COUNCIL OF ONTARIO
CONSTRUCTION ASSOCIATIONS

A Punchlist for Ontario's *Construction Lien Act*:

Submissions of the Council of Ontario Construction Associations

to Bruce Reynolds and Sharon Vogel

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1. The Council of Ontario Construction Associations ("COCA")

COCA is a federation of 28 construction associations representing approximately 10,000 general and trade contractors that perform work in the industrial, commercial, and institutional (ICI) and heavy civil construction sectors in all regions of Ontario. Established in 1975, COCA is mandated to serve as the voice of the ICI and heavy civil construction sectors at Queen's Park. We work with our members and officials at Queen's Park to develop public policy alternatives and solutions that support success in the industry and serve Ontarians effectively. COCA is the largest, most diverse, and most representative voice for the non-residential construction sector in the Province.

2. Executive Summary

Construction is a primary driver of the economy, providing for the employment of more than 434,000 Ontarians (6.4% of Ontario's workforce).[1] As it important as it is, the industry struggles to be profitable. According to Industry Canada Statistics, 21% of small and medium sized businesses in Canada in the non-residential building construction industry were unprofitable in 2013.[2] The financial pressure facing the industry is both an indirect measure and cause of other problems, such as reduced employment, reduced investment in equipment and training, lower productivity, insolvency and disruption of construction projects.

Prompt payment is COCA's overwhelming priority for reform. The biggest problem with the construction industry is the routine disruptions in cash flow. Lien and trust claims are too cumbersome to address routine problems with cash flow. The government of Ontario should enact the substance of Bill 69, *Prompt Payment Act, 2014* [3] whether it be an amendment to the *Construction Lien Act* (the "*Act*") or stand-alone legislation. While COCA will defer to Prompt Payment Ontario as the primary advocate for prompt payment, these submissions do promote the following reforms to improve cash flow:

(a) Sections 25 and 33 of the *Act* should be amended to make the early release of the holdback mandatory at the request of the subcontractor. For those subcontracts that are not certified substantially complete, a subcontractor's lien rights should not expire until the lien rights of the general contractor expire.

(b) 'Pay if paid' clauses should be prohibited and the use of 'pay when paid' clauses should be regulated.

(c) Financial disclosure by owners should be compulsory.

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[1] Prompt Payment Ontario, online: Prompt Payment Ontario <http://ontariopromptpayment.com>.

[2] Industry Canada Statistics, *Non-residential building Construction (NAICS 2362): Financial Performance Data*, online: Industry Canada <http://www.opic.ic.gc.ca>.

[3] Bill 69, *An Act respecting payments made under contracts and subcontracts in the construction industry*, 2nd Sess, 40th Leg, Ontario 2013 [*Prompt Payment Act, 2014*].

(d) Mandatory interim adjudication should be mandatory for all contracts except consumer contracts.

In spite of the priority accorded by COCA to prompt payment, the main focus of our submissions is on the reform of lien clams and trust claims.

Lien rights and trust rights are necessary remedies to secure payment for contractors and subcontractors. COCA is a strong supporter of the overall scheme and objectives of the *Act*. However, the *Act* needs to be reformed. In spite of its merits, the *Act* often fails to achieve its intended purposes. The perception of COCA members is that the *Act* is not as effective as it could and should be in securing payment for suppliers in the construction industry. Set out below is a summary of COCA's views on the reform of the *Act.*

First, the *Act* needs to do a better job deterring obstruction and delay in litigation. A common strategy in construction litigation is for defendants to raise meritless defences and obstruct the discovery process all for the purpose of making litigation uneconomical for creditors. This can be an effective strategy, particularly in trust claims where a plaintiff does not know whether the defendants have sufficient assets to pay any judgment against them. The *Act* needs to tip the scales in favour of creditors. COCA suggests the following measures:

(a) Have interest accrue upon the holdback.

(b) Compel trustees to maintain a current record of receipts and expenditures of trust funds.

(c) Amend section 39 to compel trustees to produce a record of receipts and expenditures of trust funds.

(d) Compel trustees to preserve records pertaining to trust funds.

(e) Permit the joinder of lien claims and trust claims.

(f) Require particulars of any claim for set-off.

(g) Make oral and documentary discovery mandatory for lien claims.

(h) Make discovery plans optional in lien claims and trust claims.

(i) Make production of specified records mandatory in trust actions.

(j) Empower the Court to make orders where a defendant obstructs or delays discovery or the litigation:

    (i) compelling a defendant to post security for costs; and

    (ii) compelling a defendant to a trust claim (or the officers and directors of a corporate defendant) to submit to an examination-in-aid of execution before judgment.

(k) Shift the burden of proof for section 13 of the *Act* upon officers and directors.

(l) Remove or extend the limitation period for fraudulent conveyance.

Second, the *Act* needs to do a better job allocating the risk of insolvency. The insolvency risk of the owner should be shifted more to mortgagees, and particularly building mortgagees. The bargaining strength of mortgagees *vis-à-vis* an owner will enable them to obtain alternate security from owners to compensate them for any additional risks which they may run as a result of their reduced priority. The *Act* should be amended to do the following:

(a) Amend section 78(2) to give priority to lien claimants over the notice holdback.

(b) Give the Court an express power to marshall prior mortgages or interests in the property.

On a public sector project, the insolvency risk of the general contractor should fall upon the public. Labour and material bonds should be made mandatory on public sector projects.

Third, as important as these major reforms are, the objectives of the *Act* are often frustrated by an accumulation of minor failures. The enforcement of lien claims and trust claims needs to be reformed by adopting procedures that advance the objectives of the *Act* and remove or modify procedures that tend to defeat those objectives. The COCA is of the view that the Experts should recommend the following measures:

(a) Update the criteria for substantial completion.

(b) Permit the release of holdback upon the completion of project phases.

(a) Simplify the procedure for liening the common elements of a condominium.

(b) Amend section 19(1) to simplify the procedure for serving Form 2 upon a landlord.

(c) Allow a claim for equitable *quantum meruit* to support a claim for lien.

(d) Codify and clarify the existing law regarding the extent to which damages for delay may support a claim for lien.

(e) Amend subsections 31(2), 31(3), and 36(2) to provide that the time to preserve or perfect shall be extended for the duration of any stay of proceedings that prevents the preservation or perfection of a claim for lien.

(f) Extend the deadline for perfecting liens to 90 days from the trigger date.

(g) Amend section 39 to require an owner to disclose the name of a tenant.

(h) Restore the curative powers pursuant to section 6 to bring them in line with other Canadian jurisdictions.

