (c)	Consider the length of the perfection period	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3. 3. Perfection (d)	Consider the alignment of time limitations in the Act with payment time periods in the Ontario construction industry	No position, subject to review of proposed clause	N/A	N/A
3. 4. Expiry (a)	***Expiry Under Section 37 of the Act*** Consider whether the two year limitation is appropriate	Agree	In Toronto, setting down an action for trial is the first active step after close of pleadings. If this has not been done in two years, the plaintiff ought not be given any further latitude in compromising title or security posted. When a plaintiff ties up land or security, it ought to be required to advance its action.	N/A
3. 4. Expiry (b)	Consider improving alignment of the Act with the *Limitations Act,* 2002, including breach of trust actions	No position, subject to review of proposed clause	Courts have held that if a claim can be discovered by making a s.39 request to the owner, the obligation to exercise that due diligence arises as soon as the plaintiff is unpaid.[18] This should not be overturned by legislation.	N/A

[18] See *Cast-Con Group Inc. v Alterra (Spencer Creek) Ltd.,* 2008 ONSC 8595 (CanLII), at para. 16-17 and *Carmen Drywall Limited v BCC Interiors Inc.*, 2013 ONSC 4644 (CanLII), at para. 27-28.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
3. 5. Requests (a)	***Requests for Information Pursuant to Section 39 of the Act*** Consider whether further clarity is required in relation to what information is required to be produced in response to a section 39 request for information for various participants	Strongly agree	Terms in s.39 are ambiguous and clarification would be beneficial.	s.39 - remove "statement of accounts" and replace with: 1. "*the amount paid by owner to the contractor, the amount of basic holdback retained by the owner, the amount of notice holdback retained by the owner and any other amounts retained by the owner"* 2. "*the amount paid by the contractor to the subcontractor, the amount of basic holdback retained by the contractor, the amount of notice holdback*

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
				retained by the contractor and any other amounts retained by the contractor"

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
4.	**Prompt Payment of Timely Payment for Construction Work**			
4. (a)	Consider the causes of payment delays and how they can be addressed in the Act or other legislation, including the potential effect of prompt payment provisions on the principle of "freedom of contract"	Agree	Freedom of contract is a serious consideration that ought to be paramount. The more specific an Act prescribes the actions of the parties, the more the Act will limit the development and innovation of the industry. This has already been seen in tensions between the Act and P3 projects, and will only be exacerbated the more strict and inflexible payment terms are prescribed. It is impossible for the Act to consider all types of projects and work effectively, the parties are best able to determine the best terms for their particular project circumstances. The premise of ensuring *timely* payment of amounts owing is laudable, but its proposed provisions may be seriously unbalanced, putting the timely completion of public projects and use of tax payer funds at significant risk. Moreover, the Act ought never determine what *amounts should be paid* forcing owner to pay contractors and subcontractors money they are not entitled to. The Act must not seek to remove the ability to dispute issues and payment.	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
4. (b)	Consider making the release of holdback mandatory/automatic after the expiration of lien rights	Strongly disagree	This seeks to remove the right of set-off in s.12. This is unjust, ineffective and inefficient. Owners will be required to pay contractors money they do not owe. It allows a breaching contractor to get a windfall and the innocent owner to be left with the loss in order to protect an innocent subcontractor. *Innocent owners should not be sacrificed for innocent subcontractors*. Owners will be required to litigate against contractors to reclaim amounts paid to the contractor and the increased legal and other litigation costs will be borne by tax payers when those owners are public bodies.	None should be considered
4. (c)	Consider the potential effects of prompt payment provisions and their alignment with the Act on industry lenders and sureties	Agree	Any prompt payment issues ought to be considered in conjunction with the remaining provisions of the Act.	N/A
4. (d)	Consider the applicability and/or adaptability of any prompt payment provisions to different types of contracts	No position, subject to review of proposed clause	Freedom of contract is a serious consideration that ought to be paramount. See comments in issue 4(a) above.	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
4. (e)	Consider whether "pay-when-paid" and/or "paid-if-paid" clauses should be made unenforceable	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
5.	**Proof of Financing**			
5. (a)	Consider introducing access to proof of financing rights for owners, contractors and subcontractors • Consider whether financial pre-qualification may address certain issues with contractors being under financed and being unable to adequately pay their sub-contractors; • Consider whether such pre-qualification may be overly onerous on certain contractors and subcontractors; • Consider whether the surety bonding process may eliminate the need for financial pre-qualification; • Consider whether contractors should be entitled to proof of financing.	Disagree	Any information regarding financial stability of any public entity is publicly available. It should not be a requirement of any public owner to provide any "proof of financing".	None should be considered re public owners.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
6.	**Trust Provisions**			
6. (a)	Review and consider either eliminating or clarifying and strengthening the requirements of the trust provisions in the Act	Strongly agree	The Act should be clarified that a breach of trust can only occur between parties with privity of contract. The recent case of *Robert Nicholson Construction Company Limited v. Edgecon Construction Inc*., 2015 ONSC 1237 (CanLII),[19] conflicts with established case law.[20]	Add s. 10(2) – *"This Part does not create a trust between two parties who do not have privity of contract"*.
6. (b)	Consider introducing a mandatory holdback trust account or a mandatory project bank account • Consider whether or not mandatory holdback trust account or a project bank account requirement should be limited to contracts with a price greater than a specified amount	Strongly disagree	The Crown and municipalities are not subject to breach of trust actions and should not be required to maintain project accounts. Requirements for public owners to maintain a separate project bank accounts would impede the management of municipal and Crown funds.	None in respect of public owners.

