# Expert Review of Ontario's *Construction Lien Act*

Submissions of Labourers' International Union of North America, Local 183

**10/23/2015**

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**About LIUNA Local 183**

Labourers' International Union of North America, Local 183 ("LIUNA Local 183") is the largest construction union local in North America with over 40,000 members in the Greater Toronto Area. It represents members in both the construction and non-construction/industrial sectors. It has collective agreements with employers related to every aspect of the construction industry, including bricklaying and masonry, carpentry, concrete and drain, low-rise forming, blanket insulation, high-rise (formwork, building, and restoration), high-rise and low-rise trim, heavy construction, house building, plumbing, piecework (carpet, countertops, railings, tiles), railroad, lumber yard, locates, utilities, road building, landscaping, fencing, sewer and watermain, and stucco.

We are pleased to be provided this opportunity to make submissions on these issues which have a serious effect on the livelihood and security of our hard-working members. The *Construction Lien Act* ("*CLA*") plays an important role in helping us represent our members and their best interests.

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**Holdback**

LIUNA Local 183 is firmly opposed to any reductions in the statutory holdback requirements. The 10% required to be held back under the *CLA* is necessary to protect those lower down in the construction chain, such as labourers and other tradespeople. The sacrosanct nature of holdback has been recognized by both our courts and leading practitioners in the field.

In *Landry Mechanical Services Ltd. v. J.C. Sulpher Construction Ltd. and The City of Ottawa*, Master Beaudoin held that the owner of a project could not set-off its delay claim against a contractor against the holdback, noting:

> …the holdback is to protect those "on lower rungs of the ladder" with whom there may be no direct contractual relationship….Those funds are for the benefit of the subtrades.[1]

A leading practitioner in the field of construction liens has commented that holdback "lies at the heart of everything having to do with liens."[2]

To the extent that workers' claims are covered by the worker's priority under section 81(1), the 10% statutory holdback and notice holdback together are often sufficient to satisfy the claims of labourers that have not been paid their wages or benefit and pension remittances. The fact that there is often sufficient holdback means that construction lien claims on behalf of workers can be resolved expeditiously and without unduly burdening the court system.

However, where workers' claims for wages or pension and benefit remittance exceed the worker's priority, the 10% statutory holdback is not sufficient. In those situations, all the parties are drawn into a lengthier and more complex process. It also means that our members must wait longer to be paid the wages and remittances they have earned.

As such, any reduction to the holdback would necessarily impair the ability of those who are the most vulnerable and have the least power to be paid for their hard work. Lowering the amount of holdback would mean there would be less to divide among multiple lien claimants after claims for workers' wages are settled.

The holdback must, at the least, be maintained at 10%. The security that the holdback provides for the labourers and small subcontractors on a construction project should not be sacrificed for the benefit of cash flow.

LIUNA Local 183 is in support of increasing the amount of holdback. Under New Brunswick's *Mechanics' Lien Act,* the holdback is 20% for projects under $15,000. For projects over $15,000 the holdback is 15%.[3] Prince Edward Island's *Mechanic's Lien*

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1 2005 CanLII 46399 at para 15

2 Duncan W. Glaholt, *Conduct of a Lien Action,* (Toronto: Carswell), 2014 at p. 35.

3 *Mechanics' Lien Act,* RSNB 1973, c M-6 *at* section 15(1) and 15(3)

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*Act* also has similar provisions.[4] We take the position that increasing the holdback to 15% would provide additional security to our members and other workers. In any event, the holdback should not be reduced.

**Finishing Holdback**

LIUNA Local 183 also takes the position that the holdback for finishing work should be retained. The finishing holdback is meant to protect those workers and trades that typically provide labour to a project after it has been substantially completed. Our members that provide finishing work on construction projects often rely on the finishing holdback to recover their unpaid wages and pension and benefit contributions.

The provision requiring the finishing holdback was enacted to ensure that finishing trades were not prejudiced by the release of the holdback before they began their work or had the opportunity to register their liens.[5]

Eliminating the finishing holdback would deny this sub-set of workers the same protection afforded to workers that provided labour earlier on in the project. Further, without the finishing holdback, the lien claim and litigation process would become much more costly and complicated.

