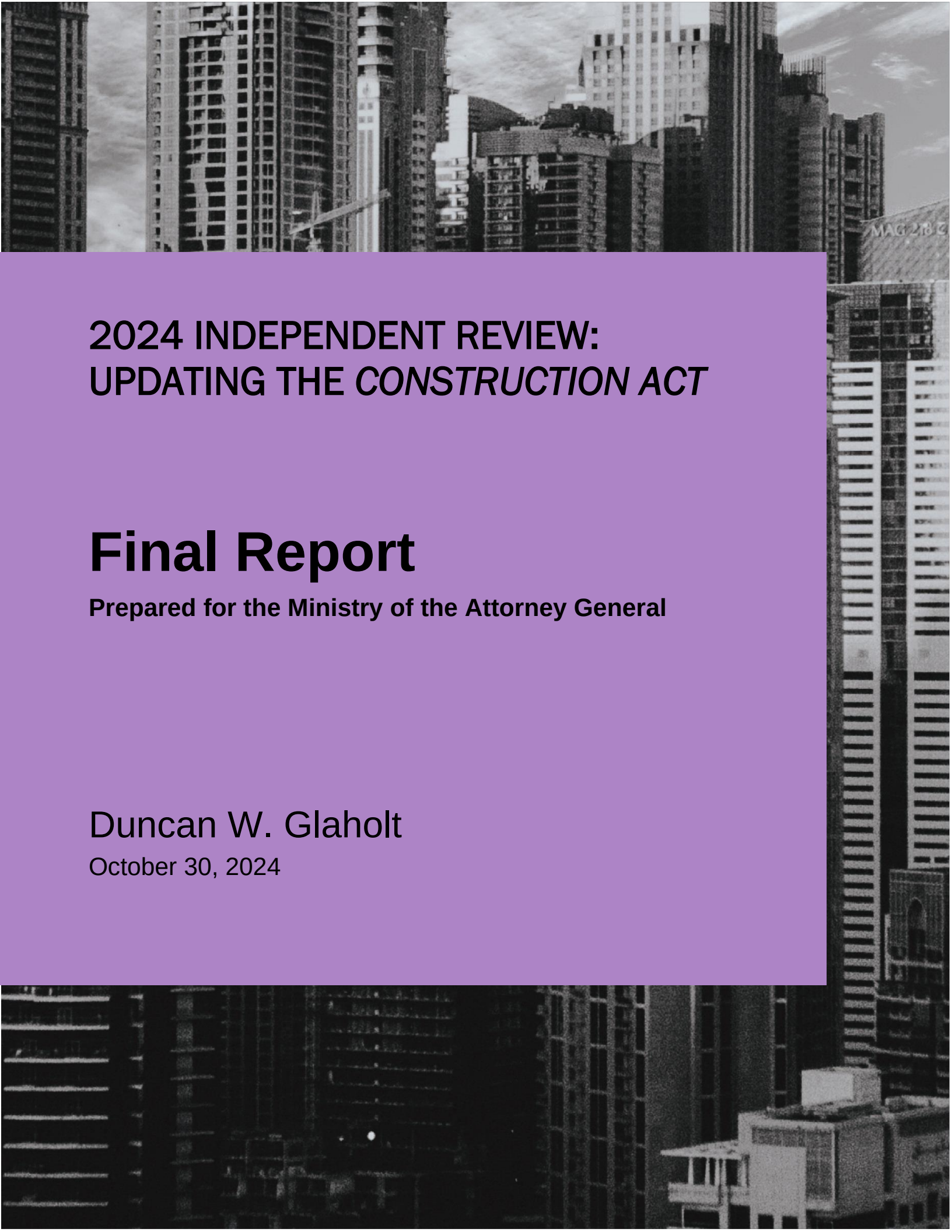

2024 INDEPENDENT REVIEW: UPDATING THE *CONSTRUCTION ACT*

Final Report

Prepared for the Ministry of the Attorney General

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October 30, 2024

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A. INTRODUCTION

Acting on the recommendation of Bruce Reynolds and Sharon Vogel in their 2017 report Striking the Balance: Expert Review of Ontario's Construction Lien Act ("**Striking the Balance**"), the Attorney General retained me in May of 2024 to conduct an independent review of the *Construction Act* ("**2024 OCAR**").

My mandate was to ensure that all Ontario stakeholders had equal opportunity to participate in the 2024 OCAR process, regardless of geographic location, the size of their business, or their position in the "*construction pyramid*". To accomplish this, I created a website[1] in June 2024 and published a Consultation Paper to inform interested stakeholders of the process that I was undertaking. The public was encouraged to use this website to register their interest and schedule a virtual meeting with me to voice their views and provide feedback.

Forty stakeholders registered to participate in the 2024 OCAR process. I received written or verbal submissions from 33 stakeholders, both institutional and individual. This included submissions from over 14 institutions representing tens of thousands of construction workers in the province and in some cases across Canada. All stakeholders who requested a virtual consultation appointment got one. Even after submissions closed, I heard from some groups and met with them virtually. No-one was left out.

I consulted directly with adjudicators, engineers, lawyers, owners, contractors, subcontractors, and building trade organizations. All submissions received were thoughtful, insightful, and focused on improving the *Construction Act* ("the Act").

It was the active participation of organizations such as the Canadian Council for Public-Private Partnerships (CCPPP), Canadian Credit Union Association (CCUA), City of Toronto, Council of Ontario Construction Associations (COCA), Infrastructure Ontario (IO), Ministry of Transportation (MTO), Ontario Association of Architects (OAA), Ontario Bar Association, Construction and Infrastructure Law Section (OBA), Ontario Dispute Adjudication for Construction Contracts (ODACC), Ontario General Contractors Association (OGCA), Ontario Road Builders Association (ORBA), Ontario Sewer and Watermain Construction Association (OSWCA), Association of Consulting Engineering Companies – Ontario (ACEC), Professional Engineers Ontario (PEO), Royal Institution of Chartered Surveyors (RICS), and the Surety Association of Canada (SAC) that allowed me to fulfill my mandate.

This review process has been an exercise in generating and testing ideas. To encourage a free exchange of ideas, I did not record any consultations. I have anonymized all responses. At the same time, I have quoted consultees' remarks freely without specific attribution and express deep and sincere gratitude to everyone with whom I consulted for their commitment to the improvement of the Act.

[1] ontarioconstructionreview.ca

There are several people that I wish to thank by name, at risk of causing them embarrassment, as none of them sought recognition. The first is Glenn Ackerley, a partner at the Toronto law firm of Weir Foulds. Glenn volunteered an enormous amount of uncompensated time to prepare a report representing the views of construction industry organizations representing thousands of individual stakeholders. Glenn's early work allowed me to focus this review. I also wish to thank Bruce Reynolds and Sharon Vogel of the Singleton Reynolds firm in Toronto for their original, foundational work. Striking a balance among so many competing interests, as they did by that very name in their report, was no mean feat. I have come to respect their achievement even more over the course of this review.

I thank Sheryl Cameron, legal counsel with the Ministry of the Attorney General (MAG) for participating in all of my virtual consultations. The MAG team – which also included Juliet Robin, Andrea Hargovan and Ben Hanff – guided this process efficiently and capably from its inception and provided valuable insights on potential legislative and regulatory amendments. I also wish to thank Anthony Galea, Director of Legal Affairs & Senior Policy Advisor to the Attorney General of Ontario, for his constant support of this review process, beginning to end.

I thank my assistant of 32 years, Teresa De Sousa, who (as always) took charge of organizing this complex process and bringing it off without a hitch. I thank Nicholas Dasios, a friend and lawyer from London, Ontario, who created and administered the 2024 OCAR website and online booking form.

All of my work was performed in a solicitor/client relationship with the provincial government. Nevertheless, I was permitted complete freedom of action and opinion. My work was free of influence or interference of any nature or kind whatsoever. The recommendations in this final report are mine and mine alone.

Based on my extensive consultations with industry stakeholders across the province, I can say with complete confidence that Ontario's 2017 reforms to the Act have been well received by the industry. Stakeholders have adapted to them. They are working well. The prompt payment and adjudication scheme is a success. With some further adjustment, we can make this important statute even better.

B. METHODOLOGY

I was retained for the consultative phase of this assignment in June of 2024. I drafted a Consultation Paper based upon recommendations contained in Glenn Ackerley's July 2023 report titled *Report on Proposed Changes to the Construction Act*, and an Ontario Bar Association submission on *Recommendations for Further Legislative Reform to Ontario's Construction Act* from January 9, 2024. I also reached out directly to a number of industry sources. I published my Consultation Paper on a public website: "**ontarioconstructionactreview.ca**".

This website described the background of the 2024 OCAR and the virtual consultation process. Reference documents such as the current *Construction Act* and its Regulations were made available. Interested parties were provided with a 2024 OCAR Registration form, a 2024 OCAR Consultation Form, and, once registered, were granted access to a 2024 OCAR Booking Page with its calendar of available dates and times. Registrations and Consultation Forms were received until 9 August 2024. Requests for extensions were considered on a case-by-case basis, none were denied.

Stakeholders were invited to upload written responses to my Consultation Paper along with their own remarks. Many took advantage of the opportunity to bring new points to my attention. Some of these points will need to be considered further at a later date.

I reached out directly to ODACC for data on the uptake of adjudication under the Act. I reached out to Bruce Reynolds and Sharon Vogel to better understand their conception of a 5-year review. I had an ongoing dialogue with MAG to better understand their timelines and processes for making legislative and regulatory amendments.

As noted in the Consultation Paper, three foundational principles guided my thinking during the 2024 OCAR process:

1. **Respect for party autonomy**. Party autonomy must be respected wherever possible while achieving the remedial purposes of the Act.

2. **Respect for property rights.** Property rights must be interfered with as little as possible while achieving the remedial purposes of the Act.

3. **Respect for simplicity and transparency.** The statute must allow all stakeholders to know their rights and obligations with certainty. Simplicity and transparency promote compliance and responsible construction project delivery.

C. ORGANIZATION

Each substantive section of this report starts with background information on the issues set out in the Consultation Paper along with the relevant statutory or regulatory language. This is followed by a summary of stakeholder views and submissions obtained during the consultation process. Finally, I set out my recommendations. I have summarized my recommendations at the end of the report.

Some stakeholders included draft legislation with their submissions, often to exemplify a point. I have not done so here. I have learned that legislative and regulatory drafting is like analog watch repair. Everything is connected, sometimes not obviously so, and even the smallest parts affect the operation of the whole mechanism. When you get it all back together, it must produce the same accurate result for everyone every time it is consulted. I have left legislative and regulatory drafting to others.

D. CONTEXT

The Act plays a pivotal role in Ontario's economic growth and prosperity. The Act transcends narrow inter-party commercial concerns. It affects social issues that concern every Ontarian. These are issues such as full employment, the supply of affordable housing, and the delivery of necessary infrastructure, to take only a few examples.

Ontario's construction industry employs over 588,000 people representing approximately 7.6% of Ontario's total workforce. In 2022, the construction industry contributed approximately $57 billion (7.4%) to Ontario's GDP.[2]

Ontario has always been a leader and innovator in the enactment of remedial construction industry legislation. The first Canadian lien legislation came into force in Ontario and Manitoba as early as 1873. Ontario's lien legislation has undergone regular improvement ever since. The Act has had to keep pace with the increasing size, complexity, and sophistication of the construction industry. Projects now take longer, and cost more than they did ten years ago, let alone a hundred years ago. Longer durations and higher values mean proportionally greater commercial risk which, in turn, places stress on the efficiency of the Act in achieving its remedial purposes.

The Act must not unduly restrict entry into the marketplace. The Act must foster commercial efficiency and honest dealing. The Act must create rights that are understood, enforceable, and enforced at every level of the construction industry at the least possible expense.

Statutory duties and obligations must be clear and certain. Stakeholders want to comply; they just need to be told how to do so. These values lie at the heart of the 2017 amendments which created the province's successful prompt payment and adjudication regime.

The Act operates in derogation of common law and must interfere as little as possible with the property rights of owners and their financiers. Protection of owners lies at the heart of the statutory holdback scheme for example. Owners are required to retain a holdback from money earned by and otherwise payable to their contractors. This makes them custodians of other people's money and they must always know the precise extent of their statutory liabilities and obligations, especially to non-privies.

[2] https://www.jobbank.gc.ca/trend-analysis/job-market-reports/ontario/sectoral-profile-construction

E. MAJOR THEMES

Over the course of many consultations, three major themes emerged:

1. **Holdback**: The industry wants a simple, straightforward, easily administered holdback regime that applies to everyone equally. Historically high project values, combined with historically long periods of project performance, have made regular and reliable holdback payment an urgent issue. Industry margins are no longer double-digit. In the real world of single digit margins and double-digit statutory holdback, there is built-in inequity and unnecessary solvency risk. Accepting that a 10% holdback is necessary to achieve the remedial purposes of the Act,[3] consultees felt strongly that the holdback regime should be reformed to ensure that holdbacks flow regularly, predictably, and efficiently.

2. **Adjudication**: The industry wants simple, straightforward, easily administered statutory adjudication at all levels for all disputes under their contracts and under the Act. Consultees agreed that a more comprehensive statutory adjudication scheme would allow adjudication to fulfill its promise more fully here in Ontario, as it has done elsewhere. We have already made the difficult culture shift to real time dispute resolution. Now all we need to do is dismantle artificial barriers to its full adoption. We must give statutory adjudication a chance to work as well here in Ontario as it does in other jurisdictions globally.

3. **Administration**: There are some artefacts of the legislative process that are now in need of amendment. Some of these raise issues that are purely theoretical. Few of these have caused problems yet. Some consultees called these "*solutions in search of problems*". The broad consensus of all consultees, however, was that rather than leave pitfalls for the unwary, we should address them now while we have the chance. I agree. In my view, this is precisely what was envisioned by Reynolds and Vogel in Striking the Balance.[4]

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[3] As Reynolds and Vogel explain in Striking the Balance p. 63: The reasons for setting the holdback at 10 percent were explained by the Ministry of the Attorney General in 1980 as follows: *Traditionally, the holdback rate has been set at the prevailing margin of profit within the construction industry. Where the holdback relates to the profit, the contractor and subcontractor receive enough payment to satisfy their obligations to those who supply services or materials under agreement with them. The current rate of profit in the construction industry is no longer near 15%. It now runs closer to 5%.* […] *Reduction of the holdback to the actual levels of profit, approximately 5%, would mean its virtual elimination. This would not be acceptable to most segments of the industry.* […] *The 10% figure seems to be a more reasonable rate of holdback* […].

[4] Reynolds and Vogel: Striking the Balance, p. 284: "*During the Consultation Process, the relative slow pace of amendments to the Act was compared with the relatively fast pace of evolution of the construction industry. In this regard, certain stakeholders recommended that the Review consider a periodic review of the Act in order to maintain currency, to the best degree possible. The Canadian Institute of Quantity Surveyors, the City of Toronto, the Council of Ontario Construction Associations, Infrastructure Ontario, Metrolinx, the Ontario Association of Landscape Architects, Ontario Public Works Association, the Ontario Road Builders Association and York Region all recommended a periodic review of the Act. Specific recommendations were made in terms of how often a review should be undertaken which ranged from 5 to 10 years. No stakeholder expressed opposition to a periodic review of the Act*."

F. PROPOSALS: HOLDBACK

The province's statutory holdback scheme lies at the heart of the Act and has done so for more than a century. Statutory holdback represents 10% of the earned value of all work done. Holdback is earned money that absent the Act would have been paid to the contractor pursuant to a proper invoice in the ordinary course of business, and then in turn paid by the contractor to trades and suppliers. Retaining earned money in the owner's hands, secured in the owner's land, mitigates the consequences of contractor insolvency or opportunistic non-payment, particularly to non-privies (subcontractors, trades, suppliers).[5]

The key for the province, as Reynolds and Vogel so aptly put it, is striking a balance between the need for mitigation of insolvency risk on the one hand and mitigating the consequences of artificially restricted cash flow on the other. Inhibiting cash flow increases the risk of insolvency throughout the contractual chain. The cost of borrowing money to replace earned money held back can become an unnecessary impediment to growth in the industry.

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[5] See generally the 2019 Ontario Court of Appeal decision in The Guarantee Company of North America v. Royal Bank of Canada, 2019 ONCA 9:

> 28 There is no issue that the CLA as a whole is valid provincial legislation in relation to property and civil rights in the province. The CLA aims to ensure that parties who supply services and materials to construction projects are paid by creating an integrated scheme of holdbacks, liens and trusts. This scheme protects subcontractors who are vulnerable due to their lack of privity of contract with the owner who benefits from the improvements they perform. Holdbacks require the owner and other contractors to withhold payments in order to ensure that funds are available to pay subcontractors and suppliers. Liens give subcontractors and suppliers the right to assert a claim directly against the property they have improved. Trusts protect the interests of subcontractors and suppliers by protecting funds owing to or received by those to whom they have supplied their services or materials.

As for the bankruptcy issue, see the Court of Appeal decision in *Urbancorp Cumberland 2 GP Inc. (Re),* 2020 ONCA 197:

> 1 Those involved in the construction industry add value to real estate by their provision of work and materials. In order to protect them against the risk of non-payment and the unjust enrichment of others, Ontario enacted the Construction Lien Act, R.S.O. 1990, c. C.30 (the "CLA"), now the Construction Act, R.S.O. 1990, c. C.30, with a comprehensive scheme of liens, holdbacks, and trusts. One situation where the need for protection can be most acute is when contractors have improved a real estate project, have not been paid, and the owner becomes insolvent. Insolvency, however, is a federal matter, with its own processes and priorities.

And then there is a case I argued, *Graham Mining Ltd. v. Rapid-Eau Technologies Inc*., 2000 CarswellOnt 3181

> 18 The purpose of the holdback provisions in the Act is to provide some financial protection for those persons who have worked or supplied material to a project, thus enhancing its value, but who would not otherwise be entitled to assert any direct claim against the owner since there is no privity of contract.
>
> 19 The holdback provisions in the Act do not always operate to limit the value of the lien. Rather, they only apply when the "least amount owed" by a payer is less than its holdback obligation. For example: an owner has a contract with a general contractor for $10,000. The subcontractors are owed, by the contractor, the sum of $7,000. If the owner has paid the general contractor in full (i.e., the $10,000), he will still be liable for the 10% holdback he should have retained. Put another way, the owner will not be liable to pay out more than the 10% holdback if he has already paid the contractor in full.

See also: *King Road Paving and Landscaping Inc. v. Plati,* 2017 ONSC 6319:

> The purpose of the holdback under the Construction Lien Act is to create a fund to which the lien claimants may look if they are unable to recover from the person with whom they have a direct contract. The holdback is a trust fund for the subcontractors. Provided the owner retains the proper holdback over the course of the construction and otherwise complies with its statutory obligations, the owner's liability to a subcontractor lien claimant, with whom the owner has no direct contract, is limited to the amount of the holdback.

A century ago, releasing earned statutory holdback only following attainment of substantial performance made a great deal of sense. A century ago, the Act was a workers' statute, and few projects took longer than a year to complete. A century later, however, and the industry is unrecognizable. It is orders of magnitude more complex, expensive, and time consuming. The Act is no longer a workers' act. Few projects, residential, commercial, or industrial, are ever completed in one year. Most take several years. In the infrastructure community, it is not uncommon to see contractual performance extending over five or more years. When contract performance exceeds one year, the financial burden of statutory holdback overbalances the benefit of insolvency risk mitigation. This is our new reality. Our new reality requires that we strike a new balance.

Ontario's current, well-intentioned holdback scheme places unnecessary stress on the entire interdependent system. People and trades least able to sustain this retainage are most vulnerable to insolvency. They are left dependent on strangers to their subcontract or purchase order. They end up waiting, and waiting, and waiting to receive money earned several months – or even several years – earlier. Most consultees that I spoke with (including owners, contractors, and trade organizations) would prefer reliable cash flow today over protection against contractor insolvency tomorrow. It was disheartening to hear from one major institutional consultee, one with province-wide representation, that "*It remains the case that holdback money is not paid on time, in full, or at all. The system remains broken as it relates to payment of holdback*."

Ontario has taken a half step towards solving this problem. The 2017 amendments enacted a consensual annual/phased release of holdback overlay onto the existing statutory earned holdback scheme. This was well-intentioned, but it has not solved the earned holdback cash flow problem in the industry.

It was clear from my consultations that our consensual scheme has suffered from an inequality of bargaining power. People with little or no effective bargaining power (subtrades and suppliers lacking privity of contract with the owner) are the ones most affected by unreliable distribution of basic earned holdback. The current consensual scheme for annual/phased release of holdback was poorly understood and seen as dauntingly complex by many that I spoke to.

A mandatory annual release of holdback scheme is necessary and would be welcomed at all levels of the industry.

1. Mandatory Release of Basic Holdback

1.1. Background

Sections 26.1 and 26.2 of the Act permit the release of holdback on an annual or phased basis, if provided for by contract, and subject to conditions. The statutory references are 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.

The current annual/phased release of holdback scheme applies only if "*the contract price at the time the contract is entered exceeds the prescribed amount*." The prescribed amount under O. Reg. 304/18 (GENERAL) is currently $10,000,000 or more. Thus, we have effectively created a two-tier holdback system based on an arbitrary monetary threshold. This

is no longer good policy. The industry wants one scheme for all. Why? The answer is obvious:

1. Subtrades and suppliers most in need of annual/phased release of holdback are now wholly dependent upon contractual negotiations between others (owner and contractor) for their rights. This leaves them powerless to protect themselves.

2. Even when the monetary threshold is met, nothing in the statute currently entitles this group, subtrades and suppliers, to notice of release of holdback on an annual or phased basis. Lack of notification makes it possible for a subcontractor to have a subsisting lien claim against basic holdback (i.e., lien rights that exist even though not yet preserved by registration or service), and yet miss out on the annual/phased release of holdback to others with no higher claim. This is manifestly unfair.

3. The current rules governing annual and phased release of holdback have caused confusion. For example, some stakeholders took the view that annual/phased release of holdback is currently permitted only if "*all liens in respect of the contract have been satisfied, discharged or otherwise provided for*". As annual/phased release of holdback by definition occurs before publication of a certificate of substantial performance of the contract, there will be many "*subsisting*" liens (i.e., lien rights that exist but have not yet been preserved by registration or service at the time of release of holdback). The current wording may suggest that all such liens would have to be "*satisfied, discharged, or otherwise provided for*" to permit the release of annual/phased holdback, and this is technically impossible. What is actually important is that there are no "*preserved*" liens on title at the time of release.

