CONSTRUCTION LIEN ACT REVIEW
SUBMISSIONS OF THE REGIONAL MUNICIPALITY OF YORK

ISSUES TO BE CONSIDERED BY THE REVIEW

1. **Lienability**

   (a) Consider the effectiveness of the definitions of "improvement", "materials", "supply of services" and "owner".

   YR (a) The definitions for the terms "improvement", "materials", "supply of services" and "owner" all need to be revised to reflect the caselaw surrounding each of these definitions and to add clarity

   YR (b) The Region strongly believes that the scope of when a lien does not attach to a premises should be expanded to include all lands owned by government entities

2. **Holdback and Substantial Performance**

   (a) Consider changing the amount of holdback (from the current 10%);

   YR (a) The Region does not support changing the amount of the 10% holdback

   (b) Consider increasing the number of dates for the release/early release of holdback, for instance on phased projects;

   YR (b) The Region supports allowing for substantial performance of various phases of a project for larger and more complex projects where more than one distinct phase is clearly identified in the contract

   (c) Consider making the release of holdback mandatory/automatic after expiration of lien rights, unless there has been early release of holdback;

   YR (c) The Region does not support the automatic release of holdback after expiration of lien rights

   (d) Consider eliminating the "holdback for finishing work";

   YR (d) The Region does not support elimination of the "finishing holdback" as this would be a disincentive for contractors to achieve completion of the work. Additionally, owners and subcontractors would have significant exposure if there were no "finishing holdback" on projects where partial substantial performance has been issued

   (e) Consider revising the minimum requirements for substantial performance;

   YR (e) The Region supports a review of the minimum requirements for substantial performance

   (f) Consider whether or not to add further specifics to the requirements for a Certificate of Substantial Performance; and

   YR (f) The Region supports a review of the Certificate of Substantial Performance form to consider the addition or removal of certain information

(g) Consider introducing a new requirement for a mandatory Certificate of Intention to Release Holdback.

YR (g) The Region would like further clarification on the idea of a mandatory Certificate of Intention to Release Holdback

3. **Preservation, Perfection and Expiry of Liens**

Generally

(a) Consider whether the mechanics of preservation and perfection require any changes;

YR (a) The Region would support a review of the mechanics of preservation and perfection of liens

(b) Consider clarifying the release of liens and consider if there are any alternatives to release and discharge; and

YR (b) The Region would support reviewing whether there are any alternatives to release and discharge of liens

(c) Consider the effect of posting security and vacating liens on lien claimants (s. 44 of the Act).

YR (c) The Region has no comment on this issue

Preservation

(a) Consider the length of the preservation period;

YR (a) The Region has no comment on this issue

(b) Consider the impact of written notices of lien;

YR (b) The Region supports reviewing written notices of lien

(c) Consider the introduction of mandatory certification of subcontract completion rather than the elective option currently provided for under Section 33 of the Act;

YR (c) The Region does not support mandatory certification of subcontract completion as this would create a significant administrative burden, particularly on larger projects where there are numerous subcontractors

(d) Consider mechanisms to avoid potential abuse of lien rights; and

YR (d) The Region supports strengthening the mechanisms to avoid potential abuse of lien rights

(e) Consider lien registration issues vis-à-vis specific types of properties.

YR (e) The Region strongly believes that formal liens should not be permitted to be registered on any lands owned by government entities

Perfection

(a) Consider the potential burden that the requirement to perfect within a relatively short time imposes on the court system;

YR (a) The Region has no comment on this issue

(b) Consider any alternatives or changes to the perfection requirements;

YR (b) The Region supports reviewing the perfection requirements

(c) Consider the length of the perfection period; and

YR (c) The Region is supportive of the current perfection period

(d) Consider the alignment of time limitations in the Act with payment time periods in the Ontario construction industry.

YR (d) The Region would support considering the alignment of time limitations in the Act with payment time periods in the Ontario construction industry

Expiry under Section 37 of the Act

(a) Consider whether the two year limitation is appropriate; and

YR (a) The Region is supportive of the current two year limitation

(b) Consider improving alignment of the Act with the *Limitations Act*, 2002, including breach of trust actions.

YR (b) The Region would support efforts to improve the alignment of the Act with the Limitations Act, 2002

Requests for Information Pursuant to section 39 of the Act

(a) 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.

YR (a) The Region strongly supports reviewing Section 39 of the Act and adding clarity in terms of what types of information lien claimants are entitled to

4. **Prompt Payment or Timely Payment for Construction Work**

(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";

YR (a) The Region supports the principle of "freedom of contract" but would support an investigation into the causes of payment delays in the construction industry

(b) Consider making the release of holdback mandatory/automatic after the expiration of lien rights;

YR (b) The Region does not support the automatic release of holdback after expiration of lien rights

(c) Consider the potential effects of prompt payment provisions and their alignment with the Act on industry lenders and sureties;

YR (c) The Region supports the consideration of this issue

(d) Consider the applicability and/or adaptability of any prompt payment provisions to different types of contracts; and

YR (d) The Region would not support prompt payment provisions without a careful review of their applicability and/or adaptability to different types of contracts

(e) Consider whether "pay-when-paid" and/or "paid-if-paid" clauses should be made unenforceable.

YR (e) The Region has no comment on this issue

5. **Proof of Financing**

(a) Consider introducing access to proof of financing rights for owners, contractors and subcontractors.