Considering that the amount of finishing work is typically a fraction of the work already performed, it would be impractical to oppose such a finite holdback and burden the system with civil claims over relatively small amounts.

As such, the finishing holdback is a useful mechanism that ensures all workers are provided equal protection and should be maintained.

**Phased Release of Holdback**

LIUNA Local 183 cautiously supports the phased release of holdback in certain circumstances and upon the condition that it would not prejudice claims for wages of any workers. We recognize that holdback can often be held for several years pending the completion of large and complex construction projects. While we understand the utility in having those funds flow down the construction pyramid in a timely manner, we wish to ensure that any early or phased release of the holdback does not lessen the security it provides for our members' wages.

Once again, we note the relation of the holdback to the fundamental purpose of the *CLA*, i.e. the protection of those vulnerable to the financial instability and disputes of parties not directly relating to them. The Ontario Superior Court emphasized this in *Wellington Plumbing & Heating Ltd. v. Villa Nicolini Incorporated*, when it stated,

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4 *Mechanics' Lien Act* , RSPEI 1988, c M-4 at Section 14(1) and 14(3)

5 Kevin Patrick McGuiness, *Construction Lien Remedies in Ontario*, (Scarborough: Carswell), 1997 at p. 64

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> The purpose of the *Act* is generally accomplished through three mechanisms: the right to lien, the holdback provisions and the creation of specified trust funds… I agree that the holdback provisions are a critical design feature in the overall scheme of the *Act*. The importance of the holdback to the overall effectiveness of the *Act* is reflected in the principle that the basic holdback is inviolate…The holdback cannot, for instance, be reduced by assertions of deficiencies, completion costs, delay claims or by payments made directly from the owner to one or more sub-contractors, save in compliance with s. 25.
>
> Given the significance of the holdback in the overall scheme of the *Act*, a strong argument can be made that provisions that may result in a reduction of the holdback ought to be carefully followed. [6]

Phased release of holdback should not be permitted in relation to any workers that provide services throughout the duration of a project or on multiple phases. Any contracts or subcontracts under which a lien for wages could be registered and involving such workers should be exempt from the possibility of releasing the holdback early.

As well, LIUNA Local 183 suggests the approach taken by Saskatchewan in its *Builder's Lien Act* towards phased release of holdback may be helpful. Under that statute, payers on construction projects which have a contract price over $25 million and that are scheduled to take longer than one year to complete can release the holdback on each yearly anniversary. Before they can release the holdback, they must ensure that there are no liens registered and must publish a notice of early release of holdback. Forty days after posting the notice, payers are legally allowed to release the holdback for that year.[7]

We propose that a similar method of early release of holdback be implemented, one that takes a cautious approach with safeguards to ensure that lien claimants are not deprived of their rights by virtue of releasing the holdback.

**<u>Prompt Payments</u>**

LIUNA Local 183 generally supports the notion of prompt payments, recognizing that such legislation has been successfully implemented in other jurisdictions. However, we oppose any prompt payment provisions that would reduce the ability of our members' to be paid in a timely manner or to have security for their wages or pension and benefit contributions in the form of holdback.

In the face of prompt payment legislation, the holdback must, at the very least, be maintained at its present amount of 10%. Further, any prompt payment legislation must

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6 2012 ONSC 5444 at para 65

7 *Builder's Lien Act* , SS 1984-85-86, section 46(1)

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not result in the elimination or reduction of the finishing holdback. As noted above, both types of holdback are critical for our members and need to be preserved.

Further, LIUNA Local 183 is fundamentally opposed to the implementation of any pay when paid and/or paid if paid clauses. Such clauses should be unenforceable. They force those lowest in the construction chain, such as our members and other tradespeople, to bear the burden of an owner's, contractor's, or subcontractor's default.

As noted, several jurisdictions in the United States have banned such clauses.[8] By passing the burden of payment down the chain, a large contractor may force a subcontractor to default on its payment obligations. This leads to a situation where each party in the chain defaults on their payment obligations and leaves those that are the most vulnerable and have the least bargaining power, the tradespersons, without wages for their hard work.

