Comments on The Independent Review of

The Construction Lien Act

Submission by the Ontario Society of Professional Engineers

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1.0 INTRODUCTION

Through the oversight of the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, the Government of Ontario has commissioned an Independent Review of the *Construction Lien Act*. This review, the first substantial analysis since it was first enacted in 1983 to replace the *Mechanics Lien Act* in Ontario, is of significant importance to the Engineering Profession in Ontario.

This substantial review of the Construction Lien Act (The Act), has come at an appropriate time, given that the provincial government have committed to investing $131.5 Billion to replace and build new infrastructure over the next 10 years. The required changes to the Act will facilitate more efficient flow of this investment into needed Infrastructure projects.

The recommendations and discussion contained in the submission will address shortcomings in the act in order to effectively recognize and accommodate prompt payment requirements for services provided by Professional Engineers and other Engineering Professionals that occur outside of the traditional contractor/subcontractor relationship.

OSPE also proposes that revisions to the Construction Liens Act must be written in a manner that allows for permissible and objective based legislation. The Act should not only be enforceable, but also be written to reflect modern banking practices and allow for flexible circumstances to reflect the unique nature of services provided and work undertaken by different classes of professionals.

The Ontario Society of Professional Engineers would also like to recognize the diligent and commendable work already conducted on this issue by the Consulting Engineers of Ontario (CEO), and for providing invaluable insight and clear advice on the required changes to the Act. OSPE is in alignment with the overall direction of the recommendations provided through the consultation process by CEO in order to provide a unified and amplified voice for the Engineering Profession.

1.1 About the Ontario Society of Professional Engineers

The Ontario Society of Professional Engineers (OSPE) is a member-interest, advocacy organization. We are the voice of Ontario's engineers, supporting, representing and advancing their interests and promoting engineering excellence for the benefit of the public. We represent licenced professional engineers, as well as unlicenced engineering professionals, who work in several of the most strategic sectors of Ontario's economy.

OSPE was formed in 2000 after members of Professional Engineers Ontario (PEO) voted to separate regulatory and advocacy functions into two separate organizations. Thus, PEO continues to conduct strictly regulatory activities and OSPE advocates for issues impacting engineering on behalf of all Ontario Professional Engineers and Engineering Professionals.

2.0 THE CONSTRUCTION LIEN ACT AND THE ENGINEERING PROFESSION

2.1 Application and release of holdback for engineering services:

The *Construction Lien Act* is written specifically for the construction industry and those providing general and sub contracting services. It is also, by extension, applied to related professional services, such as engineering, architectural and other design and service professionals.

OSPE recognizes that the relationship between the prime consultant and sub-consultants for consulting engineering services and other professional services, such as contract administration, are significantly different than the relationship that exists between a general contractor and their sub-contractors and their supply chain. Additionally, professional engineering services provided to clients frequently include planning, feasibility studies, environmental approvals and project management, in addition to traditional design and construction administration services contemplated in the Act.

OSPE wishes to definitively state and have recognized that many of the engineering services provided by our members are in the early design stage, which occur many months, and in some instances, even years in advance of the completion of the project. However, due to the absence of clear definitions or guidelines around prompt payment for these services, many constructors or owners apply holdback payments to professional engineers and engineering professional until after the date of completion of the Construction project.

Understandably, this was not the original intent of the Act. Proposed revisions to existing or new statutes exclude that class of work undertaken by our profession and their firms that is not "construction related." therefore, to ensure a fair, equitable and timely payment process for Ontario's Construction Sector, OSPE recommends that specific classes of services delivered by Professional Engineers and Engineering Professionals as they apply to design stage, and not to construction related services, be exempt from the Act and any future statute. The Act will need to explicitly define the scope and nature of work to be included under the purview of such legislation. This will ensure the proper application of the holdback provision in a consistent, and predictable manner.

2.1.1 Automatic Release of Holdback

OSPE proposes that any revised or new payment statute in the Act should include the provision for the release of holdback on design services, or other services as they are completed as per the contract. This provision will realistically reflect the nature and completion of the services provided. As previously mentioned, design services, as well as other services noted above, are performed and often completed many months, if not years, prior to the beginning of construction, yet holdback is not released until construction of the project is completed.

2.1.2 Continuation of Lien Rights

OSPE recommends that any revised or new payment statute governing Ontario's construction and design industry should require the continuation of a parties' lien rights through to 45 days after substantial performance unless there has been early release of the holdback. This provision would apply to those construction-related engineering services for which holdback is taken and held through to project substantial completion,

2.1.3 Eligible financial instruments for holdback

OSPE recommends that any revisions to current statute or any new legislation governing Ontario's construction sector should provide for the use of alternative, secured, financial instruments such as appropriate letters of credit or bonds. In today's business reality, there are numerous options available to businesses to secure lines of credit and guaranteed bonds, as an alternative to cash deposits, as well as other advances in banking technologies that provide secured and guaranteed instruments that are as readily available as cash.