[19] See para. 32.
[20] See "When Holdback is No Longer Holdback" by Neil S. Abbott & Erica Maidment (October 2014) online: https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=3756 and Harvey J. Kirsh, *Kirsh's Guide to Construction Liens* in Ontario, 2nd ed. (Butterworths Canada Ltd., 1995), pg 108.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
6. (c)	Consider the effectiveness of the trust provisions, the remedies and the actual chances of recovery they afford creditor contractors, subcontractors and suppliers, including in the context of bankruptcy or a debtor owner, contractor or subcontractor	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
7.	**Interrelationship with Insolvency Legislation**			
7. (a)	Consider conflicts between the Act and either the *Bankruptcy and Insolvency Act*, RSC, 1985 ("BIA"), c. B-3 or the *CCAA*	No position, subject to review of proposed clause	N/A	N/A
7. (b)	Consider any potential statutory mechanism to regulate stay proceedings in the face of registered liens	No position, subject to review of proposed clause	N/A	N/A
7. (c)	Consider Canada Revenue Agency's super priority	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
8.	**Priorities**			
8. (a)	Consider whether or not any amendments are necessary to clarify the rights intended to be conferred upon lien claimants and/or mortgagees	No position, subject to review of proposed clause	N/A	N/A
8. (b)	Consider whether or not a new obligation should be imposed on mortgagees to expressly identify, as a pre-condition to registration, whether the mortgage is intended to finance the acquisition of the property or construction on the property	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
9.	**Public-Private Partnerships**			
9. (a)	Consider the application of the Act in relation to such projects	Agree	The Act ought to better consider the P3 project delivery model	N/A
9. (b)	Consider aligning the definitions and structure of the Act with the PPP projects delivery system • Consider generally what parts of the Act are and are not well-aligned in relation to the PPP project delivery model and what unique features of the PPP model need to be addressed with reference to the Act • Consider how the PPP model works in the context of phasing of projects. Specifically, consider how holdback functions with respect to the complex PPP framework. The concept of phasing is also considered in	Agree	The Act ought better consider the P3 project delivery model	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
	Section 2 • Consider whether there should be definitions that apply to PPP projects • Consider prompt payment in the context of PPP projects. This issue is also considered in Section 4 • Consider issues relating to substantial performance and certification as they relate to PPP projects; and • Consider alternative dispute mechanisms as they relate to PPP projects, this issue is also considered in Section 13.			

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
10.	**Non-Waiver**			
10. (a)	Consider allowing waiver of lien provisions	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
11.	**Bidder Exclusion Provisions**			
11. (a)	Consider regulating bidder exclusion provisions • Consider limitations on the use of exclusion provisions by specific legislation, regulation, policies or guidelines; and • Consider use of exclusion provisions in various domestic and international jurisdictions	Strongly disagree.	The need of an owner in a tender/bid situation to obtain the highest quality contractor within the framework of the rules of tendering must be protected. Exclusions regarding, for example, performance, legitimacy of claim history, quality/timeliness of work or communication, reference checks etc. must be maintained in order to obtain high quality contractors on public construction projects. This issue is outside of and ought not be addressed within the framework of the Act.	None ought to be considered.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
12.	**Alternative Dispute Resolution**			
12. (a)	Consider the effectiveness of available procedures and remedies • Consider adding clarifying language or methodology to address the complexity of construction disputes (multi-party disputes with many parties in proximity, and no privity of contract in many cases) • Consider the expense of pursing legislated procedures and seeking legislated remedies • Consider the timing of available procedures and remedies vis-à-vis the progress of the project, particularly with respect to phased projects. Phased projects are discussed further in Section 2. • Consider clarifying the process for coordinating	Agree, in part	A streamlined process for small lien claims (i.e. under $50,000) is desireable, however it should follow a simplified procedure model rather than a small claims court model.	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
	and scheduling interlocutory proceedings; • Consider dispute resolution as it relates to preventing the holdup of cash flow during construction disputes; • Consider issues with consultants (e.g. mechanisms to avoid perceived bias or unfairness in consultant determinations or expert evaluations); • Consider requirements that would effectively improve the uptake of ADR methods including mediation, dispute review boards and arbitrations; • Consider enhancing harmonizing dispute resolution mechanisms with the domestic surety bond and insurance industries (particularly as the methods espoused by such			

