

February 10, 2016

Mr. Bruce Reynolds  
Lead Counsel, Expert Review of *Construction Lien Act*  
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Dear Mr. Reynolds,

**RE: Additional Issues Relating to Expert Review of the *Construction Lien Act***

The Advocates' Society (the "Society") thanks you for your invitation to provide our comments on the additional issues you have outlined on the *Construction Lien Act* Expert Review website. We thank you and other members of your Review team for the important work that you are doing to update and improve the Ontario *Construction Lien Act*.

The Society's Task Force charged with reviewing proposed amendments to the *Construction Lien Act* has closely examined the additional issues raised. As with the written submissions provided on December 2, 2015, the Society has restricted its comments to those issues which engage the mandate of the Society.

**New Issue #16: Introduction of an Adjudication Mechanism for Construction Disputes in Ontario**

The Society is supportive of the introduction of an adjudication mechanism for construction disputes in Ontario. The following comments deal with specific practical issues surrounding adjudication.

*Interplay between Adjudication and Liens*

We see two possible approaches to the interplay between adjudication and liens.

- The first approach would see the lien remedy integrated into the adjudication scheme. Statutory lien and trust remedies could be suspended during the course of the project in

favour of adjudicated determinations. At the end of the project, the parties would be free to pursue any remedy they may have, including revisiting any adjudicated determinations, if so advised, using any process that is available to them.

- Another approach would be to have the two schemes run in parallel. In some Australian jurisdictions (South Australia, for example), security of payment legislation and lien legislation exist side by side, and the contractor or subcontractor elects under which regime to proceed.

### *Appeals of Adjudicators' Decisions*

We see this issue as analogous to the process already set out in many commercial construction contracts, whereby a consultant makes the initial findings related to, for instance, a contractor's entitlement to an extra for work. The distinction is that an adjudicator's findings would be binding on the parties for some period of time – until substantial performance or completion of a contract, for instance – whereas many contracts typically provide that a consultant's findings are non-binding, and subject to ratification by the owner and contractor.

In our view, an adjudicative process could be valuable in ensuring that disputes are resolved efficiently and that work is allowed to proceed. The value of an adjudicative process is significantly undermined if an appeal process in the course of construction is allowed to delay the decision-making process, and increase the costs to the parties.

In any event, adjudication is not intended to be a final, binding determination of the rights of the parties. Those powers are properly reserved to the courts or an arbitrator. Appeals, if any, are properly reserved to these later processes. It may, however, be prudent to provide for an exception in cases of reasonable apprehension of bias or actual bias, as the integrity of adjudication might otherwise be brought into disrepute.

### **New Issue #21: Improving Harmonization of the Act with the *Registry Act***

The Society views such harmonization as highly desirable. Disharmony between the two Acts has resulted in confusion and sometimes prejudice to lien claimants. In particular, as you know, the *Construction Lien Act* provides for the ability to either *vacate* or *discharge* a lien from title. Both have the effect of clearing title, but the latter results in the loss of lien rights to a lien claimant. However, the *Registry Act* forms have until recently provided only for a *discharge of construction lien* form; as a result, counsel inexperienced in the intricacies of the *Construction Lien Act* have sometimes inadvertently discharged their clients' liens while attempting to vacate them from title.

These problems were compounded by the policy of the land registrars to register vacating orders as discharges, resulting in confusion that the Toronto Masters had to overcome by specifically

directing the registrar to register vacating orders as applications to amend. The legal prejudice and negligence claims occasioned by this disharmony were entirely avoidable. The situation has recently been improved by Teraview's recent introduction of a new Application to Delete Construction Lien form. However, in the Society's view more explicit harmonization should be provided for by the Legislature, and the Acts should be amended so that separate prescribed forms exist for the registration, vacating and discharge of constructions liens.

Further, the *Construction Lien Act* should be amended to change the reference to the registration by a lien claimant of a "release of lien" (and replace it with a "discharge of lien"). These steps would harmonize the Acts and avoid confusion, mistakes and potential prejudice..

I hope these submissions are helpful. We would be pleased to discuss them with you further at your convenience.

Yours sincerely,



Martha A. McCarthy  
President

Task Force Members

- Jeffrey Armel
- Sandra Astolfo
- Keith Bannon
- Jay Nathwani
- Michael Swartz