(i) Give the Court an express power to amend a lien.

(j) Eliminate the two year limitation period pursuant to section 37.

(k) The *Act* should impose a trust upon any tenant's improvement allowance.

(l) Require all trust funds to be deposited into a trust account.

(m) For contracts having a value of $5,000,000 or less, require that contractors maintain and use a mixed trust account.

(n) For contracts having a value greater than $5,000,000, require contractors to use a separate trust account.

(o) Amend section 78 to permit a mortgagee to advance funds to be posted as security without losing priority to registered liens.

(p) Codify the existing law that no one gets access to security for costs beyond the amount posted for that purpose.

Finally, in spite of the foregoing, COCA is not suggesting that we tear the *Act* down to its foundations and start building again from scratch. While reform is absolutely necessary, the core concepts and procedures of the *Act* have merit and ought to be preserved. The *Act* and its procedures are familiar and that familiarity helps parties assert their rights, assess their risk, and compromise as necessary. In the absence of a compelling reason, the default outcome should be to leave the *Act* unchanged. With respect to various issues raised in the Information Package, COCA takes the following positions:

(a) Provided prompt payment is enacted, the 45 day deadline for preserving a claim for lien should be preserved.

(b) The prohibition on the waiver of lien rights should be preserved.

(c) The amount of the basic holdback should remain 10%.

(d) The finishing holdback should be preserved.

(e) The procedure for giving written notice of lien should be preserved.

(f) The existing measures to deter the abuse of lien rights are adequate.

(g) Mandatory mediation is not necessary provided binding interim adjudication is implemented.

COCA's submission are organized according to the same outline used in the Information Package circulated in July 2015.

3. Lienability

Liening for Interest/Interest on the Holdback

Section 14 of the *Act* prohibits any claim for interest to be included in the amount of the lien. However, a lien claimant can recover interest from a defaulting payer in a contractual claim against a defaulting payer.

The objectives of the *Act* are often frustrated in small ways and this is one of them.

By deferring payments that would otherwise be payable to the contractor, the holdback confers a benefit upon the owner either in the form of interest that is gained or a financing cost that is avoided. The benefit to the owner comes at the expense of lien claimants as the value of their liens gradually erode over time.

The Ministry of the Attorney General considered it necessary for interest to accrue on the holdback. Section 24 of the Draft Construction Lien Act required the holdback to be held in an interest bearing trust account:

> It is also unfair that no interest is paid on the money withheld at the present. In many cases, what is intended as a security scheme has turned into an interest-free loan to the owner.
>
> The holdback does not belong to the owner, but rather, belongs to those who have contributed services and materials to the improvement. Its purpose is to provide security to subcontractors and labourers, not to assist the owner in the financing of his endeavors.[4]

In its report, the Committee on the Draft Construction Lien Act (the "Committee") expressed the view that a claim for interest should not be included in a claim for lien because interest does not represent an improvement of the premises.[5] COCA is of the view that the Ministry of the Attorney General was on the right side of that debate.

Interest should accrue upon the holdback at the rate prescribed by the *Courts of Justice Act* for post-judgment interest and cannot be determined by a contractual rate of interest. On the one hand, a subcontractor lien claimant should not lose its right to interest where the contract fails to include a right of interest on overdue payments. On the other hand, through no fault of its own, an owner may be required to hold the holdback for an extended period of time before a dispute

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[4] Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, 1980) at 53.

[5] Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, Appendix A to Duncan W Glaholt & David Keeshan, *The 2005 Annotated Ontario Construction Lien Act*, (Toronto: Carswell, 2005) at 599.

between a contractor and a subcontractor is resolved. Interest should not accumulate upon the holdback at an excessive rate of interest in such circumstances.

The *Act* should be amended to provide that interest accumulates upon the holdback in accordance with the rate prescribed pursuant to the *Courts of Justice Act* for post-judgment interest once all liens that may be claimed against that holdback have expired as provided in Part V.[6]

Damages for Delay

COCA is of the view the *Act* should be amended to codify the existing state of the law regarding the lienability of damages for delay without altering the substance of the law.

Allowing delay claims generally to support lien claims would upset the balance achieved by the *Act*. Furthermore, allowing liens for delay claims would likely increase the potential for lien rights to be abused. Quantifying the value of labour and materials supplied to an improvement can be done with reasonable precision at the time that a claim for lien is filed. Accurately quantifying damages for delay at the time that a lien is preserved is a difficult if not impossible task. For example, assessing the value of unabsorbed office overhead may only be possible with the benefit of expert evidence which is not likely to be available before a lien must be preserved.

The *Act* should be amended to provide that damages for delay cannot be included in a claim for lien except to the extent that the damages reflect the increased cost of materials and services that were supplied to the improvement.

Quantum Meruit

The *Act* should be amended to create lien rights for the value of materials and services supplied to an improvement even in the absence of a contract.

Some cases have held that a claims for lien could not be supported by a claim of restitutionary *quantum meruit*, as opposed to contractual *quantum meruit*.[7] Others have permitted such claims.[8]

Allowing lien claims to be supported by claims for restitutionary *quantum meruit* advances the remedial purpose of the *Act* of ensuring that those who supply materials and labour to an improvement are properly compensated.

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[6] The language of the proposed amendment reflects the language of section 26 of the current *Act.*

[7] See e.g. *Torty* v *Gilina*, 2006 CanLII 29666 (Ont SCJ).

[8] See e.g. *Androus v Bedford Residences Inc*, 2011 ONSC 2453 (available on CanLII); *Goulimis Construction Ltd. v Jason Smith, Eva Klein and Bank of Montreal*, 2014 ONSC 1239 (available on CanLII).

4. Holdback and Substantial Performance

The Release of Holdback Upon The Completion Of Project Phases

COCA supports the proposal in the Information Package to permit the release of holdback upon the completion of project phases. In our view the proposal appears to accomplish the objective of accelerating payment for work done in the early stages of the project without substantially compromising the protection available to trades working at the end of the project.

The Criteria for Substantial Performance

The *Act* should be amended to modernize the criteria for substantial performance. COCA members complain that projects are not being certified as being substantially performed even though the projects are being put to their intended use. A contributing cause of the problem appears to be the criteria for substantial performance have become dated. The criteria for substantial performance were established in 1983. One dollar in 1983 is worth about 50 cents today. The definition of substantial performance should be updated to reflect inflation since 1983. Furthermore, the definition of substantial performance should be shifted to the regulations so that it can be updated more often in the future.

Trust Accounts for the Holdback

The *Act* should be amended to require the owner to deposit the holdback into a trust account.