YR (a) The Region does not support the introduction of access to proof of financing for any parties under the Act. Proof of financing should be something that is left for the parties to a contract to negotiate

6. **Trust Provisions**

(a) Review and consider either eliminating or clarifying and strengthening the requirements of the trust provisions in the Act;

YR (a) The Region is generally supportive of the trust provisions of the Act, but strongly supports clarifying the trust provisions of the Act

(b) Consider introducing a mandatory holdback trust account or a mandatory project bank account; and

YR (b) As the owner of numerous ongoing construction projects, the Region is not supportive of separate accounts for each project, but is not opposed to a separate account for all holdbacks

(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 of a debtor owner, contractor or subcontractor.

YR (c) The Region has no comment on this issue

7. **Interrelationship with Insolvency Legislation**

(a) Consider conflicts between the Act and either the *Bankruptcy and Insolvency Act*, RSC, 1985 ("BIA"), c. B-3 or the *CCAA*;

YR (a) The Region has no comment on this issue

(b) Consider any potential statutory mechanism to regulate stay proceedings in the face of registered liens; and

YR (b) The Region has no comment on this issue

(c) Consider Canada Revenue Agency's super priority.

YR (c) The Region has no comment on this issue

8. **Priorities**

(a) Consider whether or not any amendments are necessary to clarify the rights intended to be conferred upon lien claimants and/or mortgagees; and

YR (a) The Region would support clarification to the regime of priorities under the Act

(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 (or both).

YR (b) The Region has no comment on this issue

9. **Public-Private Partnerships ("PPP")**

(a) Consider the application of the Act in relation to such projects; and

YR (a) The Region would support amendments to the Act so that PPP's can be better dealt with under the Act, However, this may require the establishment of a separate section of the Act since PPP's can be dramatically different from normal construction projects

(b) Consider aligning the definitions and structure of the Act with the PPP projects delivery system.

YR (b) See response 9(a) above

10. **Non-Waiver**

(a) Consider allowing waiver of lien provisions.

YR (a) The Region would support the consideration of allowing for waiver of lien provisions

11. **Bidder Exclusion Provisions**

(a) Consider regulating bidder exclusion provisions.

YR (a) The Region is strongly against the regulation of bidder exclusion provisions under the Act.

12. **Alternative Dispute Resolution**

(a) Consider the effectiveness of available procedures and remedies;

YR (a) The Region supports a review of the effectiveness of the procedures and remedies currently available under the Act

(b) Consider introducing an adjudication mechanism for construction disputes in Ontario;

YR (b) The Region would support consideration of an adjudication mechanism for construction disputes in Ontario

(c) Consider providing for mandatory mediation of lien actions;

YR (c) The Region does not support mandatory mediation of all lien actions

(d) Consider providing for an arbitration mechanism for construction disputes in Ontario; and

YR (d) The Region would support consideration of an adjudication mechanism for construction disputes in Ontario

(e) Consider requiring Dispute Review Boards for certain types of projects.

YR (e) The Region does not support requiring Dispute Review Boards for certain types of projects. Owners should be free to decide when a DRB is appropriate

13. **Summary Procedure**

(a) Consider whether or not any changes need to be made in respect of the "summary" nature of proceedings under the Act;

YR (a) The Region would support a review of the efficiency and effectiveness of the "summary" proceedings under the Act

(b) Consider how the efficiency of the procedure can be improved; and

YR (b) The Region would support a review of the efficiency and effectiveness of the "summary" proceedings under the Act

(c) Consider amendments to the procedural provisions of the Act.

YR (c) The Region would support a review of the procedural provisions of the Act

14. **Surety Bonds and Default Insurance**

(a) Consider requiring labour and material payment bond sureties to promptly pay undisputed amounts;

YR (a) The Region would support having sureties promptly pay undisputed amounts

(b) Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project;

YR (b) The Region would support further investigation into the issue of requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project

(c) Consider mandatory labour and material payment bonding of all public projects;

YR (c) The Region would support mandatory labour and material bonding for projects over a certain value

(d) Consider requirements in respect of the adjusting of bond claims;

YR (d) The Region would support consideration of the requirements in respect of adjusting of bond claims

(e) Consider providing for the electronic delivery of surety bonds;

YR (e) The Region would strongly support electronic delivery of surety bonds

(f) Consider whether bond claims should be subject to adjudication;

YR (f) The Region has no comment on this issue

(g) Consider whether changes to the third party beneficiary rule are appropriate in order to enable payment by owners directly to subcontractors and suppliers; and

YR (g) The Region would support consideration of changes to the third party beneficiary rule in order to enable owners to pay subcontractors and suppliers directly

(h) Consider whether the Act requires any revisions in light of the existence of contractor and subcontractor default insurance.

YR (h) The Region has no comment on this issue

15. **Miscellaneous**

(a) Consider providing for greater precision in setting out the technical irregularities that can be cured under the Act;

YR (a) The Region supports providing for greater precision in setting out the technical irregularities that can be cured under the Act

(b) Consider the use of letters of credit with international commercial conventions in their terms;

YR (b) The Region has no comment on this issue

(c) Consider utilizing security for costs to award interest;

YR (c) The Region has no comment on this issue

(d) Consider clarifying the application of liens to subdivision lots; and

YR (d) The Region has no comment on this issue

(e) Consider instituting a periodic review of the Act on a go forward basis.

YR (e) The Region strongly supports a mandatory periodic review of the Act on a go forward basis