Construction Lien Act Review

NEW ISSUES LIST

January 13, 2016

Submission by

The Council of Ontario Construction Associations

COCA
COUNCIL OF ONTARIO
CONSTRUCTION ASSOCIATIONS

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Lienability

1. **Consider whether Municipal Lands should be considered in the same manner as federal and provincial crown lands vis-à-vis lienability**. COCA agrees that liens should not attach to the interests of a municipality in the premises provided, however, that municipalities remain bound by the *Act* and that a lien be a charge on the holdbacks required to be maintained by the municipality.

2. **Consider clarifying the process by which a lien is given**. COCA supports any amendment that simplifies the process for giving a lien in accordance with section 34(1)(b) of the *Act*.

3. **Consider removing the notice of lien provisions.** COCA believes that written notice of lien ought to continue to form part of the fabric of the *Act*. Giving written notice of lien is a quick and inexpensive step that a lien claimant can use to secure payment. However, COCA acknowledges that there is room for improvement. COCA supports the proposal by the OBA to allow parties to "vacate" a written notice of lien upon the posting of funds into Court. COCA also supports the proposals by the TTC and the City of Toronto to amend the *Act* to make it clearer what documents qualify as written notice of lien for the purpose of the *Act*.

4. **Consider further clarification of the definition of improvement (e.g. distinguishing between construction and IT projects and service agreements).** COCA is not taking a position on this proposal at this time because it is uncertain what changes to the definition of "improvement" are being proposed.

5. **Consider whether the process with respect to liening condominium units needs to be modified.** COCA agrees that the process of liening the common elements of a condominium ought to be reformed. COCA relies upon the arguments made in its original submissions.

Holdback and Substantial Performance

6. **Consider, with respect to release of holdback, drawing a distinction with respect to services (such as design services) rendered prior to commencement of construction.** COCA takes no position with respect to this issue.

7. **Consider use of certain financial instruments (i.e. letters of credit or bonds) or cash for holdback purposes.** COCA supports the proposal of the Ontario Society of Professional Engineers and the Consulting Engineers of Ontario to permit the holdback to be secured by alternative financial secured instruments.

8. **Consider implementing a deficiency holdback.** Any proposal for a mandatory deficiency holdback is a step backward. The objective of the *Construction Lien Act*

should be to promote prompt payment. Deficiency holdbacks defeat that objective by creating delays in payment even in the absence of known deficiencies. The *Act* should prohibit deficiency holdbacks. Alternatively, the *Act* should limit the amount retained for a deficiency holdback.

9. **Consider releasing tranches of holdback as the project achieves designated percentages of completion**. See our comments below at Q. 10.

10. **Consider annual release of holdback.** COCA is generally supportive of proposals that allow for flexibility with respect to the release of the holdback on large projects, including project phases, designated percentages of completion, or possibly annual release of holdback.

Prompt Payment or Timely Payment for Construction Work

11. **Consider punitive "interest" as a mechanism for breach of payment terms.** In order to achieve the objective of prompt payment, the *Act* should be amended to compel the payment of interest when payments are delayed. The rate of interest should be sufficiently high to meaningfully deter the now prevailing incidence of late payment.

12. **Consider potential conflicts with prompt payment legislation and regulatory legislation such as the *Professional Engineers Act* and/or *Architects Act*.** Bill 69 provided that any application for payment should be paid within 20 days of the date that it was submitted. Twenty days is a reasonable time. If there are any provisions in the *Professional Engineers Act* and/or *Architects Act* that prevent Engineers and Architects from fulfilling their responsibilities to review payments within the timelines provided in Bill 69, then those *Acts* should be amended.

13. **Consider the causes of payment delays and how they can be addressed in the Act or other legislation.** COCA agrees that the underlying causes of payment delays ought to be considered and, if possible, addressed through reform of the *Act* or other legislation.

14. **Consider whether or not technological solutions would improve prompt payment issues (e.g. an automatic rejection of incomplete progress draws).** COCA has several concerns with this proposal. First, some parties in the construction industry may not be equipped to use the proposed technology. Second, this proposal may add an unnecessary layer of costs to construction projects. Third, overly restrictive criteria for a payment applications may be used as a device to defeat the objective of prompt payment. While COCA encourages the adoption of new technologies, it is not something that ought to be legislated by the government.

15. **Consider implementing KPI's as a method of motivating prompt payment**. The Ontario Association of School Business Officials has suggested that the *Act* should legislate a voluntary and/or non-binding Prompt Payment Code or Protocol that would implement Key Performance Indicators. A voluntary and/or non-binding protocol is a wholly inadequate response to pervasive problems with late payment in the construction industry. The delays at issue already occur in spite of a mandatory contractual

obligations to make timely payments. Suggesting that a voluntary code will succeed where a contractual obligation has failed is unrealistic. A legislative solution to payment delays is needed.

Alternative Dispute Resolution

16. Consider introducing an adjudication mechanism for construction disputes in Ontario:

(a) **Consider how adjudication could work where there is the ability to preserve a lien.** COCA acknowledges the interaction of adjudication and lien rights creates a potential problem to which there is not an obvious solution. Given the summary nature of adjudication and the interim effect of adjudication rulings, COCA has real concerns about depriving a party of its lien rights based on the outcome of adjudication. On the other hand, allowing a party that has lost an adjudication to register a lien may frustrate the object of adjudication. We note that South Australia's system includes adjudication and lien rights. We suggest that the Experts investigate how South Australia has managed the interaction of the two rights.