The idea of trust accounts for holdbacks is not new. In fact, in its Discussion Paper on the Draft Construction Lien Act the Ministry of the Attorney General provided that holdbacks would be paid into a joint trust account. Section 24(1) of the *draft Act* provided as follows:

> 24(1) Where the contract price or estimated price of services or materials to be supplied under a contract is $150,000 or more, the owner shall pay the holdback required to be retained by subsection 1 of section 23 into a joint trust account.

However, the Committee advised the government against requiring the holdback to be deposited into a trust account. The Committee recommended as follows:

> The Committee decided that the system set out in section 24 was too rigid to serve as the method for providing security. This decision was reached after considering the many briefs received from the public in response to the Discussion Paper. These briefs raised many possible problems with respect to the administration of a joint trust account, the calculation of interest, and the equitable distribution of the proceeds. Therefore, the Committee recommends that section 24 as proposed in the Discussion Draft be deleted.

> Various types of holdback security schemes, such as joint trust accounts, bonding, letters of credit, and an industry financed insurance fund were evaluated by the Committee and found to be inadequate. Each of these systems would add significant costs to construction which would not be proportionate to the risks of default in retaining the holdback. However, the Committee was of the opinion that there was a definite need for security for the holdback. Due to the current rates of interest on mortgages, an owner's equity in the property can quickly disappear when a mortgage falls into arrears, leaving little to satisfy lien claims. It was agreed that a system providing for the security of lien claims over building mortgages to the extent of the holdback would be the most effective, efficient and fair method of securing the holdback.

Therefore, the Committee recommended against having the holdback being deposited by the Owner into a separate bank account.

COCA submits that requiring the owner to deposit the holdback into a trust account is an idea whose time has come. On the one hand, with the advent of electronic banking, the administration of a separate bank account for the holdback has become easier. On the other hand, the proposal would address a flaw in the current system. Currently, the only security for the holdback is the land itself. If and when the owner becomes insolvent, lien claimants typically have to wait for the land to be sold in order to be paid their holdback from the proceeds of sale. The resulting delay is unnecessarily prejudicial to the interests of lien claimants. Giving lien claimants priority over the building mortgagee to the extent of the basic holdback does not go far enough to protect their interests.

> <u>Certification of Subcontracts at the Option of Subcontractors and the Extension of Subcontractors' Lien Rights.</u>

Sections 25 and 33 of the *Act* should be amended to make the early release of the holdback mandatory at the request of the subcontractor. Where a subcontract is not certified as complete, a subcontractor's lien rights should subsist until the lien rights of the general contractor expire.

In its Discussion Paper on the *Draft Construction Lien Act* the Ministry of the Attorney General intended to make the certification of subcontracts mandatory. In its comments concerning section 34 of the *Draft Construction Lien Act*, the Ministry said that it wanted to avoid long delays in the payment of holdbacks to trades:

> The section is intended to permit holdback funds retained in respect of subcontracts to be released after the time has expired for the preservation of liens arising under that subcontract. This is reasonable, in view of the fact that on

> major projects some subcontracts may be completed years before the substantial performance of the contract.[9]

Unfortunately, the Committee recommended against the mandatory certification of subcontracts on the basis that a mandatory scheme of certificate would be an extremely expensive burden for the industry to bear.[10]

The scheme put in place by the *Act* contemplated that subcontractors would be paid their holdback following the expiration of their lien rights. However, the current industry practice puts the burden of financing the holdback upon subcontractors. Most subcontracts – including the CCA1 – 2008 Stipulated Price Subcontract – delay payment of holdbacks to subcontractors until the prime contract is substantially complete. The resulting delays in the payment of holdbacks by contractors to subcontractors places a significant burden upon subcontractors, particularly those who are involved in the early stages of the project. We believe that this financial burden contributes significantly to the incidence of insolvency among subcontractors.

Owners should bear the burden of financing a project. Making the early release of holdback pursuant to sections 25 and 33 of the *Act* mandatory at the request of the subcontractor would achieve that goal without putting owners in jeopardy of paying the holdback twice. We submit that any administrative inconvenience involved in obtaining early release of holdback would be more than offset by the improvement of the financial stability of subcontractors.

Furthermore, if a subcontract is not certified as complete pursuant to sections 25 and 33 of the *Act*, then the subcontractor's lien rights should continue to subsist until the lien rights of the general contractor expire.

Amount of the Basic Holdback

The amount of the basic holdback should remain 10%. Reducing the amount of the basic holdback would reduce the amount of protection available to lien claimants. Furthermore, a basic holdback of 10% is simpler to calculate than a holdback of 5%.

Finishing Holdback

The finishing holdback should be preserved in its current form. The finishing trades need the protection of the *Construction Lien Act*. Providing meaningful protection for the finishing trades requires owners to maintain a holdback from contractors. If the definition of substantial performance is modernized as COCA has recommended, then the value and importance of the finishing holdback will increase accordingly.

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[9] Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, 1980) at 63.

[10] Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, Appendix A to Duncan W Glaholt & David Keeshan, *The 2015 Annotated Ontario Construction Lien Act*, (Toronto: Carswell, 2005) at 599.

5. Preservation, Perfection and Expiry of Liens

The Preservation of Liens

Provided prompt payment is enacted, the 45 day deadline for preserving a claim for lien should be preserved.

In the current environment, the 45 day period for preserving liens contributes to unnecessary litigation. The terms of payment often exceed 45 days. This puts potential lien claimants in a difficult situation: They are often required to decide whether to allow their lien rights to expire before their last progress draw becomes due and payable. Even where they have a good relationship with the payor, many potential lien claimants feel they have no choice but to exercise their lien rights.

The solution, however, is not to extend the 45 day lien period but to implement robust prompt payment legislation. Extending the timeline for the preservation of liens will delay the release of the basic holdback in most cases and defeat the goal of prompt payment.

Simply the Process for Liening the Leasehold Interest

Amend section 19(1) to simplify the requirements for serving Form 2 upon a landlord.

If a contractor provides written notice of the improvement before the work is done pursuant to subsection 19(1) of the *Act* then it may be possible to lien the interest of the landlord. However, the procedure for giving written notice pursuant to subsection 19(1) is flawed. Only a contractor can serve written notice pursuant to subsection 19(1). Any party should be able to serve a notice pursuant to subsection 19(1) provided however that any reply given by the landlord to any such notice ought to prevent any lien upon the leasehold arising from the improvement. Furthermore, under the current *Act* the notice must be served upon the landlord before the commencement of work. It is often difficult if not impossible for a general contractor to serve notice upon a landlord before starting work.

