Submission on behalf of the Canadian Institute of Quantity Surveyors (CIQS)

ISSUES TO BE CONSIDERED	CIQS Submission
1. **Lienability**	
(a) Consider the effectiveness of the definitions of "improvement", "materials", "supply of services" and "owner".	"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunneling, filling, grading or ditching of, in, on or under land. (BC Builders Lien Act [SBC 1997] CHAPTER 45) "materials" - no change "supply of services" - includes (a) services as an architect, engineer or quantity surveyor, whether provided before or after the construction of an improvement has begun, and (b) the rental of equipment, with an operator, for use in making an improvement; "owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and (a) on whose credit, (b) on whose behalf, (c) with whose knowledge or consent, or (d) for whose direct benefit work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land; (BC Builders Lien Act [SBC 1997] CHAPTER 45)

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2. **Holdback and Substantial Performance**		
(a)	Consider changing the amount of holdback (from the current 10%);	Reduction of the holdback percentage could reduce costs if the contractors and sub-contractors consider the positive effect on their cash flow.
(b)	Consider increasing the number of dates for the release/early release of holdback, for instance on phased projects;	Early release is normally based on substantial performance of a trade or prime contract. The danger on a phased project where the land is under one title is the lack of protection once the holdback on a earlier phase is released. This can likely be overcome by requiring signed lien releases on the early phases of the work.
(c)	Consider making the release of holdback mandatory/automatic after expiration of lien rights, unless there has been early release of holdback;	This is an important change that should be introduced, as uncertainty on release can and does adversely affect the contractors ability to plan and to contract new work. see 2 (f) and 6 (b) below.
(d)	Consider eliminating the "holdback for finishing work";	This holdback, in our submission, is a duplication of section "2 (b)...contract is capable of completion or, where there is a known defect, correction, at a cost of not more than...." The responsibility for declaration of substantial performance should not be taken lightly and the true cost to complete the work and including any known defects needs to be properly and accurately calculated. The "holdback for finishing work" acts as a crutch and excuse for

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		not being diligent in determining substantial performance. see (f) and 6 (b) below.
(e)	Consider revising the minimum requirements for substantial performance;	The minim requirements we submit if applied properly do not need revision.
(f)	Consider whether or not to add further specifics to the requirements for a Certificate of Substantial Performance; and	**"When contract substantially performed** 2. (1) For the purposes of this Act, a contract is substantially performed, (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than, (i) 3 per cent of the first $500,000 of the contract price, (ii) 2 per cent of the next $500,000 of the contract price, and (iii) 1 per cent of the balance of the contract price." We submit that the definition is clear but has likely been loosely applied with the 10% completion holdback provision. Recommend setting a time period for the payment certifier to certify substantial performance on the request of the subcontractor, or to explain why substantial performance has not been met.

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(g) Consider introducing a new requirement for a mandatory Certificate of Intention to Release Holdback.	Agree there should be a requirement to at least post a notice on the construction site, in a conspicuous location, of the date of substantial performance and the date on which holdback will be released.
3. Preservation, Perfection and Expiry of Liens	
Generally	
(a) Consider whether the mechanics of preservation and perfection require any changes;	no comment
(b) Consider clarifying the release of liens and consider if there are any alternatives to release and discharge; and	no comment
(c) Consider the effect of posting security and vacating liens on lien claimants (s. 44 of the Act).	With a holdback account the lien should be able to be vacated by posting the portion of the holdback due the contractor or trade contractor, material supplier or others.
Preservation	
(a) Consider the length of the preservation period;	no comment
(b) Consider the impact of written notices of lien;	no comment
(c) Consider the introduction of mandatory certification of subcontract completion rather than the elective option currently provided for under Section 33 of the Act;	Recommend setting a time period for the payment certifier to certify substantial performance on the request of the contractor or subcontractor, or to explain why substantial performance has not been met.
(d) Consider mechanisms to avoid potential abuse of lien rights; and	no comment
(e) Consider lien registration issues vis-à-vis specific types of properties.	no comment

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Perfection		
(a)	Consider the potential burden that the requirement to perfect within a relatively short time imposes on the court system;	no comment
(b)	Consider any alternatives or changes to the perfection requirements;	no comment
(c)	Consider the length of the perfection period; and	no comment
(d)	Consider the alignment of time limitations in the Act with payment time periods in the Ontario construction industry.	Payment time periods vary widely throughout the industry and are often a matter of contract. Attempting to align the act could encroach on the freedom to contract.
Expiry under Section 37 of the Act		
(a)	Consider whether the two year limitation is appropriate; and	Consider reducing the limitation period to one year.
(b)	Consider improving alignment of the Act with the *Limitations Act, 2002*, including breach of trust actions.	no comment
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.	no comment
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	We submit that prompt payment provisions are contrary to the contractors being able to properly manage the trades. Most contract do

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	potential effect of prompt payment provisions on the principle of "freedom of contract";	have a stipulation in them that requires payment XX days after certification.
(b)	Consider making the release of holdback mandatory/automatic after the expiration of lien rights;	Agree. See 2(d) above and 6(b) below.
(c)	Consider the potential effects of prompt payment provisions and their alignment with the Act on industry lenders and sureties;	This is a matter of contract that should not be regulated.
(d)	Consider the applicability and/or adaptability of any prompt payment provisions to different types of contracts; and	This is a matter of contract that should not be regulated.
(e)	Consider whether "pay-when-paid" and/or "paid-if-paid" clauses should be made unenforceable.	This is a matter of contract that should not be regulated.
5.	**Proof of Financing**	
(a)	Consider introducing access to proof of financing rights for owners, contractors and subcontractors.	Proof of financing should be included but limited to the owner and prime contractor . The contractor should be able to confirm that finacing is in place, and the owner to confirm that the contractor has the financial ability to finance the holdback.
6.	**Trust Provisions**	
(a)	Review and consider either eliminating or clarifying and strengthening the requirements of the trust provisions in the Act;	No comment
(b)	Consider introducing a mandatory holdback trust account or a mandatory project bank account; and	A mandatory joint bank account held by the Owner and Prime contractor should be introduced. This then places the holdback

