2024 INDEPENDENT REVIEW: UPDATING THE *CONSTRUCTION ACT*

OCAR Consultation Form (comments/submissions)

From: The Canadian Council for Public-Private Partnerships (CCPPP)

To: Duncan Glaholt

2024-08-08

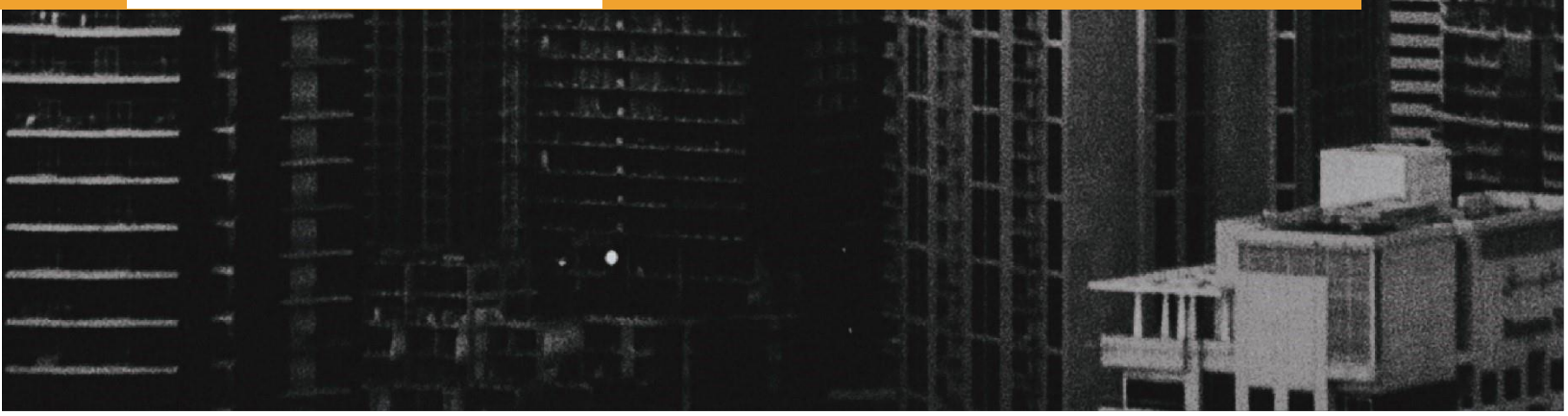

Table of Contents

A. INTRODUCTION

Earlier this year, the Attorney General asked me to conduct an independent review of the *Construction Act* ("the Act"). The Act was last significantly reformed in 2017 on the basis of a seminal report by Bruce Reynolds and Sharon Vogel entitled, *Striking the Balance: Expert Review of Ontario's Construction Lien Act* ("Striking the Balance"). I recall participating in the Advisory Group process at that time. The final recommendation of that report was for a further independent review of the Act to be conducted within several years.

Based on my own experience in practice and informal conversations I have had with industry leaders and members of the legal community, I can say with confidence that the 2017 reforms are working well. What is needed now are targeted changes to make a good system even better. To that end, this document is intended to help facilitate a conversation with the construction industry and other stakeholders about potential adjustments to the Act.

B. BACKGROUND

The Act plays a critical role in Ontario's economic development, increasing housing supply and building infrastructure projects such as public transportation and hospitals. As of 2022, there were 588,000 people employed in Ontario's construction industry, comprising 7.6% of Ontario's total workforce. That year, the construction industry contributed $57 billion (7.4%) to Ontario's GDP.

Ontario has always been a leader in the modernization of construction lien legislation. The first Canadian lien acts came into force in Ontario and Manitoba in 1873 and Ontario's statute has undergone regular improvement ever since, keeping pace with the increasing size, complexity, and sophistication of the construction industry in this province.

The Act has several purposes. Its primary purpose is to prevent an owner of lands, whatever the owner's estate, from improving land without paying for the improvement. Thus, lien legislation is remedial in nature and in derogation of common law. Importantly, however, as the Supreme Court of Canada has long recognized, lien legislation must also protect owners. The protection of owners is at the heart of the holdback scheme for example. Owners of land improved must always be able to disencumber their land and know the precise extent of their statutory obligations to non-privies.

The Act also encourages fair and honest dealing. This is at the heart of Part II.1 of the Act and the province's successful prompt payment and adjudication regime.

The Act must enable these statutory rights and obligations to be enforced at the least possible expense and in as summary a fashion as is possible.

C. PROCESS

This independent review has proceeded in two stages.

During the first phase of my review, I met with leading construction law practitioners to help me assess and prioritize potential areas of reform to the Act. Many of these suggestions are incorporated into this Consultation Paper.

The second phase of my review is consultation. I will engage industry stakeholders in a process that I hope to be complete by mid-August 2024 after which my final report will be made publicly available.

I am guided in this review by three overarching principles:

1. **Respect for party autonomy.** Party autonomy is preserved wherever possible while achieving the remedial purposes of the statute.

2. **Respect for property rights.** Property rights are interfered with as little as possible while achieving the remedial purposes of the statute.

3. **Certainty, inclusiveness, and transparency.** The statute must allow all stakeholders to know with certainty their rights and obligations so as to promote responsible construction project delivery.

D. SUBSTANTIVE PROPOSALS

1. Definition of Contract Price

There is inherent ambiguity in concepts such as "*contract price*" and "*price*". They can have different meanings depending upon the procurement model being used.

The term "*price*" is currently defined in section 1 (Interpretation) as follows:

> "price" means,
>
> (a) the contract or subcontract price,
>
> (i) agreed on between the parties, or
>
> (ii) if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and
>
> (b) any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor, as the case may be, is not responsible;

On many projects in this province, particularly complex, high value projects, "*price*" can be a moving target depending on the procurement model chosen. This makes the current definition of "*price*" difficult to apply to collaborative project models, Integrated Project Delivery models, and progressive design build.

Even on conventional cost reimbursable projects, the fair market value or "*price*" of a project changes over time, perhaps taking it over the regulated threshold for phased holdback release.

These are just examples of ambiguities inherent in the current definition of "*price*". These ambiguities are compounded by the fact that the "*fair market value*" component of the definition is largely illusory. There is no market in which such a commodity can be priced or sold.

One suggestion that came forward was to look at building permit valuations as an alternative measure for "*price*" where no other alternative can be found. Building permit valuation may be an available and suitable proxy for market valuation in establishing "*price*". Building permit valuation is well-understood, sound in policy, and adjusted to the location of the improvement. Building permit valuation engages objective pricing standards applied to objective square footages and usage classifications. It is an industry-accepted benchmark.

Consideration must be given to developing a more practical definition of "*price*". All ideas are welcome, but it is suggested that building permit valuation may suit that purpose.

Do you have any comments on this proposal?