(b) **Consider the potential institutional bias of adjudicators.** See our comments at 16c) below.

(c) **Consider a qualification process for adjudicators.** The *Act* should permit the parties to use any adjudicator that they consider acceptable. However, there will be cases where the parties are unable to agree on an adjudicator. The Ministry of the Attorney General should maintain a list of qualified adjudicators from which the Court can appoint an adjudicator if the parties are unable to agree. The MAG ought to prescribe minimum qualifications to be added to the list of available adjudicators.

(d) **Consider when an adjudicated decision would have to be appealed.** Provided that the ruling of an adjudicator is only binding until the end of a contract, then COCA's view is that there ought to be no appeals for alleged errors or law or fact. One of the objectives of adjudication is to resolve a dispute on a summary basis. Allowing appeals for alleged errors or law or fact would tend to frustrate that objective. We note that in the UK it is open to a party to challenge the jurisdiction of an adjudicator. In light of the comments in Hudson's text[1] that in many cases a great deal of time and money is spent disputing the jurisdiction of the adjudicator, COCA's view is that an adjudicator ought to be able to rule on his or her own jurisdiction without right of appeal or judicial review. However, there ought to be a "slip rule" that permits an adjudicator to correct inadvertent or clerical errors in its award.

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[1] Hudson's Building and Engineering Contracts, 12th edition (2010) at pp. 1412-1413.

Miscellaneous

17. **Consider False Claims legislation similar to that used in the United States.** COCA is opposed to the adoption of False Claims legislation, at least without a more thorough debate. While the goal of the Act is worthy, False Claims Act may not be the right solution. In the U.S., the law allows whistleblowers to file actions on behalf of the government. Persons filing under the Act stand to receive a portion (usually about 15–25 percent) of any recovered damages. We have the following comments and concerns: 1. Concerns have been raised that the False Claims Act is used by fraudsters who bring false claims under the *Act* to extort large payments from contractors. 2. Other critics contend that the government asserts violations to chill legitimate claims and gain unfair settlement leverage. [2] 3. The Fraudulent Claims Act in the U.S. is not limited to the construction industry. If it was adopted in Canada, it should not be limited to construction industry. 4. There are already mechanisms in Ontario to address false claims, including civil litigation and the Criminal Code.

18. **Consider modifications to the statutory settlement meeting provisions.** In our view settlement meetings are a useful mechanism for moving actions forward that are not subject to case management by a master. While there may be room for improvement, they should not be abolished without an alternative mechanism to replace them.

19. **Consider issues related to case management references.** COCA supports the proposal of Prompt Payment Ontario to extend case management for lien actions province wide. While COCA regards settlement meetings pursuant to section 60 and 61 to be useful in those jurisdictions that do not have masters, they may be unnecessary if case management for lien actions is implemented on a province wide basis.

20. **Consider implementing changes to documentary disclosure requirements.** COCA's initial submissions recommended mandatory production of documents in trust actions. COCA simply reiterates its position with respect to documentary disclosure.

21. **Consider improving harmonization of the Act with the *Registry Act*.** COCA supports measures to harmonize the *Construction Lien Act* and the process of e-registration. [3]

22. **Consider allowing electrical contractors an ability to seize machinery and equipment from a customer that has not paid the contractor.** COCA does not take a position regarding this proposal. However, if the *Act* is amended to allow electrical contractors to repossess equipment, then similar rights should be extended to other trades.

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[2] Daniel D. Mcmillan, The Truth about False Claims, http://www.jonesday.com/files/Publication/681674c6-4414-4a7c-a74f-61072662291f/Presentation/PublicationAttachment/4d1a9778-ac80-454c-a24e-c2f73d351849/Calif_Lawyer_10_03.pdf

[3] See Duncan W Glaholt, Conduct of a Lien Action, 2014 Ed, (Toronto: Carswell, 2014) at p. 120 and 121 for a list of literature discussing the friction between the Construction Lien Act and e-registration.

23. **Consider a requirement for additional information in the certificate of substantial performance.** COCA does not consider it necessary to require additional information in certificates of substantial performance.

24. **Consider exemptions or carve-outs from lien legislation for specific forms of contract.** It is unclear what types of contract would be exempt from the *Act*. However, COCA is concerned about the possible exemption of any type of contract from the scope of the *Act.*

25. **Consider the use of the Daily Commercial News as a medium for publications.** COCA suggests that government should reconsider the Daily Commercial News as the medium for publications pursuant to the Act. The time has long since past when it was necessary for Certificates of Substantial Performance to be published in print. Other suppliers should have the opportunity to bid on the delivery of a web-based service.

26. **Consider the effect of the *Act* on projects regulated by the Ontario Energy Board.** It is unclear what is being proposed with respect to entities that are regulated by the Ontario Energy Board. If, however, the proposal that is being considered is that such entities be exempted from the application of the *Act* or prompt payment amendments, then COCA opposes the proposal.

27. **Consider providing a practice guide or series of interpretive bulletins to accompany new legislation.** COCA has no position regarding this proposal.