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		monies, including tax payable, in a secure position ensuring that the funds are available when needed and have not been used elsewhere by the developer or are not being released by the lender. The effect will be that the lenders will now advance 100% of the progress payment with the Owner and Contractor responsible for administering the holdback account. Deposits to the Lien holdback account should be inclusive of the HST payable The purpose of the holdback is to limit the liability for liens to the amount of the holdback or the amount owing on account of a contract or subcontract. If those higher up in the contractual chain fail to pay those further below, and a lien is filed, the holdback funds will be available to the lien claimants. An owner's failure to pay funds into a holdback account should constitute default under the contract.
(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.	This may be partially remedied by the introduction of the joint holdback account which removes control of the lien funds from the Owner and Lender.
7.	**Interrelationship with Insolvency Legislation**	
(a)	Consider conflicts between the Act and either the *Bankruptcy and Insolvency*	no comment

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	Act, RSC, 1985 ("BIA"), c. B-3 or the *CCAA*;	
(b)	Consider any potential statutory mechanism to regulate stay proceedings in the face of registered liens; and	no comment
(c)	Consider Canada Revenue Agency's super priority.	no comment
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	Lien claimants should be limited to the funds properly deposited (or the funds that should have been deposited) in the lien holdback account. Mortgagees should not have the ability to access the funds in the funds deposited in the lien holdback account.
(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).	This may not be known at the time financing is arranged as often the lender financing the land purchase will carry on and finance the construction.
9.	**Public-Private Partnerships ("PPP")**	
(a)	Consider the application of the Act in relation to such projects; and	the act should still apply to these projects as long as they are lienable
(b)	Consider aligning the definitions and structure of the Act with the PPP projects delivery system.	We would submit that changing the act to encompass the ever changing delivery methods is the wrong approach, the delivery method must conform to the act.
10.	**Non-Waiver**	

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(a)	Consider allowing waiver of lien provisions.	This may be important for small housing contractors who, when faced with the holdback provisions, often find that they do not have the financial capability to complete the work. Reducing the percentage of holdback to 5% would assist in this. There is a concern that the Owner is unprotected in the face of a lien if holdback is retained.
11.	**Bidder Exclusion Provisions**	
(a)	Consider regulating bidder exclusion provisions.	no comment
12.	**Alternative Dispute Resolution**	
(a)	Consider the effectiveness of available procedures and remedies;	The alternate dispute processes only work if the parties cooperate. Suggest embedding at least the arbitration process as a mandatory process which will: a) encourage the parties to settle to avoid costs, and b) relieve the pressure on the court system.
(b)	Consider introducing an adjudication mechanism for construction disputes in Ontario;	The arbitration process is likely the best route to pursue.
(c)	Consider providing for mandatory mediation of lien actions;	We submit that the more formal arbitration process is best suited. The relationship has already broken down and mediation in my experience does not normally result in resolution.
(d)	Consider providing for an arbitration mechanism for construction disputes in Ontario; and	The standard construction agreement includes mediation and arbitration clauses (often deleted by legal counsel).

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		Consider appointing a mediator / arbitrator at the outset of the project. This avoids the adversarial issues that arise in a dispute. It is also possible to access the mediator / arbitrator during the project rather than waiting for completion.
(e)	Consider requiring Dispute Review Boards for certain types of projects.	This is unwieldy and is a duplication of the mediation / arbitration mechanisms.
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;	no comment
(b)	Consider how the efficiency of the procedure can be improved; and	no comment
(c)	Consider amendments to the procedural provisions of the Act.	no comment
14.	**Surety Bonds and Default Insurance**	
(a)	Consider requiring labour and material payment bond sureties to promptly pay undisputed amounts;	Agree they would be beneficial however sureties are reluctant to pay unless they can see the entire picture.
(b)	Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project;	This may not be the best approach. This then gives authority of the surety to nominate a contractor to complete the work when there may be legitimate reason why the nominee is not suitable. The issues are normally far more complex than can be set into legislation.
(c)	Consider mandatory labour and material payment bonding of all public projects;	Our submission is that this is an unnecessary expense which will only serve to increase the costs of public projects.
(d)	Consider requirements in respect of the	no comment

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	adjusting of bond claims;	
(e)	Consider providing for the electronic delivery of surety bonds;	This would be a welcome improvement.
(f)	Consider whether bond claims should be subject to adjudication;	We submit that they could be adjudicated through arbitration if need be.
(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	no comment
(h)	Consider whether the Act requires any revisions in light of the existence of contractor and subcontractor default insurance.	no comment
15. **Miscellaneous**		
(a)	Consider providing for greater precision in setting out the technical irregularities that can be cured under the Act;	no comment
(b)	Consider the use of letters of credit with international commercial conventions in their terms;	Letters of credit should conform to our conventions.
(c)	Consider utilizing security for costs to award interest;	Requiring security may force legitimate claimants to abandon their claims.
(d)	Consider clarifying the application of liens to subdivision lots; and	no comment
(e)	Consider instituting a periodic review of the Act on a go forward basis.	This is always a good thing, and should be done at least every 10 years.