4. Statutory holdback represents money that is otherwise earned, due, and payable. Any payment issues will have been resolved by agreement or adjudication of a "proper invoice" under the Act. The prompt payment and adjudication systems are specifically designed to resolve disputes efficiently and expeditiously before money becomes payable. The purpose of statutory holdback is to mitigate the risk of contractor insolvency or opportunistic non-payment, not to provide a warranty against the risk of potential deficiencies in the quality of work. The money belongs to those who have earned it by doing the work.

A simpler and more reliable holdback regime is needed. This was a high priority for almost all consultees.[6] Industry stakeholders want and would welcome mandatory annual release of basic holdback.

[6] An argument was made by two consultees that sections 26.1 and 26.2 are fine just as they are. They argued that sections 26.1 and 26.2 are already sufficiently flexible to enable parties to work through any issues they may have relating to annual/phased release of holdback, and that all that is required now, to give payers the confidence to actually start using these existing statutory provisions, is an amendment stating that compliant payments of annual/phased holdback are made "*without jeopardy*".

My recommendation is that the current scheme of permissive annual/phased release of holdback be converted into a single, simple, straightforward mandatory annual release of holdback regime, covering the entire construction pyramid.

1.2. **Stakeholder views**

There was broad support amongst consultees, including several of the largest public owner groups, for a "*more structured process for the annual/phased release of holdback*".[7] These groups agreed with the proposition that "*there is too little certainty and too much risk with the provisions as currently structured*" the effect of which is to drive major owners away from, not toward providing for annual/phased release at the time of contract formation. One national owner's organization put it this way: "*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*". I agree.

Several consultees pointed out the unfairness of mandating that "*contractors*" but not "*owners*" release holdback upon subcontractor lien expiration. This sets up a possible circumstance in which a contractor might be required to pay subcontractors with money not yet received from the owner. No consultee I interviewed had experienced this unfairness, or even heard of it happening, but their point was that could occur, and if it did, it would be an unintended consequence of the Act as now written.

There was broad support amongst consultees (with one exception) for removal of the monetary threshold for annual/phased release of holdback. As one consultee, an individual, put it "*policy may be overlooking the asymmetric/power imbalance between Owner and Contractor, especially on smaller projects (i.e., less than $10m). While a small administrative burden may exist for phased or annual release of contract, multi-year small projects create a significant retained holdback balance, far in excess of any underlying quality or payment issue. Smaller projects often provide limited negotiating opportunity, and these projects are heavily patronized by smaller firms. Excluding smaller projects from phased or annual holdback release acts to unfairly penalize smaller market participants*." Another consultee, a national organization, put it this way "*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 would minimize the likelihood of subcontractors needing to avail themselves to certain remedies, including lien and trust claims and adjudication provisions.*"

The exception turned out to be important. The exception in section 26.2(3) is that the $10M threshold does not apply if the contract provides for payment of accrued holdback on a phased basis but only with respect to a "*specified design phase*". Even then, however, the

[7] I should add here, that when consultees referred to holdback, without exception they referred only to "*basic holdback*" and not "*finishing holdback*". Their consensus on finishing holdback was that the statutory thresholds are rarely met or enforced in practice. Most owners and contractors simply negotiate a project closeout and final payment (minus warranty holdback in many cases) at some point following release of basic holdback.

current wording of section 26.2(3) is problematic as no-one seems to know what a "*specified design phase*" means for the purpose of the statute. Could there be more than one "*specified design phase*", for example?

As I mentioned above, several consultees argued that there is a "*Catch-22*" situation in the current Act, whereby annual/phased release of earned holdback under the Act can only occur when all liens have expired, a situation that could never exist until after publication of a certificate of substantial performance at the end of a project. The suggestion was made that what the Act must have meant here was all "*preserved*" liens. If that is so, notice provisions are needed to provide fair notice to all of those with subsisting liens that annual/phased release of holdback was about to take place so that they might preserve subsisting liens if so advised.

Many consultees pointed out the need for information symmetry. There was broad support amongst consultees for public notification of annual/phased release of holdback: first, by prescribed form at the front end of a project, to notify everyone in the construction pyramid that the head contract contains a provision for annual/phased release of holdback (not necessary if we move to a scheme of mandatory annual holdback release); and second, by prescribed form at the time of pending annual/phased holdback release, to give those with subsisting liens a reasonable opportunity to preserve their liens against any annual/phased holdback before it is released.

Several consultees spoke of the need for standardized disclosure requirements for all contracts involving phased or annual holdback release. It was also suggested in consultation that statutory rights to information should allow "*any person who has supplied services and materials to an improvement, or who is a mortgagee*" to make a demand for information. There was broad support for the amendment of s. 39 (Right to information) 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/phased release of holdback. Some thought that this would clarify the current provision "*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*."

There was broad support amongst consultees for an amendment to provide that release of annual/phased holdback in conformity with the statutory scheme be made expressly "*without jeopardy*". Two consultees, however, engaged more deeply with this issue and concluded that there was insufficient "*legal magic*" in the words "*without jeopardy*", maybe even some ambiguity.[8] What was really intended, they argued, was that payment of annual/phased holdback in accordance with the underlying contract and the scheme of the Act operated as a statutory reduction of an owner's statutory holdback obligation to the extent of such payment. This seems a reasonable amendment.

[8] That term is found in s. 24(1) and (2) "Payments that may be made", and in s. 25 "Payment where subcontract certified complete.

Several consultees spoke favourably of British Columbia's holdback scheme (*Builders Lien Act* [SBC 1997] CHAPTER 45). The B.C. scheme is comprehensive and applies equally to all levels of the construction pyramid. It requires a separate holdback account for each contract. It imposes on a payment certifier a statutory obligation to certify contracts and subcontracts complete when asked to do so in writing. It prescribes a "*holdback period*" of 55 days after a certificate of completion of a contract, or subcontract, and imposes a requirement to release holdbacks in reduction of each payer's overall holdback liability. Under the B.C. scheme, phased release of holdback is also possible if the phases are clearly defined in the prime contract, and they are certified complete when complete. The seemingly perennial issue of separate holdback trust accounts was raised by several consultees. This highly controversial subject seems to arise every time amendment of the Act is considered.[9]

1.3. **Analysis and recommendations**

There are two ways of addressing this important issue. Either:

- enact a simple scheme of mandatory annual release of basic holdback applicable at all levels of the industry; or,

- give the existing, non-functioning, permissive annual/phased release of holdback scheme a mere "tune up", hoping to encourage its use.

I recommend the former not the latter.

We need a solution. Half steps will not satisfy Ontario's construction industry.

I learned from all consultees that retention and release of holdback is one area where respect for party autonomy must give way to the remedial purposes of the Act. Many institutional consultees told me that the administrative burden of mandatory annual release of holdbacks would be relatively minor. One institutional consultee, responsible for administering hundreds of contracts at any given moment in time ranging widely in value from small projects to massive infrastructure projects, supported the idea and would actually welcome a simplified mandatory annual release of holdback scheme.

Thus, the following scheme recommends itself:

[9] See Reynolds and Vogel: Striking the Balance, page 128 and following: "*Subsequently, the Attorney General's Advisory Committee on the Draft Construction Lien Act* "*strongly recommend[ed] the rejection" of the proposal to mandate holdback trust accounts which it had identified, at the time, as "the most controversial proposal contained in the Discussion Draft"*: [It] *was primarily the costs and administrative burden that motivated the recommendation to reject the joint trust account. Although the Advisory Committee did not recommend the introduction of mandatory holdback trust accounts, it recognized the importance of somehow protecting the holdback. To protect the holdback, changes were made to the statutory scheme regarding relative priorities between the interests of mortgagees and lien claimants*.

1. Mandatory annual release of basic holdback by owner: Basic holdbacks retained by an owner should be paid to the contractor annually following each anniversary date of the contract, provided that there are no preserved or perfected liens on the owner's title in respect of the contract by the expiry of the notice period for annual release of holdback. As holdbacks represent earned money that an owner has already acknowledged (or an adjudicator has determined) is due, owing, and payable to the contractor on a "proper invoice", contractual rights to setoff will have been resolved, one way or another, at the time the holdback was retained and thus the owner should have no further claim upon that money at the time of annual release and, therefore, no right to withhold payment.

2. Mandatory annual flow down payment of basic holdback received by contractors and subcontractors: All basic holdback received annually by a contractor or subcontractor shall be paid to those from whom that contractor or subcontractor kept holdbacks within 14 days, without setoff, if there are no preserved or perfected liens on title in respect of the subcontract.

3. All annual holdback payments discharge all corresponding holdback obligations: All payments of holdback made in compliance with the Act reduce the corresponding statutory holdback and trust obligations of the owner, contractor, and subcontractor respectively.

The potential advantages of this mandatory annual release of holdback regime are many:

- The province would finally have one holdback scheme throughout the entire industry, top to bottom, ensuring that holdback flows regularly and predictably to those from whom it was kept.

- Subtrades would no longer be dependent upon their contractor negotiating annual/phased release of holdback into the head contract.

- Early completing trades would not be left waiting for later completing trades before seeing vital cash flow.

- No payer would have to pay holdback that it had not already received.

- The consequences of contractor insolvency would be significantly mitigated. The consequences of information asymmetry would be significantly mitigated.

- The concerns of those supplying pre-construction design services would be resolved. Any holdback kept from a pre-construction design professional would be released no later than one year following the date of the contract. No new lien right is necessary.

- Smaller projects with a duration of less than a year would not be affected by this amendment.

If the time is not right to adopt a proper province-wide scheme of mandatory annual holdback release, then a weaker "*tune up*" approach could be taken. Although I do not recommend it, if all we can accomplish here is a mere "*tune up*", then the following should be considered:

- Amend s. 26.1(2)(d)(ii) and s. 26.2((2)(d)(ii) to refer to "*preserved*" liens.

- Amend s. 26.1 and 26.2 to provide that payment of annual/phased holdback in accordance with the underlying contract and the scheme of the Act discharges and reduces an owner's statutory holdback obligation proportionately.

- Amend section 26.2(3) to clarify the meaning of "*specified design phase*".

- Amend the Act to require publication of notice in prescribed form that a contract contains a provision for annual/phased release of holdback.

- Amend the Act to require publication of notice in prescribed form at least 10 calendar days prior to annual/phased holdback release, to give subsisting lien claimants a reasonable opportunity to preserve their liens.

- Prescribe by regulation standardized disclosure documents required for all contracts involving phased or annual holdback release, including information as to whether the contract provides for invoicing other than on a monthly, bi-weekly, phased or milestone basis.

- Amend s. 39 to permit "*any person who has supplied services and materials to an improvement, or who is a mortgagee*" to request disclosure from a contractor or owner as to whether a contract contains a provision for annual/phased release of holdback.

<u>Recommendations</u>:

- **Replace the current permissive scheme of annual/phased holdback release with a simple, annual mandatory scheme with the following essential elements:**

  1. **<u>Mandatory annual release of holdback by owner</u>: For services and materials supplied in any given year, all basic statutory holdbacks retained by an owner shall be paid to the contractor following each anniversary of the date of execution of the contract, without setoff, provided that there are no preserved or perfected liens on the owner's title in respect of the contract by the expiry of the notice period for annual release of holdback.**

2. **<u>Mandatory annual payment of holdback by contractors and subcontractors</u>: All basic statutory holdback received by a contractor or subcontractor must be paid to those from whom that holdback was kept, without setoff, within 14 days of receipt, if there are no preserved or perfected liens on title in respect of the subcontract.**

3. **<u>All conforming payments discharge and satisfy all statutory obligations</u>: All payments of basic statutory holdback made in compliance with the Act discharge and satisfy corresponding statutory holdback and trust obligations under the Act.**

- **Expand the ambit of statutory adjudication to encompass all disputes over the timing, amount, and payment of statutory holdback.**

2. Non-Payment of Holdback

Whether the province proceeds with the recommendation to provide for mandatory annual release of earned basic statutory holdback or not, the provisions relating to non-payment of that holdback by an owner are still in need of amendment.

2.1. Background

Subsection 27.1(1) currently provides as follows (underlining added):

> **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,
>
> (a) the owner publishes a notice in the prescribed form specifying the amount of the holdback that the owner refuses to pay, 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 seems to provide a closed list of circumstances in which the owner may refuse to pay some or all the holdback, it would be clearer if there were no other possible circumstances in which holdback could be withheld. It has been suggested that the word "*if*" in the opening of the provision be replaced with the words "*only if*".

Further, and 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 has a subjective quality, be replaced with "*has not paid*", which is more objective.

2.2. Stakeholders' views

Institutional consultees were divided on this point. Some supported the suggested amendments, while others questioned the need for any amendment.

One institutional consultee suggested that "*if such changes are to be made . . .* "refuses to pay" [should] *be amended to* "intends not to pay" *because if at "day 40" an owner is not yet permitted to release holdback, then it not having done so is a given. What is of greater concern to a party having a lien is whether an owner intends not to release holdback once permitted by the Act to do so*."

A group of individual consultees made the point that ". . . [the phrase] *'has not paid' could result in confusion since a notice of non-payment is required to be delivered under the Act before the payment is due under the Act*".

The proposal to introduce a "pay when paid" principle to the Act's holdback scheme divides contractors and subcontractors. This same consultee proposed a solution: make a contractor's obligation to pay holdback conditional upon having received the holdback (i.e., introduce a "pay if paid" principle) and oblige contractors and subcontractors to enforce claims for payment of holdback by way of adjudication. It seems to me that a simpler way to address this point, as I have recommended, is to provide a province-wide scheme for the mandatory annual release of holdback throughout the construction pyramid.

2.3. **Analysis and recommendations**

If my recommendation to enact mandatory annual release of holdback is accepted, then I would recommend that s. 27.1 be repealed.

As noted above, statutory holdbacks represent money that an owner has already acknowledged (or an adjudicator has determined) is earned, due, owing, and payable upon a "proper invoice". By that time all contractual rights, to setoff for example, will have been resolved, one way or another. Thus, the owner should have no further claim upon statutory holdback at the time of release. The correct time under the Act to withhold payment for claims and deficiencies is at the time of receipt of a proper invoice, which triggers the parties' rights to access adjudication and fair determination of any payment issues. Section 27.1 is not intended to allow an owner a second chance to raise payment issues.

However, if the holdback regime is merely tuned up without making the significant changes that I've recommended, then the language in section 27.1 should be clarified.

There is one problem that must be addressed whether my recommendation to enact mandatory annual release of holdback is implemented or not. One group of individual consultees put this problem particularly well *". . . Section 26 broadly applies to "each payer" and therefore requires a contractor to pay holdback to a subcontractor once the subcontractors' liens have expired, while the owner's obligation is only triggered once all liens have expired".* This creates a circumstance in which it would be possible for a contractor to become liable to make mandatory payment of holdback to a subcontractor before the owner became liable to make a corresponding mandatory payment of earned holdback to the contractor. This same problem is possible throughout the construction pyramid. The remedial purpose of sections 26 and 27 would be better achieved by three amendments:

1. Replace the word "*if*" in s. 27.1(1) with the words "*only if*".

2. Replace the words "*refuses to pay*" in s. 27.1(1)(a) with the words "*intends not to pay*".

3. Expand the ambit of statutory adjudication to encompass all disputes over the timing, amount, and payment of statutory holdback.

<u>Recommendations</u>:

- **Enact provisions for the mandatory annual release of holdback, and repeal s. 27.1 of the Act.**

3. Pre-Construction Lien for Design Professionals

3.1. Background

It takes a team of committed professionals to bring any major building project to the point of actual construction. Engineers, surveyors, architects, accountants and lawyers invest substantial value in a project in the expectation of compensation, and in the expectation that the project will become an "*improvement*".

As the Act is currently written, services supplied before there is an actual "*improvement*" to an owner's land are not protected. Several non-legal professional associations have suggested that as value is added by their services, albeit prior the coming into existence of an "*improvement*", their pre-construction design services, at least, should be brought within the umbrella of the Act.

The statutory provisions relating to liens by pre-construction design professionals are currently as follows (my emphasis):

> **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.
>
> […]
>
> **Architects**
> (3) For greater certainty, subsection (1) applies to services or materials supplied by an architect as defined in the Architects Act and any employees of the architect.
> . . .
>
> "supply of services" means any work done or service performed upon or in respect of an improvement, and includes,
> (a) the rental of equipment with an operator, and
> (b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner's interest in the land,
> and a corresponding expression has a corresponding meaning; ("prestation de services")

The term "*improvement*" in s. 14(1) means actual physical construction in respect of land, often referred to colloquially as "*the first shovel hitting the ground*".

The chief argument in favour of creating a lien for pre-construction design professionals is that significant realizable value is contributed to a project improvement before the first shovel hits the ground and therefore payment for that work should be protected by the Act regardless of whether the first shovel has hit the ground.

There is a further threshold that design professionals must meet in order to acquire lien rights under the Act. "*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 value of the owner's interest in land*" (my emphasis). In order to support a lien for pre-construction design services, therefore, design professionals must also prove that their design, plan, drawing or specification itself "*enhanced*" the value of the owner's interest in land. That is a hard proof to make if you are a pre-construction design professional, because the means of proof will lie mostly in the owner's hands.

In the early stages of the 2024 OCAR, it was suggested that a more rational and objective date for assessing enhanced value (and for starting the lien expiration period if pre-construction design services are to be afforded lien rights) would be the issuance of a building permit. The issuance of a building permit was thought to signal the coming into existence of something of realizable value. Permitted lands could be sold to realize the value of a lien for pre-construction design services, for example.

It had also been suggested that if a new lien for pre-construction services was created, it should expire within 45 days of the issuance of a building permit, with holdback release to follow.

3.2. **Stakeholder views**

Several stakeholders pointed out, correctly in my view, that Ontario courts have already given a generous reading to the requirement of "*enhancement*" (see *Armbro Materials & Construction Ltd. v. 230056 Investments Ltd.* and *1246798 Ontario Inc. v. Sterling*).[10]

Several consultees thought that creating a new lien for pre-construction design services in the face of such well-established case law would be an example of a "*solution in search of a problem*". This group argued that the current concept of "*enhancement*", as judicially interpreted, should be sufficient to protect those supplying pre-construction design services. This group thought that whatever commercial risk was left was just "*Business 101*" for any professional, and there was not reason to prefer one group of professionals involved in land development over another. This group generally felt that if any remedy was needed, it was not to create a new lien, but instead to facilitate the early release of holdback to pre-construction design professionals.

Some institutional stakeholders supported the idea of a new lien for pre-construction design services, provided that any amendments made were consistent with the prompt payment and holdback schemes already contained in the Act. Not all these consultees favoured tying the start of the pre-construction design services lien expiration period to the issuance of a

[10] (1976), 9 OR (2d) 226; [2000] OJ No 4261. At p. 23 of Striking the Balance, Reynolds and Vogel cite David Bristow, "Who is Entitled to Make a Lien Claim" The Canadian Institute Construction Superconference (2002); *Markborough Properties Inc. v 841202 Ontario Inc*., 1996 CarswellOnt 1326; *Alcorn & Associates Ltd. v 634713 Ontario Ltd.*, 1987 WL731422.

building permit, however. Some pointed out that pre-construction design can add value to an improvement even if no building permit is issued. If a new pre-construction design services lien was created, and its expiry tied to issuance of a building permit, on a project where no building permit was issued, the result would be a lien in perpetuity, contrary to the policy of the Act.

Others approached the problem of pre-construction design services a different way. They felt that the better approach was to leave the current legislative scheme in place but clarify the requirement that a pre-construction design professional prove enhancement to the value of land in establishing lienable "*supply of services*". They pointed out that any owner who kept a holdback from a pre-construction design professional had essentially admitted that the services constituted a "*supply of services*" under the statutory definition and in these circumstances, it was unfair to impose a high evidentiary burden on the design professional to prove an enhancement to the value of the land. Where a statutory holdback has been kept, it should be the owner's burden to disprove enhancement to the value of the owner's interest in the land.

3.3. **Analysis and recommendations**

One of the primary goals of the 2024 OCAR process was simplification, not complication. This means that I must not be quick to recommend new categories of lien, and new schemes of enforcement and expiration if simpler solutions are at hand, as they are here.

In my view it would be unsound to repeal the statutory requirement for proof of work "*that in itself enhances the value of the owner's interest in the land*", presently residing in the definition of "*supply of services*". Repealing this requirement would permit opportunistic or strategic liens with no corresponding added value to an owner. Taken to an extreme example, if the requirement for proof of enhancement to the value of the owner's interest in the land were to be removed, it would be theoretically possible for sale of land in satisfaction of such a lien to unjustly expropriate value that was there before any pre-construction design work was performed. That would be unacceptable and contrary to the policy of the Act.

There are several less complicated and more manageable remedial solutions that should be pursued instead:

1. Address the release of holdback directly: Even establishing a new lien would not be enough. If a new lien was created, companion provisions would have to address early release of holdback, for example. A simple and more direct approach would be to mandate annual release of holdbacks to anyone from whom they were kept. Above, I have recommended a "*one holdback regime for all*" approach. Under such a mandatory annual release of holdback scheme, those supplying pre-construction design services will not have to wait long for a remedy, even without a new form of lien.

2. Address the problem of proof directly: It seemed obvious to many consultees that if services are supplied for which the owner keeps a holdback, those services are "*supplied to an improvement*" within the meaning of the Act. I agree. This supports the creation of a legal presumption that wherever holdback is kept from a person supplying pre-construction design services, those services constitute the supply of services to an improvement, subject to an owner proving the contrary (i.e., that there has been no enhancement to the value of the owner's interest in the land).

3. Broaden statutory adjudication to include all pre-construction design payment disputes: Recommendations with respect to statutory adjudication are addressed later in this report, however at this point I recommend that the issue of whether a supply of pre-construction design services meets the statutory test of "*supply of services*" should be referrable to statutory adjudication, as should any issues relating to payment of holdback to a supplier of pre-construction design services from whom a holdback has been kept.

Recommendations:

- **Create a legal presumption in order to trigger lien rights that where the making of a planned improvement is not commenced, the supply of a design, plan, drawing or specification constitutes the supply of services to an improvement, subject to an owner proving that the services did not result in an enhancement in the value of land.**

- **Permit an owner or supplier of pre-construction design services to adjudicate any issue related to "*enhancement to the value of the owner's interest in the land*".**

G. PROPOSALS: ADJUDICATION

In the years since targeted statutory adjudication was introduced in Ontario, adjudication has become a global norm not just in the construction industry, but in a wide variety of commercial situations.[11]

Adjudication is no doubt sound in policy,[12] but achieving the full promise of statutory adjudication requires a cultural shift which is still under way. Other jurisdictions, like the U.K. for example, began with a more limited form of statutory adjudication and worked over several years to socialize the idea of interim binding adjudication. Once that idea had become mainstream, the cultural shift was complete, and the U.K. transitioned into a more comprehensive and satisfactory adjudication regime.[13] Ontario is on the same path. The Act introduced the innovative idea of interim binding dispute adjudication, but wisely chose compromise by implementing only a targeted version to remedy payment disputes in both the public and private sectors.

