COUNCIL OF ONTARIO
CONSTRUCTION ASSOCIATIONS

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SUBMISSION TO

The Committee of Finance and Economic Affairs

Regarding
Bill 57 Restoring Trust, Transparency and Accountability Act 2018

December 2018

INTRODUCTION

The Council of Ontario Construction Associations (COCA) is a federation of 30 construction associations which represents 10,000 general contractors and trade contractors that operate in all regions of the province in the industrial, commercial and institutional (ICI) segment of the construction industry. Our membership includes construction enterprises of all sizes and that are both unionized and non-union. COCA is the largest, most diverse and most representative voice for the non-residential construction sector in Ontario.

We applaud the government with proposing amendments in Section 8 of Bill 57 Restoring Trust, Transparency and Accountability Act, 2018 that will greatly improve our new Construction Act. However we wish to draw to the Committees' attention our concerns relating to the transition provisions where we believe there continues to be considerable room for improvement.

SUBMISSIONS

The transition provision, as slightly paraphrased for ease of reading, is worded as follows:

87.3 The old *Construction Lien Act*, as it read immediately before July 1st, 2018 continues to apply with respect to an improvement [ie. a project] if,

a. A contract for the improvement was entered into before July 1st, regardless of when any subcontract under the contract was entered into;

b. A procurement process, if any, for the improvement was commenced before July 1st by the owner of the premises; or

c. The premises is subject to a leasehold interest, and the lease was first entered into before July 1st.

1. As currently structured, the transition section (s. 87.3) establishes three different scenarios in which the previous *Construction Lien Act* ("CLA") provisions apply to an improvement. However, it is submitted that all three scenarios, as currently worded, are unclear and likely unworkable in practice. These submissions will address all three scenarios.

1) A Contract prior to July 1st

2. The difficulty with this wording is that it says "***a*** contract". The entire "improvement" (ie. the entire project[1]) is then subject to the provisions of the old CLA, if a single contract was entered into before July 1st. This creates significant uncertainty and perhaps even impossible application. Consider the following example, to illustrate the point.

[1] See *State Group Inc.* v. *Quebecor World Inc.* 2013 ONSC 2277 per Master Wiebe at paragraph 9 where he says that an "improvement" can have one "contract" or many "contracts," but what makes it an improvement is the coordination of the contract work toward a common purpose or goal.

3. It is well understood that "contract" under both the previous CLA and the new Act means a contract between the owner and the contractor. Consider, a common scenario in which the owner of property wishes to construct his/her own custom home. The owner hires directly all of the trades, such as the excavator, the foundation former, the carpenter, the roofer, the drywaller, the painter, the landscaper, etc. Each of these agreements is, of course, consider to be "a contract" under both Acts.

4. Here is an example to illustrate the difficulty. An Owner wishes to build a custom home and to act as his/her own general contractor (a common scenario). The Owner enters into a contract with the excavator on May 1, 2018 (ie. *before* July 1st). The Owner then hires the framer in August, the electrician in October and the window installer in February, 2019. The window installer doesn't get paid and in March, 2019 the installer wishes to lien the project. Which Act applies? If you focus on the window installer's contract, it is *after* July 1st so that trade might be inclined to believe that the new Act applies. However, based on the wording of the transition provisions, since "*a* contract" was entered into before July 1st (ie. the excavator), the whole project (ie. the "improvement") is subject to the old *CLA*. That would mean that the window installer is subject to the old Act, even though the window installer's contract was entered into in February 2019 (ie well after July 1st) and the construction services were provided well after July 1st.

5. Unfortunately, the wording of the transition clause suggests that every single trade on a project (or their legal counsel) will need to know when *all contracts* were entered into with the Owner in order to be able to ascertain whether the old CLA or the new Act applies. It is submitted that this is simply unrealistic and will likely create extreme uncertainty on many or most projects over the next several years.

6. And, more importantly, from a policy perspective, *why* should the trades (the window installer in the above example) have to determine the date when other trades were contracted by the Owner? Why should the transition provisions place this burden and obstacle upon the trades? Furthermore, from a practical point of view, *how* do the trades (or their lawyer) go about getting this critical information in a timely manner?

7. Broadly stated, the difficulty with this transition clause is that the determination of whether the new Act or the previous CLA applies to any particular trade is not determined by when that trade entered into a contract, but rather whether *any* trade entered into a contract prior to July 1st.

2) Procurement Process prior to July 1st

8. The difficulty with this second scenario, is that in many larger, commercial, industrial or institutional projects, there can be many different procurement processes.

9. For example, does this include the procurement of the design team (architects and consulting engineers)? Design teams can be procured years before any construction takes place.

10. If the owner engages a general contract to build a new plaza, a new condo, a new apartment building, a new warehouse, a new school or a new hospital in 2021, and that contract is entered into in 2021, and all of the construction work is done in 2021 or thereafter, why should

the main contract and all of the subcontracts thereunder be governed by the old CLA provisions simply because the owner had *commenced* the procurement process for the design team prior to July 1st, 2018?

11. From a policy perspective, is it actually intended that all of those trades providing materials and services in 2021 would lose the protections afforded under the new Act, simply because the procurement for the design team was commenced prior to July 1st, 2018?

3) Leasehold Interest prior to July 1st

12. The third scenario in the wording of the transition provision deals with leases. If there is a lease that pertains to the premises that was entered into before July 1st, 2018, then the old *CLA* applies – regardless when the construction work is performed.

13. It is respectfully submitted that this third scenario is perhaps the most problematic. Firstly, the provision does not make any distinction between residential or commercial leases. Was this intentional?

14. Secondly, and perhaps most significantly, the wording of the provision does not expressly state that the lease has to be *registered on title* to be considered. So, does that mean even unregistered leases pertaining to the premises affect whether the old CLA or new Act applies?

15. It is respectfully submitted that, at the very least, the leasehold interest must be registered on title in order to be considered. Otherwise, how do lien claimants (or their legal counsel) ascertain whether there are any *unregistered* leases affecting a property?

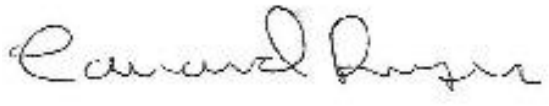
16. How will this provision work practically in a situation where you have, for example, an apartment building with 50 or 75 different rental units, and the lien claimant did work on the parking lot, or the HVAC unit on the roof? Is the trade supposed to find out when every single lease in that apartment building was entered into, just to ascertain whether the new Act or the old CLA applies?

17. Lastly, the provisions makes clear that we have to ascertain when the lease "was first entered into". However, the provision does not seem to address subsequent renewals. Many commercial leases could have an initial term of 10 or 15 years, with further renewal rights that could extend the duration of the tenancy for more than 20 or 25 years.

18. Therefore, it would appear possible (and perhaps even likely) that a trade could be working on a project 20 or more years from now (ie. in 2038) and the pre-2018 *CLA* could apply to that construction work *20 years from now*, simply because a single lease on the premises was *first entered into* back in 2017 (or earlier).

19. It is submitted that this will create mass uncertainty in the construction industry for many, many years into the future, especially if the leasehold interest that affects the property does not even need to be registered on title in order to determine that the old CLA provisions apply to the construction work being carried out in 10, 15 or 20 years from now.

These are our submissions, respectfully submitted,



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