We appreciate and understand that the current definition of “Price” is not perfect, particularly in light of the examples provided illustrating the difficulties with respect to collaborative project models, IPD, and progressive design build. Nevertheless, the current definition is a solid and satisfactory starting point, particularly for more traditional construction project delivery models, that may be built upon and supplemented with additional language that may be suitable for other project delivery models, in particular P3 (P3s: Design-Build-Finance+ Operations and Maintenance), and Progressive P3s. The suggestion of including a building permit valuation is a good one, but will be faced with other potential difficulties, complexity and disharmony in other sections of the Act.

Develop a comprehensive framework to ensure pricing is realistic and reflects current dollars and market realities: Some of the key challenges CCPPP has seen in regard to realistic cost estimates include: 1) An inexperienced entity has completed the estimate, 2) The owners have an insufficient class of estimates to determine the proper cost, 3) the owner has not updated original cost estimates to reflect current dollars and market realities, 4) commercial/contract risks have not been appropriately included in the estimate.

Creating a robust framework that includes mechanisms for price adjustments due to unforeseen circumstances and market fluctuations, ensuring fairness and transparency in pricing across all project stages and procurement types would bring greater certainty and improve cost/risk management practices. This could involve specifying components like base price, adjustments for scope changes, and escalation factors.

2. Pre-Construction Liens for Design Professionals

It can be difficult for design professionals to know whether they have lien rights under section 14 of the Act which currently reads as follows:

> **Creation of lien**
> 14 (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

The term "*improvement*" refers to actual physical construction. This is colloquially referred to as "the first shovel hitting the ground". The argument is that significant realizable value is contributed to an improvement by design professionals even prior to the first shovel hitting the ground, and that value should be protected by the Act.

As it stands, design professionals' lien rights require the "*supply of services*". "*Supply of services*" is defined to include "*where the making of the planned improvement is not commenced, the supply of design, plan, drawing or specification that in itself enhances the values of the owner's interest in land*". In order to support a lien claim, design professionals must therefore be able to demonstrate that a design, plan, drawing or specification prepared by them in advance of construction somehow, on its own, "*enhanced*" the value of the owner's interest in land.

It has been suggested that a more rational and objective benchmark for the added value of pre-construction design services might be the issuance of a building permit, as a more objective measure of "*enhancement*" of an owner's interest in land.

With a building permit in place there is added value that can be realized by sale if necessary. Once a building permit has been issued, a lien trustee appointed by a court on the application of lien claimants, for example, could see a planned improvement through to completion.

It has been suggested that a new lien right should be created for pre-construction services. The lien for pre-construction services would expire within 45 days of the issuance of a building permit, permitting early release of holdback to those providing such services.

Do you have any comments on this proposal?

Both the previous Construction Lien Act and currently Construction Act continues to be somewhat problematic as it relates to design professionals, including entitlements to liens. It would be ideal to include language that simplifies and clarifies for all parties when a design professional has entitlement to a lien. However, instituting a benchmark of the issuance of a building permit is not likely satisfactory. The current definition, while potentially subjective, does contemplate a scenario where a building permit is not otherwise obtained, despite the design professional performing work. There could be any number of reasons why a building permit is not obtained, including due to actions of third parties, which would be beyond the control of the design professional and therefore, could be inadequate and inequitable for design professionals.

An alternative approach would be to grant design professionals a lien for services related to an actual or proposed improvement, regardless of whether value has been added.The lien claimant should not necessarily bear the burden of demonstrating that the owner's purchase of design services resulted in an increased market value. The reason for the lien is the connection of the design services to the improvement, not the creation of value per se. There are other categories of lien claimants whose services may not increase the value of the land itself but who have a right to a lien. There is no reason, in principle, to treat design professionals differently. Section 14 of the Construction Act otherwise provides that the lien is for the price of the services or materials, not the extent to which those services and materials add value to the real estate.

3. Annual/Phased Release of Holdback

Sections 26.1 and 26.2 enable the partial release of holdback on an annual or phased basis, respectively, if provided for by the construction contract entered into by the parties and subject to certain conditions. These sections currently read as follows:

> **Payment of holdback on annual basis**
> **26.1** (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22 (1) on an annual basis, in relation to the services or materials supplied during the applicable annual period.
>
> **Conditions**
> (2) Subsection (1) applies if,
> (a) the contract provides for a completion schedule that is longer than one year;
> (b) the contract provides for the payment of accrued holdback on an annual basis;
> (c) the contract price at the time the contract is entered into exceeds the prescribed amount; and
> (d) as of the applicable payment date,
> (i) there are no preserved or perfected liens in respect of the contract, or
> (ii) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act.
>
> **Payment of holdback on phased basis**
> **26.2** (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22 (1) on the completion of phases of an improvement, in relation to the services or materials supplied during each phase.
>
> **Conditions**
> (2) Subsection (1) applies if,
> (a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;
> (b) the contract price at the time the contract is entered into exceeds the prescribed amount; and
> (c) as of the applicable payment date,
> (i) there are no preserved or perfected liens in respect of the contract, or
> (ii) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act.
>
> **Payment on completion of design phase**
> (3) If a contract provides for payment of accrued holdback on a phased basis but only with respect to a specified design phase, clause (2) (b) does not apply.

Several possible amendments have been suggested.

(A) Potential Areas for Reform

It has been suggested that the Act should be amended to provide a more structured process for the annual/phased release of holdback, similar to the process involved in releasing holdback after substantial performance.

For example, unlike the process involved in release of holdback under section 26 of the Act (involving publication of a certificate of substantial performance), subcontractors do not have any advance notice of the release of annual/phased holdback. This makes it possible for a subcontractor to preserve a valid lien the day after the owner released the holdback to the contractor on a phased basis, only to learn when it is too late that the holdback fund available to satisfy the subcontractor's lien claim is insufficient.

Another potential issue is that annual/phased release of holdback provisions apply only if "*all liens in respect of the contract have been satisfied, discharged or otherwise provided for*" under the Act. Since anyone who supplies services or materials to an improvement has a lien which subsists until it expires, there will often be subsisting liens as long as work is being done on site. It has been suggested that this creates potential unfairness which could be corrected by amending the statute to allow annual and phased release of holdback only so long as there are no "*preserved*" liens at the time of release.

Others have argued to the contrary that sections 26.1 and 26.2 are already sufficiently flexible for the parties to work through any issues they may have relating to annual/phased release of holdback, and that confidence in the use of these sections requires only an amendment providing that all payments of annual/phased holdback that are compliant with the Act are made "*without jeopardy*".

Do you have any comments on this proposal?
We would agree that the Act requires a more structured process for the annual/phased release of holdback. There is too little certainty and too much risk with the provisions as currently structured, which is why we typically recommend not utilizing annual/phased release of holdback. In particular, the Owner is at risk of claims of Subcontractors, who may not be aware of whether holdback is being released annually or on a phased basis. Holdback is a fundamental component to the legislation and the release of holdback can have significant consequences for any payors. Accordingly, instituting a more structured process, which provides greater certainty of outcome, should be encouraged and an amendment supported by all concerned. If this was done, there would be more utilization of the provision, which would assist in the release of holdback to entities performing work, especially those earlier on in the Project.