It is now time for Ontario to take the next step and let statutory adjudication fulfill its promise. In doing so, we are able to take advantage of a great wealth of experience, learning, and understanding that has taken place in other jurisdictions, like the U.K. whose legislative and judicial experience with statutory adjudication is now approaching its thirtieth anniversary.

We have many things to learn from the experience of others:[14]

- Party autonomy in the appointment of adjudicators is crucial to the success of the scheme. Subject to party autonomy in the appointment of an adjudicator, it should be left principally up to the adjudicator at first instance, not the statute or its regulations, to

[11] Among the jurisdictions that have adopted a form of statutory adjudication of construction disputes: United Kingdom, New South Wales, Victoria, the Australian Capital Territory, Tasmania and South Australia, Western Australia, Northern Territory of Australia, Singapore, Malaysia, Ireland, New Zealand, Hong Kong, South Africa, China and Germany.

[12] None of this was lost on Reynolds and Vogel who took the brave step of introducing statutory adjudication into the Act. As they said more than five years ago (Striking the Balance, page 202 and following): "*Adjudication is a swift and flexible mechanism of dispute resolution. While there are many variations of adjudication, the essential characteristics involve the determination of a dispute arising under a construction contract by an adjudicator who is a qualified person (not a judge) appointed to conduct an investigation and make a quick determination (in about 40 days, on average). The adjudicator's decision is binding on an interim basis and enforceable. In certain adjudication regimes, parties are free to specify in their contracts the mechanisms for adjudication, as long as those mechanisms comply with the minimum requirements set out in the legislation and/or regulations. If they do not comply, the minimum standards set out in the legislation or regulation will be implied into the contract. Adjudication is a proven, pragmatic solution for projects gridlocked by disputes, a solution that frees cash flow and resources, while at the same time striking an appropriate balance among competing interests. The task, as we see it, is to adapt the known and proven model of adjudication in a way that suits Ontario, given the existing lien regime and given our recommendations in relation to promptness of payment as described in Chapter 8 – Promptness of Payment and the summary procedures described in Chapter 6 – Summary Procedure*."

[13] Ibid. Reynolds and Vogel at page 229: "*When originally implemented, adjudication was an unprecedented step, but now adjudication is well established and well understood. Statutory adjudication has been utilized successfully in the U.K. for almost 20 years successfully. It works*."

[14] See Reynolds and Vogel at pages 202 and following.

determine whether a dispute is too complex to be dealt with fairly within the time and procedural constraints of the statutory scheme.[15]

- Parties should be free to include whatever they want in an adjudication with the concurrence of the adjudicator.[16] Beyond permitting this to occur by consent, the scope of any adjudication need not be a matter for legislation or regulation.[17]

- Adjudication works best if it works systemically and not selectively. Thus, broadening the scope of statutory adjudication is preferrable to allowing parties to agree amongst themselves to conduct *ad hoc* adjudications.[18] We need the uniformity and organizational structure provided by an Authorized Nominating Authority, as provided for under Part II.1 of the Act (i.e., ODACC).

- Broadening the scope of statutory adjudication inhibits insubstantial, strategic jurisdictional challenges.[19]

- Permitting adjudicators to investigate and determine any partial or full challenge to their own jurisdiction, reduces strategic jurisdictional challenges.

- The credibility of any statutory adjudication system depends on the way in which earlier adjudications on the same project are addressed.[20]

    - This issue has generated a significant body of case law in other jurisdictions. This issue is prominent in the context of adjudications requesting declaratory relief.

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[15] In this section, I rely heavily on the 4th edition of Coulson on Construction Adjudication, Oxford University Press, 2018, in this case paragraph 2.13.
[16] Ibid. Coulson: para. 4.54 and following.
[17] Ibid. Coulson: para. 7.118, citing Thornton J. in Fastrack Contractors Ltd v Morrison Construction Ltd: "*During the course of a construction contact, many claims, heads of claim issues, contentions and causes of action will arise. Many of these will be collectively and individually disputed. When a dispute arises, it may cover one, several or man of one, some or all of these matters. At any particular moment in time, it will be a question of fact w what is in dispute. Thus, the 'dispute' which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words, the 'dispute' is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallize into an adjudication reference*."
[18] Ibid. Coulson: para. 6.01 – 6.13.
[19] Ibid. Coulson: para. 7.03 and following. As Justice Coulson puts it: ". . . *no disputed enforcement application is complete without a jurisdiction point, whether good, bad or laughable*." Our Divisional Court has been supportive of adjudicators' jurisdictional decisions wherever possible. At para. 7.11 Justice Coulson observes "[t]*his fine line, between an agreement to allow the adjudicator to reach a conclusion on the jurisdiction point, and an agreement to be bound by that conclusion*".
[20] Ibid. Coulson: para. 7.145 and following: "*Once an adjudicator has reached his decision then, until that decision is challenged, either in arbitration or in court, it is binding on the parties. This can create practical difficulties in long-running contactors, where ether e may be a series of disputes that, over time, need to be referred to the same or different adjudicators*."

- Broadening the jurisdiction of adjudicators increases the need to address the relevance of earlier adjudications.

- Serial appointments of the same adjudicator on the same project make it inevitable that earlier rationales and findings of fact may affect subsequent adjudications. Part of the solution is creating a project-specific log of adjudications commenced, adjudication outcomes, and adjudication reasons.

4. Access to Statutory Adjudication

4.1. Background

Ontario's current targeted adjudication scheme has been a success, to the extent that it has been used.[21]

Consultees at all levels of the industry want Ontario to build on this success by expanding the present statutory adjudication scheme. This theme was pursued by many consultees during the review process. Almost all consultees agreed that more adjudication is better than less. By "*more*" adjudication, consultees meant both extending the time for adjudication and broadening the types of disputes that can be adjudicated.

It quickly became clear that the "*Specialist Adjudicators*" idea was regressive and should be discarded. Raising such an unpopular idea did generate a good deal of constructive commentary on adjudication and adjudicators. It allowed me to explore with consultees (whether they had filed written submissions on the point or not) what parts of the Ontario adjudication scheme were working and what parts were not, from the adjudicators' point of view.

Several of my consultees were active ODACC adjudicators. Some were busy, some less so, but none were making a living at adjudication. This was not a problem for any of them as none of them were in it for the money. They were ODACC adjudicators because they found the work interesting and challenging. Several adjudicators saw it as a chance to give back to an industry that had given them their professional careers.

There was much discussion amongst consultees about ODACC, ODACC's commercial terms, the quality of ODACC's adjudicators, the amount and quality of ODACC training, and a number of other ODACC-related points and issues. To the extent that the relationship between ODACC and the province is contractual, it is outside of my remit. Nevertheless, ODACC did participate actively and constructively in the review process. ODACC made a number of good, sound, data-based points that I reference below.

[21] Three consultees alerted me to the apparent existence of a reprisal clause in municipal tender documents. They reported, anecdotally, that this clause been invoked against a contractor who had used adjudication. I was unable to confirm or discredit the anecdote. In any event leave the subject of reprisal clauses is for others.

4.2. **Stakeholders' views**

With one exception, all consultees wanted statutory adjudication in Ontario to be available over a longer time period (prior to the execution of a contract in the case of preconstruction services, and after termination or completion) and to respond to a wider range of commercial issues arising from the contract, and, indeed, compliance with the Act.

These recommendations came from people using the adjudication process regularly, not just talking about it theoretically. I have given their submissions and commentary significant weight in making my recommendations.

As one institutional consultee put it (my emphasis): "*With respect to the time period for adjudication, the expansion of the availability of adjudication is critical. In particular, the fact that adjudication is unavailable following contract completion is a major impediment to the efficient determination of disputes regarding holdback release and undermines the prompt payment scheme in respect of holdback . . . The intended purpose of introducing statutory adjudication was to alleviate from construction disputes clogging up the courts and addressing certain access to justice concerns* – [we are] *in favour of any amendments that would give effect to that intended purpose*." No one I spoke with disagreed with that statement of intended purpose.

Consultees' main frustration with statutory adjudication in Ontario is with its slow uptake. Several consultees blamed ODACC's fee structure. Under ODACC's regime at most fee levels, 40% of an adjudicator's fee is retained by ODACC with 60% remitted to the adjudicator.[22] ODACC has a data-based answer to this criticism. According to ODACC's statistics, adjudication is now "*taking off like a rocket*", so much so in fact that it is straining the ability of ODACC to field enough sufficiently trained adjudicators at all price points on its roster. Clearly, ODACC would argue, the uptake issue is not related to ODACC's fee structure.

Nevertheless, a repeated concern among consultees experienced with adjudication in Ontario was that ODACC's fee structure artificially limits the available pool of adjudicators. As one major institutional consultee put it: "*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*." Another major institutional consultee concluded that: "*Lowering the 50% fee ODACC receives will greatly encourage more Adjudicators as well as adjudications*."

Almost without exception, consultees advocated for party autonomy in the choice of adjudicator on the U.K. model, regardless of that person's qualifications or ODACC affiliation.

[22] One institutional consultee referred to the ODACC "monopoly".

A closely related issue was that of adjudicator training. One group of major institutional consultees pointed out that current ODACC training was, at best, superficial training in the use of ODACC systems and procedures and not training in the basic principles of natural justice, the conduct of fair hearings, and the writing of reasoned determinations.

Another group of consultees, equally well informed, took a different view. Their view was that unless the province wants to create an adjudication system populated entirely by lawyers, it must accept that no matter how much training is offered or mandated, there will always be gaps between the work product of legally trained adjudicators and non-legally trained adjudicators. Lawyers write and argue for a living. Few other professions or trades can make that claim. It was pointed out to me, and must always be remembered, that not all disputes are legal disputes. There will be disputes more within the professional competence of engineers and experienced non-lawyers than lawyers.

The idea of expanding the time period during which adjudication is available drew a great deal of attention, all of it positive.

One large industry organization, with a broad base amongst owners, contractors, trades, and suppliers said (my emphasis): "*Adjudication rights and lien rights should not be coterminous. Adjudication rights need to continue after lien right have expired if for no other reason than to provide contractors and subcontractors an effective remedy to enforce their right to payment of holdback. The single most important reform of the Construction Act that is needed is to amend subsection 13.5(3) to extend the right to refer disputes to adjudication to: 1) 120 days after the contract or subcontract is terminated or the work is complete; or 2) 60 days after the holdback is payable, whichever is later. Most payment disputes arise after the contract or subcontract work is complete because the payor no longer needs to make payment in order to incentivize the contractor or subcontractor to continue working . . . The premature expiration of the right to refer a payment dispute to adjudication goes a long way to defeat the policy objective of prompt payment*."

Another large institutional consultee, broadly representative of all sectors of the provincial construction economy, "*strongly supported*" amending s. 14.5(3) to expand the availability of adjudication beyond the lien period, as holdback is not payable until all liens have expired. This group suggested "*that adjudication be available until 90 days after completion, termination or abandonment of the contract, to provide time for holdback release and the commencement of an adjudication if holdback is not released*". As it stands, and as another group of consultees pointed out to me, the current Act opens the possibility for what they described as "*strategic termination of a contract or subcontract*" to preclude an adjudication in respect of unpaid invoices – in other words, a termination rendering a contract or subcontract complete so as to bar access to statutory adjudication.

Another group of institutional consultees having national membership agreed 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." The contrary view (and there was only one) is that "[a]*djudication should not be available after contract completion. The purpose of adjudication is to avoid payment disputes to keep funds flowing, and avoid work stoppages, during the course of the construction project before it is completed. This is reflected, for example, by Section 13.19(5) of the Act – a contractor/subcontractor's right to suspend work under Section 13.19(5) due to non-payment arises only after it has first attempted to resolve the payment dispute through adjudication. The suggestion that adjudication be available after contract completion does not reflect the purpose of adjudication (above) – which is to keep work progressing until the contract is completed. After completion, there is no such concern as the work is completed*."

Several consultees took the position that it should be a fundamental principle that any payee on a construction project should always have at least one of the following options available: 1) payment, 2) a right to lien, or 3) a right to adjudicate – or some combination - but never none of those options.

Another consultee stated (my emphasis) that: "[t]*he timelines for liens, holdbacks and adjudications need not be coterminous, provided that the adjudication regime itself contains one cut-off for all project participants. In such circumstances, the only concern would be to ensure a contractor could commence and consolidate an adjudication on related matters if a notice of adjudication was received shortly before the cut-off . . .*".

Many consultees addressed the lack of substantive reach of a targeted adjudication scheme. I heard from several consultees (adjudicators, institutions, and individuals) that what is and is not to be included in our current targeted adjudication regime depends primarily on who ODACC assigns as an adjudicator. Some adjudicators take a liberal view of their jurisdiction, essentially that "*if it is somehow within an otherwise 'proper invoice', then it is properly before me as an adjudicator*". Other adjudicators take a conservative or restrictive view and decline jurisdiction in any adjudication that does not fit neatly within the four corners of a simple payment dispute.

Even the idea that there is any such thing as a "*simple payment dispute*" in the construction industry was challenged by some consultees. They argued that all payment disputes are in their essence performance disputes, and performance disputes in the construction industry are always an amalgam of scope, price, and time issues. Even the simplest prompt payment dispute can engage all three.

As one consultee put it (my emphasis) "*We submit that it should also be made clear that a single dispute could involve more than one issue. It is not unusual for a single construction contract to involve multiple claims, heads of claim, issues, compensation events, contentions and causes of action. These can, collectively and individually, be disputed. When a dispute arises, it may cover one, some or all of these matters. At any point in time, it will be a question of fact as to what comprises a single dispute. We submit that a dispute is defined as*

whatever claims, heads of claim, issues, etc. a referring party chooses to crystallize into a single reference to adjudication. *For example, a contractor may seek to recover sums it claims are owed under an interim payment application. The claim may include several elements such as measured work, variations and extension of time, loss and expense. The referral to adjudication may therefore identify more than one element, but this would not transform it into more than one dispute. The rationale is that the determination of the claim for an extension of time would be a necessary part of the determination of the loss and expense element of the claim*."

Another institutional consultee pointed out that broadening the scope of statutory adjudication "*raises complex policy considerations, including the competing objectives of efficiency in adjudication and the desire to avoid unnecessary repetition*". This group recommended that any party, and not just a contractor, should be able to require consolidation of "*related adjudications*" under s. 13.8(2).

I would single out one of my consultees as the most experienced with actual "*hands on*" adjudications. This consultee is an institutional owner. I would summarize their comments on adjudication in Ontario as follows:

- Party autonomy in the appointment of adjudicators must be respected: Party autonomy in choosing an adjudicator is essential to any attempt to expand the ambit of adjudication.

    - Unless there is party autonomy in the choice of an adjudicator, few institutional owners are likely to want to see the ambit of statutory adjudication increased.

    - Where there are contract interpretation issues, complex jurisdictional issues, material legal issues, or any concerns about natural justice, parties should be able to choose an adjudicator with the appropriate legal or arbitral training.

    - With party autonomy in the appointment of adjudicators, a wider range of issues, including issues between Obligee and Surety in the case of performance bonds and between Claimant and Surety in the case of payment bonds could usefully be referred to adjudication.

    - On the brighter side, ODACC appointed adjudicators seem to be doing a good job of working with the parties to resolve documentary issues.

    - On the less bright side, there are perceived significant differences between legally trained and non-legally trained adjudicators when it comes to case presentation. Legally trained adjudicators (lawyers, or non-lawyers with some arbitral training) tend to leave it to the parties to make or meet their cases, whereas non-legally trained adjudicators become more actively involved in

helping claimants "have as many kicks at the can as they can", inviting submissions on points, repeatedly in some cases.

- Also on the less bright side, there is no uniformity at present in how ODACC adjudicators deal with interest. Is interest subject to holdback or not? At the present time the answer to that question depends upon who ODACC appoints as the adjudicator.

- Informal procedures need clarification: ODACC has created a series of informal procedures that essentially become law, as the only route a respondent can take is through ODACC.

  - For example, ODACC may receive a request for adjudication many days before it wends its way to the right people in an owner's organization. ODACC (reportedly) will wait until the "*contractor pulls the trigger*" to initiate the 4-day period for adjudicator agreement or appointment. This can put owners at a significant disadvantage.

  - To take another example, ODACC will often require a "*short form response*", presumably to get the other side of the story so as to assist with the choice of adjudicator, but this request often comes before an institutional owner has had any opportunity to consider its position.

- Consolidation of adjudications needs careful consideration:

  - Two kinds of consolidation need to be distinguished, both of which should be possible with the concurrence of the parties and the adjudicator: consolidation of several adjudications with a common fact matrix into one, and consolidation of several disputes to move forward with a single, agreed adjudicator.

  - After many adjudications, this consultee had yet to see a party who has failed to achieve its objective in adjudication recast the same or similar issues in a subsequent adjudication to "*take another kick at the can*". This has been an issue in the U.K. for example, but it has not been an issue here, so far. With broader scope in adjudication, though, this is something that adjudicators and parties will have to be alert to.

- A payer's post-adjudication remedies need to be considered more carefully: While it is a fundamental precept of the whole scheme that it is only interim binding, such that any disappointed party can litigate or arbitrate the issue later, this applies more easily to payees than payers. For example, if a payer is obliged by a determination to pay a sum of money, what is that payer's cause of action if it wishes to challenge the determination by litigation or arbitration? Clarity on this would be appreciated.

The strongest counterargument against broadening the scope of statutory adjudication came from a major institutional consultee who made a party autonomy argument. Their view was that no amendment was necessary and "*only matters enumerated under that section should be referred to statutory adjudication. Pursuant to paragraph 7 of section 13.5(1), parties can agree to refer any non-enumerated matter to adjudication*."

There was also one "*in terrorem*" argument made by a single consultee who even after five years with statutory adjudication and in the face of statistics confirming its success, remained steadfastly skeptical. The tone of this consultee's submissions was somewhat extreme calling any form of expanded adjudication "*a disaster . . . Prompt payment should be the only issue adjudication deals with. In addition, the requirement to consolidate related adjudications could also be an issue. The adjudication is to resolve issues and keep the funds flowing, not as an alternative to full and final dispute resolution of claims*".

4.3. **Analysis and recommendations**

When I think about the scope and timing of statutory adjudication under the Act, I am reminded of Justice Doherty's statement for the Court of Appeal in *Popack v. Lipszyc*[23] dealing with a challenged arbitral outcome: "[t]*he parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum*."

This province, and after much careful and thoughtful analysis and industry consultation, including the comprehensive submissions set out in Striking the Balance, and with full industry support province-wide, has chosen its forum: statutory adjudication. This choice implies a preference for outcomes reached in that forum, respect for determinations made in that forum, and a desire to see statutory adjudication fulfill its promise. We must support those choices. This idea guides much of what follows.

When Reynolds and Vogel published their report, they acknowledged (my emphasis) that "*adjudication could be applied to all contracts and subcontracts related to an improvement, as those terms are presently defined in the Act, which includes public and private projects*."[24] In the end, however, they recognized the massive cultural shift that would be required and recommended only a targeted introduction of statutory adjudication into the Ontario legal landscape. Their effort (and success at the time) was to balance the perceived advantages and disadvantages of statutory adjudication, as they were then known.[25] Much has happened since then.

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[23] 2016 ONCA 135.
[24] Striking the Balance: page 236.
[25] For an experienced U.K. perspective, see James Pickavance: A Practical Guide to Construction Adjudication, Wiley Blackwell, 2016: 3.4.2 Advantages: Speed; Continuity; Cash flow; Temporarily binding; Cost; Flexibility; Privacy; Familiarity; at any time; Tried and tested process; Choice of decision maker; Speed and certainty of enforcement, 2. 3.4.3 Disadvantages: Speed; Quality of submissions and evidence; Quality of adjudicators;

Reynolds and Vogel recognized that nothing less than an industry-wide cultural shift was necessary and that it would take time. We are now five years into the regime and the hard part is over. We have already made the difficult policy decision[26] and cultural shift. It is now time to let statutory adjudication transform dispute resolution industry wide.

Taking into account the views of dozens of consultees over the past few months, it is clear that two things must happen together to realize the full potential benefits of statutory adjudication in Ontario: 1) expansion of statutory adjudication both in time and subject matter, and at the same time 2) a way must be found for greater party autonomy in the choice of adjudicators in a way that compensates ODACC for the administering any resulting private appointments.[27]

If these two steps are taken together, the scope of adjudication would no longer depend on the views of the ODACC adjudicator appointed to the adjudication. Most debates over jurisdiction would be eliminated. Adjudication would be rendered more accessible to every level of the construction industry, province wide.

Consultees wanted to see all artificially created barriers to adjudication dismantled. This view was well articulated by an institutional consultee of national scope and deep industry experience who stated as follows (my emphasis): "*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*."

Expanding statutory adjudication will no doubt burden institutional and municipal owners who carry large volumes of work on their books at any given time. This objection was stated plainly to me by one consultee: "*The intention of the adjudication regime is for highly expedited dispute resolution, which necessitates a focused process. Making this change* [consolidated adjudications] *would make it far more difficult for owners to comply with the tight timelines for responses, keeping in mind that contractors can essentially commence*

Quality of adjudicator nominating bodies; Large disputes; Temporary binding nature; Irrecoverable costs; Ambush; No automatic right to interest; No joinder provisions; No non-contractual claims; Evidence not under oath.

[26] As on nationally based consultee put it so well (my emphasis): "*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*."

[27] In conducting this review, I have given a lot of thought to the issue of single or multiple Adjudicator Nominating Authorities, or ANAs. There were vocal consultees who strongly advocate for multiple ANAs in Canada. There are equally strong and rational voices who say otherwise. As this issue is beyond my mandate for a number of reasons, I have chosen to make no formal remarks in the body of the report. I believe that the recommendations in this report as to the expansion of adjudication will make the system work to capacity in Ontario with a single ANA.

claims at will while a project is ongoing, and because several deadlines are calculated in calendar days, providing contractors a strategic advantage."

There are two answers to this objection. The first is one of relative overall transaction cost (orders of magnitude less if resolved in real time by adjudication than after-the-fact, forensically), the second is one of party autonomy (allowing parties to access their adjudicator of choice, someone who can truly "*fit the forum to the fuss*").[28] The added transaction cost and short-term burden of administering multiple adjudications during the course of any given project is a mere fraction of the cost and long-term administrative burden of taking even a single dispute through litigation or arbitration over a number of years after the end of the project.

