December 15, 2015

Bruce Reynolds, CS and Sharon Vogel
Construction Lien Act Expert Review
Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West - 44th Floor
Toronto ON M5H 3Y4

Dear Mr. Reynolds and Ms. Vogel:

RE: RESCON and OHBA Submission to Construction Lien Act Review

On behalf of the members of the Residential Construction Council of Ontario (RESCON) and the Ontario Home Builders Association (OHBA) we are writing to share our thoughts on the Construction Lien Act to inform your current Review. We have read the details contained in the Information Package, as well as submissions from other parties, ranging from the City of Toronto and the Toronto Transit Commission to those of the Ontario Bar Association and COCA.

The manner in which construction contracts are managed is obviously of importance to the residential sector of the construction industry, which in Ontario has enjoyed 15 years of continued, steady production. We can confirm that the current call for changes to the Construction Lien Act as well as the introduction of prompt payment provisions is not at all driven by the residential construction sector. In fact, even though our organizations have sub-contractors and suppliers as members, alleged problems associated with the current regime have not been raised within our organizations.

Indeed, the call for change appears to have originated in other sectors of the broader construction industry, which we do not represent. It is our opinion that possible changes made to legislation and policy should strike the right balance to ensure that the well functioning residential building sector is neither unduly burdened nor constrained.

We stress that the residential sector is distinct from others parts of the broader construction sector in many respects. These aspects are addressed in our full submission. Through the development and sale of new housing units, the residential construction sector is subject to, amongst other things, an extensive mandated warranty regime (through Tarion Warranty Corporation) which requires registered builders to undergo various levels of scrutiny including financial restrictions. These and other regulatory requirements and regular education have served to promote prompt and fair payment for services provided and an effective level of professionalism in our sector.

A detailed review was conducted into Ontario's payment legislation in 1994 and 1995 through the Attorney General's Working Group on Residential Construction Compliance under the Trust Provisions of the

Construction Lien Act. Through that review, it became apparent that improvements were needed to ensure risks were assessed and understood by builders, contractors and the trades. Thoughtful efforts were taken to improve that situation. The Working Group also came to the conclusion that introducing a regime which would seek to guarantee payment would create an unbalanced regulatory burden. At the time a payment certification regime (which would have been intrusive for our sector), was not considered practical or efficient for residential construction; instead a co-operative method of educating all sectors was undertaken. We respectfully submit that it is still the case that an intrusive payment certification regime will not help the residential construction sector, and would in fact harm it.

Based on our surveys and continued robust engagement with our members, we confirm that the current system works well and our sector of the industry is healthy.

In summary, we see no need for substantive changes to the Construction Lien Act or adding prompt payment legislation in Ontario. Introducing significant changes or another layer of bureaucracy in the form of some kind of prompt payment regime would be unwarranted and would likely harm our well-functioning industry. Attached is our Submission to assist in your review. We thank you for your consideration and look forward to our scheduled in-person discussion on Thursday, December 17, 2015 at your offices.

Sincerely,

Richard Lyall
President, RESCON

Joe Vaccaro
Chief Executive Officer, OHBA

Submission to the Construction Lien Act Expert Review by RESCON (Residential Construction Council of Ontario) and OHBA (Ontario Home Builders' Association)

Date: December 15, 2015

Submitted to: Construction Lien Act Expert Review

Submitted by: Residential Construction Council of Ontario and Ontario Home Builder's Association

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Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King St West
Toronto, ON
M5H 3Y4

Attention: Mr. Bruce Reynolds and Ms Sharon Vogel

Dear Mr. Reynolds and Ms. Vogel:

The Residential Construction Council of Ontario (RESCON) and the Ontario Home Builders Association (OHBA) are pleased to provide their submissions for your review and consideration.

RESCON

RESCON is a construction employer association which represents the interests of low rise and multifamily residential builders in Ontario. RESCON is comprised exclusively of builders of new residential construction in Ontario.