(B) Disclosure

Section 39 (Right to information) provides any person with a lien or who is the beneficiary of a trust under Part II of the Act with a statutory right to certain information including:

> vi. a statement of whether the contract provides that payment under the contract shall be based on the completion of specified phases or the reaching of other milestones in its completion.

This information is particularly relevant to prompt payment where payment is due monthly or on a milestone basis.

It has been suggested that the provision be amended to entitle any person with a lien or who is the beneficiary of a trust under Part II of the Act to disclosure of any contract provision providing for an annual or phased release of holdback.

Do you have any comments on this proposal?

The proposed amendment to provide for the entitlement would be a wise and beneficial change, granting lien rights or beneficiaries of a trust specific contractual provisions at issue. This will allow such entities to better understand their rights. Moreover, there should be no concerns regarding confidentiality in the disclosure of such contractual information if incorporated into Section 39 of the Construction Act.

Standardize Disclosure Requirements: Establish standardized disclosure requirements for all contracts involving phased or annual holdback releases. This will facilitate consistent application and understanding across the industry.

(C) Payment "Without Jeopardy"

Subsections 26.1(1) (Payment of holdback on annual basis) and 26.2(1) (Payment of holdback on phased basis) both provide that under certain conditions "*a payer may make payment of accrued holdback*" in relation to services or materials supplied in relation to an improvement. Similar provisions governing holdback release – namely section 26 (basic holdback) and section 27 (finishing holdback) – provide that an owner may release holdback "without jeopardy". This assurance is missing from subsections 26.1(1) and 26.2(1) and should be added.

It has been suggested that payment "*without jeopardy*" provisions should be added to these sections.

Do you have any comments on this proposal?

The inclusion of the words "without jeopardy" would potentially assist in the operation of the provision, providing greater certainty upon payment. However, what exactly "without jeopardy" means will likely be an issue in future contested proceedings, which could be addressed, interpreted, and determined by the Court.

(D) Repeal Monetary Threshold

The same subsections regarding the payment on holdback on an annual or phased basis apply only if "*the contract price at the time the contract is entered exceeds the prescribed amount*". Under O. Reg. 304/18 (GENERAL), the prescribed amount is set at $10,000,000 or more.

It has been suggested that this monetary threshold be repealed to increase the frequency of the use of these mechanisms an thus enhance cashflow.

While it is possible that in certain circumstances the additional administrative cost of phased or annual release of holdback may not be justified, there is no clear policy reason for the statute to prevent the parties from contracting to release the holdback on a phased or annual basis.

Do you have any comments on this proposal?
We would agree that the monetary threshold should be removed from the annual or phased basis for the payment of holdback. There is simply no rationale or justifiable reason for instituting any particular monetary threshold. Annual or phased release of holdback could work for a wide variety of construction projects, should the parties agree to do so and so long as there is greater structure and certainty for all concerned. Removing the monetary threshold also removes one of the Act's references to "price," and thus reduces the problems associated with the ambiguity of the term "price."

Promote Contractual Agility/Flexibility: Greater flexibility for freedom of contract should be encouraged to allow parties to negotiate holdback terms that suit their specific project needs without being constrained by arbitrary monetary thresholds. This promotes innovation and efficiency in contract management. It also incentivizes continuous monitoring throughout the project's life cycle, thereby strengthening collaboration in P3 and progressive models.

(E) Subcontractors

A concern has been raised that if a contract provides for the annual or phased release of holdback by the owner to the contractor, the contractor may receive payment of the holdback from the owner but not be statutorily obliged to pay all or any portion of those holdback monies to subcontractors.

It must be noted, however, that subcontractors whose work is completed early in the construction project can certify subcontract completion under section 33 (Certificate re subcontract) and obtain early release of holdback.

It must also be noted that the Act contains robust trust provisions and robust adjudication provisions that are available to mitigate this hypothetical situation.

Moreover, proposals #5 (Joinder of Lien Claims, Trust Claims, and other Claims) and #20 (Availability of Adjudication After Completion) may provide further assistance to subcontractors.

For these reasons it has been suggested that no specific amendments to sections 26.1 and 26.2 are required to address the issue of a contractor's obligation to pay holdback down to subcontractors.

Do you have any comments on this proposal?
It is true that there are other provisions and components to the Construction Act, which provide assistance to subcontractors. However, it would be of assistance to add wording which connects and clarifies the obligations of contractors to pay down holdback. This would minimize the likelihood of subcontractors needing to avail themselves to certain remedies, including lien and trust claims and adjudication provisions. There is also no reason in principle for the contractor to gain access to holdback while the subcontractors do not. It allows the contractor to profit from the time value of money by delaying the release of holdback.

4. Joinder of Lien Claims, Trust Claims, and Other Claims

The Act was amended in 2017 to delete the prohibition against joinder of lien and trust claims, but without adding enabling language in either the statute or the regulation. This situation has led to uncertainty and confusion in the profession over whether it is or is not permitted.

It has been suggested that recommendation #39 in Striking the Balance should be more fully adopted by amending O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) to expressly allow for the joinder of trust claims under Part II of the Act with a lien claim.

If *in personam* trust claims can be heard in lien actions, then they can be referred to Associate Justices for hearing. This would address any section 96 *Constitution Act* issues. There would be no jurisdiction in a lien court to grant *in rem* relief declaring monies to be trust monies in the hands of non-parties for example.

There are procedural consequences unique to lien actions, such as consolidation, that must be considered. As lien actions are consolidated for trial, then any party (and the supervising court) should have trust issues heard separately.

Do you have any comments on this proposal?

As set out in the Striking the Balance Report, the prohibition against the joinder of lien and trust claims in the Construction Lien Act, pursuant to s. 50(2), was heavily criticized by stakeholders and no one supported its retention. Rather, it was recommended that the prohibition be removed thereby allowing the joinder of lien claims and trust claims, subject to a motion opposing the same by any party on the grounds of undue prejudice. The explicit prohibition against the joinder of lien claims and trust claims was removed (i.e. s. 50(2)). However, in our opinion, the Regulation was poorly drafted. While it permitted lien claims to be joined with breach of contract claims, it failed to provide explicitly provide for the joinder of lien and trust claims. If the intent was to maintain the prohibition, then presumably the prohibition section in the CLA would have remained explicitly included the Construction Act.

However, the prohibition was removed from the Construction Act, but again, the Regulation was poorly drafted and did not explicitly address the joinder of lien and trust claims.