Two amendments are needed to section 19(1). First, it should be amended to permit any party to serve Form 2 upon the landlord. Second, is should be amended to allow Form 2 to be given to the landlord at any time until the completion of the contract.

Liening the Common Elements of a Condominium Corporation

The process for liening the common elements of a condominium corporation needs to be simplified.

Pursuant to section 11 of the *Condominium Act* the owners of the individual condominium units are tenants in common of the common elements with an undivided interest in the common elements appurtenant to each owner's unit.[11] In order to enforce a claim for lien for work done

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[11] *Condominium Act, 1998*, SO 1998, c 19, s 11 [*Condominium Act*].

on the common elements of a corporation, a lien claimant must preserve and perfect a claim for lien against each unit in the condominium. At best, the process is inefficient. For small liens, it is often uneconomic to pursue a claim for lien against the common elements of a condominium corporation for this reason.

COCA suggests that that amendments be made to the *Condominium Act* and the *Construction Lien Act* to simplify the process. The *Condominium Act* should be amended to create a common elements PIN in the name of the condominium corporation. The common elements PIN would not alter the status of the unit holders as the owners of the common elements. It would simply be an administrative vehicle for registering instruments against title to the common elements. The *Construction Lien Act* would also be amended to provide that a lien claimant shall enforce a claim for lien against a condominium corporation by preserving and perfecting its claim for lien against the common elements PIN. The interests of the condominium unit owners would be subject to the lien as if the lien had been registered against title to each individual unit. Furthermore, section 44 would also need to be amended to create a process to vacate lien claims from individual units upon the payment of their proportionate share into Court.

Preventing the Abuse of Lien Rights

COCA opposes additional measures to prevent the abuse of lien rights.

The *Act* already has measures to deter the abuse of lien rights. Section 35 of the *Act* imposes liability upon anyone who registers an invalid lien or liens for a grossly excessive amount. Section 40 permits any party to cross-examine a lien claimant on a claim for lien. Section 86 of the *Act* gives the Court the power to make an order to pay costs against anyone who registers an invalid lien or liens for a grossly excessive amount.

Furthermore, the *Act* includes remedies for a party to mitigate the impact of an invalid or exaggerated claim for lien. Subsection 44(2) allows a party to clear an exaggerated lien from title upon the posting of a "reasonable" amount of security into Court. Section 47 gives a party the opportunity to have an obviously invalid lien struck out on a summary basis.

COCA does not perceive that abuse of lien rights is a frequent occurrence. Although perhaps an imperfect measure of how often lien rights are abused, we note that the Annotated *Construction Lien Act* only refers four or five cases since 2000 where a Court has awarded damages pursuant to section 35 relating to invalid or exaggerated liens.[12]

The proposal in the Information Package to require lawyers to certify the quantum and validity of a claim for lien will likely increase the cost of enforcing valid lien claims without meaningfully reducing the incidence of exaggerated or invalid lien claims.

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[12] Duncan W Glaholt & David Keeshan, *The 2015 Annotated Ontario Construction Lien Act*, (Toronto: Carswell, 2015) at 262-69.

Extend the Deadline for Perfection

The deadline for perfecting a claim for lien should be extended to 90 days from the trigger date. There are compelling reasons to do so. On the one hand, the cost of a claim for lien typically start to ramp up as the deadline for preserving a claim for lien approaches. On the other hand, the period of time between preservation and perfection is one of the best opportunities to settle the claim for lien. Extending the deadline for perfection from 45 to 90 days would maximize the potential for an early resolution of lien claims.

Section 37 of the Act

Section 37 should either be repealed or reformed. First, the underlying assumption of section 37 that a lien action that has not been set down for trial after two years has been abandoned is usually incorrect. The limitation period contained in section 37 is perhaps a minor concern in jurisdictions where lien actions are typically heard on a reference to a Master. In other jurisdictions, the expectation that a lien action will be ready to set down for trial by the second anniversary of the action is unrealistic in most cases. The two year limitation period also comes into play where a lien action is stayed during a bankruptcy or insolvency. Second, the result of having a lien claim expire is unnecessarily harsh. If the legislature has an ongoing concern about abandoned liens cluttering title, then it should implement mandatory status hearings for actions that are not set down for trial more than two years after the action was issued.[13]

Requests for Information

Section 39 of the *Act* needs to be amended:

(a) to compel an owner to disclose to a lien claimant the name of any tenant of the property;

(b) To compel an owner to disclose any amount paid to a tenant pursuant to a leasehold improvement allowance; and

(c) To compel a trustee to produce a current record of receipts and disbursement of trust funds.

Written Notice of Liens

COCA is of the view the procedure for giving written notice of lien should be preserved. The notice holdback pursuant to section 24 of the *Act* is an important part of the protection provided by the *Act* for lien claimants. The concerns raised by lenders concerning written notice of liens may be addressed through an amendment to the *Act* that simplifies and clarifies the procedure for withdrawing a written notice of lien.

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[13] Rule 48.14 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 requires status hearings for lawsuits that are not set down for trial more than five years after the action was issued.

6. Prompt Payment or Timely Payments for Construction Work

COCA defers to Prompt Payment Ontario as the primary advocate for prompt payment remedies. COCA is limiting its submissions with respect to cash flow to the following topics: mandatory early release of holdback, contingent payment clauses, financial disclosure, and binding interim adjudication. Our submissions regarding contingent payment clauses are set out below. The other topics are addressed elsewhere in these submissions.

Pay if Paid and Pay When Paid Clauses

Prohibiting 'Pay if Paid' clauses and regulating the use of 'Pay When Paid' clauses must be a top priority for reform.

Both "Pay if Paid" and "Pay When Paid" are problematic in theory and in practice. First, contingent payment clauses shift the risk of the owner's insolvency from the general contractor to subcontractors. This is counterintuitive because subcontractors typically have less information than the general contractor concerning the ability of the owner to pay and are not in a position to bargain for it. Second, contingent payment clauses are counterintuitive because they shift the risk of insolvency to a party that has no privity of contract with the defaulting payer. Furthermore, contingent payment clauses are subject to abuse. A payor may justify a payment delay on the grounds that it has not received payment, when payment, in fact, has been received.

'Pay if Paid' clauses should be prohibited. 'Pay when paid' clauses should only be enforceable where the defaulting payer has taken steps to enforce its contract against the party above it in the construction pyramid. COCA submits that section of Bill 69 strikes the right balance with respect to the regulation of Pay when Paid clauses.

