



Hon. Yasir Naqvi
Attorney General
Ministry of the Attorney General
11th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9

December 2, 2016

Subject: Improving Ontario's Construction Lien Act

Minister Naqvi,

The Ontario Society of Professional Engineers (OSPE) appreciates the opportunity to submit commentary to support the review and enhancement of Ontario's Construction Lien Act (CLA).

Minister, OSPE wishes to acknowledge your effort to ensure the proposed legislation is fair, balanced, and reflects a diverse array of perspectives by thoroughly consulting with industry and stakeholder groups. Credit is also owed to your staff, the Ministry, and Bruce Reynolds and Sharon Vogel for their thoughtful work on this significant piece of legislation. In the months and years ahead, Ontario's CLA will prove critical to our ability to capitalize on historic foreign, federal, and domestic investment in the brick and mortar projects that enable our provincial economy to flourish.

Principally, the Construction Lien Act functions as the legislative intersection between Owners, Contractors, and the Government; a place where the insight of and consideration for engineers is of crucial importance. Engineers are key stakeholders because they are trained, innovative problem solvers who develop solutions by prioritizing public safety and considering costs and benefits, sustainability, and the complete lifecycle of a project. Engineers are also on the frontlines of developing, safeguarding, and maximizing Ontario's many investments, so it is important that the CLA supports the proliferation of the individual engineer as the sworn protector of the broader public interest and a professional class with a strict code of ethics.

If you have any questions or wish to meet to further discuss the information communicated in this submission, please contact: Patrick Sackville, Lead, Policy & Government Relations at patrick@ospe.on.ca or (416) 223-9961 ext. 225.

Key Recommendations:

1. Enshrine Engineers as a Distinct Group

OSPE believes that engineers should be recognized as a distinct group that is eligible (with other defined groups that traditionally complete their work early on a project) for early release of Holdback if applicable.

The nature of the services rendered by engineers are, in most instances, completed before shovels break-ground on the actual construction of a project. Because of this, engineers can be left waiting for years before Contractors achieve Substantial Completion and the Holdback is released. This causes an unnecessary burden that increases the cost to the project.

For most projects, engineers work as the Owner's representative and represent the interests of the Owner (especially true for small municipalities which have minimal or no in-house technical/engineering resources). Having the release of an engineering firm's Holdback tied to a Contractor's performance creates an inherent conflict of interest, whether that conflict is real or perceived.

Taking stock of engineering services in relation to other professional services rendered on projects, no such requirement is levied on lawyers or accountants. OSPE takes the position that it is illogical for engineers, as a professional class and service, to be subject to a Holdback when other 'like' professional services are not.

2. Release of Holdback

OSPE recommends that engineers should be made eligible for early release of Holdback upon completing services during the preliminary or early stages of a project.

Concerning the release of Holdback: in Item 29, the Committee states that "*[they] also recommend that the Act should be amended to allow for the segmentation of Holdback for projects involving clearly separable improvements, particularly for AFPs*". It also recognizes the fairness of paying Holdbacks to designers for their basic design and specification work.

Further, in Item 30, the Committee states that "*the Act permit the designation of a design phase for the purposes of phased release of Holdback*". This provision should also be applied to the providers of temporary work whose responsibilities have been discharged once a project has broken ground. This would apply to most excavation and shoring contracts and other work performed during the early stages of a project.

Per the Act, the Holdback can only be for 'improvements'. OSPE interprets this would apply to the design, but not necessarily the contract administration. The engineer can be working for the Owner or as a Sub-Contractor which raises questions regarding which party would dictate how this is handled.

3. Early Arbitration of Disputes

Regarding dispute resolution, OSPE is in favour of the changes proposed by the Committee. In particular, OSPE supports proposals for the early arbitration of disputes. This kind of procedure has

been in use in the United Kingdom for over 20 years, and most of the resulting arbitrated settlements there are finally accepted without recourse to further litigation or more formal arbitration.

As a minor criticism, employing the terms “Back-to-Back Adjudications” and “Multi-Issue Adjudication” deserves further clarification. It is OSPE’s recommendation that the precise meaning of these terms be clearly defined.

4. Trust Accounts

OSPE is in support of establishing trust accounts for lien Holdbacks. This action would guarantee that money will be available at the end of a project, and the establishment and administration of these accounts would not be a significant burden to the Owner or Contractor.