There is great inconvenience in requiring that parties commence separate actions. This only proliferates multiplicity of proceedings, which are typically to be avoided, and therefore require additional expense, including drafting, filing fees, etc. This also increases the burden on the Courts, which have limited resources and are facing a crushing backlog.

As set out in the Striking the Balance, the prohibition can be circumvented by obtaining an Order that allows for the lien and trust claims heard together or one after another, typically called a “connecting order”. Such an order was a typical step and routinely obtained in practice, which would allow the procedural connection between the actions, including common discoveries and pre-trials before the Court. So it makes little sense to keep lien

and trust actions separate and somehow allow them to be eventually heard together anyways.

The lien and trust remedies are separate and distinct pursuant to the provisions of the Construction Act. However, the enforcement of such remedies is inextricably linked to the same factual matrix involving typically the same parties, which is recognized with the common step of obtaining a connecting order. Officers and Directors of a corporation are not typically included in lien proceedings given the manner in which parties contract (i.e. corporate form), but such officers and directors of a corporation can face exposure to personal liability for breach of trust pursuant to s. 13 of the Act, where such officers and directors or any person effectively controlling the corporation who assents to or acquiesces in conduct knowing it amount to breach of trust by the corporation.

The philosophy underlying section 13 recognizes that the “lien remedy is only partial security for the earned and unpaid contract price of workers and suppliers and thus a trust remedy is required to make parties trustees of contract moneys while employees, material suppliers, and other remain unpaid.” In other words, the limitations of the lien remedy are backstopped by the trust remedy and conceptually, the lien and trust remedies are designed to complement each other. Consequently, permitting the joinder of lien and trust claims would provide added protection to plaintiffs attempting to enforce their rights in the event of non-payment in the same action.

In short, the Construction Act should be further amended to provide for the joinder of lien and trust claims, which would finally align the recommendations in the Striking the Balance and apparent intent of the legislature with the language of the legislation.

5. Effect of Prompt Payment and Adjudication on Trust Obligations

Payment certification remains an important objective measure for imposition of a statutory trust. Subsection 7(2) of the Act states,

> **Amounts certified as payable**
> (2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.

Most standard form contracts require a payment certifier, often the owner's engineer, to review the contractor's monthly payment applications and "*certify*" them for payment by the owner. There is a large body of case law, nationally and internationally, on the reliability of payment certificates and the circumstances in which they can be re-opened.

The payment certifier exercises a quasi-judicial function in certifying payment. There is an unfortunate perception in the industry that a certifying engineer paid by the owner is compromised in fulfilling this quasi-judicial function. One of the balanced 2017 recommendations and amendments was to disengage from this body of law and use the concept of a "*proper invoice*" instead. The 2017 reforms made delivery of a "*proper invoice*" the trigger for payment, not "*certification*". This amendment was not aligned with the certification requirements of Part II of the Act.

It has been suggested that one solution to this problem would be amend subsection 7(2) so that objected to portions of a proper invoice do not become subject to the trust obligation. This would also require a corresponding change to subsection 8(1).

Do you have any comments on this proposal?
Currently, there is a disconnect between the Proper Invoice and certification and how this relates to trust obligations. This amendment would be beneficial for all concerned, but especially trustees, as it would clarify that objected portions do not become subject to trust obligations. This would also further implement the Proper Invoice not only as the trigger for payment obligations, but also the dictating factor for substantive payment obligations.

6. Collaborative Contracting Bonds

The prescribed bond forms – Form 31 and Form 32 – for use on public projects under section 85.1 (Bonds and public contracts) are well-understood instruments for use in traditional stipulated price contracting models, such as CCDC 2 – 2020, however, not all public projects proceed under such common project delivery models. Increasingly, alternative collaborative contracting models, such as integrated project delivery using the CCDC 30 – 2018 form of contract, and progressive design/build models are being used with success.

To enable innovation in how public sector projects are delivered, it has been suggested that section 85.1 and O. Reg. 304/18 (GENERAL) be amended to permit the alternate forms of bonds, developed jointly by the construction and construction surety industries, for use in such projects.

Do you have any comments on this proposal?

Flexibility for Innovative Contracting Models: This amendment is a good idea. The construction industry and all entities participating in construction projects would benefit from greater innovation with alternate forms of bonds that have been jointly developed. Allowing for alternate forms of bonds tailored to collaborative contracting models like integrated project delivery and progressive design/build is a positive step but should also be applicable to P3s and Progressive P3 models, which continue to be deployed across the province of Ontario across asset classes. This flexibility will encourage innovation and efficiency in public sector projects, ensuring that bonding requirements are aligned with the unique risk profiles and contractual arrangements of these tried and tested models. The legislation should reflect the market realities and should provide for greater flexibility for bonding.

7. Limits of Bonds on Public Projects

The Act was amended in 2017 to mandate the use of surety bonds on public projects with a price of $500,000 or more. The penal amount of these bonds was to be set at 50% of the "*contract price*".

This amendment was intended to add a layer of protection for protect public project owners, subcontractors, workers, and suppliers against the risk of non-payment or non-performance in case of contractor default under a project agreement.

An exception was created for alternative financing and procurement arrangements ("AFP" or "P3") delivery models) over $100 million, which caps the coverage limit at $50 million.

The government recently amended the Act and O. Reg. 304/18 (GENERAL) to adjust the minimum bonding requirements for large non-P3 public infrastructure projects. Effective July 1, 2024, the coverage limit for public projects over $500 million is $250 million.

Similar to the existing obligation for bonding on P3 projects, project owners are required to assess whether the minimum coverage limit is adequate to protect against contractor non-performance and non-payment and are able to set a higher bonding requirement, if appropriate. In addition, the default minimum coverage limit of 50% for projects under $500 million has been moved from the Act to the regulation.

While the amendments address changes in market conditions and the increased size and complexity of public projects, it has been suggested that further study, information gathering and consultation is required to determine the appropriate coverage limits and to adapt bond forms to various models of public procurement.

Do you have any comments on this proposal?

Adapting Bond Forms to Procurement Models: The diversity of public infrastructure procurement models necessitates the adaptation of bond forms to suit different project delivery methods. We would agree and support any initiatives regarding studies, information gathering, and consultation to determine the appropriate coverage limits and adaptability of bonds to the wide variety of public procurement models. Conducting thorough studies and consultations with stakeholders and industry associations will aid in developing bond forms that are flexible yet robust enough to address the specific risks associated with each procurement model. The bonding aspects of the current legislation is polarizing, with ardent supporters and detractors alike. This would suggest that, at a minimum, the bonding component of the Construction Act be further reviewed and scrutinized.

8. Written Notice of Lien

Section 24 (Payments that may be made) allows a payer to make payments on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied unless, prior to making payment, the payer has received "*written notice of a lien*" with Form 1.

If Form 1 notice is given, the payer must also retain, in addition to the normally required holdback, an amount sufficient to satisfy the notified lien.