Builders play a unique role in the building process and often incur significant cost pressures and challenges in delivering affordable, high quality housing stock to the market. In advocating for its members and new home buyers, RESCON focuses on removing the barriers in new construction, eliminating and or reducing government imposed costs and red tape, and promoting innovation in construction materials and methods.

Through its various Committees and Boards, RESCON plays a critical role in the following key areas

- Labour Relations and Collective Bargaining
- Building Code and Technical Issues
- Innovations in Construction Practices and Methods
- WSIB and Health and Safety
- Training and Education
- Market Housing Affordability and Land Supply Issues

OHBA

The Ontario Home Builders' Association is the voice of the building, land development and professional renovation industry in Ontario representing 4,000 member companies organized into 30 local associations across the Province. Our members have built over 700,000 homes in the last 10 years in over 500 Ontario communities. The industry contributes over $45 billion to Ontario's economy and employs over 325,000 people across Ontario.

Overview

Simply put, the members of RESCON and OHBA experience a mostly lien-free building environment. The largest builders (such as condominiums and 250+ single detached home builders) retain large subcontracting firms (union and non union) where the best building practices are utilized. From start to finish, there are no payment issues, and very few lien claims are made. That typically is also true for the smaller and custom home builders who are members of the two organizations.

Well organized, well trained and well educated, the trades of the RESCON and OHBA members are part of the winning solution in Ontario.

As set out in our letter date December 15, 2015, RESCON and OHBA do not see a need for significant changes to be made to the Construction Lien Act. Our industry has a sustained robust record of economic activity and remains one of the strongest sectors in the provincial economy. Introducing significant changes or another layer of bureaucracy in the form of some kind of prompt payment regime would be unwarranted and would likely harm our well-functioning part of the construction industry.

General Positions

The following statements (some modified from the TTC submissions) reflect accurately the positions of RECON and OHBA:

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.

It is submitted that the parties to building contracts 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 by a simple declaration and registration – no discovery, no trial. It creates a statutory trust where in nearly every other industry 'payables' are just unsecured funds. And it prohibits anyone from contracting out of these protections.

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 grow.

Prompt Payment

OHBA and RESCON were among the earliest stakeholders to voice our concerns with Bill 69 – Prompt Payment Act. In comments to the Standing Committee and in correspondence with MPPs we argued that prompt payment would negatively affect the industry. It would do this by establishing an arbitrary payment structure with onerous timetables and significant administrative and reporting requirements. This reporting structure would make compliance by small business particularly difficult to deal with. The approval of payment applications would be "deemed approved" after 10 days after the date the payee submits the application as well as short times for final payment might cause significant disruption to the industry.

Prompt payment could also compromise the quality of work by sub-contractors and leave the builder on the hook for warrant deficiencies for the work performed by the sub-contractor, with little recourse after the payment has been provided.

Financial Disclosure

As proposed in previous iterations such as Bill 69, proof of financing was articulated as a "right to information" which would have allowed a contractor to "at any time request in writing the owner provide updated financial information and the owner shall promptly provide the information".

The ability for any firm providing construction services on behalf of an owner to request at any time the owners' financial information represents an intrusive level of disclosure that we are not aware exists in North America. In Bill 69, the flow of information may mean that potentially hundreds of parties would have access to the owner/developers financial information. That legislation provided that all subcontractors on a site where there is often two degrees or more of separation from the owner. An owner cannot have confidence that this information will not be abused, considering the sheer number of subcontractors on a project that would have access to this information.

We understand the importance for a contractor or subcontractor to be assured that the owner has the ability to finance the project. It is notable that Tarion requires a builder to post securities as well as a risk assessment to demonstrate that they have the financial capability to complete the project. There may be an opportunity to strengthen this requirement through the ongoing independent review of the Ontario New Home Warranties Plan Act and the Tarion Warranty Corporation.

ADR and Encouraging Settlement

Most parties often undertake informal negotiations throughout a project which settle most disputes. However, even where that every day negotiation is unsuccessful (which is rare for this part of the residential sector), the vast majority of cases 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. There are as many factors affecting how to approach settlement as there are disputes.