A primary goal of the *Act* was to protect those who were least able to spread risks and to absorb the losses resulting from a default in payment. Prohibiting "Pay if Paid" clause and regulating the use of "Pay When Paid" advances the fundamental objectives of the *Construction Lien Act*.

7. Proof of Financing

COCA supports mandatory financial closure as set out in section 14 of Bill 69, *Prompt Payment Act, 2014*.

An ounce of prevention is worth a pound a cure. Giving contractors and subcontractors a statutory right to financial disclosure is among the most urgently needed reforms. One of the purposes of the *Act* is to facilitate the extension of credit by contractors and subcontractors to owners. Perhaps the best way to achieve that goal of the *Act* is to make financial disclosure mandatory and allow contractors and subcontractors to make informed decisions about extending credit.

Voluntary financial disclosure is inadequate. The CCDC 2 Standard Form Stipulated Price Contract already includes a term compelling owners to disclose financial information to contractors. Invariably, owners insist that the term is deleted. Contractors typically do not have sufficient bargaining power to insist that the term remain part of the general contract.

The *Act* should be reformed to redress the imbalance of power between owners, contractors, and subcontractors and to implement mandatory financial disclosure as contemplated in 14 of Bill 69, *Prompt Payment Act*, 2014.

8. Trust Provisions

Leasehold Improvement Allowances

Section 7 of the *Act* ought to be amended to impose a trust upon any leasehold improvement allowance paid by the landlord to the tenant. A tenant improvement allowance is the amount a landlord is willing to spend so that the tenant can retrofit or renovate the space that is being leased. Since a tenant improvement allowance is intended to be applied toward the cost of construction it is arguably already impressed with a trust pursuant to the current wording of section 7(1) of the *Act.* However, COCA submits that section 7 should be amended to expressly impose a trust upon any leasehold improvement allowance.

Particulars of Set-Off Claims

Section 12 of the *Act* ought to be amended to compel anyone exercising a claim for set-off arising from deficiencies or delay in a trust action to provide full particulars in their Statement of Defence. The intent of this amendment is not to discourage parties from exercising genuine claims for set-off but to discourage the practice of raising a vague set-off defence purely for the purpose of delaying the proceeding.

Shifting the Onus Onto Officers and Directors

Section 13 of the *Act* ought to be amended to put the onus upon an officer or director to prove that they are not liable for a breach of trust by the corporation. [14] Directors and officers are insiders who have better information concerning the finances of the corporation than trust beneficiaries. Directors and officers are in a better position than trust beneficiaries to discharge the burden of proof. Furthermore, putting the burden of proof upon trust beneficiaries encourages defendants in trust actions to avoid or delay making full disclosure during the discovery process.

Mandatory Trust Accounts

The *Act* should be amended to require trust funds to be deposited into a trust account. Trust funds that are deposited to conventional bank accounts are exposed to claims by other creditors of the trustee, such as the Canada Revenue Agency[15] or the bank itself [16]. Depending on the size

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[14] *Belmont Concrete Finishing Co. Limited* v. *Marshall*, 2012 ONCA 585 stands for the proposition that burden of proof pursuant to section 13 of the *Act* is on the Plaintiff.

[15] See, for example, *Varco Pruden Buildings* v. *Thom Win Construction Ltd.*, 2013 ONSC 1190

of the contract, the trust account to which funds are deposited should be a mixed trust account or a segregated trust account. There are competing considerations with respect to the issue of separate bank accounts for each contract. One the one hand, requiring separate bank accounts for each contract or subcontract is simply too burdensome. On the other hand, several cases have commented on the likelihood that the trust will be breached where trust funds are commingled with other funds.[17] Furthermore, segregating trust funds improves the likelihood that trust funds will be paid to trust beneficiaries in the event the trustee becomes insolvent.[18] In our view, requiring mixed trust accounts for contracts under $5,000,000 and separate trust accounts for contracts in excess of that amount strikes the right balance.

Mandatory Record Keeping and Preservation for Trustees

The *Act* should be amended to compel trustees to maintain a current record of receipts and disbursement of trust funds in a spreadsheet format. Furthermore, section 39 should be amended to require the production of the trust accounting to any trust beneficiary upon request. Failure to maintain a record of trust funds should give rise to a presumption that the trust in question has been breached. The purpose of the proposed amendments is to deter obstruction and delay in trust claims. This obligation is not unreasonable. Most contractors and subcontractors already maintain a summary of costs and expenses for each job. Furthermore, a similar obligation is imposed under section 10 of the Manitoba *Builders' Lien Act*.[19]

Furthermore, the *Act* should be amended to require a trustee to preserve records relating to payments discharging of the trust pursuant to section 10 of the *Act*. This is another measure that is necessary to prevent delay and obstruction in trust claims.

Mandatory Production of Documents in Trust Claims

The *Act* should be amended to compel a trustee under the *Act* to produce as part of its Affidavit of Documents:

(a) unredacted copies of bank statements for any bank account to which trust funds were deposited or transferred;

(b) the current record of receipts and disbursement of trust funds in a spreadsheet format; and

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[16] See, for example, *Clarkson Co.* v. *Canadian Bank of Commerce*, [1966] S.C.R. 513 where the contractor's bank applied trust funds to reduce the contractor's overdraft without the knowledge of the contractor.

[17] See Duncan Glaholt, *Conduct of a Trust Action* (Toronto: Carswell, 2011) at 45-47 for a summary of the applicable law.

[18] *Royal Bank of Canada* v. *Atlas Block Co. Limited* 2014 ONSC 3062

[19] *Builders' Liens Act*, *supra* note, s 10.

(c) records relating to payments discharging of the trust pursuant to section 10 of the Act;

The purpose of the proposed amendments is to deter obstruction and delay in trust claims.

Give the Court Powers to Deter Obstruction and Delay

The *Act* should be amended to empower the Court to make orders where a defendant in a trust action obstructs or delays discovery or the litigation:

(a) compelling any defendant to post security for costs; and

(b) compelling any defendant to a trust claim (or any officer or director of a corporate defendant) to submit to examination-in-aid of execution before judgment.

The reason why delay and obstruction in trust claims is a tempting strategy for defendants is that it plays upon the uncertainty of the plaintiff that it can recover its ever increasing costs from the defendant. The proposed powers would help deter a defendant with a meritless defence from obstructing or delaying the litigation.