It has been suggested that in addition to Form 1 notices, this same obligation should be triggered if the lien claimant serves a copy of the registered claim for lien under clause 34(1)(a) or gives the claim for lien to the payor where the lien does not attach to the premises under clause 34(1)(b). As it stands, a payor who receives the actual lien but not Form 1, might be obligated to pay without retaining the lien amount. This seems arbitrary.

It has also been suggested that the manner of service of a written notice of a lien may be too onerous. Subsection 87(1.1) states,

> **Exception, written notice of lien**
> (1.1) Despite subsection (1), a written notice of lien shall be served in a manner permitted under the rules of court for service of an originating process.

This provision reflects the importance under the Act of service of a written notice of lien. On the other hand, this sets a standard that is more onerous than is provided for service of a statement of claim in the lien action itself (registered mail under subsection 87(1)).

It has been suggested that a possible amendment would be to permit service of a written notice of lien under the general rule in subsection 87(1) (How documents may be given).

Do you have any comments on this proposal?
There should be one common manner of service provided for under the Construction Act. It appears to be odd and confusing that there are different manners of service for different provisions of the Act. This would simplify and clarify service under the legislation.

9. Publication in Construction Trade Newspaper

Several notices required by the Act must be published in a "*construction trade newspaper*" which is defined in section 1 of O. Reg. 304/18 (GENERAL) as,

> "construction trade newspaper" means a newspaper,
>
> (a) that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario,
>
> (b) that is published at least daily on all days other than Saturdays and holidays,
>
> (c) in which calls for tender on construction contracts are customarily published, and
>
> (d) that is primarily devoted to the publication of matters of concern to the construction industry.

When the Act's regulations were developed, this definition was expanded to include newspapers published in electronic format.

Without any official licensing or designation for "*construction trade newspapers*", websites can simply self-identify as satisfying the requirements of the definition and accept notices for publication. This is undisciplined.

The lack of official licensing or designation for construction trade newspapers has led to some uncertainty as to where to search for statutory notices and where to validly publish notices. It is possible that notices could be published on obscure websites, and, if a particular website does not actually meet the regulatory definition, the publications themselves may end up being challenged as legally invalid and ineffective.

It has been suggested that "*construction trade newspapers*" be licensed or designated. This would require thought as to who should perform that licensing function?

Do you have any comments on this proposal?
What constitutes a "construction trade newspaper" under the Construction Act is problematic. There is no regulation, and it is correct to state that such providers self-identify for the larger construction industry as being satisfactory for the purposes of the legislation. This issue certainly needs to be addressed.

10. Access to Statutory Adjudication

Ontario's current interim adjudication scheme is successful. Many have suggested that the province should build on that success in support of sustainable growth in the province's construction industry. To this end, several changes have been suggested.

First, it has been suggested that a new category of ODACC adjudicator be created, by regulation, not for appointment by ODACC if the parties cannot agree on an adjudicator, but only with the consent of the parties. This new class of adjudicator one might tentatively call "*Specialist Adjudicator*".

- Specialist Adjudicators would still have to be ODACC certified/qualified.
- Specialist Adjudicators would be listed separately from ODACC roster adjudicators.
- Specialist Adjudicators would have to be chosen only by party agreement, not ODACC appointment. ODACC would continue to appoint only from its more economical roster list.
- Specialist Adjudicators would negotiate their commercial terms with the parties appointing them. ODACC would continue to take its regulated percentage of the negotiated fee to defray ODACC operating costs.

It is thought that the availability of Specialist Adjudicators would increase the use of statutory adjudication by the infrastructure community and in other complex matters. It might attract a more senior and experienced community of ODACC qualified adjudicators. This could be achieved without compromising the current working scheme for appointment of roster adjudicators in economical bands.

Second, it has been suggested that statutory adjudication should be available to the industry over a broader time period, including prior to the execution of a contract (in the case of preconstruction services and any new lien right that may be created there) and after termination or completion (to permit adjudication throughout the entire period during which liens against basic and finishing holdback may subsist).

In other words, the suggestion being brought forward is that lien rights and adjudication rights should be coterminous.

Do you have any comments on this proposal?

Creating another category of ODACC Adjudicator—"Specialist Adjudicators"—appears to be a beneficial idea. Providing the parties with an additional option for certain disputes would enhance flexibility. Currently, for a variety of reasons, some of the most senior and knowledgeable construction and infrastructure lawyers have not become ODACC-certified adjudicators. One primary reason has been the financial regime. This amendment may encourage more specialist adjudicators to act in this capacity, benefiting both the parties and the construction industry.

11. Transition Rules

While the transition rules that applied when the Act came into force should not be changed, some have asked if different transition rules apply for any new amendments as a result of this review.

Section 87.3 of the Act is a somewhat complex provision which establishes the following transitional rules:

> **Transition**
> **Continued application of Construction Lien Act and regulations**
> 87.3 (1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,
>
> (a) a contract for the improvement was entered into before July 1, 2018;
>
> (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
>
> (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the *Restoring Trust, Transparency and Accountability Act, 2018* came into force.
>
> **Same**
> (2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.
>
> **Exception, municipal interest in premises**
> (3) Despite subsection (1), the amendments made to this Act by subsections 13 (4), 14 (4) and 29 (2) and (4) of the *Construction Lien Amendment Act, 2017* apply with respect to an improvement to a premises in which a municipality has an interest, even if a contract for the improvement was entered into or a procurement process for the improvement was commenced before July 1, 2018.
>
> **Non-application of Parts I.1 and II.1**
> (4) Parts I.1 and II.1 do not apply with respect to the following contracts and subcontracts:
>
> 1. A contract entered into before the day subsection 11 (1) of the Construction Lien Amendment Act, 2017 came into force.
>
> 2. A contract entered into on or after the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.

3. A subcontract made under a contract referred to in paragraph 1 or 2.

One issue with these rules related to the phased introduction of changes, with the changes to lien, holdback and trust provisions coming into force on July 1, 2018, and the prompt payment and adjudication provisions coming into force on October 1, 2019. This created confusion as to which rules applied to a particular improvement/contract. For any future amendments, ideally all changes would come into force on the same day.

Clause 87.3(1)(b) provides that the Act, as it read prior to the amendments, applies to an improvement if "*the procurement process for the improvement*" was commenced prior to the effective date of the amendments. Subsection 1(4) of the Act clarifies that a procurement process is considered commenced as early as the making of a request for qualifications (RFQ). An RFQ is typically just a screening step to establish if potential contractors are qualified to perform the contemplated improvement. An RFQ bears virtually no relationship to the contract for the improvement itself or what legal regime ought to apply to the performance of the work. Arguably, an RFQ should not be considered in determining what set of rules apply to an improvement.

