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Official Report of Debates (Hansard)

M-23

Standing Committee on the Legislative Assembly

Construction Lien Amendment Act, 2017

2nd Session
41st Parliament

Wednesday 1 November 2017

Chair: Monte McNaughton
Clerk: William Short

Journal des débats (Hansard)

M-23

Comité permanent de l'Assemblée législative

Loi de 2017 modifiant la Loi sur le privilège dans l'industrie de la construction

2e session
41e législature

Mercredi 1er novembre 2017

Président : Monte McNaughton
Greffier : William Short

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Hansard Reporting and Interpretation Services
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON THE LEGISLATIVE ASSEMBLY

COMITÉ PERMANENT DE L'ASSEMBLÉE LÉGISLATIVE

Wednesday 1 November 2017

Mercredi 1er novembre 2017

The committee met at 1301 in committee room 1.

CONSTRUCTION LIEN AMENDMENT ACT, 2017

LOI DE 2017 MODIFIANT LA LOI SUR LE PRIVILÈGE DANS L'INDUSTRIE DE LA CONSTRUCTION

Consideration of the following bill:

Bill 142, An Act to amend the Construction Lien Act / Projet de loi 142, Loi modifiant la Loi sur le privilège dans l'industrie de la construction.

The Chair (Mr. Monte McNaughton): Welcome, everyone, to the Standing Committee on the Legislative Assembly. We're here for public presentations on Bill 142, An Act to amend the Construction Lien Act.

MS. MARY PHILLIPS

The Chair (Mr. Monte McNaughton): I'd like to call for our first presentation, Mary Phillips, please. Welcome to the committee. You'll have up to 10 minutes for your presentation, and the remaining time will be split between the different caucuses for questions. If you'd just state your name for Hansard and then begin.

Ms. Mary Phillips: Mary Phillips. Thank you for the opportunity to speak today. In case I run out of time, I would like to articulate four things that I hope you will remember:

(1) Homeowners have not been properly represented throughout this process.

(2) The legislation affects us more than everybody else.

(3) We want money to get to the unpaid workers too.

(4) There is something you can do about it.

I'll look at each of these points individually.

(1) Homeowners have not been properly represented: There is a strong message in the fact that I was probably the only person in this room last week and maybe the only person in this room today who is not here in a business capacity. If your constituents knew that you were making decisions that can further expose them to the "nightmare reno" and extortion through the equity in our homes, they would be much more vocal.

The banner on the expert review website reads, "Seeking sound ... outcomes for Ontario's construction industry." The government's only media release failed to include homeowners as being responsible for the holdback. In fact, it failed to mention owners at all. From the information on the review website this morning, I see that Bill 142 has passed its first reading.

Your constituents don't even know this bill exists, and if they do, they certainly don't understand the details of the legislation or the impact of the proposed changes. Trust me, I've tried to explain it, and I lose people at "holdback."

(2) It affects individual homeowners more than anybody else.

Our justice system is usually pay as you go, but lien actions are not. The cost to file a lien is $60. With the proposed extended timelines, the defendant can be stuck with high interest rates without a place to live and suffer tens of thousands of dollars in damages before somebody has even issued a claim.

Because of this imbalance, this law will continue to evolve in a way that favours those in a position of power: the lien claimants. They will continue to push the boundaries of this law, and more and more homeowners will be forced to walk away from their largest investment.

I will refer to a 2011 Court of Appeal decision in Landmark II Inc. v. 1535709 Ontario Ltd. The judge, in his reasons, said, "Registering a lien for the entire amount of the contract before construction is completed is not necessarily improper." Think about that. They can register a lien when they're not even done, and they're saying that's not improper. "The claimant will be secured only for the actual value of the work done, which is typically determined at trial." Therein lies the problem: Homeowners can't make it to trial.

If you look at the front of the written submission, that was our house when it was liened for the value of the work that wasn't done, the balance of the contract. Let me tell you what happens when somebody puts a lien on your house for work they didn't do. We had a four-year-old, a three-year-old, and a one-year-old autistic child. Our child care costs were over $3,000 per month. We had an unfinished home and no place to live. We were stuck in high-interest financing, and the debt was accumulating at an unsustainable rate.

Since the lien included amounts for work that wasn't done, the cost of posting security was astronomical. The lien froze our financing, and we no longer had access to the money we needed to finish our home.