3.0 PROMPT PAYMENT

According to the group, Prompt Payment Ontario and their members, delinquent payment in construction is rampant and a growing problem. Trade contractors are commonly made to wait for periods of four months or longer to get paid for work that has been certified as being complete.

They believe this represents an unfair transfer of financial risk from owner/developers to trade contractors. The same can be applied to professional engineers and engineering professionals who perform the initial design and early stage pre-construction activities.

Ontario and Canada lag behind a majority of other jurisdictions who already have prompt payment legislation in place – 49 US states have it for public sector projects, 31 US states have it in place for the private sector, the US federal government has had prompt payment legislation in place since 1982, the European Union, United Kingdom, Ireland, New Zealand, and Australia all have prompt payment legislation.

3.1 Prompt Payment in Ontario:

The prompt payment system proposed by organizations such as Prompt Payment Ontario would apply to every construction contract or subcontract, public or private in the province.

OSPE supports this as the current framework does not apply to the majority of the construction industry (small and medium-sized family-owned companies consisting of 20 or fewer employees) – it addresses non-payment as opposed to delinquent payment and the lien rights of many in the industry will expire long before they realize they will not get paid.

As mentioned earlier, any proposed changes to the Act should be written in a way that allows for a more permissive and objective based legislation. The proposed legislation should address the following fundamental objectives:

3.1.1. Mandatory Payment

Prompt payment should create several mandatory and enforceable payment terms and also create a progress payment structure that would be applied to all projects. If a contract or subcontract stipulates progress payments, those payments would become payable no later than 31 days after the first day that services or materials were provided to the project, or upon the stipulated invoice date.

If a contract or subcontract does not stipulate progress payments, then the proposed changes stipulate that an owner would be required to pay its contractors within 20 days after their having submitted a monthly invoice. This system would also would require contractors to pay subcontractors within 10 days after a payment certificate was issued or 30 days after the subcontractor submits its invoice.

It is important that all proposed changes to the Act will attempt to create a balance between cash flow and completed work for all types of projects, whether or not they include a progress payment structure. The changes to the Act must also lend themselves to larger and more complex projects that provide payment through milestone provisions as well as to contractual relationships involving fees for ongoing operation and maintenance that include repairs, renovations or other construction-related work.

All invoices submitted by payees would be deemed to be approved by the payer 10 days after they are submitted unless the payer provides written notice of disapproval or amendment within a ten (10) day period.

The changes to the Act must also allow a party to suspend work or terminate a contract or subcontract if the owner/payer did not make a progress payment on time or in full. These new terms would apply to all owners/payers.

All late payments under this system would accrue interest from the date a payment was due at the greater of the rate specified in the contract or subcontract. If not explicitly stated in the contract, then interest would accrue at the prejudgment interest rate determined under the *Courts of Justice Act.*

3.1.2. Financial Disclosure

In order to be effective and fair, an Ontario prompt payment system would require greater financial transparency; both for clients and for project payees. The prompt payment system would also require owners to demonstrate to their prime contractors that they had the necessary financial resources ability to pay for their project before they could enter into a construction contract.

Once established, the Ontario prompt payment system would also create obligations for disclosure for project payees. Once paid for project work, contractors or subcontractors would be required inform all of their subcontractors in a timely manner and would have to post this information on a public website.

3.1.3. Prohibiting Additional Holdbacks

The proposed changes plan on altering established industry practices on holdbacks. Once enacted, it would require the statutory holdbacks, as defined under the Act, to be paid within one day after the related lien period expires. It also proposes to not allow any additional holdbacks, other than those permitted or required under the Act.

As mentioned earlier, the only holding back of funds that would be permitted under the proposed system would be for amounts claimed in an invoice for which an owner/payer objects within 10 days. This provision would seem to prevent an owner/constructor from withholding payment for current or future invoice payments even if a deficiency is discovered relating to work that has already been completed and paid for.

Also excluded would be milestone payments, deficiency or completion reserves or set-offs. OSPE would like to highlight that this would appear to conflict with section 17(3) of the Act, which states… “Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer’s favour of all outstanding debts, claims or damages, whether or not related to the improvement.”

4.0 OBSERVATIONS

Members of the Ontario Society of Professional Engineers (both licenced Professional Engineers and the broader Engineering Professionals) have been advocating for timely payment for certified, completed work, regardless of which sector the work is completed in. Strong public policy must also serve the greater public good. The proposed prompt payment system, as it is currently written, does not serve the greater good and we believe is unfair to our members.

As mentioned above, the proposed system provides a very short review period of just 20 days, furthermore, the invoices must be deemed to be approved in 10 days following the submission, unless the payee gives written notice of disapproval. The very short time period to review the invoices and then if there is a problem, also submit a written approval, would be extremely difficult to achieve and unreasonable, particularly on larger or more complex projects where there might be a number of different design professionals involved, including Professional Engineers, Architects, and so on. This 20-day deadline is very aggressive and would seem to expose our members and other consultants to considerable potential liability.

Having a firm timeline such as this does not appear to allow for any deviations, no matter the reason, and is too strict standard. The proposed process of approving contractors' applications for payment exposes engineers to a variety of potential claims that present a heightened risk for our members who work in a variety of the design and preconstruction services.