Under subsection 87.3(4), the prompt payment and interim adjudication rules did not apply "*if a procurement process for the improvement that is the subject of the contract was commenced*" prior to the effective date. Many in the construction bar interpreted this phrase as reaching back to "*contractors*" such as designers, surveyors, and cost consultants who provide construction and often pre-construction support to the improvement, but who do not perform any construction work. Consequently, it's possible that an RFQ merely to select architects to design a building planned to be built years in the future would determine what legal rules apply to a contract.

A potential alternative transitional rule would be the date of the contract for the improvement, i.e., the contract that leads to physical work on site, typically the general construction contract. After all, it is mainly the work performed under that contract improves or enhances the value of the premises.

A potential objection is that this may result in different parties operating under different legal regimes while working on the same project. For example, the designer working on their contract would be subject to the version of the Act in place at the time the design contract was entered. The general contractor and subcontractors would be subject to a different version of the Act if the effective date has passed in the interim.

An elegant solution to this issue is set out in section 25 (Transitional provision) of the *Federal Prompt Payment for Construction Work Act*. Under that approach, changes to the Act could apply to any contract entered into after the effective date of the amendments. However, for one year (or some other period of time) after the effective date, the Act as it read prior to the amendments would continue to apply to contracts and subcontracts entered into prior to the effective date. This approach balances legal certainty for existing contracts with the legal of a

single of rules. If this approach is used, would one year provide a sufficient transition period for existing contracts?

Do you have any comments on this proposal?
We would encourage implementing clearer and simpler transition provisions. The current provisions are simply too uncertain, which carries significant risk for entities performing work, especially subcontractors. In particular, utilizing the date of the procurement process under s. 87.3(4) is problematic. Utilizing the date of the contract for the improvement is one potential option. Better yet would be, as proposed, utilizing the transition provision under the Federal legislation, which appears to be a betterment compared to the present transition provisions.

E. ADMINISTRATIVE AND TECHNICAL PROPOSALS

12. Repeal subsection 34(10)

Section 34 (How lien preserved) governs the preservation of liens. When the adjudication system was added to the Act in 2017, it was thought that lien claimants should be able to access statutory adjudication before having to preserve a lien claim. The way this was done was by extending the lien period.

Subsection 34(10) provides as follows:

> **Adjudication and expiry**
> (10) If the matter that is the subject of a lien that has not expired is also a matter that is the subject of an adjudication under Part II.1, the lien is deemed, for the purposes of this section only, to have expired on the later of the date on which the lien would expire under section 31 and the conclusion of the 45-day period next following the receipt by the adjudicator of documents under section 13.11.

This well-meaning provision may have had unintended consequences. For example, there is no mechanism in the Act for the owner to be made aware that an adjudication is taking place lower in the construction pyramid. Consequently, an owner might not know whether the statutory 60-day lien period has been further extended by 45 days and, therefore, whether it would be safe to release the holdback under section 26 (Payment of basic holdback).

In theory, the period of extension could be longer, since there could be a gap between the commencement of adjudication (which triggers subsection (10) and the date of delivery of documents (being the date to which the 45 additional days get added).

I have heard from some that this uncertainty has resulted in some owners, out of an abundance of caution, retaining holdback for longer than 45 days to ensure there are no unexpired liens that could be charged against the holdback. This arguably defeats the Act's goal of promoting timely payment and improving cashflow.

For this reason, it has been suggested that subsection (10) be repealed.

Do you have any comments on this proposal?
This particular issue and section 34(10) has caused many unintended consequences and is of significant concern. If this section has been included to allow for the extension of lien periods, but as pointed out, Owners have no knowledge or notice of any adjudication commenced lower down in the construction pyramid. Furthermore, Subcontractors will likewise not know when lien rights might expire pursuant to an adjudication higher up on the construction pyramid. This lack of certainty creates significant problems. This is a section that should be removed or overhauled to implement certainty and negate the unintended risk.

13. Notice of Termination

Subsection 34(6) of the Act provides as follows:

> **Notice of termination**
> (6) If a contract is terminated, either the owner or the contractor or other person whose lien is subject to expiry shall publish, in the manner set out in the regulations, a notice of the termination in the prescribed form and, for the purposes of this section, the date on which the contract is terminated is the termination date specified in the notice for the contract.

It has been suggested that the date of termination for the purpose of the statute should not be the date specified in the notice because that date is set subjectively and is therefore arbitrary.

Furthermore, there is presently no time frame specified for when the notice of termination should be published. As a result, it is possible that the notice may not be published for weeks or months after the actual date of termination under the contract. In the meantime, the lien rights of the contractor and subcontractors would be expiring.

For this reason, it has been suggested that the date of termination should be the date of publication of the notice of termination in a construction trade newspaper in accordance with section 8 of O. Reg. 304/18 (GENERAL) under the Act. The date of publication is objective and publicly so. This would also entail a change to Form 8.

Do you have any comments on this proposal?
We understand that the reference of s. 34(6) actually is meant to refer to s. 31(6). The Construction Act should be amended to provide for the publication of the date of termination in a construction trade newspaper as being the date for determining expiration of lien rights. This would align conceptually with the substantial performance aspect of the legislation and the publication of the certificate.

14. Multiple Improvements

Subsection 2(4) of the Act provides as follows:

> **Multiple improvements under a contract**
> (4) If more than one improvement is to be made under a contract and each of the improvements is to lands that are not contiguous, then, if the contract so provides, each improvement is deemed for the purposes of this section to be under a separate contract.

This section was added to allow for segmented treatment of separate (non-contiguous) projects constructed under a single contract. This provides an opportunity for parties to a single contract (a linear asset for example) to incorporate more than one discrete scope of work under the same contractual terms and conditions.

It has been suggested that there may be a potential issue with this provision. It is arguably unclear as it stands whether all aspects of the Act apply to each segment of the contract separately. What if, for example, an owner terminates a contractor with respect to one segmented improvement but not the others being performed under the same contract. Is a notice of termination required?

Moreover, it would make sense for the general lien provisions of the Act to apply to a contract under which multiple improvements are undertaken in accordance with subsection 2(4) (unless the contract specifies otherwise). The general lien provision allows a worker or supplier who cannot identify a specific premises to which their services or materials were supplied to lien all premises.

For these reasons, a suggestion has been made to amend subsection 2(4) so that each improvement is deemed for the purposes of the entire Act (not just section 2) to be under a separate contract.

Do you have any comments on this proposal?
We would agree with the amendment proposed, particularly since it would enhance the operation of other provisions, for instance a general lien as indicated in the commentary. At the heart of this issue is the lack of notice to subcontractors, which would not otherwise know what the contract between an Owner and Contractor provides. Accordingly, subcontractors may not know when lien period expire and dates for holdback release. Section 39 Rights to Information should also be amended to allow for parties to request such information.