The parties to the contracts ought to be the ones to determine how to best approach settlement; not a prescribed system under the Act (let alone a free standing prompt payment piece of legislation), which will make it difficult to take into account all the variables and to encourage settlement efficiently. 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.

Response to Prism Economic Report

We have taken the time to study the research advanced by various proponents of changes to the Construction Lien Act. We are particularly concerned with the research conducted by Prism Economics. We believe that the report conducted by this firm with respect to payment legislation is incomplete and in some cases flawed. We offer a few examples:

- The 2013 paper, The Need for Prompt Payment Legislation in the Construction Industry, which was focused on prompt payment provides insufficient evidence to support its conclusions. Some charts are purported to be based on certain Statistics Canada data. Figure 2 (at page 21) in the report purports to show an increase in average collection days for receivables between 2003 and 2011. However, the report does not explain how this conclusion was arrived at.

- Furthermore, the report does not differentiate between the wide range of construction sectors in its analysis or conclusions. It is clear that the entire report is based on a 'General Contractor' model of construction which is not typical in the residential sector.

- Moreover, the report sought to link the purported rise in delayed payments with a rise in independent operators as indicated in Figure 6 (at page 25). However, if one compares Figure 2 with Figure 6, one quickly sees the period covering the apparent rise in delayed payments does not coincide with an increase in independent operators. Indeed, one could actually conclude the opposite has occurred.

- The report also advances the claim that greater payment delays are serving to increase the number of independent operators. We believe that this is unrelated to the cause of accelerating payment and appears to be connected to larger political objectives.

- Another claim of the report is that delayed payment increases construction costs as contractors offset delayed payment by increasing their margins. We suggest that this claim is dubious for two reasons. First, if contractors are doing so then it offsets costs associated with delayed payments. Second, by their own admission, these increased margins should be offset by savings from parties higher up the supply chain who are saving money by dispersing costs and risks to sub trades.

1993-1995 and 2007-2008 Attempts By Trades to Amend the CLA

In 1994, the Hon. Marion Boyd, Attorney General established her Working Group on Residential Construction Compliance under the Trust Provisions of the Construction Lien Act. Although the trades were intent on achieving amendments to the Construction Lien Act at the time, the Report resulted in ten excellent recommendations, focussing rather upon Training and Education, Credit Management and Standard Contract Terms to cope with ballooning non-compliance with the Trust provisions under the Act. As was recognized by the Attorney General's predecessor, the Hon. Howard Hampton, "the construction industry has many dimensions and what would be beneficial to one interest might be seriously detrimental to another."

The Working Group moved from positions of great division to a common position which enabled the residential construction industry to accomplish achievements reflected in the continued success of its sector.

In 2007, the Council of Construction Associations (COCA) persuaded the Ministry of the Attorney General to suggest changes to the Trust Holdback provisions of the Act. Once again, the residential sector was able to persuade the Ministry that in fact changes (which would have caused greater harm than benefits) were not required.

Conclusion

The members of RESCON and OHBA compete in the Residential Construction Sector. That Sector does not require changes in the Construction Lien Act and it does not require a system of prompt payment. As noted in the Ontario Bar Association Submission, at page 8, the State of Alabama has exempted residential construction from its prompt payment act (which exists where there is no equivalent construction lien act).

RESCON and OHBA thank the CLA Expert Review for your time and efforts in this regard.

RESCON AND OHBA SUBMISSION TEAM

Richard Lyall, President of RESCON

Anthony Fernando, Director of Public Affairs, RESCON

Joe Vaccaro, Executive Director of OHBA

Stephen Hamilton, Manager of Government Relations, OHBA

Derek Freeman, 40 years a construction law lawyer, including acting as Chair of the 1995 Attorney General's Working Group on Residential Construction Compliance under the Trust Provisions of the Construction Lien Act and Co Chair of the OBA Construction and Infrastructure Law Section CLE Expert Review Submission Committee