For example, if there is a problem identified, the plaintiff's lawyers may use the Engineering Professionals signature or Professional Engineer's Seal on the payment application to hold our members responsible for potential wrongdoing. As such, it is already common for owners to equate the consultant's duty to sign payment certificates with that of inspecting the contractor's work. Some mistakenly believe that by issuing payment certificates, the engineer is "certifying" — in essence, guaranteeing — that the contractor has complied with the project's plans and specifications, and that the contractor's figures are correct. This is not always the case.

The owners' attorneys have been known to argue that because an engineering professional or professional engineer signed an application certifying the contractor's work, he or she must have looked at the methodology of construction and must be present during all phases of construction. This is not the case. Our members do not act as construction auditors nor supervisors. They are on the site sporadically and as needed. If fact, they are logged in the site as "visitors" at project sites during their construction observation services. Nonetheless, the project owners still attempt to hold them accountable for any discrepancy that occurs during construction. This is of particular concern to our members.

Commonly, claims involving payment applications that allege negligence are due to the failure to identify defective work and/or due to negligent over or under certification of payments. We understand that owners do not (and should not) pay for work that is not completed. OSPE believes that there are other options to ensure that work is paid for as it is completed. This is necessary for a number of reasons.

For example, if the consultant over-certifies what the contractor is entitled to, consultants can be exposed to a claim. Conversely, if the consultant under-certifies (resulting in a smaller payment to the contractor), then the contractor may not be able to pay their bills, defaulting on loans and payment to creditors, and thus, go out of business. The consultant has now exposed themselves to a claim by the contractor as well as the surety company.

In another example, if the contractor defaults on their obligations, the owner could sue the contractor, sue on the performance bond and sue the consultant. The bonding company could also sue the consultant for instructing the owner (or lender) to release funds too soon. of mitigating the risk involved with these processes, best practices dictate that the consultants train their personnel to do a thorough job performing construction observation services to ensure work is being done as per the schedule and done properly. However, this is not always possible, depending on the scope of their contract for that project. For example, often times in public projects, the government representatives want to assume this role in the hopes of saving money on the overall project and remaining some oversight. In these instances, the consultant has little options to mitigate the risk.

Whereas, the contractor/subcontractor has the right to suspend work or terminate a contract if they are not paid their progress payment, this is in reality an extreme measure that could lead to significant problems, resulting in project delays and eventually, massive financial losses to an owner due to penalties and other associated costs. OSPE proposes a mediation process included in the system to address and reconcile legitimate payment delays before work is suspended or contracts terminated.

It has already been mentioned in this submission that the proposed prompt payment system would be practical to work undertaken by a small portion of Ontario's construction and construction-related sectors. As it is, it is highly inadequate to address payment for large and complex construction projects; particularly provincial alternative financing and procurement (AFP) projects and federal public-private-partnership (P3s) projects. The system is not designed to address the vast majority of work undertaken by Ontario's ICI and Heavy Civil construction industry tied to municipalities, universities, other schools and hospitals.

In order for Ontario's construction sector to have a system that guarantees timely payment for completed work, additional provisions are necessary. A successful payment system must address the following:

a. Provide an adequate payment dispute resolution system that is seen to equally serve the interests of all involved parties.
b. Provide for processes that permit adequate time for proper due diligence be conducted before accepting work as complete and certifying payment to contractors and subcontractors.
c. Include timelines that reflect the necessary processes to provide for payment as dictated by the size, scope and complexity of the infrastructure project under contract.
d. Accommodate the payment processes and timelines to support large and complex public infrastructure projects e.g. milestone payments.

For the Ontario Society of Professional Engineers to support a prompt payment system for the Construction Industry, a number of revisions must be integrated and the proposed system must be amended to recognize the unique services provided by the greater design and preconstruction professionals.

5.0 CONCLUSION:

The Ontario Society of Professional Engineers is pleased to provide this submission for the Independent Review of the Construction Lien Act and Prompt Payment and recognize that this review is important for Ontario's construction sector and for the broader engineering profession. This review provides OSPE the opportunity to highlight the broad range of design, pre-construction and construction services provided by licenced professional engineers and non-licenced engineering professionals to the construction sector.

We acknowledge that Ontario is in need of a modernized and relevant construction payment system that ensures timely payment for certified and completed work. OSPE would like to make the following recommendations in order to allow the revised act to be relevant and applicable to our members.

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b. Provide for processes that permit adequate time for proper due diligence be conducted before accepting work as complete and certifying payment to contractors and subcontractors.
c. Include timelines that reflect the necessary processes to provide for payment as dictated by the size, scope and complexity of the infrastructure project under contract.
d. Accommodate the payment processes and timelines to support large and complex public infrastructure projects e.g. milestone payments.

In closing, The Ontario Society of Professional Engineers would like to thank Consulting Engineers of Ontario (CEO) for their insight and collaborations that will allow Ontario's construction sector to develop the necessary provisions to ensure all partners in this sector can work together fairly and equitably to ensure a vibrant sector