Pay-when-paid and paid-if-paid clauses undermine the security and livelihood of our members and other workers. They should be prohibited by legislation or deemed to be unenforceable as a matter of public policy.

**Lengths of Preservation and Perfection Period**

LIUNA Local 183 recommends increasing the timelines for both the preservation and perfection of construction liens. The forty-five day timelines that are currently in place for both steps are rather steep and can be difficult to meet. It is often difficult to determine whether a construction lien will be necessary within the allotted forty-five day period to register and can prejudice our ability to recover wages for our members.

Further, the forty-five day period within which a lien claimant must file its statement of claim can overburden the system. A longer perfection period would permit the lien claimant to try and settle the matter with the subcontractor or contractor and could allow for the discharge of more construction liens prior to the formal litigation stage.

We note that most other jurisdictions within Canada have more liberal time periods. In British Columbia, the time to preserve a lien is also 45 days but the time to perfect a lien is one year.[9] Similarly, Alberta also has a 45-day preservation period but a 180-day perfection period.[10] While Manitoba has a shorter period to preserve a lien (40 days), it allows up to 2 years to perfect a lien claim.[11] In Nova Scotia, a lien claimant has 60 days

8 Michal Malecki, Risk Allocation: The use of “Pay when Paid” Clauses in the Construction Industry, Canadian Bar Association: http://www.cba.org/CBA/blastemail/pdf/2014-enews-paid.pdf

9 *Builders' Lien Act*, [SBC 1997] Chapter 45, section 20 and 33

10 *Builders' Lien Act*, RSA 2000, Chapter B-7, section 41 and 43

11 *Builders' Lien Act*, CCSM, Chapter B91, section 43 and 49

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to preserve a lien and 105 days to perfect it.[12] Prince Edward Island has similar provision which allows 60 days to preserve a lien and 90 days to perfect it.[13]

As such, Ontario's timelines are unusually severe and should be brought in line with the more expansive time limits available to lien claimants across the country. LIUNA Local 183 recommends that the timeline for preserving a construction lien be extended to 60 days and the time line for perfecting a lien be extended to 90 days. These timelines strike a balance between litigating lien claims known in a timely manner and allowing parties to informally resolve lien claims.

**Registration of Construction Liens for Condos and Subdivisions**

LIUNA Local 183 takes the position that the registration of construction liens against condominiums and subdivisions should be made simpler. At present, once a condominium is registered, lien claimants must register a lien against each condominium unit separately. Even if the lien claimant wishes to lien only against the common elements of a condominium, they must lien against each unit separately. While the *CLA* provides some help in requiring a notice of intent to register a condominium, it is still extremely prohibitive to try and recover wages owed to workers that provided labour on a condominium project. The costs involved and time required to register a lien against each single unit make it less likely that a lien claimant will pursue their rights.[14]

Similarly, at present, a lien claimant must register a lien against each individual lot in a subdivision. Workers, such as our members, often provide their labour to a large number of lots within a subdivision in an undifferentiated manner. While the *CLA* allows for the filing of general liens, they are subject to certain pre-conditions. One of these pre-conditions is the owner and contractor have not already agreed that any construction liens will expire on a lot-by-lot basis. If the contract for a subdivision includes such a clause, a general lien is not applicable. Again, the cost of registering a lien against each lot is prohibitive.

Such requirements are excessive and unduly burdensome. Further, they prejudice the rights of workers to be paid the wages they rightfully earned. LIUNA Local 183 proposes that amendments be made to the *CLA* to make the process of registering liens against condos and subdivisions more efficient and economical. General liens may, perhaps, be applied to condominium projects. As well, general liens could be applied even in the face of a lot-by-lot expiry clause.

12 *Builders' Lien Act*, RSNS 1989, c 277, section 24 and 26

13 *Mechanics' Lien Act*, RSPEI 1988, c M-4, section 24 and 27

14 *Conduct of a Lien Action*, supra note 2 at p. 122

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**Worker's Priority**

As the representative of thousands of construction workers in Ontario, LIUNA Local 183 relies on the worker's priority to ensure that its members get paid for their hard work and do not bear the burden of the mistakes of those above them in the construction chain.