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
	entities add further contractual rights and remedies that overlap the judicial process of the Act); • Consider issues regarding monies being captured and redistributed to secured creditors on the insolvent debtor's reorganization under CCAA; • Consider access to justice issues for small to medium size businesses who undertake contracting work or supply materials and services associated therewith; • Consider clarifying who holds disputed funds until such time as a dispute is finally resolved; • Consider dispute resolution regarding small lien claims (under $50,000) and lack of			

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
	inexpensive/quick alternative dispute resolution (similar to small claims court); • Consider issues of delay and inflexibility in lien litigation;			
12. (b)	Consider introducing an adjudication mechanism for construction disputes in Ontario • Consider providing for adjudication of set-offs; • Consider providing for adjudication of progress payment claims; • Consider providing adjudication of performance bond claims;	Disagree	The parties to a contract ought to determine the ADR process that best fits the circumstances of the project. Adjudication may not be suitable for certain disputes and the requirement to use adjudication will be an inefficient use resources of the parties in those circumstances.	None should be considered
12. (c)	Consider providing for mandatory mediation of lien actions	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
12. (d)	Consider providing for an arbitration mechanism for construction disputes in Ontario • Consider providing the courts of Ontario with the jurisdiction to consolidate multiple arbitrations relating to the same project • Consider providing further clarity to court intervention in arbitral proceedings, particularly with respect to providing stay of court actions in favour of arbitration, as well as mechanisms for joinder and third party intervention; • Consider the effectiveness of the current arbitration model	Disagree	Arbitration is a private process, and ought to be left to the parties to determine whether arbitration is desirable. Similarly, forcing construction disputes into arbitration would create a dearth of case law on the issues relevant to the industry.	None should be considered

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
12. (e)	Consider requiring Dispute Review Boards for certain types of projects	Disagree	Use of dispute review boards is a private process, and ought to be left to the parties to determine whether it is desirable. Furthermore, the effectiveness of DRBs varies significantly depending on the quality of board members and the procedure in place for the disputes. The usefulness of DRBs will not necessarily be dictated by the type of project, but rather the type of dispute including the nature, amount, relationship of the parties, documentarion require, requirement of an expert, etc. A small project may find a DRB useful for a particular dispute while a large project may find a DRB unhelpful for their particular dispute.	None should be considered

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
13.	**Summary Procedure**			
13. (a)	Consider whether or not any changes need to be made in respect of the "summary" nature of proceedings under the Act	No position, subject to review of proposed clause	N/A	N/A
13. (b)	Consider how the efficiency of the procedure can be improved	No position, subject to review of proposed clause	N/A	N/A
13. (c)	Consider amendments to the procedural provisions of the Act • Consider eliminating or amending s.67(2) to permit some interlocutory steps such as discoveries, affidavits of documents and appeals from interlocutory orders in a lien action; • Consider eliminating s.50(2) which prohibits the joinder of trust and lien claims	Agree, in part	In Toronto, Masters' review of issues in light of the amount at issue is effective at determining which and to what extent interlocutory steps are required is an effective process. Breach of trust claims ought to be allowed to be joined with lien claims, with leave of the court required, if the matters concern largely the same issues.	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
14.	**Surety Bonds and Default Insurance**			
14. (a)	Consider requiring labour and material bond sureties to promptly pay undisputed amounts	No position, subject to review of proposed clause	N/A	N/A
14. (b)	Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project	No position, subject to review of proposed clause	N/A	N/A
14. (c)	Consider mandatory labour and material payment bonding of all public projects	Disagree	The owner bears the cost of this and it ought to be up to the owner to determine if it is willing to pay for this in light of the circumstances of the project.	None should be considered
14. (d)	Consider requirements in respect of the adjusting of bond claims	No position, subject to review of proposed clause	N/A	N/A
14. (e)	Consider providing for the electronic delivery of surety bonds	No position, subject to review of proposed clause	N/A	N/A
14. (f)	Consider whether bond claims should be subject to adjudication	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
14. (g)	Consider whether changes to the third party beneficiary rule are appropriate in order to enable payment by owners directly to subcontractors and suppliers	No position, subject to review of proposed clause	N/A	N/A
14. (h)	Consider whether the Act requires any revisions in light of the existence of contractor and subcontractor default insurance	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
15.	**Miscellaneous**			
15. (a)	Consider providing for greater precision in setting out the technical irregularities that can be cured under the Act	No position, subject to review of proposed clause	N/A	N/A
15. (b)	Consider the use of letters of credit with international commercial conventions in their terms	Agree	This issue requires consideration.	N/A
15. (c)	Consider utilizing security for costs to award interest	No position, subject to review of proposed clause	N/A	N/A
15. (d)	Consider clarifying the application of liens to subdivision lots	No position, subject to review of proposed clause	N/A	N/A
15. (e)	Consider instituting a periodic review of the Act on a go forward basis	No position, subject to review of proposed clause	N/A	N/A

