

November 15, 2017

Mr. Monte McNaughton, MPP
Chair, Standing Committee on the Legislative Assembly
Room 202, North Wing
Main Legislative Building, Queen's Park
Toronto, ON M7A 1A8

Dear Mr. McNaughton:

RE: Bill 142: *Construction Lien Amendment Act, 2017*

The Advocates' Society, established in 1963, is a not-for-profit association of over 5,700 members throughout Canada. The mandate of The Advocates' Society includes, among 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.

The Advocates' Society has followed the development of Bill 142, *Construction Lien Amendment Act, 2017* with interest. The Advocates' Society made submissions to the Expert Review Team prior to the release of the report entitled "Striking the Balance: Expert Review of Ontario's *Construction Lien Act*" (the "Expert Review Report"). The Advocates' Society also met with Attorney General Naqvi and provided submissions on potential changes to the construction lien regime in Ontario prior to the introduction of Bill 142.

Following the introduction of the Bill, in the summer of 2017, The Advocates' Society's Construction Law Practice Group Executive held a Town Hall Meeting to discuss Bill 142. Most of the proposed legislative amendments to the *Construction Lien Act* (the "CLA") were very positively received. However, certain concerns were raised by participants with respect to the effect of the amendments on court procedures and the manner in which disputes would be litigated under the new legislation. Those concerns are summarized below.

Changes to the Summary Nature of Construction Lien Claim Actions

Bill 142 proposes to repeal Section 67 of the CLA, which provides that proceedings under the CLA are of a summary nature. The intention of Bill 142 is for construction lien actions to proceed under the *Rules of Civil Procedure*. Most of the tools included in the CLA to ensure that actions proceed expeditiously and in a summary nature (sections 53-57, 59-61, 66 and 69) would be removed under Bill 142. However, the reference procedure in Section 58 would remain unchanged. The proposed new regime may create new and possibly unanticipated issues, potentially causing significant delay in the resolution of construction lien litigation.

Bill 142 includes a new proposed Section 50(3) which provides that proceedings will be of a summary nature. But, with the proposed elimination of the Sections of the CLA enumerated

above, the new legislation will not have the means through which a summary procedure could be enforced. It will undoubtedly take longer to litigate construction lien actions under the proposed legislation. Specifically, the “discovery culture” that encourages litigants to produce and review every document and fact about a case prior to trial in Toronto-based litigation is a concern. This will likely mean that real property and/or the security posted to vacate lien claims will be tied up for a much longer period of time. Security will undoubtedly be held by the Accountant of the Superior Court for a longer period.

The deadline to set a lien action down for trial in Section 37 of the CLA has not been amended. Despite a lengthier procedure, litigants will still need to make strategic decisions within this two-year window to set the matter down for trial while litigating under the regular *Rules of Civil Procedure*. We note that the period provided to set a matter down for trial under the *Rules* is five years (Rule 48.14(1)).

There is a further concern regarding the application of Rule 50 pre-trial procedures under the *Rules of Civil Procedure*. The current practice in construction lien actions is to obtain a judgment of reference after pleadings are delivered and proceed to a “first pre-trial” before a Master. Then, an order for production and discovery is obtained under the CLA summary procedures, if the Master believes it to be necessary. But Rule 50 of the *Rules of Civil Procedure* requires discovery to be completed before a pre-trial can be ordered. If discovery is being carried out as a matter of right under the *Rules of Civil Procedure* and a breach of trust action is involved, it may be ambitious to expect that discovery will be completed within two years (as required by Section 37 of the CLA) if motions concerning pleadings and discovery are brought.

Eliminating the summary nature of the CLA will increase the courts’ case load. Currently, motions may be brought in Toronto for CLA claims commenced in other court offices. If this were to continue, it could overload Toronto court offices. If this practice were not allowed to continue, then other court offices outside Toronto may be under-resourced to handle this change.

Additionally, the repeal of Section 67(2) under the CLA (the prohibition on the appeal of interlocutory matters) gives a recalcitrant party another opportunity to delay the litigation. Under Bill 142, a litigant could seek leave to appeal all interlocutory matters to Divisional Court, further delaying proceedings.

It was noted at The Advocates’ Society’s Town Hall Meeting that the Expert Review Report which was before the Attorney General when Bill 142 was drafted recommended that the summary nature of construction lien actions be removed from the new Act. However, the Expert Review Report also recommended that all construction lien claims be case-managed. By removing the summary proceedings sections without including case management, Bill 142 may create additional overload for the courts and drastically slow down the litigation of claims where real estate has been encumbered or security has been posted pending resolution.

Under the existing CLA, Judges and Construction Lien Masters have been able to effectively case-manage proceedings using existing summary procedure rules without overloading the court system.

Repeal of Sections 60 and 61 of the *Construction Lien Act*

Bill 142 proposes to repeal Sections 60 and 61 of the CLA. Section 60(4) provides that an action to prove a perfected lien is a “class” proceeding, requiring notice to every party with an interest in the improved premises (on title to which a lien is registered). This proposed repeal is confusing because Section 79, which identifies “streams” for each “class” of payer, remains unaltered on the determination of priorities. In light of the proposed repeal of Section 60(4), the following questions are not answered by Bill 142:

- If Section 60(4) is removed, is a lien action still a class action?
- What mechanism exists to deal with priorities outlined in Part XI of the CLA?
- How can *pro rata* distribution be ensured if a party with an interest in the improved premises is not part of the action in which the lien is to be proven?

The Advocates’ Society Construction Law Practice Group strongly feels that the class action elements of the CLA should be preserved, and notes that the Expert Review Report did not recommend the repeal of these sections.

The Implications of Breach of Trust Claims being heard together with Lien Claims

The prohibition on lien claims being heard with breach of trust claims under Part II of the CLA has been removed. This long-recommended change means that there is no prohibition on commencing a breach of trust claim in an action perfecting a construction lien in all circumstances. The proposed elimination of the summary procedure for production and discovery sections of the CLA (as explained above) may unduly complicate the litigation of lien claims by requiring production of financial documentation necessary to prove a breach of trust claim in combined construction lien and breach of trust actions. Moreover, an application to the civil courts under the *Rules of Civil Procedure* may slow a process already lengthened by the extension of time to preserve and perfect a construction lien.

The Implications of the New Adjudication Regime

The Advocates’ Society believes that adjudication, i.e. the resolution of issues so that the project is not delayed, is a salutary aspect of Bill 142. However, it is concerning that there is currently no provision in Bill 142 for the parties to go to court during adjudication (for example, if the parties cannot agree upon an adjudicator). The adjudication process is contemplated to be completed in forty days, and access to the courts in that short window would often be nearly impossible. Further, the legislation contemplates an appointment by the Authorized Nominating Authority and litigation on the adjudicator’s decision would occur after the completion of the project. The court or arbitrator would be entitled to consider any issue resolved in adjudication *de novo*.

Currently, the adjudication rules in the United Kingdom, upon which the Expert Review Report’s recommendations for adjudication were based, do not provide for a consistent process in adjudication. In the United Kingdom, the process is left up to the adjudicator. It is not clear whether Bill 142, or any regulation that would be implemented under the new legislation, would contemplate standardized rules for adjudication or if the adjudication process in each case would be left to the Adjudicator as in the United Kingdom. Considering that the identity and

profession of the adjudicator will depend on the parties and the nature of the issues (e.g. engineer, architect, or lawyer), The Advocates' Society has some concerns with the potential for differing modes of resolution.

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 truly,



Sonia Bjorkquist
President

C: William Short, Clerk, Standing Committee on the Legislative Assembly

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