Unlike contractors and subcontractors, a worker has no ability to spread the risk that his or her employer will default on wages since they are typically only employed by one employer.[15] The worker's priority is a fundamental mechanism that permits the early and quick resolution of claims for wages. Without the worker's priority, the system would be further burdened with prolonged claims for wages.

As such, the worker's priority should, at the very least, be maintained and preserved. Any amendment that would reduce the protection of the worker's priority would undermine the fundamental purpose of the *CLA*.

Notwithstanding the above, LIUNA Local 183 takes the position that certain changes could be made to the worker's priority to make it clearer. There is often confusion at the manner in which the 40 day period is to be calculated, whether it is to be the last 40 days of work or an average of typical 40 days of work.[16]

We propose that language similar to that used in Saskatchewan's *Builders Lien Act* be incorporated into the *CLA* to make the provision clearer. Section 75(2) of Saskatchewan's act states,

> The priority of a labourer under subsection (1) shall be determined by calculating the amount which the labourer would earn in one ordinary working day, exclusive of overtime, and multiplying that amount by 40.

Similar language would clear up any ambiguities and confusion about the manner in which the worker's priority is to be calculated. It would resolve frequent disputes over the proper interpretation of the provision and would help the parties focus on resolving the lien claim instead of semantics.

**Trusts**

LIUNA Local 183 is in support of the segregation of trust funds related to a construction project from non-trust funds. While it is recognized that amounts owing to a contractor or subcontractor and amount received by a contractor or subcontractor are trust funds for the benefit of those supplying services or materials, the *CLA* does not require these trust funds to be held separately. Often contractors and subcontractors co-mingle trust funds from separate projects together or co-mingle trust funds with general funds.

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15 McGuiness at p. 340

16 Conduct of a Lien Action, supra note 2 at p. 207

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Requiring trust funds to be held separately would simplify many disputes involving payments from the trust fund. At present, such claims often require the tracing of payments from co-mingle funds to demonstrate whether or not a breach of trust has occurred. This can prove to be a timely and costly process. Breach of trust claims would be made much more simple and efficient if there was a requirement that trust funds for each project be held separately. A simple inquiry into the existence of such a trust fund and payments into and out of it would considerably narrow the scope of breach of trust claims.

Further, the co-mingling of trust funds for a project with trust funds from another project or with general funds becomes problematic in situations that end in insolvency. Without distinct trust funds that can be identified and segregated, the amounts often end up in the estate, making the protections against insolvency for lien claimants under the *CLA* redundant.[17]

We also agree that lien claims and trust claims should be permitted to be joined and heard together. The present non-joinder and lien and trust claims creates inefficiency and waste of resources by forcing the parties to undergo two separate sets of litigation.

We note that the legislation in Saskatchewan[18] and Manitoba[19] already permit the joinder of trust actions with lien actions. Further, a practice has arisen in Toronto of having related lien and trust actions referred to the same Master to be heard together.[20]

**Insolvency Legislation**

Section 85 of the *CLA* sets out the priorities that are to be followed in the event of an insolvency. When a payer becomes insolvent, priority over the trust fund held by the payer is given to those who have supplied services or materials and have proven liens. In accordance with the priorities detailed in Part XI of the *CLA*, these trust funds are to be paid out by class and rateably within the class. Any remaining trust funds are to be distributed to those who provided services or materials that do not have proven liens, by class and rateably within the class.