15. Mandatory Release of Holdback and Subcontractors

Subsection 27.1(1) currently provides as follows:

> **Non-payment of holdback**
> **By owner**
> 27.1 (1) An owner may refuse to pay some or all of the amount the owner is required to pay to a contractor under section 26 or 27, as the case may be, *if* **(emphasis added)**,
>
> (a) the owner publishes a notice in the prescribed form specifying the amount of the holdback that the owner *refuses to pay* **(emphasis added)**, and the notice is published in the manner set out in the regulations no later than 40 days after the date on which,
>
> (i) the applicable certification or declaration of substantial performance is published under section 32, or
>
> (ii) if no certification or declaration of substantial performance is published, the date on which the contract is completed, abandoned or terminated; and
>
> (b) the owner notifies, in accordance with the regulations, if any, the contractor of the publication of the notice.

While this subsection likely already provides a closed list of circumstances in which the owner may refuse to pay some or all of the holdback, to ensure there is absolute clarity that there are no other circumstances in which holdback may not be paid, it has been suggested that the word "*if*" in the opening of the provision be replaced with the words "*only if*".

Further, to ensure there is no question about what constitutes a "*refusal*" to pay holdback, it has been suggested that the words "*refuses to pay*", which is subjective, be replaced with "*has not paid*", which is objective.

Do you have any comments on this proposal?
The two (2) proposed amendments implementing the words "only if" and "has not paid" would appear to be simple fixes which would clarify the obligations and enhance the operation of the provision. We would support these amendments.

16. Motions Before Action Commenced

The 2017 amendments moved procedural rules formerly contained in part VIII of the Act to O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII). The now repealed section 67 of the Act used to set out procedural rules governing lien claims, including subsection (6) which provided:

> **Manner of making motion**
> (6) Where in this Act the court is empowered to do anything upon motion, the motion may be made in the manner provided for in the rules of court for the making of motions, regardless of whether any action has been commenced at the time the motion is made.

Yet, under the Act there are certain specific situations where a motion must be brought to the court even though an action has not yet been commenced. The most common example is when a party wishes to post security to vacate a preserved lien. To ensure that courts are able to deal with these motions, an equivalent to the former subsection (6) should be added to O. Reg. 302/18.

One option would be to permit motions to be brought for relief under the Act before an action has been commenced to perfect a lien. As the Attorney General has launched a separate review of the Rules of Civil Procedure, feedback on this proposal will be considered in the future once that review has been completed. Please note that if feedback on this proposal is relevant to that broader review of the Rules, it will be shared within the Ministry of the Attorney General.

Do you have any comments on this proposal?
We would agree with the proposed amendment which would include some form or equivalent to the former s. 67(6). It is absolutely true and accurate that the Construction Act already contemplates motions before actions are formally commenced. This amendment makes appropriate conceptual sense in the circumstances.

17. Proper v. “Improper” Invoicing

Section 6.1 of the Act currently provides as follows:

> **Definition, “proper invoice”**
> **6.1** In this Part,
>
> “proper invoice” means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:
>
> 1. The contractor’s name and address.
> 2. The date of the proper invoice and the period during which the services or materials were supplied.
> 3. Information identifying **the authority**, whether in the contract or otherwise, under which the services or materials were supplied.
> 4. A description, including quantity where appropriate, of the services or materials that were supplied.
> 5. The amount payable for the services or materials that were supplied, and the payment terms.
> 6. **The name, title, telephone number and mailing address of the person to whom payment is to be sent.**
> 7. Any other information that may be prescribed. [emphasis added]

A question has been raised about the meaning of “*authority*” in paragraph 3 of s.6.1 in this context and why there is a requirement to identify a person in paragraph 6 of s.6.1.

In addition, it is not clear how milestone payments are accommodated in this definition.

It has been suggested that the definition of “*proper invoice*” be amended to remove the word “*authority*” and replace it with language accommodating milestone payment, for example, and to provide an alternative to paragraph 6 in the list to allow naming of the individual person to whom payment is/was sent (e.g. direct payment information or the accounts receivable department).

Do you have any comments on this proposal?
This is a fair point – query what the word “authority” means under paragraph 3 of s. 6.1. Presumably the wording attempts to identify the contract under which the services or materials were supplied. But this is subjective and open to interpretation. Furthermore, query the necessity for paragraph 6 of s. 6.1, particularly in light of turn-over within an organization where people depart. Implementing information for payment purposes would appear to be a simple amendment that would enhance the Proper Invoice provision.

18. "*Matter*" v. "*Dispute*" in Statutory Adjudication

Subsection 13.5(4) (Multiple matters) states that an adjudication "*may only address a single matter*", unless the parties to the adjudication agree otherwise.

Some have suggested that the use of the term "*matter*" is ambiguous and creates uncertainty. Is a "*matter*" one of the enumerated categories of adjudication jurisdiction? Or is a "*matter*" one dispute, however many categories it fits into? Or does a "*matter*" encompass any issues related to a single improvement?

It has been suggested that subsection (4) be amended so that an adjudication may only address a single "*dispute*", not a single "*matter*". This amendment would have significant policy aspects, as it would mean that issues involving time (schedule extension), money (compensation for schedule extension), and performance security (occurrence of "default" for the purpose of making a claim on a performance bond for example) might all be subject to a single adjudication. This would also require amending subsection (1) to add disputed change orders and change directives to the list of "*matters*" or "*disputes*" that may be referred to adjudication.

There is a strong contrary view that statutory adjudication serves only the purpose of prompt payment and is not the appropriate vehicle for interim determination of scope and time issues, even if they are associated with non-payment.

Do you have any comments on this proposal?
Implementing amendments which clarifies what is a single "matter" would make conceptual sense. Nevertheless, virtually any language utilized would be subject to scrutiny and potentially open to interpretation. Presumably the Courts would have provided some guidance and clarity through case law. However, providing flexibility and allowing the ability of the parties to agree to have multiple matters heard together would be beneficial. Adjudication should be open to virtually any dispute that the parties agree upon and expanding the enumerated categories of disputes should be encouraged.

19. Availability of Adjudication After Completion

Subsection 13.5(3) of the Act provides:

> **Expiry of adjudication period**
> (3) An adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise.

In terms of the typical timing of completion of an improvement, the date of release of the holdback under section 26 (Payment of basic holdback) following substantial performance may not fall due until after completion of the contract.

The release of the finishing holdback under section 27 (Payment of holdback for finishing work) will not fall due until after completion of the contract, as project completion is itself the start of the 60-day lien expiry period under that section.

For this reason, it has been suggested that an amendment to subsection 13.5(3) is necessary to provide that adjudication is available until all liens that may be claimed against the relevant holdback have expired.

Do you have any comments on this proposal?
We would agree that the proposed amendment to s. 13.5(3) is required to allow for adjudication to occur until all liens that may be claimed have expired. We would surmise that this should not be controversial and would enhance the operation and certainty of the legislation.

20. Subcontractor Rights under Labour and Material Payment Bond

The current Form 31 (Labour and Material Payment Bond under Section 85.1 of the Act) is the result of extensive consultation with the surety industry and key stakeholders.