I met with one young in-house lawyer who said to me that while he understood his employer was burdened by having many adjudications under way at any given time, they had by now learned to systematize their responses to minimize this burden. He was personally delighted to have the opportunity for meaningful advocacy. He had a dozen or so adjudications under his belt at the time of our consultation and felt that he was becoming more efficient and effective in resolving disputes as time wore on. He was learning. He was adapting. This was encouraging. It will be the experience of the whole industry here if the proposed reforms are adopted, as it has been in the U.K. and elsewhere in the world.

But if we expand statutory adjudication in this way, can we expect an immediate uptake of the process? Maybe. There will likely always be some resistance to something as relatively new as adjudication.[29] I heard this in consultations. Few contractors want to be the first on their block to make use of statutory adjudication. Few contractors want to risk reprisal, whether or not reprisal clauses in tender documents are permitted by law. No payer welcomes a payee's formalization of an adjudication. There will inevitably be some bruised commercial relationships along the way, at least until statutory adjudication becomes normalized, as it has become after almost three decades in the U.K.[30]

The discussion so far foregrounds a special problem with complex or large-scale adjudications. Complex or large-scale adjudications can involve vast numbers of relevant and material documents, large dollar amounts, and often a number of hotly contested legal and factual issues. ODACC reports that it is receiving several high dollar value adjudications this year. ODACC expects this to become a trend. If high dollar value adjudications are a trend, will some be too big or complex to be adjudicated? This problem has been discussed in the U.K.:[31]

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[28] A brilliant phrase originally used by Harvard's Frank Sanders I believe, but Prof. Sanders may have borrowed the phrase from Sidney Lezak.
[29] The points that follow are distilled from James Pickavance: A Practical Guide to Construction Adjudication, Wiley Blackwell, 2016, paragraphs 3.17 and following.
[30] It must always be remembered that the genesis of statutory adjudication a private form of the same procedure adopted by Robert MacAlpine & Sons long before the U.K.'s 1996 amendments that made it statutory.
[31] Another colourful metaphor, Ibid. Pickavance.

> [8.51] Nevertheless there may be good reasons why a referring party feels it must refer a large dispute to adjudication. It maybe that several issues cannot easily be separated, either because they are part of a common factual matrix or that there is one legal principle binding those issues together. A more sinister motive might be that a referring party, aware that the other party may not be as prepared for dispute as it is, triggers a large-scale adjudication with the aim of increasing its chance of obtaining a favourable decision because the responding party will not have time to pull together a strong defence.
>
> [8.52] Notwithstanding the reasons or perceived benefits, the size of the dispute may simply not lend itself to being resolved within an unextended timeframe. If there are files upon files of information coupled with difficult or complex issues, the adjudicator will probably ask for additional time. Where consent is not given, he should resign. Where the adjudicator does not ask for more time, though he may not say it, the adjudicator is more likely to find shortcuts in his analysis so that a decision can be reached. This may increase the susceptibility of his decision-making process and the decision on a challenge that it was reached outside of the bounds of the adjudicator's jurisdiction and/or that the adjudicator has breached the rules of natural justice because he has not addressed the dispute put to him or he has not considered material parts of the submissions or evidence.

The solution is clear. First, allow party autonomy in the appointment of adjudicators to give parties confidence in the process (while compensating ODACC fairly for the cost of administration) and, second, allow the parties' chosen adjudicator faced with a "*kitchen sink*" adjudication to relegate it to arbitration or litigation if necessary. The risk of relegation should be sufficient incentive to all parties to take reasonable approaches in large scale adjudications.

I review specific adjudication issues in the sections that follow.

4.3.1. Adjudication by any party to a contract or subcontract of any issue arising under that contract or subcontract

Allan Stitt of ODACC sits as Canada's representative on the UNCITRAL working group on adjudication. After close study by representatives of legal systems globally, UNCITRAL will be issuing a recommended model adjudication clause that expands adjudication well beyond the targeted adjudication model we currently have here in Ontario, to include all parties to all commercial disputes generally.[32]

[32] UNCITRAL draft explanatory notes: [Adjudication] *is a well-established procedure particularly in certain jurisdictions for construction contracts. The Model Clause aims to facilitate the use of adjudication for long-term contracts or projects beyond those in the construction industry, such as financial or other commercial*

Statistics indicate that broadening access to statutory adjudication is the trend globally.[33] This makes a compelling argument for broadening access to statutory adjudication in Ontario. We are in an unprecedented period of infrastructure renewal. Joint ventures draw in significant capital and expertise from countries that make better use of statutory adjudication than we do here in Ontario. Ontario needs to become a familiar dispute resolution environment to sustain and encourage infrastructure investment from the private sector.

4.3.2. Amend s. 13.5(3) to permit adjudication to be commenced for a period of 90 days following the expiration of all lien rights

For statutory adjudication under the Act to succeed, it must ensure that contractors, subcontractors, and workers are either paid, have access to lien rights to secure payment, or have access to statutory adjudication to enforce payment. There should be no situation in which an unpaid contractor, subcontractor, or worker has no money and no remedy under the Act. For more information, see below in this report issue #8 ("Availability of Adjudication After Completion").[34]

relationships, including supply chain contracts and to provide a mechanism for cross-border enforcement of determinations made by the adjudicator.

[33] For example, the following is reported in the 2023 report of King's College London and the Adjudication Society (my emphasis): "*The majority of individual respondents, at 66%, would remove the exception under section 105(2)(c)(i) of the Construction Act relating to 'assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is (...) nuclear processing, power generation, or water or effluent treatment'. 65% of individual respondents would also remove the exception under section 105(2)(c)(ii) which excludes construction operations if they concern 'assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is (...) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink'. 47% of questionnaire respondents stated that they would remove the exception to the definition of 'construction operations' under section 105(2) (d)(i) of the HGCRA. However, a high number of individual respondents (31%) did not support any amendments to the section. A further 7% thought that the scope of the provision should be increased. The section relates to 'manufacture or delivery to site of (...) building or engineering components or equipment (...) except under a contract which also provides for their installation'. Section 105(2)(d)(ii) excludes the 'manufacture or delivery to site of (...) materials, plant or machinery (...) except under a contract which also provides for their installation' from Part II of the Construction Act. Questionnaire respondents were almost equally split in relation to whether the provision should be amended. 41% supported the removal of this exclusion while 38% would not amend it. Section 105(2)(d)(iii) states that the following is not a construction operation under Part II of the Construction Act: 'manufacture or delivery to site of (...) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems (...) except under a contract which also provides for their installation'.*"

[34] The State of Victoria, Australia, is in the midst of reviewing an adjudication remedy and it has been suggested there that to prevent abusive or opportunistic "11th hour" adjudications, a black out period for adjudication between mid-December and mid-January might be a solution. This is an interesting idea and one that might be worth consideration here should "11th hour" adjudications become problematic following the expansion of the adjudication remedy in this Province.

4.3.3. Amend s. 13.5(4) to clarify the provisions relating to multiple disputes referred to a single adjudication

UNCITRAL's solution is to define "dispute" as anything "*relating to* [the] *contract, or breach, termination, or invalidity thereof*". This definition comports with the "*real world*" experience of many Ontario adjudicators with whom I consulted. These adjudicators are deciding the scope of the dispute before them as a preliminary question of fact (whether they are aware that is what they are doing or not).

Where the parties find themselves facing multiple disputes arising out of the same contract and factual matrix, it should be open to them to jointly recommend consolidation of those disputes into a single adjudication, subject to the agreement of their adjudicator, or, alternatively, recommend the order of determination of the disputes, again subject to the agreement of the adjudicator.

Several consultees spoke of the procedural complexity here posing a challenge to non-legally trained adjudicators.

4.3.4. Require anyone commencing an adjudication to disclose previous adjudications on the same improvement

Unless and until a secure, province-wide project information register is implemented, there is a risk that a disappointed party might subtly change a failed adjudication into a new dispute, and new adjudication, to try their chances before a new adjudicator. That sort of thing would frustrate the remedial intent of the Act and in an extreme case might lead to an abuse of process. While none of my consultees had experienced this, it seems to be a feature of the adjudication landscape in the U.K.

What is required (as in so many sections of the Act) is information symmetry, transparency, and disclosure within a project of all determinations affecting that project. Ultimately it will be necessary to publish anonymized determinations.[35] This will allow an adjudicator to make an informed decision in such circumstances. Disclosure of prior determinations by the same parties on the same projects should be required.

[35] In *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555 (CanLII) Justice Corbett, writing for the Divisional Court, noted that "*Apparently neither the Merits Decision nor the Jurisdiction Decision have been released to legal databases. They should be: the* "open court principle" *applies to adjudicative bodies and public release of decisions is one way in which decisionmakers such as ODACC adjudicators are publicly accountable*." As I have mentioned in this report, the need for "information symmetry" as George Adams, K.C. used to call it, requires that a secure, province wide e-registry be set up to ensure that everyone contributing value to every improvement has access to the same information at the same time, including the date and result of all adjudicative determinations.

4.3.5. Amend s. 13.9 to permit the parties to agree on the appointment of any natural person as a private adjudicator

This recommendation was made in one form or another by all consultees with hands-on experience of Ontario's current adjudication scheme.

In making my recommendations, I wish to emphasize that the current ODACC roster and fee structure for ODACC-appointed adjudicators should be maintained. Although there is some dissatisfaction amongst roster users and ODACC roster adjudicators, it seems to be working whenever ODACC appointment is necessary. The current ODACC system works in two ways: first, it allows low dollar value disputes between unsophisticated parties to be adjudicated at a fair price (this is an access to justice issue); second, it currently operates "*in terrorem*" to persuade everyone else to agree on an ODACC roster adjudicator.

The downside is that if this roster scheme is all we have, it is an unnecessary limitation on party autonomy.[36] For adjudication to work as intended, parties must be able to choose their adjudicator. This availability of choice in the statutory scheme was a significant issue for all consultees, particularly those exposed to high dollar value, highly complex adjudications. These parties would use statutory adjudication if they could choose their own adjudicator, but the adjudicators they would choose are not attracted to ODACC's 60/40 fee model.

If allowing parties to choose their adjudicator requires adjustment in ODACC's commercial agreement with the province to provide for a reasonable one-time administrative charge (not based upon a percentage of the amount in dispute, but based on recovery of ODACC's costs, overhead, and reasonable profit for administering a non-roster adjudication) to compensate ODACC fairly for the administration of the non-roster adjudication and certification of the determination achieved in that adjudication. It would be reasonable to expect all non-roster, private adjudicators to be ODACC trained, i.e., to have completed ODACC's training course(s).

The appointment of a private adjudicator should require only an agreement in writing, signed by the parties and the proposed, qualified adjudicator, and payment of ODACC's one-time administration charge, evidence of which to accompany the Notice of Adjudication under s. 13.7(1).

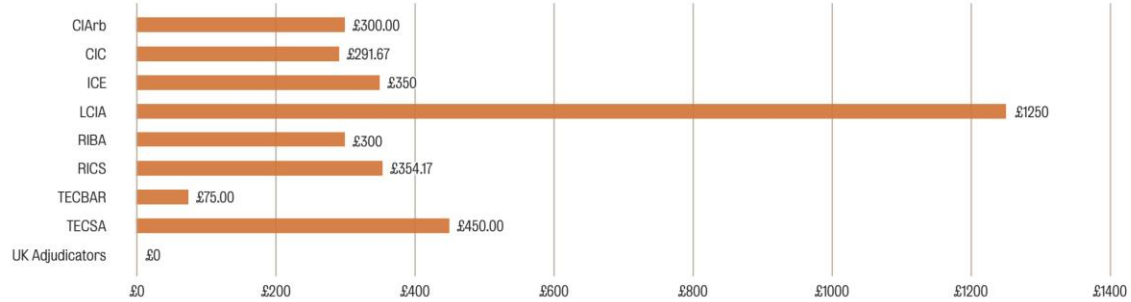
This would require an amendment to s. 13.9 to provide for ODACC's one-time administration charge, to be set from time to time by Regulation. The one-time administration charge should be recalibrated periodically to fairly compensate ODACC for the actual cost of administrative services to be provided together with reasonable recovery of overhead and profit. Section

[36] As Justice Doherty said for the Court of Appeal in *Popack v. Lipszyc*, 2016 ONCA 135: "*The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum*". We must let parties choose their forum, and their decision maker, and legislation should respect that choice.

13.10 would have to be amended as necessary to conform to the amendments made to s. 13.9.

To give you a sense of proportion, and by way of example only, statistics recorded in 2023 by King's College London and the Adjudication Society indicated some very roughly comparable fee ranges:

Figure 10: Adjudicator nomination fee in 2023 (excluding VAT)
Based on nine received responses



4.3.6. Amend s. 13.12 to add the right to determine jurisdiction

Adjudicators in Ontario regularly determine their own jurisdiction as a preliminary matter, without the benefit of having enabling statutory language. The adjudication process would fail if they could not do so. Unless adjudicators can deal with their own jurisdiction, any frivolous jurisdictional argument could be thrown up to stop an adjudication in its tracks and if that were to happen, then the remedial intent of the legislature would be frustrated.

Enabling language along the following lines adapted from the *Arbitration Act, 1991* should be considered:

> 17 (1) An adjudicator may rule on their own jurisdiction to conduct the adjudication.
> **Time for objections to jurisdiction**
> (2) A party who has an objection to the adjudicator's jurisdiction to conduct the adjudication shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.
> **Time for objections, exceeding authority**
> (3) A party who has an objection that the adjudicator is exceeding their authority shall make the objection as soon as the matter alleged to be beyond the adjudicator's authority is raised during the adjudication.
> **Later objections**
> (4) Despite section 3, if the adjudicator considers the delay justified, a party may make an objection after the time limit has expired.

4.3.7. Amend s. 13.18 to include a "*slip rule*" like that found in the Arbitration Act 1991

At present, adjudicators do not have quite the same ability as arbitrators to catch and correct slips of the pen.[37] All consultees that responded to this point felt that a very short time period should be allowed adjudicators to do so. This amendment, if made, may require corresponding adjustment in other dates (such as the time period for payment of any amount found due as a result of a determination). Language along the following lines adapted from the Ontario *Arbitration Act, 1991* could be considered:

> **CORRECTIONS AND ADDITIONAL AWARDS**
> **ERRORS, INJUSTICES CAUSED BY OVERSIGHTS**
> 44 (1) An adjudicator may, on its own initiative within five calendar days after making a determination, or at a party's request made within five days after receiving the determination,
> (a) correct typographical errors, errors of calculation and similar errors in the determination; or
> (b) amend the determination so as to correct an injustice caused by an oversight on the part of the adjudicator.
>
> **NO HEARING NECESSARY**
> (2) The adjudicator need not hold a hearing or meeting before exercising jurisdiction under (1) or rejecting a request made under this section.

4.3.8. Amend the regulations to require ODACC to establish and maintain a database of indexed, anonymized determinations

This was a common request. At present, neither parties nor adjudicators have a way of knowing what other adjudications in the contractual chain have proceeded, and what have not. Adjudicators have no way of knowing whether their rulings on jurisdiction, for example, are within norms. The suggestion is not that prior determinations be in any sense binding or even persuasive.[38] The suggestion is that to be credible, the adjudication system must be transparent.

This shortcoming of the Act has attracted judicial comment. In *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555 (CanLII) Justice Corbett, writing for the Divisional Court, noted that "[a]*pparently neither the Merits Decision nor the Jurisdiction Decision have been released to legal databases. They should be: the* "open court principle" *applies to adjudicative bodies and public release of decisions is one way in which decisionmakers such as ODACC adjudicators are publicly accountable*."

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[37] Under s. 22(2) of O. Reg. 306/18 (Adjudications under Part II.1 of the Act), an adjudicator may during a short period change a determination "to correct an error that is of a typographical or similar nature".

[38] One adjudicator argued forcefully against publication of anonymized determinations: "*There has been much talk about publication of determinations rendered by adjudicators. That is an awful idea. Some adjudicators will get it wrong, and some have used a poor process to get there. There should be no stare decisis attached to a wrong decision*."

The credibility of an adjudication system depends on the way earlier adjudications on the same project are addressed. Adjudication works, the industry needs to see it working.

4.3.9. Administrative amendment required regarding adjudicator's fee under current Act

The current wording in the Act in subsection 13.10(1) provides that the fee to be paid for conducting an adjudication shall be determined "*before the adjudication commences*", but if the adjudicator is being paid on an hourly basis, as is commonly the case, the fee is often not known until the end of the process. Thus, the amount that should be paid up front should either be the fee agreed among the parties and the adjudicator (if the fee is fixed), or and amount estimated and set by ODACC if the amount is not fixed.

Also, the language in subsection 13.10(1) of "*before the adjudication commences*" begs the question of when an adjudication "*commences*". The requirement should be for the adjudicator fee to be deposited within five days of a request by the ODACC, and for the fee payable to be the amount agreed by the parties and the adjudicator if there is one, or the estimate of ODACC in the absence of such an agreement.

A corresponding amendment to s. 23 of O. Reg. 306/18 (Adjudications under Part II.1 of the Act) would permit an adjudicator to resign if the stipulated retainer has not been paid to ODACC within the relevant time period.

I would anticipate no objection to these administrative amendments from any industry stakeholder.

4.3.10. Frivolous conduct

Section 13.17 of the Act currently provides as follows:

> **Frivolous, vexatious, etc.**
>
> 13.17 If an adjudicator determines that a party to the adjudication has acted in respect of the improvement in a manner that is frivolous, vexatious, an abuse of process or other than in good faith, the adjudicator may provide, as part of his or her determination of the matter, that the party be required to pay some or all of the other party's costs, any part of the fee amount determined under section 13.10 that would otherwise be payable by the other party, or both. 2017, c. 24, s. 11 (1).

One consultee pointed out an ambiguity in this provision: does "*acted in respect of the improvement*" implicitly include "*in respect of the adjudication*"? Different readers came to different conclusions. There seems to be no rational basis for excluding conduct of the adjudication from the class of conduct in respect of the improvement. The adjudication arises from the improvement. I recommend the addition of the words "*in respect of the adjudication*" to s. 13.17.

. **Recommendations:**

- **Amend s. 13.5(1) to permit adjudication by any party to a contract or subcontract of any matter set out in the Regulations. Amend the regulations to include any issue arising under a contract or subcontract, and pertinent decisions under the Act itself.**

- **Amend s. 13.5(3) to permit adjudication to be commenced for a period of 90 days following the earliest of the date that a contract is completed, abandoned or terminated, and in the case of an adjudication under a subcontract, no later than 90 days after the date the subcontract is certified to be completed, or the date services or materials are last supplied to the improvement. It is not necessary that the adjudication be completed in that time frame, only that it be commenced within that time frame.**

- **Amend s. 13.5(4) to clarify the provisions relating to multiple disputes that can be referred to and included in a single adjudication.**

- **Amend s. 13.7(1) to require any party to a contract or subcontract who wishes to refer a dispute to adjudication to include in the notice of adjudication a true copy of the determination(s) in any previous adjudications in which it was involved on the same project.**

- **Amend s. 13.8(2) to permit the consolidation of multiple adjudications at the request of any party, with the concurrence of all adjudicators that may be involved in all adjudications that are to be consolidated. The choice of adjudicator for consolidated adjudications can be made by the parties or in the absence of agreement by ODACC.**

- **Amend s. 13.9 to permit the parties to agree on the appointment of any natural person who has completed ODACC training as a private adjudicator for any referred dispute, provided that the appointment is made in writing, signed by the parties and the proposed adjudicator, and discloses all commercial terms between the parties including provision for the payment by the parties of ODACC's one-time administration charge for such private adjudications. The one-time administration fee should be recalibrated periodically as necessary to fairly compensate ODACC for the actual cost of administrative services to be provided together with reasonable recovery of overhead and profit.**

- **Amend s. 13.10 and s. 23 of O. Reg. 306/18 (Adjudications under Part II.1 of the Act) as necessary to require the adjudicator fee to be deposited within five days of a request by the ODACC, and for the fee to be the amount agreed by the parties and the adjudicator if there is one, or the estimate of ODACC in the absence of such an agreement. A corresponding amendment to s. 23 would permit an adjudicator to resign if the stipulated retainer has not been paid to ODACC within the relevant time period.**

- **Amend s. 13.12 to add to an adjudicator's jurisdiction the right determine that adjudicator's jurisdiction. Precedent language from the *Arbitration Act, 1991* could be considered and adopted with any necessary changes.**

- **Amend the Act to add a "*slip rule*" like that found in the *Arbitration Act 1991*, with a very short time period, and adjust other time periods to accommodate this new period. Precedent language from the *Arbitration Act, 1991* could be considered and adopted with any necessary changes.**

- **Amend s. 13.17 to add the words "*or in respect of the adjudication*" after the words "acted in respect of the improvement".**

- **Amend the regulations to require ODACC to establish within one year of the regulation and to maintain thereafter a database of indexed, anonymized determinations accessible to any party to an adjudication, or any adjudicator conducting an adjudication, on a fee-per-use basis, with the fee set by ODACC independently.**

- **Amend any forms prescribed by regulation to conform to the above amendments.**

5. Repeal subsection 34(10)

5.1. Background

When statutory adjudication was added to the Act in 2017, it was thought important to provide persons with subsisting liens (liens that had arisen but were not yet preserved by registration) with access to statutory adjudication without having to take the trouble and incur the expense of hiring lawyers to preserve a lien claim.

This was addressed in the 2017 amendments by extending the lien preservation period while an adjudication was taking place. Subsection 34(10) currently 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-intentioned provision has had the following unintended consequences:

1. There is no way for an owner to know if an adjudication is taking place between non-privies.[39] This means that an owner might not know whether the statutory 60-day lien period has been further extended by 45 days and an unwitting owner might well release the holdback under section 26 (Payment of basic holdback) while there were still subsisting liens with claims against that holdback.

2. Worse yet, the period of extension could be longer, as there could be a gap between the commencement of adjudication (which is the date that triggers subsection (10) and the date of delivery of documents (being the date to which the 45 additional days get added as the statute now stands).

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

It was suggested in the Consultation Paper that s. 34(10) be repealed.

[39] This same "*knowledge asymmetry*" point arose over and over again in consultations. In my view there should be complete transparency and information symmetry. This could be achieved with something as simple as a Facebook page for each project (provided there was legislative support and regulation for the use of the page), as a repository for all notices at every level of the construction pyramid. The tools are readily available for the creation of a purpose-built, province-wide, password protected Construction Act E-registry for all projects over a monetary threshold, or of more than one-year duration. I comment on this idea elsewhere in this Report.