It is also clear that any funds that are impressed with a trust under the *CLA*, including holdback, do not form part of the estate for distribution to creditors where a trustee becomes insolvent. Those trust funds are to remain for the benefit of the beneficiaries under the *CLA.*[21]

17 *Royal Bank of Canada v. Atlas Block Co. Ltd.,* 2014 ONSC 3062

18 *Builder's Lien Act* , SS 1984-85-86, section 46(1), section. 89

19 *Builders' Lien Act*, CCSM Chapter B91, section 66

20 Duncan W. Glaholt and David Keeshan, The 2015 Annotated Ontario Construction Lien Act, (Toronto: Carswell), 2014, at p. 367

21 *Canadian Asbestos Services Ltd. v. Bank of Montreal*, (1992) 5 CLR (2d) 54

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Given the priorities set out in the *CLA* and separation of trust funds from any insolvent estate, LIUNA Local 183 takes the position that liens for workers' wages should automatically be made exceptions to the stays that arise in bankruptcy and insolvency situations. The *Bankruptcy and Insolvency Act* ("*BIA*") already recognizes the importance of workers getting paid wages owed to them ahead of other creditors, by virtue of section 81.3. However, the amount of that super-priority is limited to $2,000. In order to achieve the spirit and intention of both the workers' priorities in the *CLA* and *BIA*, workers and workers' trust funds should be permitted to register liens for wages and commence action in order to enforce their lien claims without having to undergo the time-consuming and costly process of having the stay lifted.

In relation to the Canada Revenue Agency's ("CRA") super-priority, such claims by CRA can be an impediment to claims of workers and workers' trust funds under the *CLA*. LIUNA Local 183's position is that the holdback retained for the benefit of workers should not be subject to the CRA's priority.

The approach of the CRA in the past five years has been to apply the principles arising from the British Columbia Supreme Court's decision in *PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc*.[22] In that decision, the CRA claimed a priority over the holdback owed to a subcontractor by the general contractor. The general contractor, claiming the subcontractor defaulted, claimed a set-off in excess of the holdback and argued that the holdback was not due to be paid to the subcontractor. The court held that since the subcontractor had no right to the holdback funds, the CRA could not claim any priority over them. The general contractor's set-off was then subject to liens of other subcontractors, which take priority over the set-off.

In recent years, CRA has applied the *Norex* reasoning in Ontario. This approach has provided some certainty in cases where the general contractors set-off claim against a defaulting subcontractor exceeds the holdback owed by the general contractor. However, as noted by the court in *Norex*, the decision gives rise to an arbitrary result from the perspective of the lien claimants. A lien claimant's access to the holdback is dependant entirely upon the validity of a payer's set-off claim.

We also note that a significant amount of time and resources can be consumed in efforts to coordinate between the payer and CRA to establish that a valid set-off claim exists. Finally, in the case where there is not a valid set-off claim, CRA will often continue to exert its super-priority, which results in a requirement for claimants to engage in protracted negotiations with the Department of Justice acting on behalf of the federal government.

The priority afforded to workers and workers' trust funds under the *CLA* is undermined by CRA's super-priority claim. Efforts to should be undertaken to develop a consistent approach under both legislative schemes that respects the priority afforded to workers and workers trust funds under the *CLA*.

22 2009 BCSC 95

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**Waiver**

LIUNA Local 183 strongly opposes any amendments that would permit any party within the construction chain to waive or contract out of the *CLA*. As noted above, the CLA is intended to protect those parties within the construction chain that do not have privity of contract with the owner or contractor, such as workers of a subcontractor. These workers, including our members, would unknowingly be precluded from exercising their rights to recover unpaid wages and contributions if waiver of the *CLA* was permitted.

The committee that drafted the recommendations leading to the enactment of the *CLA* explained the need for the prohibition against waiving the *CLA* in the following terms:

> Usually it is only those who are in the weakest bargaining position or who are unaware of the realities of the industry and the law who will agree to waive their rights. Unfortunately, these are the very people the Act was intended to protect.[23]

In order to uphold the *CLA*'s purpose in protecting such people, it is necessary to maintain the prohibition against waiving the *CLA*. To allow the *CLA* to be waived would undermine the very objective of the *CLA*.

**Alternative Dispute Resolution and Small Claims**

LIUNA Local 183 recommends that more substantive and practical methods of alternative dispute resolution be incorporated into the construction lien process. Claims can often be settled without proceeding to the formal litigation stage and such settlements would be helped by mediation or arbitration. Ontario's *Rules of Civil Procedure* contain a number of provisions that can be applied or tailored to lien claims in order to facilitate alternative dispute resolutions.

