

November 29, 2016

VIA EMAIL

The Honourable Yasir Naqvi
Attorney General of Ontario
Ministry of the Attorney General
11th Floor
720 Bay Street
Toronto, ON M7A 2S9

Dear Attorney General:

RE: *Striking the Balance: Expert Review of Ontario's Construction Lien Act*

As you know, The Advocates' Society (the "Society"), founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective judicial resolution of legal disputes.

We write to thank you again for meeting with members of our Construction Law Practice Group's Executive team on October 17, 2016. The Society appreciated your invitation to provide comments with respect to the report *Striking the Balance: Expert Review of Ontario's Construction Lien Act* (the "Expert Review Report").

Province-Wide Standardization

The Society notes that the suggestions with respect to section 67(2) of the *Construction Lien Act* (the "Act") set out in our letter of December 2, 2015 to the Expert Review Team have been largely adopted. Similarly, the Society believes that the recommendations concerning the adoption of the Society's suggestions with respect to the provisions resulting in multiple proceedings will significantly streamline the litigation of construction disputes in Ontario. As set out in our December 2, 2015 letter, increased reliance upon the *Rules of Civil Procedure* will ensure that lien actions are litigated in an expeditious manner.

We note, however, that many of the existing unique procedural provisions of the *Act*, such as the provisions for settlement conferences, have been recommended to be retained. The Society is concerned that unless the interaction between the *Rules of Civil Procedure* and the unique features of lien claim litigation are set out in the *Act* itself or in a Regulation, different procedures may arise in each of the various court jurisdictions as to how the *Rules* and the unique features of the *Act* interact. The Society would be pleased to provide any assistance or

advice as to how a statutory provision or Regulation may assist in standardizing how the construction lien claims are litigated across the province.

Such a statutory provision or Regulation could also include standardized procedures for posting security and vacating liens from title, including improved access to courts in jurisdictions other than Toronto. As the Society recommended in its letter of December 2, 2015, a consistent process for setting perfected lien actions down for trial across all judicial regions could also be remedied through the drafting of a statutory provision or Regulation. The Society believes that unifying the procedure for setting a perfected lien action down for trial will remove unnecessary complexities faced by both advocates and the judiciary. Advocates will know that setting a lien action down for trial in Toronto will require the same procedures as setting a lien action down for trial in Kenora. Likewise, the judiciary will be able to determine if an action has been set down for trial without inquiring into the regional customs of the current system.

Further, with the expert review team's recommendation that claims below a monetary threshold of \$25,000 be referred to the Small Claims Court, the need for unification and standardization is even stronger. As these actions will have to be set down for trial (to avoid the consequences of the current Section 37 of the *Act*) before being referred, it does not make sense to keep the legal and administrative costs of the current kaleidoscope of regional practices for setting such matters down for trial. Setting a unified standard for setting matters down for trial will reduce costs and smooth the administration of justice.

To the extent that the Ministry of the Attorney General believes that province-wide standardization is best accomplished through a Practice Direction issued by the Court, the Society would be pleased to assist by providing its views on the form, structure and substance of such a Practice Direction.

Mandatory Mediation

It does not appear as though the Expert Review Report addresses the potential for mandatory mediation in a new revised *Act*. The Society submits that mandatory mediation has had success in ordinary civil actions and resulted in the settlement of a significant number of these actions.

Pursuant to Section 67(1), the *Act* is to be a summary procedure having regard to the amount and nature of the liens in question. In the past, the Construction Lien Masters would request that a colleague conduct a case conference (which was essentially a mediation) providing both parties consented to same. This practice ought to continue and provisions mandating these requirements would probably achieve the objective of the encouragement of settlement in lien actions.

The Society has been advised that there is a concern amongst the Construction Lien Masters that there may not be enough resources to appoint an alternate lien master to conduct a case conference. Further, the Society has been advised that a past practice of permitting a lien Master to sit on a supernumerary basis (in order to hear case conferences) is no longer in force. The Society submits that it would be desirable to revert to the practice of having Construction Lien Masters sit on a supernumerary basis which could facilitate additional case conferences and thus facilitate settlements in lien actions.

The Society further submits that it may be desirable to set a minimum threshold for the application of any potential mandatory mediation clause as to avoid unnecessary costs in lien actions which fall under a reasonable minimum threshold. One suggestion is to consider setting the threshold at the same level as the Simplified Rules threshold of \$100,000.00.

Adjudication

As per the Society's February 10, 2016 letter to the Expert Review Team, the Society remains supportive of the introduction of an adjudication mechanism for construction disputes in Ontario. Moreover, the Society is largely supportive of the Expert Review Team's recommendations, namely, that:

- adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contractors;
- the *Act* allow the parties the freedom of contract to agree on provisions to be included in their contract with respect to adjudication so long as such provisions are consistent with the *Act*;
- the statutory default regime be set out in a regulation to the *Act*;
- adjudication be available to any party to a construction contract or subcontract;
- back-to-back adjudications be permitted so as to facilitate greater efficiency in dealing with adjudicated disputes;
- adjudication decisions be enforced by way of application to the Superior Court of Justice in a manner similar to that employed in respect of the awards in domestic arbitrations under the *Arbitration Act, 1991*;
- parties maintain their lien rights;
- the Ministry select a first tranche of qualified individuals based in key centres such as Ottawa, Toronto, London and Windsor with a distinct set of criteria;
- a single Authorized Nominating Authority be created to administer the appointments, certification and training of all adjudicators in Ontario;
- standardized training and qualification system be developed and implemented; and
- as a general rule, costs and fees related to adjudication should be borne by each party with the reservation of power that an adjudicator can award costs in appropriate circumstances.

The certification and training qualifications is not set out in the recommendations but a list of ideal qualities is listed. The Society supports a system where the certification and training qualifications be set out in a regulation to the *Act*.

Mandatory Arbitration in Lien Actions

The Courts have established guidelines for staying lien actions in favour of commercial arbitration and procedures for allowing lien claimants to perfect their claims for lien when faced with a stay order. However, the Society believes that it is time to consolidate and codify these procedures within the *Act* for greater clarity and efficiency.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'B. Berg', written in a cursive style.

Bradley E. Berg
President

Task Force Members:

Jeffrey A. Armel, *Koskie Minsky LLP*

Robert Drake, *Goldman, Sloan, Nash & Haber LLP*

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