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
16.	**New TTC Suggestions**			
16. (a)	Rules re Sheltering	Sheltering should be removed entirely.	Sheltering is a complex component of the Act designed to permit a lien claimant to continue its action without perfecting its lien. However, due to its sometimes fatal consequences to the lien, experts do not recommend that sheltering be relied upon to avoid the cost of a lien action and in practice, sheltering is rarely used.[21] If its purpose is to reduce costs in a lien action but expert advice is that it should not be used to reduce costs, sheltering's functionality is questionable. Perfecting a lien sets out minimum facts about the claimants case. If a claimant intends to move forward with its lien action, perfection should be a minimum step required. With management of lien actions by the court, concerns about a multiplicity of actions regarding the same improvement can be dealt with.	Remove s. 36(4) entirely.

[21] See Duncan W. Glaholt and David Keeshan, *The 2014 Annotated Ontario Construction Lien Act* (Carswell: Thomson Reuters Canada Limited, 2013), pg 267.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
16. (b)	New definition required for "holdback"	Clarification required	Industry knowledge of "notice holdback" as different from "basic holdback" and "finishing holdback", is not reflected in Act. Adding a definition for "notice holdback" would provide clarity and simplicity.	s.1(1) change def'n of "holdback" to "basic holdback" and add def'n of "notice holdback" as *"notice holdback" means the amount required to be retained from payment by s.24(2) to satisfy a written notice of lien received"* and other related changes to the Act

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
16. (c)	False Claims provisions	Rules similar to the US Federal False Claims Act ought to be included	Provisions prohibiting false claims by a claimant ought to be incorporated into the Ontario Construction Lien Act, similar to the False Claims Act in the US.[22] The US False Claims Act prohibits a party from knowingly making a false claim for money or property from the US government, and applies to contracts undertaken directly with the US government or those that in part receive federal funding.[23] False Claims provisions in the Ontario Construction Lien Act would have a dual purpose of enabling Crown and municipalities to obtain penalties from contractors who make false claims and be a deterrent to contractors in making false claims. Overall, this would better protect taxpayers money. While the US False Claims Act is not restricted to the construction industry, the US Department of Justice obtained judgements and settlements under the False Claims Act of $22.75 billion from January 2009 through the end of 2014 and over $5 Billion in 2014 alone.[24] One example from the construction industry in the US includes a $367,500 settlement by one company who is alleged to have "sought price increases in the form of	To be determined

[22] "The False Claims Act: A Primer" *The United States Department of Justice,* online: http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf and Kayhan M. Fatemi & MatthewLankenau, "A Practical Guide to Establishing or Avoiding False Claims Liability", 24 Constr. Law. 5 (2004).

[23] "False Claims Liability: The Long Arm of the Law" *Laurie & Brennan LLP* online, http://www.lauriebrennan.com/article-False-Claims-Liability-The-Long-Arm-of-the-Law.html. Note this Act is not limited to construction projects.

ISSUES TO BE CONSIDERED BY THE REVIEW				
Issues/Considerations		**TTC Position**	**Reasons**	**Proposed Clause**
			change orders and requests for equitable adjustment which were inflated because the general liability and workman's compensation insurance rates used to support the adjustments included added amounts or "cushions" that were not actually incurred by the company and therefore should not have been charged."[25] False Claims provisions would discourage abuse of lien rights and should also logicially be included in the Construction Lien Act as a corollary check on the contractors demands for prompt payment provisions to be included in the Act. When contractors request payments be made more swiftly there is less time for owners to scruitinze those requests for payment. False Claims provisions would provide an additional check on requests for payment and ensure that those being submitted to be paid promptly are legitimate.	

[24] "Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014" *The United States Department of Justice* (November 20, 2014), online: http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

[25] "California-Based Granite Construction Company to Pay U.S. $367,500 to Resolve False Claims Allegations" *The United States Department of Justice* (February 8, 2013), online: http://www.justice.gov/opa/pr/california-based-granite-construction-company-pay-us-367500-resolve-false-claims-allegations.