Amend the Limitation Period for Fraudulent Conveyance

The *Limitations Act, 2002* should be amended to remove or extend the limitation period for fraudulent conveyance.[20] The basic limitation period in Ontario is two years from the date that a claimant first knew or ought to have known of a claim. The limitation period for a claim for a fraudulent conveyance is presumed to expire two years from the date of the alleged conveyance.[21] There are cases in Ontario where the limitation period for a claim for fraudulent conveyance expired before the creditor obtained judgment against the principal debtor.[22] Where a trustee under the *Act* has breached the trust provisions, or a person is liable for such breach pursuant to section 13 of the *Act*, there is a strong temptation to transfer assets to defeat creditors. The *Limitations Act, 2002* should be amended to delay the running of the limitation period for a fraudulent conveyance action until the plaintiff obtains judgment in the underlying action.

9. Interrelationship between the Act and Insolvency Legislation

Insolvency proceedings typically involve a stay of proceedings that prohibits a lien claimant from taking steps to preserve and perfect a claim for lien. Sections 31 and 36 of the *Act* should be amended to extend the 45 day periods set out in subsections 31(2), 31(3), and 36(2) for the

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[20] *Limitations Act, 2002*, SO 2002, c 24, Sch B.

[21] *Ibid*, s 5(2).

[22] See *Toronto Standard Condominium Corporation No 1703 v I King West Inc*, 2010 ONSC 2129, Sachs J; See also John J Chapman & Maanit Zemel, "More (Unanswered) Questions on the New Limitations Act 2002" (2009), The Advocate's Quarterly 499 at 502-05.

duration of any stay of proceedings that prevents the preservation or perfection of the claim for lien plus an additional five working days.

While COCA is concerned about the impact of the *Companies Creditor's Arrangement Act* on lien rights in Ontario, our view is that any remedial action must come from the federal government.

10. Priorities

Building Mortgagees

Subsection 78(2) of the *Act* should be amended to give lien claimants priority over building mortgagees where there is a deficiency in the "notice holdback" pursuant to subsection 24(2) of the *Act*.

As it is currently interpreted, a building mortgagee has priority over lien claimants with respect to the notice holdback. In the 2013 decision of *Basic Drywall Inc v 1539304 Ontario Inc* the Divisional Court held that a building mortgagee has priority over lien claimants for all except the basic holdback.[23] Thomas Heintzman, O.C., Q.C. has suggested that *Basic Drywall* was wrongly decided:

> Sub-section 78(2) does not explicitly establish any rights in the building mortgagee. It creates rights for lienholders that do not exist against other mortgagees. Interpreting the sub-section as the Divisional Court has done creates better rights for building mortgagees than other mortgagees, limiting their maximum exposure to the statutory holdback when, at least on its face, the subsection sets a minimum exposure to the statutory holdback (presumably so that building mortgagees will ensure that owners maintain that holdback). Is the inference of rights in favour of the mortgagee reasonable in those circumstances?[24]

COCA submits that the outcome in *Basic Drywall* defeats the objectives of the *Act.* The Committee intended to transfer the risk of insolvency from lien claimants to the mortgagees because mortgagees were a class of creditor best equipped to spread, avoid, and compensate themselves for those losses:

> Earlier in our report, the Committee advanced the proposition that the Act should primarily protect those who

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[23] Cite *Basic Drywall Inc v 1539304 Ontario Inc*, 2012 ONSC 6391 (Div Ct) (available on CanLII) [*Basic Drywall*].

[24] Thomas G Heintzman, QC, *What Is The Priority Between Building Mortgages And Construction Liens In Respect Of Holdback Amounts Greater Than The Statutory Holdback?* (2013), online: ConstructionLawCanada.com <http://www.constructionlawcanada.com>.

> were least able to spread risks and to absorb the losses resulting from a default in payment. Our proposal in respect to the restructuring of priorities between mortgagees and lien claimants follows this theme. Mortgagees are usually better able to spread the risk of a default than are the suppliers to an improvement. The bargaining strength of mortgagees vis-à-vis an owner will enable then to obtain alternate security from owners to compensate them for any additional risks which they may run as a result of their reduced priority. To the extent that no such security is available, the additional risk to mortgages may be compensated for in an increased rate of mortgagees, but this increase in cost will likely reflect accurately the cost which the risk of an owner's insolvency imposes upon the industry. It is not unreasonable to transfer the cost of insolvency back to owners, since they are the sources of the risk. Where the financial stability and strength of the owner suggests that there will be no additional risk to the mortgagee, the owner will probably face no increase in the price of his mortgage.[25]

The Committee intended subsection 78(2) to provide a "reasonable balance between the interests of the mortgagees who finance the construction of improvements and the lien claimants who do the actual work on the improvement."[26]

As it is currently interpreted, subsection 78(2) does not achieve the balance between lien claimants and building mortgagees intended by the Committee.

Giving priority to building mortgagees with respect to any deficiency in the notice holdback compensates building mortgagees at the expense of lien claimants. The labour, materials, and equipment supplied to an improvement by general contractors, subcontractors, consultants, and suppliers enhances the value of the security held by the building mortgagee in the property. Building mortgagees recoup the value of that labour and material from the proceeds of sale of the property when it is sold via a judicial sale.

In practice, giving lien claimants priority with respect to any deficiency in the basic 10% holdback does not transfer a significant amount of insolvency risk to building mortgagees. Building mortgagees mitigate their risk relating to the basic 10% holdback by holding back from their mortgage advances 10% of the increase in the value of the completed work.

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[25] Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act (1982), Appendix A Duncan W Glaholt & David Keeshan, *The 2015 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 610-11; See also Justice Leonard Ricdchetti & Tim Murphy, *Construction Law in Canada* (Toronto: LexisNexis, 2010) at 107-16 on the conditions precedent, covenants, and warranties that can be included in the loan agreement to further protect a building mortgagee.

[26] Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act (1982), Appendix A Duncan W Glaholt & David Keeshan, *The 2015 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 929.

Therefore, as it is current drafted and interpreted, subsection 78(2) allocates the risk of insolvency primarily to lien claimants. Subsection 78(2) is not achieving the Committee's goal of protecting those least able to spread risks and to absorb losses.

To achieve the Committee's goal, subsection 78(2) ought to be amended to give lien claimants priority over building mortgagees with respect to any deficiency in the notice holdback. If giving 100% priority to lien claimants is considered too radical, then the Experts ought to consider alternatives that divide the risk of insolvency between lien claimants and mortgagees.