One purpose of the new form was to provide limited protection against non-payment to second tier subcontractors ("sub-subcontractors"). This protection was limited to recovering their share of the holdback and any contract monies that the defaulting contractor would have been liable to pay to the sub-subcontractor if the sub-subcontractor had filed a claim for lien.

The language in the current Form 31 suggests that the sub-subcontractor must have a subsisting or perhaps preserved construction lien claim in order to recover under the bond. It states:

> 1…The entitlement under this Bond of any Sub-subcontractor, however, is limited to such amounts as the Contractor would have been obligated to pay to the Sub-subcontractor under the *Construction Act* (the "Act").

There is an argument that under the Act as it now stands, the contractor would not have to pay any sub-subcontractors who did not preserve a lien. Therefore, the contractor's liability under the bond would be limited to the sub-subcontractors who preserved a lien.

This may have been an inadvertent deviation from the Federal Government form of payment bond, which was used as a template for Form 31. It states:

> 4. For the purpose of this bond the liability of the Surety and the Principal to make payment to any claimant not having a contract directly with the Principal shall be limited to that amount which the Principal would have been obliged to pay to such claimant had the provisions of the applicable provincial or territorial legislation on lien or privileges been applicable to the work. **A claimant need not comply with provisions of such legislation setting out steps by way of notice, registration or otherwise as might have been necessary to preserve or perfect any claim for lien or privilege which the claimant might have had.** Any such claimant shall be entitled to pursue a claim and to recover judgment hereunder subject to the terms and notification provisions of the Bond. [Emphasis added]

The highlighted language recognizes that a claimant under the bond does not need to commence lien proceedings in order to recover under the bond.

For this reason, it has been suggested that Form 31 be revised to incorporate the language of the Federal Government form of bond, so that sub-subcontractors do not have to preserve, perfect, and sue on liens to recover, while the subcontractor that employed them does not.

Do you have any comments on this proposal?
We would agree that Form 31 should be amended as proposed to clarify that a claimant need not commence lien proceedings in order to recover under the bond. This appears to have been an oversight and the proposed amendment is a simple fix thereby enhancing the clarity and efficiency of the Act. The Federal Government's form of payment bond provides helpful guidance that should be followed.

21. Minor Errors, Irregularities

Subsection 6(2) sets out the types of minor errors and irregularities that do not invalidate a certificate, declaration or claim for lien, absent prejudice. The provision reads as follows:

> **Same**
> (2) Minor errors or irregularities to which subsection (1) applies include,
>
> (a) a minor error or irregularity in,
>
> (i) the name of an owner, a person for whom services or materials were supplied or a payment certifier,
>
> (ii) the legal description of a premises, or
>
> (iii) the address for service; and
>
> (b) including an owner's name in the wrong portion of a claim for lien.

It was suggested by some that there may be a possible ambiguity in clause 6 (b). The use of the word "*including*" in reference to an owner's name potentially suggests that the document includes multiple mentions of the owner's name. Rather, it should be clear that so long as the owner's name is inserted somewhere on the document, then this curative provision should apply.

For this reason, it has been suggested that an amendment be made to clause 6(2)(b) by replacing the word "*including*" with "*inserting*".

Do you have any comments on this proposal?
We would agree with any amendments to the curative section of the Construction Act which provide greater flexibility and coverage for minor errors or irregularities, which should not invalidate substantive rights.

F. OTHER FEEDBACK

Do you have any other feedback or comments either on the proposals or on the operation of the Act more generally?

Generally speaking, the amendments instituted to the Construction Act has made for a better, more fortified piece of legislation that has been modernized to reflect the construction industry.

In our opinion, the concept of adjudication is appropriate. The construction and infrastructure industry in Ontario should be better served by a timely and cost effective interim binding process that provides a clear path forward for the parties, instead of protracted and costly proceedings that would otherwise delay payment throughout the construction pyramid and progress of work to Projects. Core foundational concepts appear to have taken hold and entities and stakeholders in the construction and infrastructure industry appear to have a greater understanding of adjudication under the Construction Act, particularly as additional interpretation and guidance is being provided by the Court.

However, the conceptual alignment of liens with adjudication is an interesting approach, which has not been followed elsewhere in the world. In this regard, see the commentary offered by several individuals of the Ontario Bar Association Construction and Infrastructure Law Executive, including Edward Lynde at Fasken.

Ontario remains uniquely situated as one of the very few jurisdictions in the world to combine adjudication and liens in a single, integrated piece of legislation, as virtually all other jurisdictions have chosen one or the other. Accordingly, there is an on-going process of understanding the interplay between adjudication and lien proceedings before the Court. Moreover, by including both adjudication and liens in a single, integrated statute, this may have over encumbered the legislation with additional dispute resolution processes. Given Ontario's unique approach to combining adjudication and liens, we may not see the correlation between the introduction of adjudication and reduction of construction litigation and reduced workload before the Court, as was the case in other jurisdictions internationally. Indeed, we continue to see a large number of lien proceedings, as the "tried, tested, and true" remedy that has been around since being first implemented in Ontario almost 150 years ago. If anything, parties are pursuing both adjudication and liens simultaneously.

Consequently, it remains to be seen whether it is possible for liens and adjudication to harmoniously co-exist in a single piece of legislation, or whether this decision was ill-advised.

Additional considerations:

Enhanced Training and Awareness Programs: To ensure all stakeholders understand their rights and obligations under the Act, enhanced training and awareness programs should be implemented to improve transparency and understanding.These programs should focus on key aspects of the Act, recent amendments, and best practices for compliance. As the only industry association representing virtually all major public and

private sector players across the infrastructure sector, CCPPP would welcome the opportunity to work with the Government of Ontario
to support industry outreach and engagement.

Dispute Resolution Mechanisms: Enhancing dispute resolution mechanisms within the Act, such as expanding the scope and efficiency of statutory adjudication, could further promote timely and fair resolution of disputes. This could include clearer guidelines for adjudication processes and improved access to adjudicators with specific expertise in construction law. Project agreements must incorporate suitable dispute resolution processes and facilitate opportunities for collaboration between the public and private sectors to address challenges and avoid unnecessary litigation prompts – this is particularly true for P3 procurement models but applicable to all models.

Sustainability and Innovation: Provisions that encourage sustainable construction practices and innovation throughout a project's entire lifecycle (including operations and maintenance) could be beneficial. To promote sustainable development within the construction industry, incentives and the use of innovative technologies (including environmentally friendly practices) could be incorporated into the Act and would go a long way to ensuring resilient infrastructure delivery and asset management.

Consideration of Digital Processes: With the increasing digitization of construction documentation and processes, reviewing and updating the Act to accommodate electronic filings and notifications might be beneficial. This modernization would improve efficiency, reduce paperwork, and align with current industry practices.