5.2. Stakeholders' views

Only two stakeholders, one individual and one institutional, spoke in favour of keeping s. 34(10), but only if it was amended to require that all notices of adjudication at every level of the construction pyramid be delivered to the owner.

All other consultees at all levels of the industry strongly favoured outright repeal. As one group of individual consultees put it in their written submission, s. 34(10) "*creates significant uncertainty and risk in the industry, and therefore in practice interferes with the payment of holdback at the conclusion of a project. It is inconsistent with all other lien expiry and holdback provisions and is not even located logically within the text of the Act*." Another group of individual consultees said that s. 34(10) "*is unworkable on a practical level and is unnecessary in principle*."

Only one consultee, institutional and nationally based, spoke of actual experience with the prejudicial effects of the section (my emphasis): "*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*."

Rather than confuse the issue by extending lien rights, a better solution is to expand the temporal reach of statutory adjudication. All consultees who responded to this issue agreed.

5.3. Analysis and recommendations

The idea that all notices of adjudication at every level of the construction pyramid be delivered to the owner so that the owner might better monitor its exposure under s. 34(10) is a workable solution only if made part of a province-wide *Construction Act Project e-Registry*. Without such a registry, the idea that all notices of adjudication must pass through the owner would unnecessarily compound administrative burdens. One can also imagine notices to adjudicate being invalidated because of failure to properly notify an owner of an adjudication between parties many layers of privity down the construction pyramid.

A better solution in the short term is to expand the temporal reach of statutory adjudication, and repeal s. 34(10) outright.

Recommendations:

- **Repeal s. 34(10).**

6. Proper versus "Improper" Invoicing

6.1. Background

Section 6.1 of the Act currently provides as follows (my emphasis):

> **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]

It was suggested to me at the time of my Consultation Paper that there was ambiguity in the use of the word "*authority*" in paragraph 3 of s.6.1. Some read "*authority*" to mean an individual's authority and they wondered why there was a requirement to identify a person in paragraph 6 of s.6.1. Others understood the word correctly, to mean contractual authority.

These discussions led to the suggestion that the definition of "*proper invoice*" be amended to remove the word "*authority*" and replace it with language accommodating milestone payments, 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).

6.2. Stakeholders' views

Several institutional industry stakeholders, and a number of individual stakeholders were of the view (my emphasis) that "*The expansive definition of "proper invoice" as set out in section 6.1 is acting as barrier to payment. Many invoices that would conventionally have been considered adequate do not meet all of the statutory requirements of a "proper invoice". This is particularly true in the residential renovation sector. The statutory requirements of a "proper*

invoice" should be minimal. If a particular project demands a more elaborate form of invoice, then section 6.1 allows parties to elaborate on the requirements of a proper invoice as a term of their contract."

Several practicing adjudicators responded to this point generally that "*'authority' is not necessarily an individual [it could be] a letter, sign back, P.O., text, oral, handshake, or whatever*."

There was also a vigorous debate on the uses and abuses in practice of s. 6.1 (6) and (7) which is as follows:

> 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:
> . . .
> 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. 2017, c. 24, s. 7.

Proponents of eliminating or seriously qualifying item #6 argued that "*deleting the words 'title, telephone number and mailing address' and substituting the words 'and the methods of payment which are acceptable'*" would be a welcome amendment. This group claimed to have had experience with owners using the current wording to avoid payment solely on the ground that the invoice did not include the title or mailing address of the person to who payment is to be sent.

Proponents of eliminating or seriously qualifying item #7 argued (my underlining) that "[it] *places unnecessary risk on contractors by allowing owners to require additional information that may be irrelevant or immaterial to the payment process. <u>This provision gives owners broad discretion to dictate what must be included in an invoice, which can lead to arbitrary or excessive demands for documentation</u>. As a result, contractors often face delays in payment as they scramble to comply with these unpredictable and sometimes unreasonable requirements*. <u>*This uncertainty undermines the core objective of the Construction Act, which is to ensure prompt payment for work performed*</u>*. When contractors are unsure about what constitutes a proper invoice or are forced to provide excessive information, the risk of payment delays increases. This can strain cash flow, disrupt project timelines, and place undue financial pressure on contractors, particularly smaller firms that may not have the resources to manage extensive administrative demands*." This group would at least impose a "*reasonableness test*".

Several institutional consultees took a contrary view on both points. This group, correctly in my view, understood the word "*authority*" to mean "*the specific section in a contract's scope of work, or the specific drawing or specification, that obligated the contractor to perform the work it is now invoicing for. In other words, if a contractor is invoicing for x scope, paragraph 3 requires the invoice – in order to be proper – to specifically cite the section of the contract the work was performed under (e.g., the invoice should state something along the lines of "x scope, pursuant to section 3 of Schedule A – Scope of Work to the Contract")*."

One group of consultees pointed out that subcontractors do not benefit from the prompt payment regime if a contractor fails to carry the subcontractor's invoice in its own proper invoice. This group sought an amendment to require a contractor who elects not to carry a subcontractor's invoice forward give the subcontractor notice and reasons for not doing so. This same group identified a gap in the prompt payment provision in application to AFP/P3 projects where draws come from lenders who are not "owners" under the Act. This group recommended that "*Section 1.1(5) should be amended to add Part I.1 of the Act (the prompt payment provisions) to the list of purposes for which Project Co is deemed to be the owner for the purpose of "Any other portion or provision that may be prescribed." Alternatively, a regulation pursuant to Section 1.1(5)(6) could so prescribe. Then, the monthly invoice from the Construction Contractor to Project Co would be a "proper invoice." It would not matter how Project Co funded the payment of the Construction Contractor's proper invoices – whether from its lenders or from the Contracting Authority. Payment of the Construction Contractor's proper invoices would then trigger the prompt payment provisions down the construction pyramid*."

6.3. **Analysis and recommendations**

Reynolds and Vogel dealt with the issue of "*authority*" comprehensively in Striking the Balance. They pointed out[40] that under the U.S. federal prompt payment legislation an "*invoice*" is defined as a bill or a written request for payment submitted by a contractor for property delivered or services performed. A proper invoice under U.S. legislation must meet the minimum contractual standards and must contain or be accompanied by: the name and address of the contractor; the invoice date; the contract number, or other authorization for the property delivered or services performed (including the order number and contract line item number); the description, quantity, and the price of the property delivered and/or the services performed; the shipping and payment terms; the name, title, telephone number, and complete mailing address of the responsible official to whom payment is to be sent; the name, title, telephone number, and complete mailing address of the responsible official to be notified in the event that the invoice ids defective; and "*any other substantiating documentation or information required by the contract*."

The U.S. approach to the issue related to paragraph 3 under s. 6.1 of the Act is sound and consistent with the views of the institutional stakeholders who raised this issue.

[40] Ibid. Striking the Balance, pp. 195 and following.

The idea proposed by some that a contractor be mandated to carry subcontractor invoicing forward to the owner, or otherwise state its reasons to the invoicing subcontractor for not doing so, would be, in my opinion, an unreasonable intrusion on party autonomy. There may be any number of reasons for a contractor to choose not to carry a subcontractor's invoicing forwards, some commercially reasonable and others less so perhaps. Mandating inclusion of subcontractor invoicing while leaving a door open for a contractor to give reasons for non-inclusion would merely fuels arguments and jeopardize prompt payment.

To me, the best solution to these issues is to get the parties before an adjudicator, and to remove any obstacles to doing so.

The suggestion made to amend subsection 1.1(5) of the Act to add Part I.1 of the Act in the case of AFP/P3 projects is interesting but policy-rich and in need of closer examination following the 2024 OCAR process.

Recommendations:

- **Replace s. 6.1 item #3 with some version of the words in the equivalent U.S. statute: "*the contract number, or other authorization for the property delivered or services performed (including the order number and contract line-item number)*".**
- **Amend s. 6.1 item #7 to read "*Any other information that may be reasonably requested as being an essential component of a payer's accounts payable system*".**
- **Permit the discrete and summary adjudication of whether an invoice is a "*proper invoice*" under the Act, and as to the reasonableness of any imposed additional requirements under s. 6.1 item #7.**
- **Add a provision deeming an invoice to be a "*proper invoice*" within the meaning of the Act unless a payer receiving such an invoice identifies to the payee in writing within 7 days of receipt of the invoice as to specific requirements of s. 6.1 not satisfied and what is required to address the deficiency.**
- **Continue to consider the possible amendment of s. 1.1(5) of the Act to add Part I.1 of the Act in the case of AFP/P3 projects.**

7. **"*Matter*" versus "*Dispute*" in Statutory Adjudication**

7.1. **Background**

Subsection 13.5(4) states as follows:

> **Multiple matters**
> (4) An adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise. 2017, c. 24, s. 11 (1).

Some suggested that the use of the term "*matter*" in this subsection 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?

There is a contrary view held by some that statutory adjudication is meant to serve only the purpose of prompt payment and is not an appropriate vehicle for interim determination of scope and time issues.

7.2. **Stakeholders' views**

Several practicing adjudicators responded to this item. They were not troubled by the current language of the Act. Their view was best summarized by one consultee as follows: "[t]*he 'Matter' is the Issue being disputed which is the non-payment of one of more invoices. Its that simple*. *If a non-payment arises from a delay claim, the delay claim and the non-payment are the same matter. But if a non-payment occurs and a delay claim is layered on as a defense to payment, the issue remains non-payment not the delay claim. It all goes back to the stated reasons for non-payment*." These individual adjudicators believed that a change from one "*matter*" to one "*dispute*" would have no effect, good or bad, on the state of adjudication at present.

This sentiment was echoed in different ways by several institutional consultees. As one institutional consultee put it: "*virtually any language utilized would be subject to scrutiny and potentially open to interpretation*". Another said, with helpful clarity (my underlining) that it ". . . *is not unusual for a single construction contract to involve multiple claims, heads of claim, issues, compensation events, contentions and causes of action. These can, collectively and individually, be disputed. When a dispute arises, it may cover one, some or all of these matters. At any point in time, it will be a question of fact as to what comprises a single dispute. We submit that a dispute is defined as whatever claims, heads of claim, issues, etc. a referring party chooses to crystallize into a single reference to adjudication*. *For example, a contractor may seek to recover sums it claims are owed under an interim payment application. The claim may include several elements such as measured work, variations and extension of time, loss and expense. The referral to adjudication may therefore identify more than one element, but this would not transform it into more than one dispute. The rationale is*

that the determination of the claim for an extension of time would be a necessary part of the determination of the loss and expense element of the claim."

This opinion was echoed by a major institutional consultee who noted that the subject matter of adjudication was already a matter for party determination as "[p]*ursuant to paragraph 7 of section 13.5(1), parties can agree to refer any non-enumerated matter to adjudication*."

The strongest opposition came from a group of individual consultees who held the view (my underlining) that "[e]*xpanding adjudication to one "dispute" would be a disaster. Adjudicators are not all qualified in every area, there is no consistency in their approach and determinations, and this will lead to a mess before the Divisional Court and the courts. Frankly, the roster model is not appropriate for this change. Adjudicators are not qualified or knowledgeable enough to deal with complex multi-issue disputes properly*." This strong opinion seemed to stem less from an objective policy perspective and more from subjective disappointment in a small sample of outcomes. In any event, I disagree with this viewpoint.

This is to be contrasted with the diametrically opposite view of a nationally based institutional consultee who said that "*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*."

Others offered simple and practical solutions. One institutional consultee pointed out that this proposal raises complex policy considerations related to the efficiency of adjudication and the desire to avoid unnecessary repetition. This group suggested a "*potential alternative, which would prevent a very large and complex dispute being submitted to what is supposed to be an efficient and summary process, would be to permit any party, and not just a contractor, to require consolidation of related adjudications under section 13.8(2)*." With one exception, all responding institutional consultees, and many individual consultees agreed with this consolidation provision. At the very least it would minimize the risk of inconsistent results. The one exception saw consolidated adjudications as an undesirable outcome, primarily because of the tight timelines involved, and the distraction they present from just getting on with the work.

7.3. **Analysis and recommendations**

Importantly, in my view, the single "*matter*" or single "*dispute*" issue comes down to a question of fact as to what comprises a single dispute at a given point in time. This question of fact needs to be determined at the moment the adjudication is commenced, not later. As an issue of fact, it should be another issue for the adjudicator.

For reasons stated elsewhere in this review, I believe that the best solution overall is to expand the temporal and jurisdictional ambit of adjudication, while at the same time permitting party autonomy in the appointment of their desired adjudicator.

There is unanimity among consultees on the desirability of an amendment to permit consolidation of adjudications by any party to an adjudication, leaving it for the adjudicator to decide whether and on what terms consolidation may be appropriate.

Recommendations:

- **Amend s. 13.5(4) to replace the word "matter" with "dispute".**
- **Amend the Act to permit any party, and not just a contractor, to require consolidation of related adjudications under s. 13.8(2) subject to the overriding discretion of the adjudicator.**

8. Availability of Adjudication After Completion

8.1. Background

Subsection 13.5(3) of the Act provides as follows:

> **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.

Under the Act, the date of release of the holdback under section 26 (Payment of basic holdback) following substantial performance may not occur until after completion of the contract. The release of the finishing holdback under section 27 (Payment of holdback for finishing work) will by definition almost always 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 remains available for a reasonable period of time after all liens that may be claimed against the relevant holdback have expired.

8.2. Stakeholders' views

There is a broad consensus amongst stakeholders that this is a serious shortcoming in the Act in need of amendment.

As one institutional consultee put it (my emphasis): "*the fact that adjudication is unavailable following contract completion is a major impediment to the efficient determination of disputes regarding holdback release and undermines the prompt payment scheme in respect of holdback*."

Only one group of individual stakeholders expressed a different view that "[a]*djudication should not be available after contract completion. The purpose of adjudication is to avoid payment disputes to keep funds flowing, and avoid work stoppages, during the course of the construction project before it is completed. . .. The suggestion that adjudication be available after contract completion does not reflect the purpose of adjudication . . . which is to keep work progressing until the contract is completed. After completion, there is no such concern as the work is completed.*" This group urged me to consider making adjudication unavailable after substantial performance is achieved for fear of encouraging "*the adjudication of large claims at the end of a project and increase costs*".

The dominant institutional view was very much the opposite (my emphasis), that "*the extension of the adjudication period is the single most important reform of the Act . . . Making*

lien rights and adjudication rights coterminous is a mistake. Adjudication rights need to persist after lien rights have expired in order to enforce claims to payment of the statutory holdback, at a minimum." One member of this group that would have taken the point very much further. They did ". . . *not believe that it goes far enough. Owners increasingly retain finishing holdback and other forms of retention from contractors for years beyond substantial completion. Any improper retention of the contract price should be decided by way of adjudication*."

A major trade organization stated that "*adjudication* [should] *be available until 90 days after completion, termination or abandonment of the contract, to provide time for holdback release and the commencement of an adjudication if holdback is not released*."

8.3. **Analysis and recommendations**

In view of the broad consensus amongst consultees, institutional and individual, that statutory adjudication needs to be available in support of all payments due at all times under all contracts and subcontracts, an amendment to extend the temporal reach of adjudication is recommended. The two outlying opinions were not representative of the industry generally and were based primarily on subjective disenchantment with the quality of adjudicators and their determinations.

I recommend expanding the time period in which adjudication can be accessed, as indicated above in section 4.3.2 of this report. In order to provide time for holdback release and the use of statutory adjudication to sort out any problems with holdback release, statutory adjudication should be available until 90 days after contract completion, termination, or abandonment. In the case of subcontracts, adjudication should also be available no later than the date the subcontract is certified to be completed, and the date services or materials are last supplied to the improvement under the subcontract.

Recommendations:

- **See recommendation above in part 4.3 of this report.**

H. PROPOSALS: ADMINISTRATION / OTHER

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

9.1. Background

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 has led to uncertainty and confusion over whether joinder is or is not permitted. It has been suggested that O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) be amended to expressly allow for the joinder of trust claims under Part II of the Act in a lien action. Several consultees suggested that the 2024 OCAR should pick up on the Divisional Court's invitation in *Devlan Construction Ltd. v SRK Woodworking Inc.* to amend the regulations.

This amendment raises the issue of the trust consequences of the "*proper invoice*" provisions of the Act. The Act made delivery of a "proper invoice" the trigger for payment, not the "certificate of a payment certifier", but this amendment was not well aligned with the certification requirements in the trust sections of the Act. Should the undisputed portions of a proper invoice constitute the monies of a trust fund, just as if they were amounts "*certified*" under the present statute? I believe that the answer is clearly: yes. At present, notwithstanding the conceptual focus of the Act on the issuance of a "*proper invoice*", payment certification still occurs and remains subject to the statutory trust.

Subsection 7(2) of the Act states as follows (my emphasis):

> **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.

One solution to this problem would be to amend subsection 7(2) to make an amount equal to the unobjected portion of a proper invoice that is in the owner's hands or received by the owner at any time thereafter subject to a trust for the benefit of the contractor.[41] The corollary of such an amendment would include adding this to the list of adjudicatable matters by regulation.

[41] No similar amendment to s. 8(1) should be necessary. Unlike s. 7(2) (which is structured specifically around the concept of a certificate of a payment certifier), s. 8(1) is framed more generally and includes all amounts "*owing to a contractor or subcontractor, whether or not due or payable*". There is no reference to a payment certifier, and all amounts (even if not yet payable) are subject to a trust. Section 8(1) is more like the owner's trust obligation under s. 7(1) than the certification trust under s. 7(2).

9.2. **Stakeholders' views**

A commonsense approach was taken by most consultees who responded to this point. They assumed that the intent of Striking the Balance five years ago was to permit joinder of trust claims in lien actions.[42] They want this joinder to be permissible, subject, of course, to the overriding discretion of the courts.

It was pointed out by some, however, that even permitting joinder would not be a complete remedy if it was still necessary for a party to commence separate actions to bring in separate parties (such as officers, directors, and persons in control, as would be the case if declaratory, "*in rem*" relief was sought). One stakeholder put it this way: "*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 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*."

One consultee "*fully disagreed*" with this proposal and foresaw dire consequences (i.e., turning every claim into a trust claim). As they put it "*Trust claims and lien claims have distinct remedies, and we are not supportive of allowing for their joinder*." This particular consultee spoke against most of the reforms proposed in the Consultation Paper.

Few consultees engaged directly with the core trust issue (making an amount equal to the unobjected to portion of a proper invoice that is in the owner's hands or received by the owner at any time thereafter subject to a trust for the benefit of the contractor). Those who did engage with that issue were still supportive of joinder. This "*pro joinder*" group included institutional owners, contractors, and engineers.

There was particularly strong support from one national organization, an organization many of whose members would bear the burden of any such amendment: "*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*

[42] From "Striking the Balance", p. 101: *The prohibition against the joinder of lien and trust claims stems from the Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act in 1982. At that time, it was decided that the issues in relation to lien claims and trust claims may be very different, and the resolution of lien claims should be the primary concern under the Act. Ontario is the only common law province that prohibits the joinder of lien and trust claims. Manitoba allows for the joinder of other claims related to the construction or improvement of land without leave of the court, but if a joined issue cannot be conveniently tried with the other issues in that action or cause undue prejudice to other lien claimants or parties, a separate trial on that issue may be ordered on application from any party*.

also further implement the Proper Invoice not only as the trigger for payment obligations, but also the dictating factor for substantive payment obligations."

One group of consultees would have gone further to make an amount equal to the full amount of a proper invoice, disputed or not, a trust fund for the benefit of the contractor unless and until ruled otherwise by an adjudicator or a court.[43]

9.3. **Analysis and recommendation**

Liens and trust claims are created by a single remedial statute and often fall to be determined on a common set of facts. This alone presents a strong case for joinder, under judicial supervision to avoid a multiplicity of proceedings.

No compelling argument has been presented to me to keep trust and lien claims out of the same legal proceeding. The argument that the claims arising from the same set of facts among the same interested parties have distinct remedies argues more for than against joinder. We want to avoid the possibility of conflicting decisions on a common set of facts. A lien court should have at its disposal all remedies available under the Act, including those under Part II dealing with trusts.

The current procedural workaround has judges and associate judges fashioning "*connecting orders*", linking separate lien and trust actions together procedurally without requiring them to be joined under one title of proceeding. The judge or associate judge then manages all procedures to avoid unnecessary duplication. Trial in such cases may be together or one after the other as the circumstances of the case require. This system works, after a fashion, but it should not be left to *ad hoc* procedural workarounds. Joinder should be a clear statutory right.

Several consultees suggested amending subsection 7(2) of the Act to make an amount equal to the unobjected portion of a proper invoice that is in the owner's hands or received by the owner at any time thereafter a trust fund for the benefit of the contractor with a corresponding change to subsection 8(1). An amendment like this might call into question the timing of trust obligations. Subject to the giving of a notice of non-payment, an owner is required to pay the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the contract. Once a proper invoice is first received by the owner, the owner has 14 days to give the contractor a notice of non-payment. The following chronology would be possible:

- Owner receives a proper invoice (Day 1) – Assume, as several consultees recommended, that an amount equal to the entire amount of the proper invoice that

[43] "*Unless all amounts in a proper invoice were to be impressed with a statutory trust, no amendment exempting disputed amounts is necessary. We believe that s. 7(2) shall be amended to provide that the amount of the proper invoice shall become trust funds. All amounts of a proper invoice and/or all amount certified as payable shall remain trust funds until any issues between the owner and the contractor have been finally decided by the Court or by settlement*."

is in the owner's hands or subsequently received by the owner becomes subject to the statutory trust.

- Owner objects to portion of proper invoice (Day 14) – If the consultee's recommendations were adopted, the trust that arose on Day 1 would shrink in size to cover only the amount of the invoice to which the owner objects. In other words, if the consultees' recommendation was accepted there would be no trust under subsection (2) with respect to the objected portion of the proper invoice. The recommended amendment might create such an ambiguity.

- Owner pays proper invoice (Day 28) – As the funds are paid to the contractor, the trust is discharged. This is the consequence now under s. 10 of the Act:

> **Payment discharging trust**
> 10 Subject to Part IV (holdbacks), every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee.
> R.S.O. 1990, c. C.30, s. 10.

With expanded adjudication jurisdiction and mandatory annual release of holdback, the need for such an amendment (with all of its uncertainties and complications) is significantly diminished. Indeed, it might only complicate the existing trust regime without corresponding benefit.

Once it becomes permissible to join trust claims in lien actions it should also be possible to adjudicate trust issues along with payment issues on a project. Few other jurisdictions have statutory adjudication and a statutory trust remedy. I recommend that statutory adjudication be broadened to include trust claims under Part II of the statute.

