

March 8, 2018

The Honourable Yasir Naqvi, MPP
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Sir:

Re: Proposed Regulations to the Construction Lien Act

We appreciate the opportunity to comment on the *draft* regulations to the *Construction Act*. Our comments are set out below.

Adjudication - Section 3(2) Experience to Act as An Adjudicator

We would like to see the types of experience that would qualify a person to act as an adjudicator as set out in section 3(2) 1. expanded to include people with experience as contractors and subcontractors. Different types of disputes will call for different types of expertise. In many construction disputes the key issues are not legal but factual.

1. Was the work done correctly?
2. Is the contractor entitled to an extra?
3. Is the amount being charged reasonable?

In many cases the best person to decide disputes within the expedited format of an adjudication will be a construction professional with years of experience in the industry.

Furthermore, we believe that it is helpful to include examples of the types of experience that is relevant to illustrate that the scope of relevant experience is to be interpreted broadly.

Adjudication – Powers of the Adjudicator

COCA believes that it is necessary for an adjudicator to rule on a dispute where one party fails to comply with an order of an adjudicator. Accordingly, we would support a regulation to that effect.

Adjudication – Consolidated Adjudication

COCA agrees that additional regulations pertaining to consolidated adjudications are necessary. The additional regulations ought to clarify that the adjudicator who makes the determination regarding the availability of consolidation and who adjudicates on the consolidated adjudication will be selected jointly by

all parties to the proposed consolidated adjudication or, in the absence of any agreement, appointed by the ANA.

Adjudication – Determinations

COCA has no objection to the proposed regulation regarding the delivery and correction of determinations.

Adjudication – Adjudicator Unable to Conduct Adjudication

COCA has no objection to a regulation that is to apply where an adjudicator is unable to act.

Adjudication – Adjudicators Fees Where the Adjudication is Terminated

COCA discourages giving the ANA authority to decide disputes over the payment of adjudicator fees in circumstances where an adjudication is terminated for reasons other than a settlement. If the ANA has jurisdiction to decide disputes between adjudicators and parties, then it will need to set itself up as a regulatory tribunal, complete with procedures and panel members. COCA suggests that is an inefficient form of dispute resolution for what ought to be a rare occurrence. It would be preferable if this type of dispute was resolved in Court based on whatever contract was executed as between the adjudicator and the parties.

Adjudication - Surety Bonds

COCA supports the proposal for the addition of regulations regarding the application of adjudication to surety bonds.

General – Sections 5 and 6 – Thresholds for Annual and Phased Release of Holdback

The proposed \$20,000,000 threshold for annual and phased release of holdback sparked a lively discussion among our membership. There are competing considerations at play.

On the one hand, the holdback scheme is a form of insurance against the potential insolvency of a project. The historic rationale for releasing the holdback upon the substantial completion of the general contract is that a project was unlikely to fail once the building in question was ready for use and the cost of completion was minimal. COCA has supported annual or phased release of holdback on the premise that the thresholds would be high enough that they would only apply to very large projects where the likelihood of insolvency was presumably lower. We are concerned that the \$20,000,000 threshold may be too low to exclude projects with a real risk of financial failure.

On the other hand, we are mindful of the financial burden that that mandatory payment of holdback will place upon general contractors who must finance the holdback of their subcontractors. The general contractors among our membership, in addition to some trades who tend to be on the job from beginning

to end, would prefer to have phased and annual release of holdbacks made available on smaller contract amounts.

To acknowledge those voices within our membership who advocated for a lower threshold, we recommend that the threshold be reduced from \$20,000,000 to \$15,000,000 for annual or phased release of holdback. Furthermore, we would like to see the regulations include some definition of "phase". The definition of "phase" should not be left entirely up to the parties to the general contract.

General – Section 7 – Non-Payment of Holdback

Sections 27.1(2) and (3) of the *Act* require a contractor and subcontractor to give notice to the parties below them in the construction pyramid if payment of the holdback will not be forthcoming. Neither section 27.1 nor draft regulation 7 set out a deadline for notice to be given. If the timelines in Part 1.1 are intended to apply, they should be cross-referenced in the regulation. If not, some other timeline should be specified in the regulations.

Form 1.1 – Notice of Non-Payment Under Subsection 6.4(2) (ie. Owner to Contractor)

We find the part of the form "Name of the person to whom the persons having a lien supplied services or materials" somewhat confusing. We recognize the language as being the same as Form 12, Claim for Lien. However, we are uncertain why it is included in Form 1.1. If the notice is being served by an owner to the contractor, would it not always be the owner to whom the contractor supplied services and materials?

Form 1.4 – Notice of Non-Payment Under Subsection 6.6(6) (i.e. Subcontractor to Subcontractor)

This form includes an undertaking on behalf of the subcontractor who is withholding payment to refer the dispute to adjudication within 21 days. However, a subcontractor is not required to give such an undertaking where the failure of the contractor to make payment is as a result of non-payment by the owner in accordance with section 6.6(6)(a)(iii). The form needs to be modified so that the undertaking is only given when it is required.

Yours truly,

COUNCIL OF ONTARIO CONSTRUCTION ASSOCIATIONS

Per:



Ian Cunningham
President