5. Promptness of Payment

In general, OSPE is in favour of improvements to prompt payment but wishes to highlight circumstances where a 15 day requirement may result in challenges.

In most circumstances, there is no reason why a Contractor or engineer/architect cannot be paid within 15 days of submitting their claim. This arrangement offers 10 days for certification and five days for the Owner to deliver the funds. This is standard under Canadian Construction Association contract language, and brings with it a strong track record of project success. For this process to function properly, the primary Contractor must have all paperwork completed including all required statutory declarations stating that all outstanding bills have been paid.

There may be instances where these responsibilities have not been completed or the engineer has valid reasons to question the integrity/quality of the work on the basis of public safety or contractual concerns. Under valid circumstances, the Act should afford extensions to engineers in instances whereby they must take additional steps to verify the safety of a structure.

In the case of Local Services Boards (LSBs)—particularly in Ontario’s northern communities—a 15 day requirement would be extremely difficult to meet. LSBs get most of their funding through the Ministry of Northern Development and Mines (MNDM) meaning the monthly payment process would be: Contractor, Consulting Engineer, Project Manager (contracted by the LSB), MNDM (who forwards the funds to the LSB), LSB (who produces the cheque made payable to the Contractor). Payment to the Contractor usually occurs within 30 days but occasionally it is delayed by a few days. Because of this, LSB contracts can feature a clause in the contract that payment will be made within 45 days so that the Contractor is aware at the time of tender that payments will take longer than normal. If it becomes a statutory requirement to deliver payment within 15 days it will make these transactions impossible to complete within that timeframe. In some cases even a window of 30 days may be difficult to achieve, because some very small municipalities do not have full-time staff and only produce cheques several times each month. To address this challenge, OSPE recommends that some flexibility be written into the revised statute to allow for these extenuating circumstances.

Small municipalities have insufficient resources to hire third-party project management firms. In those instances, the payment certification paperwork goes from the Contractor to the Consulting Engineering firm to the Project Management firm (who reviews it on behalf of the Owners) and then finally to the Owner for payment. This added step makes the 15 day deadline difficult to meet.

6. Lien Period

OSPE sees a benefit in increasing the lien periods to encourage the preservation and perfection of liens.

Under the current legislation and the recording (preservation) of a lien, a supplier or Sub-Contractor is frequently faced with the difficult choice of either angering their client or preserving their rights to eventually be paid. Adoption of the arbitration procedure plus greater time to formally preserve a lien would likely reduce the number of preserved liens and facilitate more constructive settlement dialogue.

Although an extended lien period would increase the financing and administrative costs, OSPE takes the position that this action would enable more cooperative relationships between Owners, General Contractors, and Sub-Contractors which would result in a net-benefit by accelerating the expansion of their businesses and the broader economy.

7. Holdback

For all parties subject to a Holdback, OSPE recommends that the amount of money held back for Substantial Completion (deficiencies) should be clearly specified. If the government wishes to prioritize high quality structures, the Holdback should be used to encourage Contractors to be thorough and meet contract specifications.

Furthermore, contract administration is an important part of the process and is often not given the same support as other parts of a project are. It is OSPE's stance that achieving proper contract administration will result in better Owner and Contractor relationships, thus enabling a more rapid expansion of business and projects, as well as alleviating pressure on dispute resolution mechanisms.

8. A Mounting Danger: The Commoditization of Engineering Services

Separately, OSPE wishes to draw attention to the creeping commoditization of engineering services and how it undermines and endangers the value, quality, integrity, and safety of projects.

The commoditization of engineering services presents a host of problems for the growing level of investment in the construction of public and private structures, as well as Phase II Federal Infrastructure investment in critical public infrastructure and transit projects. High quality engineering at the outset of a project saves time and money throughout the rest of the project. Engineering is not simply a task, it is integral to project planning. As the adage goes, "failing to plan is planning to fail." Because of this, professional engineering should not be grouped in with other construction activities.

Taking this approach will not only reduce immediate cost overruns and lower Total Lifecycle Costs over time, it will also encourage creativity, innovation, and functionality of projects. Most important of all, fighting against the commoditization of engineering services will result in the heightened defense of public safety—supporting the central mandate of Ontario's engineers.