Recommendations:

- **Amend O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) to expressly allow for the joinder of trust claims in lien actions, with discretion to the court to sever claims or require separate trials or procedures.**

- **Amend the statute and regulations as necessary to permit the adjudication of all claims brought under Part II of the Act.**

10. Written Notice of Lien

10.1. Background

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*" in 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. Thus, written notice of lien often stops or seriously interrupts the flow of funds on a project.

It has been suggested that this same retainage obligation should be triggered if the lien claimant simply serves a copy of the registered claim for lien under clause 34(1)(a) or "*gives*" the claim for lien to the payer where the lien does not attach to the premises under clause 34(1)(b). As it stands, a payer who is served with a copy of the actual lien, but not Form 1, might not be obligated to retain the lien amount.

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.

It has also been suggested that the manner of service of a written notice of a lien may be too onerous. While the current method of service reflects the importance of a written notice of lien, it does impose a standard more onerous than for service of a statement of claim (which includes registered mail under subsection 87(1)).

10.2. Stakeholders' views

All stakeholders who commented on this proposal saw a real risk of double retention of holdback in the current scheme.[44] One stakeholder put the problem succinctly: "*Section 24 of the Act permits a person having a lien to require a payer to retain, "in addition to the holdbacks required…an amount sufficient to satisfy the lien…." A person's lien includes holdback which has been retained by the payer on their subcontract. Accordingly, a written notice of lien can properly include both outstanding progress and cumulative holdback amounts. This results in holdback amounts owing to a subcontractor potentially being retained twice. As prompt payment obligations are subject to holdback requirements, the provision of a written notice of lien by one subcontractor, prompting notice holdback by the owner against the contractor, can have serious consequences for other subcontractors on a project*."

[44] This was noted in the Reynolds and Vogel report at p. 270 (my emphasis): "*The purpose of the written notice of lien is to permit the payment of funds down the construction pyramid, but at the same time require the holdback of an amount sufficient to satisfy the lien. The payment of funds ought to continue in the face of a written notice of lien, subject to an increased holdback*."

Consultees opposing this proposed amendment raised several objections. Lawyers understood the importance of the written notice of lien and recommended that "*stringent service is appropriate*". They recommended that persons giving written notice of lien also be required to specify what portion of the amount claimed was holdback and what portion was not holdback, to prevent double counting of holdback.

Institutional owners most affected by written notice of lien felt that written notice of lien (which for their purposes could also be a preserved claim for lien) should be served on an "*originating process*" basis so that it doesn't get "*lost in the shuffle*".

One consultee would have removed the whole concept of notice holdback from the Act. This same idea was raised and rejected at the time of Striking the Balance.[45]

10.3. **Analysis and recommendations**

In my view, there is good reason to maintain the current, rigorous requirements for "*giving*" written notice of lien. While sophisticated owners would no doubt prefer service as if an originating document, the Act must work for all claimants, including unsophisticated and self-represented claimants. When project cash flow is jeopardized, the smaller claimants are usually the last ones to find out. Protection of their rights can be a matter of hours, not the days it might take to hire a lawyer to search a title and register a valid claim for lien. In such circumstances, although it is no doubt intrusive and bears risk of double holdback, the ability to serve a Form 1 written notice of lien provides a stop-gap remedy.

Recourse to statutory adjudication in the case of ambiguity or doubt as to the effectiveness of a written notice of lien would be beneficial and would provide a "real time" process to resolve potential issues of double retention.

At the very least, the minimum requirements for validity of a written notice of lien should include a statement of amounts that are holdback and non-holdback. This change would not be administratively complex and is information that should be within the knowledge of every prospective lien claimant, even those unrepresented by counsel.

Recommendations:

- **Amend Form 1 to the Act to require a notifying party to clearly state the amount claimed that is holdback, and the amount claimed that is non-holdback.**

[45] Reynolds and Vogel, Striking the Balance, p. 270: "*Responding stakeholders were split on the question of removing the written notice of lien provision from the Act. Those in favour of keeping it suggested that it serves a useful purpose in creating a notice holdback, while those opposed suggested that it has the effect of halting funds without the requirement of registering a lien. Most of the responding stakeholders were not opposed to keeping the notice provisions . . .*"

- **Maintain the Act's present requirements for service but permit persons serving written notice of lien to serve a true copy of a preserved claim for lien in place of Form 1.**

- **Amend the Act and Regulations to permit issues about the validity of written notice of lien to be adjudicated.**

11. Notice of Termination

11.1. Background

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 was suggested that the date of termination for the purpose of section 34 should not be the date specified in the notice, because that date is subjective, arbitrary, and often highly contentious. For this reason, it was suggested in the Consultation Paper that the relevant date for the statute 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. At least the date of publication is objective. This amendment would also require a change to Form 8.

It was also noted as discussed in the Consultation Paper that no time frame is presently specified as to when the notice of termination should be published, or who is responsible for publication, or the consequences of non-publication. As it now stands, publication could happen weeks or months after the actual date of termination under the contract.

11.2. Stakeholders' views

Institutional stakeholders who responded to this point unanimously favoured amending the Act to "*provide at sections 31(2), 31(2.1), and 31(3) that liens expire not following the termination or abandonment of the contract but following publication of the notice of termination (or abandonment)*".

The same group supported amendments to clarify who must publish the notice (any party who intends to assert in the future that the contract is terminated or abandoned) and an express provision that reservation of rights provisions of section 31(7) continued to apply.

One group of institutional consultees with province-wide representation recommended a full six-point remedial scheme:

1) the Act and O. Reg. 304/18 (GENERAL) should be amended to specify that the notice of termination should be published within 14 days of the date of termination;

2) the party who terminated the contract should be obligated to publish the notice of termination;

3) the party who publishes the notice should be required to provide a copy of the notice to the affected parties within 3 days of publication;

4) a party who fails to comply with this requirement should be liable to any person entitled to a lien who suffers damages as a result;

5) Form 8 should be corrected to remove reference to subcontract termination based on the current rules applicable to termination; and

6) further consideration should be given to whether subcontract termination should be introduced as a new milestone triggering the start of the 60-day lien expiry period in circumstances where the subcontract was still in force when terminated, but the last date of actual supply under the subcontract was more than 60 days prior.

11.3. **Analysis and recommendations**

A starting point (well expressed by a group of individual consultees) is that the Act should not purport to "*affect the contractual date of termination, potentially rendering an important and time-sensitive contractual termination ineffective until publication has been arranged*." I agree.

Termination and abandonment are among the most factually and legally complex calamities that can occur on a project. Respect for the principle of party autonomy requires that the parties be left to manage their contractual termination and abandonment rights and remedies as they deem best.

While the complex 6-part code recommended by one group of consultees might work, in my view it would unnecessarily complicate an already complicated situation. All that is required to achieve the remedial purposes of the Act is to start the expiration period for all liens claiming directly through or under a contract or subcontract on the date of publication of notice of termination or abandonment of that contract or subcontract.

This leaves us with the problem of "*who*" is to publish such a notice, and "*when*" is it to be published. If no such notice is published, then subsisting lien rights do not begin expiring and could remain "subsisting" until judicial (or arbitral) resolution of the complex web of legal and factual issues surrounding termination or abandonment. Clearly, therefore, it would be in the best interest of the party terminating, or reacting to an abandonment of contract, to publish notice of this fact as soon as reasonably possible to provide an objectively ascertainable date for the start of the lien expiration period. Regardless of who is responsible for publication, this notice should be published within 7 calendar days of termination or abandonment.

Where there has been a termination, the completion contract will likely be a new "contract" with its own holdback. Where there is an abandonment, however, some contracts will provide

at an owner's option for the owner to either take over and complete the works or assign the contract to a replacement contractor. In either case, the more notice that is provided to persons claiming through or under the allegedly abandoned contract, the better.

Recommendations:

- **Amend s. 31(6) so that lien periods commence on the date of publication of notice of termination of that contract.**
- **Amend the Act to require the notice to be published in a Construction Trade Newspaper within 7 calendar days of termination.**

12. Motions Before Action Commenced

12.1. Background

The Act moved procedural rules into O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII). The included what used to be section 67(6) which provided for the manner of making a motion in a lien proceeding:

> **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.

The Act contemplates specific situations where a motion must be brought even though an action has not yet been commenced. It is suggested that to ensure jurisdiction, an equivalent to the former subsection 67(6) should be added to O. Reg. 302/18.

All consultees are aware that the Attorney General has launched a separate review of the Rules of Civil Procedure. Feedback on this proposal will be considered once that review has been completed.

12.2. Stakeholders' views

There was unanimous agreement amongst consultees who responded on this point that the equivalent of s. 67(6) must be added into either the Act or the regulations, as soon as practicable.

12.3. Analysis and recommendations

This need for this is clear and the following recommendation is undisputed.

Recommendations:

- **Subject to the Attorney General's ongoing review of the Rules of Civil Procedure, amend either the Act or its regulations to include the equivalent of s. 67(6) of the pre-2017 statute.**

13. Minor Errors, Irregularities

13.1. Background

Subsection 6(2) 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 ambiguity in clause 6(2)(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.

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*".

13.2. Stakeholders' views

Few stakeholders had an opinion on this suggested amendment. Those that did, uniformly supported it.

13.3. Analysis and recommendations

This was one of the few recommendations upon which there was unanimity.

Recommendations:

- **Amend clause 6(2)(b) to clarify that so long as an owner's name is placed somewhere on a claim for lien, the minor errors rule in s. 6(1) applies.**

14. Collaborative Contracting Bonds

14.1. Background

The statutorily prescribed bond forms for use on public projects under section 85.1 (Bonds and public contracts, Form 31 and Form 32) are well-understood instruments for use in traditional stipulated price contracting models, such as CCDC 2 – 2020. Increasingly, however, new forms of collaborative contracting, such as integrated project delivery using the CCDC 30 – 2018 form of contract ("**IPD**"), progressive design/build ("**PDB**"), and alternatively financed projects ("**AFP/P3**") are being used.

It has been suggested that section 85.1 and O. Reg. 304/18 (GENERAL) should be amended to permit the alternate forms of bonds developed jointly by the construction and surety industries, for use in such projects.

14.2. Stakeholders' views

With one exception, there was unanimity that "*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*."

An institutional owner provided strong support for this proposed amendment: "*The current form of bond does not adequately deal with contracts where, ultimately, the contractor is "*at-risk*" for profit and overhead (essentially over-securing these contracts as a result) . . . allowing parties to enter into such forms of bond as they see fit would allow parties the flexibility to properly secure their projects, as long as such forms of bond meet minimum requirements set by the Act*."

The surety industry has not waited for the Act to catch up. The Surety Association of Canada ("**SAC**") has already developed a performance bond based on Ontario standard Form 32 for use in conjunction with the CCDC 30 IPD contract, which SAC believes is flexible enough to be used in other contract arrangements and is compatible with the Form 31 labour and Material Payment Bond.[46] One of the challenges in this area is determining the "*price*" that

[46] Based upon what I have seen in this consultation process, the Surety Association of Canada ("SAC") treats its relationship with Ontario's construction industry as a partnership. SAC stated outright that "*The Act should be amended to accommodate new methods of procurement delivery that weren't contemplated when it was proclaimed into law in 2017, including Integrated Project Delivery and Progressive Design Build*." SAC agreed to revisit the minimum bond amount for large, non-P3 infrastructure projects to allow for minimum bond amounts that provide adequate protection by increasing as project values increase, provided "*The amount of any bond will never be less than 25% of project value, which we believe should offer sufficient protection to unpaid subtrade/supplier claimants, project owners and taxpayers. Surety providers will be incentivized to become fully*

must be bonded. With the amendments designed to eliminate ambiguity in the definition of "*price*" that are proposed in this Report, this challenge will be overcome.

SAC raised an issue that had not previously been brought to my attention. They claimed (my emphasis) that "[w]*hen discussing the issue of minimum bond amounts on large projects, it's worth noting that a particular group of general contractors has expressed concern about what they refer to as "additive indemnity". Apparently, a high-profile public owner has begun to include a provision in its contracts calling for the contractor to indemnify the owner for losses in addition to any amounts recovered under the surety bond in the event of default. This group aggressively advocated for the minimum amounts to be set as low as possible or eliminated altogether. Their concerns have some validity, and SAC has expressed a willingness to work with this group to ensure a fair and proper allocation of risk. However, there are ways to accomplish this objective without diminishing the protection provided to owners, subcontractors and suppliers under the performance and payment bonds*." This is an issue upon which further consultation might be recommended although, in the end, it likely comes down to a matter of pure party autonomy and contract negotiation.

There was one contrary point of view, arguing that the only amendment that is needed is to entirely eliminate the requirement for performance bonding on public projects, leaving it to the parties to sort out issue of this nature themselves. Underlying this submission was a firmly held, but wholly subjective belief that "*given the track record of performance sureties, it is a waste of scarce taxpayer dollars to require performance bonds*".

14.3. **Analysis and recommendations**

Dealing first with the contrary point of view noted above, it is my view that the underlying rationale for mandating bonding on public projects has not changed in the years since the Act came into force. The argument for requiring such bonds (as stated in Striking the Balance[47]) is as sound now as it was then.

The contrary argument can be answered statistically if one broadens one's outlook to take into consideration periods of economic downturn, during which the surety industry's earned loss ratios can remain in excess of 100% for several years running. Loss ratios in excess of 100% represent cash flowing back into the construction industry when it is needed the most.

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engaged during the claims resolution process, being actively involved in the completion of the project and timely payment of labour & material payment bond claims".

[47] Striking the Balance, p. 150: "*One certain way to provide protection to subcontractors and suppliers involved in all forms of construction projects for the public sector, regardless of the project delivery model that is adopted on each project, is to adopt a statutory regime similar to the Miller Act, and the "Little Miller Acts", in the U.S. Given the current uncertain economy, including recent indications from the Federal Reserve Bank that interest rates will gradually increase, and given the major infrastructure initiatives underway in Ontario, we are of the view that the fundamental objective of the Act, to protect subcontractors and suppliers, are best served by making surety bonds mandatory for public projects. Regarding the implementation of our recommendation, we propose that the Province enter into a dialogue with the Surety Association of Canada to agree on standard form surety bonds to be incorporated into the Act by regulation*."

The surety industry also helps regulate access to markets and supports and encourages honest contracting.

The appendix of this report contains correspondence from SAC, produced at my request as part of the consultation process, outlining compensated sureties' contribution to the efficient operation of the construction industry in Canada.

There is sufficient unanimity amongst stakeholders to support the recommended amendment. Arriving at language for standard bonding will be an exercise for working groups after this review is complete.

Recommendations:

- **Amend s. 85.1 and O. Reg. 304/18 (GENERAL) to permit the alternate forms of bonds.**
- **Empower working groups representing all interested stakeholders to develop alternative forms of bond to be adopted by regulation for use in such projects.**

15. Limits of Bonds on Public Projects

15.1. Background

The Act was amended in 2017 to mandate the use of surety bonds on public projects above a set limit. The bonds were to have a penal amount at 50% of the "*contract price*". AFP or P3 projects over $100 million were capped with coverage limits at $50 million. The Act and O. Reg. 304/18 (GENERAL) have recently been amended to set the coverage limit for public projects over $500 million at $250 million. The default minimum coverage limit of 50% for projects under $500 million has been moved from the Act into the regulation.

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

15.2. Stakeholders' views

First, the detractors. As one city put it: "*over the past 5 years, it has become clear that the 50% rule for surety bonds for projects in excess of the prescribed $500,000 value has been problematic for contractors . . . In some cases, contractors have not been able to secure bonds from surety companies as a result . . . that the Act/Regulation be amended to allow for bonding on public projects be capped at $50M. In the alternative, amend the Act/Regulation to allow for bonding on public projects to be capped at some number less than 50% of the project value*." As another group put it "*The unintended consequence of high bond limits (or any) will be to limit procurement of large non-P3 projects to only a small handful of multinational contractors that can assume this liability exposure or not to have any company engage in the procurement at all*."

Next, the proponents. Proponents of flexible bond limits worry that once the cost of remedying a default exceeds the available bond limit by a large enough amount (a $10 million bond on a $100 million loss, for example), the bond ceases to be a "*partnership guaranteeing performance*", and becomes a mere financial instrument, no different than a letter of credit. The surety industry claims to have a reliable data confirming that with very large (greater than $500 million) projects, if the prospective surety payout levels drop below approximately 25 percent of the cost of performing the guarantee, sureties will simply make the payout. Bond limits are necessary to incentivize sureties to remain fully engaged in the process of paying trades and suppliers in accordance with performance substitution options of the bond.

Some have raised issues of industry and contractor capacity. There is usually a capacity limit (total value and work on hand) for principal obligors attempting to qualify for high-value bonding. This can operate as a barrier to entering the market, for better or worse. There is the issue of the ability of our surety industry in Canada to back extremely high value bonds. I

was assured by consultees that sufficient capacity exists in the Canadian bonding community to meet our province's needs now and in the future.

15.3. **Analysis and recommendations**

An apt description of the current situation was made by an organization with a national platform and perspective: "*The bonding aspects of the current legislation is* [sic] *polarizing, with ardent supporters and detractors alike*." I heard this several times in my consultations.

Several institutions expressed "*negotiation fatigue*", having just participated in the process leading up to the amendments to the Act and O. Reg. 304/18 (GENERAL) regarding bond limits. The recent amendments satisfy the need for any adjustments in the near term. There are so many policy-laden issues involved, and such a need for data driven assessment, that this issue will require further review.

Consideration should also be given to a cost-equivalent scheme that would take the money otherwise invested in managing solvency (bonds from compensated sureties) and apply it instead to dispute avoidance throughout the life of the project (dispute boards). The benefits of bonding are many, but they are often only realized during periods of economic downturn and insolvency. In the public sector, the mandatory requirement for performance and payment bonding shifts this solvency risk away from the public sector to the private sector. Waiting for a significant downturn in the economy to realize the benefits of bonds seems a rather frustrating exercise, particularly considering the annual cost of maintaining surety bonds over the life of a long-term project. An option to channel this same level of investment into dispute avoidance might be welcomed by many.

My recommendation is that public owners with projects over the prescribed statutory threshold be granted the option at the outset of a project to either:

1. Buy statutorily prescribed bonds for the duration of the project; or,

2. Invest in the establishment and maintenance of standing Combined Dispute Boards ("CDB") having, at minimum, the following characteristics:

    a) The CDB shall be a standing body of three independent, impartial, members two of whom shall have technical and/or senior managerial expertise relevant to the Project and a chair who is either a lawyer who is licensed to practice law in Canada or an ex-judge or master, constituted by written agreement between the parties and members of the CDB.

    b) The CDB shall remain constituted until at least 120 days after publication of a certificate of substantial performance.

c) The Parties shall fully cooperate with the CDB and communicate information to it in a timely manner ensuring that the CDB is kept informed of the performance of the parties' obligations, all reports or notices issued in respect of the Works, all amendments, variations, notices of dispute, IC reports, and other commercially relevant material.

d) The CDB shall establish a schedule of meetings and site visits sufficient to keep the CDB informed of the performance of the project, not less than quarterly.

e) The CDB may at any time provide informal assistance to the parties to avoid disputes, resolve disputes, or mediate disputes.

f) Where dispute avoidance fails, either Party may in writing refer the dispute to the CDB for resolution.

g) The CDB shall set procedures in consultation with the parties, hold a hearing, decide the dispute(s) based on the applicable contract and law applicable to the dispute(s), in a written reasoned decision within 30 days of the close of the hearing.

h) Cost of the CDB split equally, monthly, with each party bearing its own costs.

Recommendations:

- **In future, give further consideration to the proposal of providing public owners a choice between mandatory levels of bonding and the creation of a standing combined dispute board.**

16. Subcontractor Rights under Labour and Material Payment Bond

16.1. Background

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 Form 31 suggests that the sub-subcontractor must have a subsisting or even "*preserved*" lien claim to recover under the bond (my emphasis):

> 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").

The argument is that under the Act as it now stands, the bond would not have to pay any sub-subcontractors who did not preserve a lien obligating a Contractor to make payment. If this argument held, it would mean that a bonding company's liability under the bond would be artificially and unreasonably limited to the sub-subcontractors who had preserved a lien.

This situation seems to have resulted from an inadvertent deviation from the Federal Government form of payment bond, which was used as a template for Form 31. The Federal Government form states (my emphasis):

> 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.

The underlined language above recognizes that a claimant under the bond need not commence lien proceedings 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.

16.2. Stakeholders' views

The key stakeholder here is the surety industry. It has no objection to the inclusion of language in the Form 31 bond form that confirms a sub-subcontractor's right to claim under the instrument, even if they do not preserve or perfect a lien.

Only two non-surety stakeholders held a contrary view. One was a group of individual stakeholders who stated that: "[t]*he Construction Act form should require a sub-sub-contractor to maintain a claim for lien in order to recover under the bond. This is necessary given the broad and unknown potential liability to sub-sub-contractors and the need to preserve potential subrogated rights, whether by the surety or bonded principal, as against the subcontractor*." Another was a major trade organization who stated that: "*The reason that the federal bond form states that the claimant need not comply with lien legislation is that liens cannot be registered against federal land. In the prescribed bond form, the omission is necessary to ensure that courts and adjudicators are able to properly determine competing priorities between a subcontractor that registered a lien and a subcontractor that did not.*"

16.3. Analysis and recommendations

I recommend protecting sub-subcontractors over protecting the seldom exercised right of subrogation that is currently enjoyed by bonding companies.

Recommendations:

- **Work with the Surety Association of Canada to amend the Form 31 bond to provide that 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.**

17. Definition of "Price"

17.1. Background

The term "*price*" is presently defined in section 1 of the Act 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;

The definitions of "*contract price*" and "*price*" are of central importance to the operation of the Act, but these defined terms can have different meanings when used in different procurement models. For example, are financing costs and insurance costs part of the "*price*" of an AFP/P3 project?

Many institutional and individual consultees observed that the current definition of "*price*" does not translate well into other collaborative project delivery models such as Integrated Project Delivery ("**IPD**"), Construction Management at Risk, and progressive design build ("**PDB**"). Even on conventional cost reimbursable projects, "*price*" changes over time as the contract is performed, causing ambiguity as to the applicability of the statutory threshold for phased holdback release.

This problem is compounded by the fact that the "*fair market value*" component of the statutory definition of "*price*" is largely illusory. There is no market in which such contracts can be bought or sold.

17.2. Stakeholder views

The consensus was that although the definition of "*price*" in the Act may be imperfect, "*it is a solid and satisfactory starting point*".

One idea had been to resort to building permit value as a proxy for "*price*", where no other measure could be found. Consultees were divided on this idea.