Firstly, mediation of lien claims should be mandatory. Ontario's *Rules of Civil Procedure* require mandatory mediation for specified actions in order to "reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."[24] Construction lien cases, like other civil cases, should be subject to mandatory referral to mediation after lien claim is registered. As under Rule 24.1, the parties should be required to file statements of issues and documents of central importance prior to the mediation.

If mediation fails there should be a process or structure for referral to private arbitration. This could be done on consent of both parties and through an arbitration agreement. Moving towards arbitration rather than litigation would increase the efficiency in which lien matters are dealt with and reduce their civil litigation costs.

There should be a specialized list of mediators for construction lien cases to ensure that they are dealt with by persons with specialized knowledge and experience, similar to

23 McGuiness at pp. 209-210

24 *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 24.1.01

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that under Rule 24.1.08 of the *Rules of Civil Procedure*. Retired construction lien masters and retired judges with construction lien experience would be ideal candidates for these positions.

Complex construction lien cases within Toronto should also be case managed in a manner similar to civil cases under Rule 77 of the *Rules of Civil Procedure*, with construction lien masters having the same powers to make orders, impose terms, give directions and award costs. We propose that the timeframes contained in the CLA and in the proposed civil case management rules should be aligned as far as possible to ensure compatibility.

We also take the position that a mechanism should be created to allow for the resolution of modest lien claims through a small claims procedure. In our case, liens for workers' wages are often the smallest and least complex within a group of liens.

Creating a small claims procedure, similar to the one already in place for civil cases, would simplify and expedite the process for resolving liens for small amounts. Under the *Courts of Justice Act*, the Small Claims Court has jurisdiction over actions where the amount claimed is under $25,000.[25] As well, there are particular rules for Small Claims Court that provide a stream-lined and simpler procedure for the litigation of claims. [26]

A Small Claims procedure could be created for construction liens under $50,000 with a similar uncomplicated set of rules to quickly resolve small lien claims.

**Labour and Material Bonds**

LIUNA Local 183 supports the more wide-spread use of labour and material bonds. The existence of labour and material bonds helps prevent the registration of liens and ensures that our members get paid quickly once their employer is unable to pay them.

We support a requirement for mandatory labour and material bonding on public construction projects, as well as large, prolonged private construction projects. We recommend multi-tier labour and material bonds be mandatory for such projects to ensure that subcontractors further down the chain, and consequently workers, can claim against the bond without any issues.

We also support a requirement that labour and material bond sureties be required to promptly pay undisputed amounts. Following a short, yet reasonable, period for investigating a claim, the surety should not be permitted to withhold the funds.

Further to that point, we take the position that bond claims should be subject to adjudication. Disputes over labour and bond claims between the claimant, bonded party and surety can become complex and prolonged when turned into a separate action.

25 *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 22

26 *Rules of the Small Claims Court*, O Reg 258/98

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More importantly, they can prevent the timely payment of the bond and delay related lien proceedings. Requiring labour and material bond claims to undergo mandatory mediation or be subject to arbitration would bring uniformity to such disputes and expedite resolution.

## Conclusion

LIUNA Local 183 submits that the purpose of the *CLA* is to protect those that are most vulnerable and powerless within the construction chain and ensure that they are paid for their services and materials. The protections within the *CLA* must, at the least, be maintained, if not enhanced.

We emphasize the need to retain the current level of both the holdback and finishing holdback in order to provide security to workers, such as our members. A reduction in either holdback could jeopardize their livelihoods and make them bear the burden of other parties' defaults.

Similarly, any other changes to the holdback, including phased release of holdback and prompt payments, should be considered carefully. Any new mechanisms that have the potential to reduce the level of holdback must not put workers and tradesperson's in a position where they are unable to claim their lien rights.

Lastly, the worker's priority in an invaluable mechanism that allows tradesperson's to recover lost wages or pension and benefit contributions quickly and efficiently. Any changes to the *CLA* must not take away from or frustrate the worker's priority.

LIUNA Local 183 recognizes that certain parts of the *CLA* require amendment. We support changes that need to be made in order to make the process clearer, quicker and more efficient. However any changes must not undermine the fundamental purpose of the *CLA.*

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