Marshalling

Part XI of the *Act* should be amended to give the Court an express power to marshall prior mortgages or interests in the property. In its simplest form the doctrine of marshalling dictates that if a creditor has two funds to draw upon to satisfy the debt, the Court will require him to take satisfaction from that fund upon which another creditor has no security.[27] If the doctrine of marshalling was applied in the context of a priority dispute between a mortgagee and a lien claimant, the Court could compel a mortgagee that would otherwise have priority over the lien claimant pursuant to section 78 to enforce and satisfy the mortgage debt from security other security held by the mortgagee. There is some authority that the Court already has the power to marshall prior mortgages in action involving liens. Harvey Kirsh and Thomas G. Heintzman, Q.C. have both suggested that the Court already has the power to marshall prior mortgages in proceedings under the *Act*.[28] If the Court has that power, it is exercised sparingly if at all. The Court should be encouraged to do so by being given an express power to marshall prior mortgages in proceedings under the *Act*.

Advances Made for the Purpose of Vacating a Lien

Section 78 should be amended to permit a mortgagee to advance funds to be posted as security pursuant to section 44 of the *Act* without losing priority to registered liens. The *Act* should facilitate the posting of security in place of the land because it prevents the disruption of the project financing without prejudicing the position of a lien claimant. The circuitous procedure used by the mortgagees in *RSG Mechanical Inc* v *1398796 Ontario Inc*,[29]to advance funds for the purpose of vacating claims for lien without losing priority to registered liens illustrates a problem with the current *Act*. COCA submits that all stakeholders would benefit if section 78 was simply amended to provide that a mortgagee who advances funds for the purpose vacating a claim for lien does not lose priority with respect to the funds advanced for that purpose.

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[27] *Gerrow v Dorais*, 2010 ABQB 560 at para 21 (available on CanLII).

[28] Harvey J. Kirsh, "The Equitable Doctrine of Marshalling in Construction Lien Actions", (2005) 39 C.L.R. (3d) 161; Thomas G. Heintzman, Q.C. "The Equitable Doctrine of Marshalling Applies to Construction Liens" (1 August 2011), online: ConstructionLawCanada.com <http://www.constructionlawcanada.com>.

[29] *RSG Mechanical Inc* v *1398796 Ontario Inc*, 2015 ONSC 2070 (Div Ct) (available on CanLII).

11. Public Private Partnerships

COCA agrees that the *Act* ought to be amended to clarify the application of the *Act* to P3 projects, but it does not take a position on what specific changes should be made.

12. Non-Waiver of Lien Rights

As a general rule, COCA opposes the amendment of the *Act* to permit the waiver of lien rights.

The old *Mechanics Lien Act* permitted any person having a lien, other than a workman earning $50 dollars a day or less, to waive their rights under the Act.[30] As noted in the Discussion Paper on the Draft Construction Lien Act, that provision became a trap for the unwary and innocent.[31] Accordingly, when it was introduced in 1983 the *Act* specifically prohibited parties to bargain away their lien rights.

However, COCA would accept the amendment of the *Act* to permit the waiver of lien claims where an alternative form of security was available to the party giving the waiver, such as a claim upon a Labour and Material Bond.

13. Bidding and Tendering

Some public owners have adopted by-laws or policies that prohibit them from accepting bids from contractors with whom they are engaged in litigation.[32] COCA is of the view that bidder exclusions should be prohibited or regulated. However, the topic of bidder exclusions should be addressed within a larger discussion regarding problems with procurement.

14. Alternative Dispute Resolution

Adjudication

COCA supports the proposal in the Information Package to make adjudication of certain types of disputes on an interim basis mandatory. However, mandatory adjudication should not apply to contracts with consumers. Mandatory adjudication would represent an unnecessary burden in the administration of contracts with consumers. Furthermore, an owner should be prohibited from adjudicating with respect to funds that a payment certifier has certified as being payable. To do otherwise would defeat the objective of prompt payment.

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[30] *Mechanics Lien Act*, RSO 1980, c 261, s 5.

[31] Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, 1980) at 11.

[32] e.g. The Regional Municipality of Waterloo's Purchasing By-Law (Regional Municipality of Waterloo, consolidated by-law 04-093, *A By-law to Provide for its Procurement of Goods and Services and the Disposal of its Surplus Goods and to Repeal B-law 61-91 of the Regional Municipality of Waterloo, as Amended*, (10 November 2004). s 40.)

No Mandatory Mediation

COCA does not see mandatory mediation as a beneficial reform. Of course, mediation is already an optional and frequently used process in lien actions. Furthermore, it is open to the parties to make mediation mandatory as a term of their contract. We have the following concerns regarding mandatory mediation in construction lien actions:

(a) Mediation can be wasteful where one party is not committed to the process;

(b) Where there is a significant imbalance of bargaining power, compelling parties to attend a mediation is likely to increase the costs of the weaker party without increasing the likelihood of a settlement;

(c) An early stage mediation is not conducive to settlements in complicated cases; and

(d) Parties can become committed to positions taken at an early stage mediation.

Therefore, COCA does not support mandatory mediation of lien actions, particularly if mandatory interim adjudication is implemented.

15. Summary Procedure

Permit Joinder of Lien Claims and Trust Claims

Subsection 50(2) should be repealed to permit the joinder of lien claims and trust claims. In its *Draft Construction Lien Act* the Ministry of the Attorney General intended that lien claims and trust claims should be heard together to avoid duplication of proceedings. Set out below is an excerpt from page 16 of the Discussion Paper:

> The Draft Act has been developed upon the assumption that duplication of proceedings should be avoided. As far as possible, a court hearing of a lien action should be empowered to dispose of all related issues in a single proceeding. Therefore the Draft makes provision for the joinder of all claims related to the making of an improvement into a lien action. Under the Draft Act, joinder applies irrespective of whether these claims are founded in trust, contract, tort, or the lien, so long as it is practice for joinder to be permitted.[33]

[33] Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, 1980) at 16.

The Committee recommended against the joinder of lien claims and trust claims in order to maximize the summary nature of lien proceedings.[34] In COCA's view, the cost of prohibiting the joinder of lien claims and trust claims outweighs the benefit. On the one hand, it debatable whether separating trust claims and lien claims significantly reduces the cost or length of lien proceedings. On the other hand, individual trust claimants will have issues in common. Each "class" of trust claimant would need to prove that there are funds that have been impressed with a trust, that there has been a misapplication of trust funds, and that officers and directors are liable for a breach of trust. Each "class" of trust claimant would be seeking production of the same documents, including bank statements, a cost summary, and supporting documentation. All of these issues would be most efficiently pursued as a class. Compelling trust claimants to pursue their rights in separate actions increases costs and gives trustees an incentive to delay and obstruct the litigation.