Consultees who favoured statutory reference to building permit value in the definition of "*price*" (a minority) saw building permit value as a well-known and publicly available number bearing some tenuous relation to market value. They recognized that while building permit values are not by any means accurate, they are a good starting point for the determination of

"*price*" because they engage objective pricing standards applied to objective square footages and usage classifications localized to the area of construction. In other words, however approximate they may be, building permit values might at least be an accepted industry-accepted benchmark.

Consultees who disfavoured a statutory reference to building permit value in defining "*price*" emphasized that building permit values are not representative of the actual cost of an improvement. They are prospective not retrospective valuations. They do not consider the quality of work done or the standard of construction delivered. Critics of the concept argued that building permit values do not represent "*a true benchmark of actual market value*". Neither the *Planning Act* nor the *Building Code Act* expressly apply to the Crown or its agents, so that a statutory reference to building permit value in the definition of "*price*" would have no relevance to Crown projects.

An alternative suggestion involved the creation of a new definition of "*Bonded Contract Price*" for the exclusive purpose of determining the amount of surety protection necessary on a project, leaving the definition of "*price*" unamended for all other purposes. Consultees who opposed this suggestion saw it as requiring several associated amendments, in the end only complicating an already complicated statute.

Another solution, in the case of specialized forms of construction procurement such as IPD, AFP/P3 or PDB, for example, was to aggregate the total estimated reimbursable costs + risk pool. Such contracts often refer to "*Target Price*" which might be a useful component metric for "*price*". But even then, "*devilishly difficult*" questions remain, such as whether financing costs and insurance costs on such projects should be part of the "*price*" for the purposes of the Act.

One institutional stakeholder cautioned strongly against any change in this core definition, pointing out that the "*actual market value*" concept already in the statute provides sufficient flexibility to determine "*price*" on a project-by-project basis. Parties are free to seek a determination of the valuation of services provided under a contract by adjudicating the issue in the context of a notice of non-payment. If a party believes building permit valuations are an appropriate benchmark, they can make that case to an adjudicator.

17.3. **Analysis and recommendations**

An amendment to introduce building permit valuations as an alternative method of arriving at a "*price*" would cause more problems that it would solve. The same is true for a new definition of "*Bonded Contract Price*". I cannot recommend either of these as solutions.

Innovation in project procurement will always outpace the Act. For this reason, the formulae for the ascertainment of "*price*" in the case of specialized procurement methodologies should be introduced by regulation, not legislation. This would require the creation of post-2024

OCAR working groups to arrive at industry-approved formulae for "*price*" in the case of AFP/P3, IPD, progressive design build and any other forms of contract procurement.

RECOMMENDATIONS:

- **Amend subclause (a)(ii) of the definition of "*price*" in section 1 to include, for prescribed classes of contracts, "*price*" calculated in accordance with the regulations.**
- **Create working groups to propose regulations for industry-approved formulae for the calculation of "*price*" in the case of specialized or collaborative forms of procurement such as AFP/P3, IPD, PDB.**

18. Multiple Improvements

18.1. Background

Subsection 2(4) of the Act currently 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 accommodate a relatively uncommon situation, mostly on linear projects, where there are a series of separate (non-contiguous) projects constructed under a single contract. The idea was to allow parties to a single such 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 whether all aspects of the Act would apply to each segment of the contract separately. For example, what if an owner deleted (terminated) scope for one entire segment of a segmented improvement but not the others being performed under the same contract. Would a notice of termination be required, as the contract still exists, but with one segment terminated?

Others pointed out that 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, it was suggested that subsection 2(4) be amended so that each segment of a segmented improvement under one contract is deemed to be under a separate contract for the purposes of the application of the entire Act (not just section 2).

18.2. Stakeholders' views

Those few institutional stakeholders who responded to this point felt that "*clear delineation of separate improvement-contract chains under the Act is critical for clarity with respect to prompt payment, holdback and lien rights*."

Others focused on the rights of subcontractors, noting that the heart of this issue is lack of notice to subcontractors who cannot know what the head contract provides in this regard: "*Amend s.2(4) to provide that subcontracts under contracts may by the terms of the subcontract be similarly treated as separate subcontracts for purposes of holdback release*

on non-contiguous improvements", including an expansion of corresponding rights to demand information under s. 39 and "*clarification of the general lien provisions*" of the Act.

Two institutional consultees highlighted the complexity of this provision in application and suggested that further discussion and review would be in order.

18.3. Analysis and recommendations

It would be worthwhile for the rule in subsection 2(4) regarding multiple improvements under a single contract to apply for the purposes of the entire Act. In addition, section 39 should be amended to permit subcontractors to demand this information from an owner or contractor.

Recommendations:

- **Amend s. 2(4) so that the rule applies for the purposes of the entire Act.**
- **Amend s. 39 to permit subcontractors to demand information from an owner or contractor at any time as to whether the contract provides more than one improvement is to be made under a single contract on lands that are not contiguous.**

19. Publication in Construction Trade Newspaper

19.1. Background

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

> "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.

The regulations under the Act expanded this definition to include newspapers published in electronic format only. The result has been a proliferation of websites that self-identify as construction trade newspapers and accept notices for publication.

The lack of official designation has created some uncertainty as to where to search for statutory notices and where to validly publish notices. It has been suggested that "*construction trade newspapers*" should be licensed and designated by regulation so that everyone knows where to look.

19.2. Stakeholders' views

The few consultees with views on this subject unanimously supported some form of official designation of "*Construction Trade Newspaper*". The problem they saw was one of monopoly. Monopoly makes the price go up. Several consultees noted the "*exorbitant*" pricing currently offered by one of the three entities now purporting to be a Construction Trade Newspaper.

One major construction trade organization had this to say: "*There are currently three websites that hold themselves out as "construction trade newspapers": The Daily Commercial News, Link2Build, and the Ontario Construction News . . . the current market landscape strikes* [a] *workable balance between allowing competition and avoiding potential confusion*."

A theme emerging from many consultations, particularly from groups with broad representation among industry stakeholders, was that it is now time, past time even, for the province to create and administer a province-wide commercial construction project E-registry system that would function as follows:

1. Central registry: A central e-registry would be created. All commercial construction projects over a relatively low monetary threshold ($250,000 for example) would be

required to register at the time the contract is entered into. Each payer would then be obliged to register each payee as the procurement process proceeds. Only registered payers and payees on a project (credentialed persons) would have access to that project's site. The technology exists to achieve this.[48]

2. Notice board: The site would function as a comprehensive project-specific notice board, and "real time" repository for all statutory notices on all commercial construction projects, including notices of termination and abandonment, notices of non-payment, written notice of lien, and notices of mandatory annual release of holdback. A receipt for posting would be conclusive proof of the time, date, and fact of notification.

3. Lien log: The site would give all credentialed parties at all levels of the construction pyramid immediate "24/7, 365" real-time access to all liens and all proceedings in all lien actions, where lien and trust claims were joined, and including motions to vacate liens, s. 39 information demands, and s. 39 responses.

4. Adjudication log: The site would give all credentialed project participants simultaneously notice of all adjudications and access to all adjudicative determinations on a given project.[49]

If this idea were to be implemented, as I believe it should, everyone with a smart phone at every level in the construction industry— anywhere in this province— would have reliable access to all information on all projects for which they were properly credentialed that would be necessary to make informed decisions about rights and obligations under the Act 24/7, 365 days a year. Full transparency and openness would increase confidence in the system and reduce the likelihood of important decisions being made based on suspicion, apprehension, gossip, or conjecture.

I recommend this concept for further study. It was raised separately by almost half of the institutional consultees and many individual consultees. It is an idea that should be explored.

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[48] As one nationally based institutional consultee put it: "*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*."

[49] By way of reference, a broad-based study of adjudication by King's College London and the Adjudication Society published in 2023 had this to say: "*Publication of adjudicators' decisions. 52% of individual respondents stated that adjudicators' decisions should not be published. 35% stated that they should, but parts of the decision should be redacted. 6% would publish decisions without any redactions. Those who opposed the idea, cited several grounds including: (i) confidentiality and privacy of proceedings, (ii) expedited nature of adjudication as opposed to obtaining necessarily the 'right' answer and (iii) the need to avoid creating any notion of precedent. On the other hand, 55% of questionnaire respondents supported a pilot scheme to trial the publication of redacted adjudication decisions. 67% of questionnaire respondents also agreed that, if decisions were to be published, it would require consent of both parties and the adjudicator. 53% stated that such redacted decisions should be published by the nominating ANB*."

Every consultee who raised this idea (not knowing that others had raised it) went on to say that the technology to achieve this is far from complicated and is in everyday use in other applications. Thus, a site functioning purely as a repository and notice board could be largely self-administering.

19.3. Analysis and recommendations

I believe that the Ontario market can support no more than three construction trade newspapers at present. If we begin by designating three only, the market will tell us within a year or two if one more or one less is necessary.

Recommendations:

- **Designate by regulation a maximum of three "construction trade newspapers" for the purposes of the Act, beginning with: 1) The Daily Commercial News, 2) Link2Build, and 3) the Ontario Construction News.**
- **Provide designation for a fixed period and review and renew designations, or add designations, as may be necessary to serve the industry.**
- **Continue to explore the idea of a province-wide, project-specific, notice board and project registry.**

20. Transitional Rules

20.1. Background

Section 87.3 established 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.

Subsection 87.3(1)(b) applied the old Act to an improvement if "*the procurement process for the improvement*" was commenced prior to the effective date of the amendments. Subsection 1(4) said that a procurement process would be considered commenced as early as a request for qualifications ("**RFQ**"), but an RFQ bears virtually no relationship to the contract for the

improvement itself and should not be determinative of what statute applies to an improvement.

Under subsection 87.3(4) prompt payment and interim adjudication, 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 interpreted this to be intended to reach back as far as the work done by designers, surveyors, and cost consultants. Under such a regime, an RFQ to select architects a decade before a building was built years later might surface to determine what legal rules applied to a contract. This outcome seemed anomalous to many.

Changes to lien, holdback, and trust provisions came into force on 1 July 2018. Prompt payment and adjudication provisions came into force on 1 October 2019. These staggered incept dates created confusion as to which rules applied to a particular improvement/contract. It was suggested that different transition rules should apply to any amendments implementing the 2024 OCAR recommendations.

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 balanced legal certainty for existing contracts with the advantage of a single set of rules.

20.2. **Stakeholders' views**

As one professional organization put it to me "[t]*he current landscape (some projects under Construction Act, some projects under Construction Lien Act) is not productive*."

Another institutional consultee of national scope summed the problem (and a possible solution) up nicely (my emphasis): "*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*." Several institutional and individual consultees advocated for the adoption of the Federal model of transition.

Two institutional consultees, representing a broad segment of Ontario's construction industry, recommended a fixed date to transition all changes to the Act, excepting only a handful of P3 projects whose AFP/P3 financial model was not designed to accommodate prompt payment.

Several well-informed consultees submitted that "*the most problematic transition provision"* is the lease provision, and the best solution to that problem "w*ould be to immediately eliminate any reference to the date of a lease, with immediate effect*".

One particularly well-informed consultee advocated for a "*make it law but not retroactive*" approach. Their submission was that the Federal phasing was only designed that way to permit the creation of the Authorized Nominating Authority, and there is no reason why the entire Act should not simply apply to all new projects. In other words, have the amendments take affect when they become law, but without retroactive application.

Although framed in slightly different language, a major institutional consultee in the province was "*supportive of a fixed date to transition all improvements to the provisions of the new Act. Adopting a cut-off date after which any new contracts would be subject to the Act including prompt payment and adjudication is a good way to create the required certainty without any issues of retroactive application*."

20.3. **Analysis and recommendations**

There is clear consensus that a fixed date to transition all new changes to the Act should be set, with the exception of a handful of P3 projects that would have to be excluded by regulation as their AFP/P3 financial model was not designed to accommodate prompt payment.

The solution adopted federally, in section 25 (Transitional provision) of the Federal *Prompt Payment for Construction Work Act* (application to any contract entered into after the effective date of the amendments, with the former statute continuing to apply for a year after the amendments on contracts and subcontracts entered into prior to the effective date) makes a great deal of sense, particularly with the extensive amendments suggested to the current adjudication scheme. This approach would balance legal certainty for existing contracts with the inception of a new, a single set of rules.

On the other hand, it is not clear that most of the amendments to the Act I am proposing would actually necessitate a one-year transition for contracts and subcontracts entered into prior to the effective date. At the end of the day, simplicity is best when it comes to transitional rules.

For avoidance of doubt, my recommendation is that the amendments made as a result my 2024 OCAR should not touch the existing transition provisions governing the major amendments made in 2017. So, for example, the new adjudication amendments should only impact projects that are currently subject to the adjudication system under the existing transition rule.

In the future, careful consideration could be given to repealing the existing transition provisions in subsections 87.3(1) to (4) as of a specified date, so that the amended Act

applies industry wide. To ensure predictability and fairness, this potential future change would require the parties to any contracts still operating under the old *Construction Lien Act*, or without the benefit of prompt payment and adjudication, to be given sufficient notice in order to bring themselves into compliance with the amended Act.

Recommendations:

- **The transitional rules for any amendments implementing the 2024 OCAR recommendations should reflect the following principles:**

  1. **All amendments should apply to new contracts and subcontracts entered into on or after the day the amendments come into force.**

  2. **For pre-existing contracts and subcontracts, consideration should be given to whether a one-year transition is needed for each amendment, or alternatively whether the amendments can be made to apply to these pre-existing contracts and subcontracts as of the day the amendments come into force. Regardless, this should be designed so as not to impact the existing transition rules in s. 87.3 of the Act.**

- **Continue to exclude, by regulation and appropriate language in the statute where necessary, any existing AFP/P3 projects whose financial model is fundamentally incompatible with prompt payment. These will be few indeed.**

I. OTHER FEEDBACK

I have incorporated recommendations throughout in response to consultees' submissions made in the "Other Feedback" portion of the Consultation Paper.

One submission which I have not carried forward into a recommendation was a request for coercive (punitive) interest rates on late payments. As one nationally based consultee put it to me: "*The current prejudgment interest rate under subsection 127 (2) of the Courts of Justice Act is 5.3%. While this rate is near the rates available for high interest-bearing savings accounts, the rate may not truly compensate the lienholder for the time value of unpaid funds. Moreover, the rate itself may not act as an incentive to promote prompt payment itself. Conversely, the Texas Prompt Payment Act provides a statutory interest rate of 1.5% per month if payment of an undisputed amount is late or wrongfully withheld on a private project in Texas. While the appropriate rate may be debated, an interest rate more closely approximating the Texas model may incentivize delinquent payors to promptly process payments and/or promptly engage in the other processes set out in the Construction Act*." Rather than impose coercive or punitive interest rates to encourage promptness of payment, I prefer amendment to the holdback scheme to mandate annual release of holdback, combined with universal access to the statutory holdback scheme to enforce payment of holdback when due.

Another suggestion made was to provide that "[i]*f an Adjudicator is a representative of the independent certifier, require the Authority to publish that information; if an Adjudicator is a representative of the independent certifier, specifically permit the Adjudicator to accept appointment without risk of bias; and if an Adjudicator is a representative of the independent certifier, expand the indemnity provisions of section 13.21 to cover the Adjudicator's employer (currently it is Adjudicator and their employees, not their employer)*". There are a number of policy aspects to this suggestion, which I was unable to explore adequately during my review. With the amendments that I have proposed for the appointment of private adjudicators, upon the payment of a one-time administration fee to ODACC, and the level of disclosure required of adjudicators prior to appointment, this should not materialize into a significant issue. I make no recommendation in this regard.

Another interest group suggested the prohibition of adjudication reprisal or exclusion clauses. This was a practical concern involving the application of the following clause "*The City may reject a Bid from a Supplier where in the opinion of the Treasurer in consultation with the City Solicitor, the commercial relationship between the City and the Supplier, including any sub-contractor the Supplier intends to use, has been impaired by the act(s) or omission(s) of the Supplier or sub-contractor, within the five-year period immediately preceding the date on which the Bid is to be awarded*" in the face of a prior adjudication by a contractor. The parties apparently found their way through the serious policy concerns over a reprisal clause being

triggered by a statutory right effectively written right into the contract,[50] however there was lingering concern. In my view this is part of a larger policy-driven conversation and not something appropriate to the scope of my review.

Another interest group sought amendments to permit a contractor to unilaterally use alternatives to cash holdback, by amendment to s. 22 of the Act. At present, the statute requires agreement of the parties, and owners are loathe to accept any form of security, even if permitted by the statute, other than cash. I have made no recommendation in this regard in view of my having recommended mandatory annual release of holdback which is a more complete and less intrusive way of dealing with this concern.

One institutional consultee proposed adoption of a dispute avoidance system in addition so statutory adjudication and summary lien enforcement procedures already in the Act. The suggestion was that "[p]*ursuant to such a conflict avoidance process, parties to a contract or subcontract could elect to appoint from the ODACC roster a conflict avoidance expert or panel (the "CAE"). This CAE would be provided with the contract/subcontract and related documents and may then be engaged upon request by the parties to either provide guidance to help coach the parties through issues arising under the contract/subcontract or to provide a non-binding determination and suggested way forward within no more than 28 days. The CAE would be empowered by the parties to take on a more inquisitorial and collaborative approach to resolving the dispute, working together with parties to get to the heart of the issues and identify practical solutions agreeable to all parties. Where the CAE's determination is not accepted by both parties, they may then proceed to adjudication (or other dispute resolution process)*." This process (or the RICS "CAP" process in the U.K.) has merit and may be worthy of further examination.

Finally, one stakeholder raised questions about how the Act intersects with prefabricated housing built off-site in a factory and transported to the site for assembly. This touches on a broader Modular Housing Strategy being developed by the Ministry of Municipal Affairs and Housing. A challenge I faced in developing the recommendations in this report was that the Act applies to all sorts of improvements, from transportation megaprojects to home renovations, without distinguishing between different types of construction projects. A change meant to assist one sector could have undesirable or unanticipated impacts for other sectors, and so should be pursued only with the benefit of careful analysis and consultation with affected groups. That's why no sector-specific recommendations are contained in this report, including with respect to modular housing.

[50] Contracts to conform: 5 (1) Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act. R.S.O. 1990, c. C.30, s. 5 (1).

J. STAKEHOLDERS CONSULTED

The following stakeholders provided either written or verbal submissions, or both, during the 2024 OCAR process:

1. ADR Chambers Adjudication Inc.
2. Association of Consulting Engineering Companies – Ontario
3. Borden Ladner Gervais LLP
4. City of Toronto, Legal Services Division
5. Dufferin Construction Company
6. Genge Construction Adjudication, Gerald R. Genge, Adjudicator
7. Glaholt Bowles LLP
8. Hall Advisory, Owen Hall
9. Infrastructure Ontario
10. Ken McCullough, Arbitrator
11. Margie Strub Construction Law LLP
12. Metrolinx
13. Metropolitan Plumbing & Heating Contractors Association
14. Ministry of Transportation Ontario
15. Ontario Association of Architects
16. Ontario Bar Association
17. Ontario Dispute Adjudication for Construction Contracts
18. Ontario General Contractors Association
19. Ontario Masonry Contractors' Association
20. Ontario Road Builders' Association
21. Ontario Sewer and Watermain Construction Association

22. Paul Winfield, Arbitrator
23. PCL Constructors Inc.
24. Professional Engineers Ontario
25. RICS – ADR Institute of Canada
26. Robert Bales, Adjudicator
27. Ron Kanter, Adjudicator
28. Singleton Urquhart Reynolds Vogel LLP
29. Struct-Con Construction Ltd. (Mohamad Shariati)
30. Surety Association of Canada
31. The Canadian Council for Public-Private Partnerships
32. The Council of Ontario Construction Associations
33. WeirFoulds LLP

K. SUMMARY OF RECOMMENDATIONS

By way of summary, the recommendations made in this report are as follows:

1. **Replace the current permissive scheme of annual/phased holdback release with a simple, annual mandatory scheme with the following essential elements:**

   - **<u>Mandatory annual release of holdback by owner:</u> For services and materials supplied in any given year, all basic statutory holdbacks retained by an owner shall be paid to the contractor following each anniversary of the date of execution of the contract, without setoff, provided that there are no preserved or perfected liens on the owner's title in respect of the contract by the expiry of the notice period for annual release of holdback.**

   - **<u>Mandatory annual payment of holdback by contractors and subcontractors:</u> All basic statutory holdback received by a contractor or subcontractor must be paid to those from whom that holdback was kept, without setoff, within 14 days of receipt, if there are no preserved or perfected liens on title in respect of the subcontract.**

   - **<u>All conforming payments discharge and satisfy all statutory obligations:</u> All payments of basic statutory holdback made in compliance with the Act discharge and satisfy corresponding statutory holdback and trust obligations under the Act.**

2. **Repeal s. 27.1 of the Act.**

3. **Create a legal presumption in order to trigger lien rights that where the making of a planned improvement is not commenced, the supply of a design, plan, drawing or specification constitutes the supply of services to an improvement, subject to an owner proving that the services did not result in an enhancement in the value of land.**

4. **Permit an owner or supplier of pre-construction design services to adjudicate any issue related to "*enhancement to the value of the owner's interest in the land*".**

5. **Amend s. 13.5(1) to permit adjudication by any party to a contract or subcontract of any matter set out in the Regulations. Amend the regulations to include any issue arising under a contract or subcontract, and pertinent decisions under the Act itself.**

6. **Amend s. 13.5(3) to permit adjudication to be commenced for a period of 90 days following the earliest of the date that a contract is completed, abandoned or terminated, and in the case of an adjudication under a subcontract, no later than 90 days after the date the subcontract is certified to be completed, or the date services or materials are last supplied to the improvement. It is not necessary that the adjudication be completed in that time frame, only that it be commenced within that time frame.**

7. **Amend s. 13.5(4) to clarify the provisions relating to multiple disputes that can be referred to and included in a single adjudication.**

8. **Amend s. 13.7(1) to require any party to a contract or subcontract who wishes to refer a dispute to adjudication to include in the notice of adjudication a true copy of the determination(s) in any previous adjudications in which it was involved on the same project.**

9. **Amend s. 13.8(2) to permit the consolidation of multiple adjudications at the request of any party, with the concurrence of all adjudicators that may be involved in all adjudications that are to be consolidated. The choice of adjudicator for consolidated adjudications can be made by the parties or in the absence of agreement by ODACC.**

10. **Amend s. 13.9 to permit the parties to agree on the appointment of any natural person who has completed ODACC training as a private adjudicator for any referred dispute, provided that the appointment is made in writing, signed by the parties and the proposed adjudicator, and discloses all commercial terms between the parties including provision for the payment by the parties of ODACC's one-time administration charge for such private adjudications. The one-time administration fee should be recalibrated periodically as necessary to fairly compensate ODACC for the actual cost of administrative services to be provided together with reasonable recovery of overhead and profit.**

11. **Amend s. 13.10 and s. 23 of O. Reg. 306/18 (Adjudications under Part II.1 of the Act) as necessary to require the adjudicator fee to be deposited within five days of a request by the ODACC, and for the fee to be the amount agreed by the parties and the adjudicator if there is one, or the estimate of ODACC in the absence of such an agreement. A corresponding amendment to s. 23 would permit an adjudicator to resign if the stipulated retainer has not been paid to ODACC within the relevant time period.**

12. **Amend s. 13.12 to add to an adjudicator's jurisdiction the right to determine that adjudicator's jurisdiction. Precedent language from the *Arbitration Act, 1991* could be considered and adopted with any necessary changes.**

13. **Amend the Act to add a "*slip rule*" like that found in the *Arbitration Act 1991*, with a very short time period, and adjust other time periods to accommodate this new period. Precedent language from the *Arbitration Act, 1991* could be considered and adopted with any necessary changes.**

14. **Amend s. 13.17 to add the words "*or in respect of the adjudication*" after the words "*acted in respect of the improvement*".**

15. **Amend the regulations to require ODACC to establish within one year of the regulation and to maintain thereafter a database of indexed, anonymized determinations accessible to any party to an adjudication, or any adjudicator conducting an adjudication, on a fee-per-use basis, with the fee set by ODACC independently.**

16. **Amend any forms prescribed by regulation to conform to the above amendments.**

17. **Repeal s. 34(10).**

18. **Replace s. 6.1 item #3 with some version of the words in the equivalent U.S. statute: "*the contract number, or other authorization for the property delivered or services performed (including the order number and contract line-item number)*".**

19. **Amend s. 6.1 item #7 to read "*Any other information that may be reasonably requested as being an essential component of a payer's accounts payable system*".**

20. **Permit the discrete and summary adjudication of whether an invoice is a "pr*oper invoice*" under the Act, and as to the reasonableness of any imposed additional requirements under s.6.1 item #7.**

21. **Add a provision deeming an invoice to be a "*proper invoice*" within the meaning of the Act unless a payer receiving such an invoice identifies to the payee in writing within 7 days of receipt of the invoice as to specific requirements of s. 6.1 not satisfied and what is required to address the deficiency.**

22. **Amend s. 13.5(4) to replace the word "*matter*" with "*dispute*".**

23. **Amend the Act to permit any party, and not just a contractor, to require consolidation of related adjudications under section 13.8(2) subject to the overriding discretion of the adjudicator.**

24. **Amend O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) to expressly allow for the joinder of trust claims in lien actions, with discretion to the court to sever claims or require separate trials or procedures.**

25. **Amend the statute and regulations as necessary to permit the adjudication of all claims brought under Part II of the Act.**

26. **Amend Form 1 to the Act to require a notifying party to clearly state the amount claimed that is holdback, and the amount claimed that is non-holdback.**

27. **Maintain the Act's present requirements for service but permit persons serving written notice of lien to serve a true copy of a preserved claim for lien in place of Form 1.**

28. **Amend the Act and Regulations to permit issues about the validity of written notice of lien to be adjudicated.**

29. **Amend s. 31(6) so that lien periods commence on the date of publication of notice of termination of that contract.**

30. **Amend the Act to require the notice to be published in a Construction Trade Newspaper within 7 calendar days of termination.**

31. **Subject to the Attorney General's ongoing review of the Rules of Civil Procedure, amend either the Act or its regulations to include the equivalent of s. 67(6) of the pre-2017 statute.**

32. **Amend clause 6(2)(b) to clarify that so long as an owner's name is placed somewhere on a claim for lien, the minor errors rule in subsection 6(1) applies.**

33. **Amend s. 85.1 and O. Reg. 304/18 (GENERAL) to permit the alternate forms of bonds.**

34. **Empower working groups representing all interested stakeholders to develop alternative forms of bond to be adopted by regulation for use in such projects.**

35. **Work with the Surety Association of Canada to amend the Form 31 bond to provide that 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.

36. **Amend subclause (a)(ii) of the definition of "*price*" in section 1 to include, for prescribed classes of contracts, "*price*" calculated in accordance with the regulations.**

37. **Create working groups to propose regulations for industry-approved formulae for the calculation of "*price*" in the case of specialized or collaborative forms of procurement such as AFP/P3, IPD, PDB.**

38. **Amend s. 2(4) so that the rule applies for the purposes of the entire Act.**

39. **Amend s. 39 to permit subcontractors to demand information from an owner or contractor at any time as to whether the contract provides more than one improvement is to be made under a single contract on lands that are not contiguous.**

40. **Designate by regulation a maximum of three "construction trade newspapers" for the purposes of the Act, beginning with: 1) The Daily Commercial News, 2) Link2Build, and 3) the Ontario Construction News.**

41. **Provide designation for a fixed period and review and renew designations, or add designations, as may be necessary to serve the industry.**

42. **The transitional rules for any amendments implementing the 2024 OCAR recommendations should reflect the following principles:**

    - **All amendments should apply to new contracts and subcontracts entered into on or after the day the amendments come into force.**

    - **For pre-existing contracts and subcontracts, consideration should be given as to whether a one-year transition is needed for each amendment, or alternatively whether the amendments can be made to apply to these pre-existing contracts and subcontracts as of the day the amendments come into force. Regardless, this should be designed so as not to impact the existing transition rules in s. 87.3 of the Act.**

43. **Continue to exclude, by regulation and appropriate language in the statute where necessary, any existing AFP/P3 projects whose financial model is fundamentally incompatible with prompt payment. These will be few indeed.**

44. **A number of potential amendments to the Act merit further consideration, and I was not able to pursue these ideas as thoroughly as I would have liked or as they deserved, given the limited time available for this review. I recommend that the province consider a further phase of this review in the coming years, after the above recommendations have been enacted, to evaluate the following additional proposals in more depth:**

- **Provide public owners a choice between mandatory levels of bonding and the creation of a standing combined dispute board, compliant with terms set by regulation, including, at minimum, the following:**

  i. **The Combined Dispute Board ("CDB") shall be a standing body of three independent, impartial, members two of whom shall have technical and/or senior managerial expertise relevant to the Project and a chair who is either a lawyer who is licensed to practice law in Canada or an ex-judge or master, constituted by written agreement between the parties and members of the CDB.**

  ii. **The CDB shall remain constituted until at least 120 days after publication of a certificate of substantial performance.**

  iii. **The Parties shall fully cooperate with the CDB and communicate information to it in a timely manner ensuring that the CDB is kept informed of the performance of the parties' obligations, all reports or notices issued in respect of the Works, all amendments, variations, notices of dispute, IC reports, and other commercially relevant material.**

  iv. **The CDB shall establish a schedule of meetings and site visits sufficient to keep the CDB informed of the performance of the project, not less than quarterly.**

  v. **The CDB may at any time provide informal assistance to the parties to avoid disputes, resolve disputes, or mediate disputes.**

  vi. **Where dispute avoidance fails, either Party may in writing refer the dispute to the CDB for resolution.**

  vii. **The CDB shall set procedures in consultation with the parties, hold a hearing, decide the dispute(s) based on the applicable contract and law applicable to the dispute(s), in a written reasoned decision within 30 days of the close of the hearing.**

viii. **The cost of the CDB to be split equally, monthly, with each party bearing its own costs of the CDB.**

- **Consider a "CAP" conflict avoidance process along the lines of a process now being used on a limited basis in the U.K. whereby parties to a contract or subcontract could appoint from an ODACC roster a conflict avoidance expert or panel (the "CAE") who is provided with the contract/subcontract and related documents and made ready to be engaged upon request by the parties throughout the project on an ad hoc basis to provide guidance, or coach the parties through issues arising under the contract/subcontract, or even provide a non-binding determination and suggested way forward within no more than 28 days. The CAE would be empowered to take on a more inquisitorial and collaborative approach to resolving the dispute, working together with parties to get to the heart of the issues by identifying practical solutions agreeable to all parties. Where the CAE's determination is not accepted by both parties, they may then proceed to adjudication (or other dispute resolution process). This process (the RICS "CAP" process in the U.K.) has merit and may be worthy of further examination.**

- **Establishment of a holdback trust account, similar in nature to that prescribed by the current B.C. statute.**

- **Adopting procurement model-specific formulae for "price" for the purpose of collaborative forms of contracting.**

- **Adapting performance and payment bond forms to collaborative forms of contracting.**

- **Create and maintain a secure, province-wide project e-registry for all notices and events under the Act, including all steps in the adjudication process.**

- **Provide a statutory cause of action for a disappointed payer in an adjudication, including adjudication of issues between Obligees and Sureties under performance bonds, and Claimants and Sureties under payment bonds.**

- **Continue to consider a possible amendment of s. 1.1(5) of the Act to add Part I.1 of the Act in the case of AFP/P3 projects.**

All of which is respectfully submitted.

_____

Duncan W. Glaholt, C. Arb.

L. APPENDIX

The following correspondence from SAC, produced at my request as part of the consultation process, outlines compensated sureties' contribution to the efficient operation of the construction industry in Canada.

Steven D. Ness,
President

August 23, 2024

via email

Ontario Construction Act Review
c/o Mr. Duncan Glaholt,
Glaholt Bowles
Toronto, Ontario

Dear Duncan:

Re: Unseen Services of Surety Bonds – Default/Dispute Avoidance

Thanks again for taking the time to meet with us on August 2nd. At that meeting, we discussed those not infrequent instances where developing problems on a bonded project call for a surety to engage in preventative measures to avoid a possible work disruption or even a default. You had asked us to follow up with our comments along with examples of a surety's intervention in such situations.

Over the last two weeks, I've asked several key surety writers across the country to recount their experiences around pre-default intervention and provide commentary on those unseen services that sureties can provide when faced with deteriorating conditions on a bonded project. In speaking with the membership it became obvious that those unseen services extend beyond those instances where a surety intervenes to resolve identifiable disputes or performances issues. Members recounted occasions where even after a contractor failure, claims adjusters utilized their resources, leverage, and experience to minimize the impact of the default and reduce, or even eliminate work stoppages. We appreciate your recognition of the role our members play in the broader construction ecosystem and are pleased to support your review.

Also, sureties have, in recent years, become more proactive in default prevention through the ongoing monitoring of their contractor clients and their ability to identify financial and operational trends that can lead to problems with their work programs. This can enable a surety to become involved before problems even begin to manifest themselves on bonded projects. Finally, it's worth noting that the Act itself has provided a means to enable sureties to engage in preventative measures through a special provision in the standard Form 32 Performance Bond.

Much of the information provided here is anecdotal as sureties don't keep detailed records of potential claims or "near misses" that never materialize, nor does the impact of their intervention efforts appear in the quantitative results. That said, our members did share useful information that can provide a sense of the issues that are being encountered by the industry and the surety's approach to resolving them. I must admit that even I was surprised at the number and magnitude of problems being addressed, particularly over the last two years with the post-pandemic economic challenges slowly finding their way to the balance sheets of highly leveraged contractors.

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Pre-Notice Meetings: Paragraph 2 of the Form 32 Performance Bond

The prescribed Form 32 Performance Bond was drafted with the understanding that a surety's ability to intervene before project problems deteriorate into a default was a key component of construction risk management. Paragraph 2 of the bond provides an owner with the option of convening a "Pre-Notice Meeting" should they be "…*considering declaring the Contractor in default*…" with the objective being to identify and, if possible, avert a default by rectifying any performance issues.

In speaking to our member sureties, we were quite surprised at how extensively this provision is invoked with all respondents confirming that they've been called upon to participate in such meetings. Indeed, one member informed us that they had engaged in 54 Pre-Notice conferences since the new forms were introduced. We're told that the provision was not always used as intended and requests to meet sometimes surrounded minor disputes over inconsequential matters that were better resolved through the contractual dispute resolution process. However, sureties also reported several instances where very serious issues were resolved, and defaults were prevented.

Examples include:

- A public owner contracted for upgrades and expansion of its water distribution system, with a project value of $27.5 million. The project completion date was missed, and the most recent schedule was several months in arrears. The owner expressed concerns with the delay, as well as with deficiencies in the work, poor quality of submittals, and safety issues. In response, the contractor complained of the owner's unreasonable rejection and delay in approval of submittals, lack of clear responses by the owner to the contractor's requests for information, and that the owner was requiring the contractor to take steps not called for by the contract.

  The owner reached out to the surety for assistance in achieving project completion and indicated that it was contemplating a performance bond claim. The surety assumed the role of intermediary between owner and contractor, assisting both parties to identify obstacles in the progression of the work, and promoting discussion to resolve those issues. The surety also arranged for a consultant to visit the site and meet with the owner and contractor.

  The consultant assisted the owner and contractor to isolate the issues in dispute, determine parties' positions on those issues, and collaborate on path forward to completion. Both owner and contractor appear pleased with the outcome and a schedule is now in place to complete project. The owner has also acknowledged contractor's efforts to complete the remaining works and deficiencies, and it appears there is no immediate prospect of a performance bond claim.

- In early days of the pandemic, a specialty contractor was facing a significant delay in obtaining a specialty, sole-sourced component on a complex, high-value engineering project (approx. $97 million) due to workforce issues being encountered by the supplier. The owner would not agree to any extension and threatened to invoke the liquidated damages provision of the contract which would almost certainly have resulted in a default/abandonment of the project with all the ensuing disruption and cost.

The surety's in-house engineer and claims staff worked with the owner and the contractor to rearrange the scheduling of the workflow and allow work to continue on the non-critical path streams of the project while awaiting delivery of the required equipment. They were successful in convincing the owner that by precipitating a default, the delay would be extended even further to no measurable advantage. The owner agreed to delay the application of the LDs for eight months until the proper components were delivered.

According to the surety, given the specialty nature of the project, a full-on default would likely have triggered a payout of the total bond amount and an immeasurable delay.

- A mid-sized general contractor was completing a small project (less than $1 million) for the local municipality when the surety received a request for a Pre-Notice Meeting from the owner. The contractor was in arrears on payments to several key trades who had placed liens on the project and had contacted the owner threatening to walk off the job unless payment was forthcoming.

  In fact, the surety was aware of these issues, having received claims on its payment bond and had convened its own meeting with its principal. The contractor was financially strong, profitable, and had no cash flow issues. In discussing the payment issues, the surety learned that these came about as a result of a series of disputes with the affected trades/suppliers, most of which were minor, or even trivial and did not merit withholding of payment.

  During that meeting, the surety used its leverage to convince the contractor of the need to expedite the settling of those issues and remit the required payments. As a result of the surety's influence, the outstanding payments were made within 5 business days and the project proceeded to substantial performance without further incident.

Without exception, every surety we consulted was in agreement that the Pre-Notice Meeting was a useful tool and a much-needed addition to the performance bond language. This provision has now been included in the recently updated industry standard CCDC Performance Bond.

Surety Monitored Default Prevention

Enhanced Monitoring – Watch Lists

Often, a surety's pre-default involvement is not triggered by the owner but comes about via the routine monitoring of a bonded client's operation and work program. A bonding company will typically require a contractor to submit regular progress reports on outstanding projects and sometimes internally prepared interim financial statements to assess the status of the ongoing jobs (bonded and unbonded) and identify any emerging problems in their early stages.

In the wake of the pandemic with the construction economy driven by labour shortages, inflation and high interest rates, sureties have become hyper-sensitive to the threats posed by steep increases in the cost of debt servicing and the scarcity of skilled workers and supplies. In the course of their day-to-day monitoring, should a surety detect financial storm clouds on the horizon, they typically won't wait for the problems to manifest themselves on the bonded projects before taking remedial action.

Several sureties reported that they had established enhanced monitoring programs or "watch lists" for contractors that are under elevated financial or operational stress that require closer monitoring. These are not necessarily contractors that are imminent insolvency risks, but those that are managing through financial difficulty that requires more attention to cashflow management and capital bolstering. Some of the larger sureties employ teams of engineers and accountants that work with financially distressed contractors to help manage them through it.

In discussing the current state of their watch list management, one of the largest surety writers in the country offered the following sobering observation:

> *At this moment, our watch list is longer than historical records and we have more larger contractors than in the past. There are presently 4 contractors that have backlogs of over $1 billion and pursue large scale projects.*

Active Intervention – Financing

Should the situation with a contractor deteriorate to the point of requiring more active intervention by the surety there are a number of approaches a surety can choose from, depending on nature of the challenges being faced. The most common preventative measure taken by sureties when faced with a contractor in financial distress is the extension of short-term financing to ensure that bills are paid, and the bonded work is completed.

As any surety claims professional will attest, this can be a risky proposition and the decision to extend financing must be carefully considered with the project(s) and fund distribution being closely monitored and controlled. When a surety extends credit to a struggling contractor where no default has been declared and no claim has been made under the performance bond, the surety is acting "outside of its bond" and any monies advanced will not be applied to the bond amount. Should their financing efforts prove unsuccessful, and the contractor becomes insolvent, a surety will still be responsible for the entire bond amount in addition to any amounts previously advanced.

Again, just a few selected examples:

- An Ontario based general contractor was carrying out four bonded projects for the same municipality ranging in value from $1.8 million to $6.5 million when they encountered serious cashflow issues arising from a delayed payment on a large project. Work on all bonded projects slowed as crews were laid off and default declarations were issued on all four.

  The surety provided short term financing as well as administrative/consulting assistance to the contractor until payments were received which allowed for an accelerated schedule, to avoid liquidated damages. All four projects were completed by the principal. The surety's loss was minimal, and two of the four projects were completed on time. The remaining two were only marginally delayed.

- In a project that is currently underway, a general contractor is constructing a Long Term Care Home at a value of approximately $100 million. Design difficulties resulted in extensive change orders and serious disputes between the owner, the contractor, and subtrades as the payments were withheld and liens were filed. As cashflow tightened, the contractor threatened to down tools and abandon the project.

In this particular circumstance, the same bonding company acts as the surety for general contractor and major subcontractors on the project and were able to meet with all the contracting parties to cooperatively work out a proposal to the owner. The following is a quote from the surety's claim representative:

> *(We were) able to host both the GC and the sub trade to discuss their issues on the project, assisting in a global reset of the relationship to ensure that each party had clear understanding of the other's position and issues, and made sure the payment process was transparent with access to information and documents as needed. (We were) able to assist with the frustrations of each (of the) parties, opening more clear lines of communication. Each party went away with an understanding of their responsibilities in getting the work complete. The project is now back on track.*

- In another ongoing project, the bonded contractor is the GC on a $7.7 Million community college laboratory building upgrade. When the project was 80 plus percent complete a serious dispute erupted between the owner and principal around unresolved change orders, project delays, and outstanding monies owed to the principal. The owner declared the principal in default and the surety had received several payment bond claims.

  The surety met with the owner and the principal in an attempt to resolve the issues, but both were firm in their positions. The principal did not have the financial ability to pay the outstanding bills to the claimants under the payment bond without the owner releasing funds. Matters were at an impasse as the owner wanted to terminate the principal and the parties had not been communicating well for months.

  The surety paid several payment bond claims to keep the subcontractors and the principal working and to bring the project to completion. The surety also arranged for a construction consultant to visit the site regularly and meet with the owner and principal to help avoid further issues and help them communicate more effectively.

  As of this writing, the parties are still negotiating a final financial resolution, but the project has now been completed. The surety informed us that had the owner terminated the project contractor and insisted on bringing in a replacement, substantial performance would have been delayed by several months as the new contractor was brought on board and ramped up. The laboratory building would not be available for use during the coming school year.

- The owner and sole proprietor of a relatively small general contracting firm passed away suddenly leaving only a widow who had no involvement or experience with the business. The firm had a $15 million high school under construction at the time and the surety convinced the project manager to stay on and complete the project while paying outstanding payment bond claims. The project owner was aware of the claims and may have noticed that that the calls from subs and suppliers dropped off, but otherwise was unaware of the bonding company's involvement until they received a direction of funds letter to have the holdback sent to the surety. The project was successfully completed by the bonded contractor without a claim on the bonds.

It should be noted that in many, perhaps most cases where a surety is called upon to provide financing, their involvement will be invisible to the other stakeholders including the owner and subtrades

Minimizing the Impact of a Default

Unfortunately, circumstances do not always provide a surety with the opportunity to be proactive and engage in preventative medicine. In those instances where a surety faces an all-out, irredeemable failure, resourceful claims professionals will often employ innovative and unconventional approaches to minimize its impact, reduce the costs and arrange to have the project completed more expeditiously to the mutual benefit of all stakeholders.

- An Ontario based contractor was engaged in a multi-year facilities maintenance contract valued at approximately $6 million over four years. The contract was seasonal in nature with terms running from May 1st to October 31st for each contract year.

  The maintenance operation was a wholly owned subsidiary of a large general contracting group that ceased operations and filed for bankruptcy protection five weeks before the commencement of the third year of the maintenance contract, leaving the surety scrambling to find a replacement for the upcoming season.

  The surety was able to secure the services of a qualified replacement contractor from its existing client base. They quickly arranged a meeting with the owner and had a completion agreement executed before the May 1st commencement date. This occurred with no work stoppage or interruption of the services provided.

  The surety claims professional was quite proud of this outcome and boasted "*We were able to go to the owner with a solution before they even knew they had a problem.".*

- A general contractor in Atlantic Canada ceased operations after incurring heavy losses on an unbonded project resulting in the bank called its loan. The principal had one bonded project valued at slightly more than $8 million for an addition/retrofit of the local municipal building that was approximately 85% complete.

  The surety quickly engaged the services of a construction manager and established a new corporate entity or "Newco" for the purpose of completing the outstanding work. Newco then proceeded to hire the key field and project management people that had been working on the project. This ensured the continuity of the project team who had the knowledge of and familiarity with the intricacies of the project and had the relationships with the key trades and on-site workers

  As an aside, the owner initially objected to this approach, expressing the concern that the bonding company was simply "using the same people that had messed it up in the first place". The surety was able to convince the owner to accept the arrangement, pointing out that the failure of project contractor was precipitated by factors outside the current project and no significant problems had appeared before that point.

  Work on the project resumed after only eight days following the project's abandonment. The surety indicated that had they been required to find a replacement contractor, completion would have taken another eight to ten months.

It's important to note that the list of instances provided here is nowhere near exhaustive and represents a cross section of the many examples provided by the responding SAC members.

Duncan, thanks again for your efforts and interest and if you or the ministry representatives have any questions or would like to discuss further, we'd be happy to get together with you to elaborate further.

All the best,

Steven D. Ness
President and Chief Operating Officer
Surety Association of Canada