Mandatory Oral and Documentary Discovery in Lien Actions

Discovery in a lien action only occurs with leave.[35] However, most lien claims require some form of documentary and oral discovery. In lien references before a master, obtaining leave of the Court is routine and easy to obtain. Furthermore, in jurisdictions without masters, most counsel are co-operative in facilitating oral and documentary discovery. However, there are exceptions. Some counsel and parties use the prohibition on discovery as a technique to delay and obstruct lien actions. In such cases it is necessary to bring a motion. Section 67 of the *Act* should be amended to make oral and documentary discovery mandatory subject to a discretion of the Court to modify the scope and duration of discovery.

Discovery Plans

Discovery Plans are a failed experiment. In cases where counsel and parties are reasonably co-operative Discovery Plans contribute little or nothing to the process of the litigation. In cases where one or more of the parties or their counsel are being uncooperative, requiring the parties to agree on a Discovery Plan creates another opportunity for delay and obstruction. The ideal reform would be to have Rule 29.1 of the Rules of Civil Procedure revoked. At a minimum, COCA suggests that Discovery Plans be made optional in lien and trust actions.

16. Surety Bonds and Default Insurance

Labour and material bonds should be mandatory on public sector projects. First, making labour and material bonds mandatory on public sector projects is consistent with the overall purpose of the *Act* of transferring insolvency risk from the most vulnerable parties to those parties that are most able to bear the risk. Second, the cost of a labour and material bond to an owner is relatively small in comparison to the impact of an insolvency of a contractor upon a subcontractor. Third, this proposal merely reinforces what is already a widespread practice.

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[34] Duncan W Glaholt & David Keeshan, *The 2015 Annotated Ontario Construction Lien Act*, (Toronto: Carswell, 2015) at 838-839.

[35] Duncan W Glaholt, *Conduct of a Lien Action*, 2014 Ed, (Toronto: Carswell, 2014) at p. 315

Most public sector contracts in excess of $5,000,000 already require contractors to post labour and material bonds.

17. Miscellaneous

An Express Power to Amend a Lien

An early line of cases permitted the Court to make amendments to claims for lien, including the date of last supply. However, since the Court of Appeal decision in *Gillies Lumber Inc.* v. *Kubassek Holdings Ltd.* it is debatable whether the Court has the power to amend a claim for lien, even in the absence of prejudice.[36] It is difficult to see any policy reason why the *Act* should not permit the Court to amend a claim for lien in the absence of any prejudice that cannot be compensated for by costs or an adjournment. The *Act* should be amended to give the Court an express power to amend claims for lien upon the motion of any party.

Expanding the Curative Powers of the Court Pursuant to Section 6

The *Act* should be amended to expand the Court's power to cure irregularities in lien claims.

As described by Duncan Glaholt, section 6 "is not a 'curative' section at all but an 'invalidation' section."[37] It is unclear to our members why such a restrictive standard is necessary. Section 6 represents a triumph of form over substance, and tends to defeat the remedial purpose of the *Act*.

There is a perfectly good alternative. The old *Mechanics Lien Act* permitted the Court to cure defects in lien claims provided there was "substantial compliance" with the *Act* and curing the defect did not prejudice any other party.[38] The old standard adequately protected the interest of owners by preventing the curing of a defect if it would result in prejudice to another party. The old standard is still in use in Alberta, Manitoba, Newfoundland, New Brunswick, Prince Edward Island and Saskatchewan.[39]

Ontario should restore the more liberal standard that is in use in most other common law jurisdictions.

Security for Costs

The *Act* should be amended to clarify that no one gets access to security for costs beyond the amount posted for that purpose. The Court of Appeal decision of *P&D Holdings Ltd.* v. *Alta*

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[36] David Bristow, Duncan Glaholt, Bruce Reynolds, Howard Wise, Construction Builders' and Mechanics' Liens in Canada, 7th ed, looseleaf, (Toronto: Carswell, 2005) at section 7.2.3.

[37] Duncan Glaholt, *Conduct of a Trust Action* (Toronto: Carswell, 2011) at 106.

[38] *Mechanics Lien Act*, *supra* , s 19(1).

[39] Duncan W Glaholt & David Keeshan, *The 2015 Annotated Ontario Construction Lien Act*, (Toronto: Carswell, 2015) at 63-64.

Surety Co.[40] created some confusion by appearing to allow access by a lien claimant to the surplus in security posted in relation to another claim for lien that was vacated from title. Although the prevailing view is that a lien claimant is not entitled to access security posted for the purpose of vacating another lien claim, [41] the uncertainty can create impediments to the settlement of lien claims. The Court sometimes requires the consent of multiple parties before making an order for the payment out of Court. The *Act* should be amended to clarify the law on this point in order to facilitate the settlement of lien claims.

Period Reviews of the *Act*

Finally, COCA supports the proposal in the Information Package to review the *Act* on a regular basis. The scale of changes under consideration reflects the fact that too much time has passed since the last overhaul of the *Act*. Given the importance of the construction industry to the Ontario economy, the *Act* should be reviewed more often.

18. Conclusion

COCA would like to thank the members of its Construction Lien Task Force for their contributions in developing these submissions. Set out below are the members of the Task Force:

(a) Gary van Bolderen – Dutch Masters Construction Services (Canadian Farm Builders Association, Barrie Construction Association Council of Ontario Construction Associations)

(b) Ted Dreyer – Madorin, Snyder LLP (Grand Valley Construction Association)

(c) Glenn Ackerley – WeirFoulds LLP (Toronto Construction Association)

(d) Jim DiNovo – BML Multi Trades (Hamilton-Halton Construction Association)

(e) Martha George – Grand Valley Construction Association

(f) Eric O. Gionet – Dooley Lucenti Barristers & Solicitors (Barrie Construction Association)

(g) Paul Gunning – Acoustical Association of Ontario

(h) Ron Johnson – Interior Systems Contractors Association

(i) Jeff Koller – Electrical Contractors Association of Ontario

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[40] *P&D Holdings Ltd.* v. *Alta Surety Co*., (1996), 29 CLR (2d) 60

[41] See Duncan W Glaholt, Conduct of a Lien Action, 2014 Ed, (Toronto: Carswell, 2014) at 153 for an analysis of the law.

(j) Sandra Skivsky - Ontario Masonry Contractors Association

(k) Andrew Sefton – Ontario Painting Contractors Association

(l) Ian Cunningham – Council of Ontario Construction Associations

Finally, COCA would like to thank Bruce Reynolds, Sharon Vogel, and their lawyers and staff at BLG for their hard work in connection with the Review.