As might be expected when circumstances end like this, there's a liability to the unpaid subcontractors. After

we refused to pay into the holdback, we were sent a $175,000 bill for extras in mostly profit, labour and a construction management fee, despite having a written fixed-price contract and having paid for extras upfront along the way to avoid surprises, and also, presumably, protection under our Consumer Protection Act. Apparently, the company didn't want to tell us about these extras, because they knew how stressed we were about money.

With the delivery of this invoice by email, our liability to the subs went up from $30,000 to $200,000, because the liability isn't just the holdback; it's any unpaid amount on the contract. Since he said that that's what we did, that's our liability.

Also, according to the lien legislation, any rent we might collect to help offset our costs needed to be retained for the contractor because, until we could defend ourselves, it was considered to be money in trust.

Even with hundreds of thousands of dollars of equity we had personally invested in this property, we deeply regret not walking away the day the lien was filed, because every day since, every dollar we've put into trying to complete our home, every dollar we took out of our life savings, every dollar we borrowed from family so we could have a safe place to live, is a dollar we won't have when we run out of the financial resources we need to get to trial and the house is sold anyways. It will be another dollar in the plaintiff's pocket when our house is forced to be sold to satisfy a judgment that we couldn't afford to defend.

Unlike a corporation, when a homeowner finally runs out of money and chooses bankruptcy to mitigate the damages, the homeowner no longer has a place to go home to. So yes: (2) This law affects us more than anybody else.

(3) Homeowners want the workers to get paid too.

We pay money upfront and we expect that this money will go to the people on the job. This law wasn't written to protect the management companies; it was written to protect the hard-working people who work on the site. The companies with direct privity of contract are trustees of the trust funds, and they have direct remedy under contract law if a party fails in their obligations. These companies need to choose: Do they want a deposit, or do they want lien rights? Because, right off the bat, any contract that is written requiring a deposit is violating the principles of this law, and they should not then be able to rely on this law for protection.

We hired a general contractor to act in our best interests. They are given money in advance, and they are the ones tasked with managing the job efficiently so they can meet the agreed-to price. As consumers with a stipulated-price contract, we know that our job isn't being managed efficiently, but we think it's not our problem and we have no right to interfere.

What possible incentive do they have to meet their targets when they can just place a lien on our property for the additional costs incurred? Their liens aren't limited to 10%. When the inevitable conflict over a price increase occurs, they just tell the workers that the owner isn't paying up

This leads to—and I realize I probably have to speed up—number (4): There is something you can do about this.

If you go back to 1983, the last time a major amendment was made to this act—same time of year, same pressures—after the second reading, the industry lobbied aggressively to pass the amendments. MPPs were scrambling to figure out what this law was about. In that amendment, removing one word in one place had a drastic impact. That word was "owners," and it was removed as beneficiaries of the trust. Because owners were removed, the story of a contractor who takes your money and abandons the job is all too common.

"Homeowner: I heard that you didn't pay the subs. Where's the money? I gave you a deposit. Where's the money?

"Contractor: It's not your money.

"Homeowner: What do you mean, it's not my money?

"Contractor: It's not yours. It is in trust for people owed money on the job.

"Homeowner: But I gave you a deposit and you barely did anything. Only one person came here, and you haven't paid them. Who can possibly be owed money on the job?

"Contractor: Well, I don't have to tell you that."

So the answer to what you can do, number (4)? Put that word back. Ontario owners should be reinstated as beneficiaries of the trust—at least homeowners. Unlike Ontario, owners in other provinces are beneficiaries of the trust. They are both at the top and the bottom of the pyramid, so they can enforce getting money to the unpaid workers. If a contractor breaches the trust, the homeowners have a direct cause of action against them that can survive bankruptcy and pierce the corporate veil.

Yes, this is a provincial law and, for some reason that is beyond my comprehension, it seems to have the ability to rearrange the priority in bankruptcy. This begs the question, where do all Ontario owners, not just homeowners, stand relative to owners in other provinces when a national company goes bankrupt? Again, this is beyond my scope. But I know that I do not have the same rights to recovery as homeowners in other provinces, and that is unacceptable.

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I apologize that I do not have recommendations with me today, but even if I did, I am not a lawyer. Your constituents need proper representation—somebody with knowledge of the law who can fiercely advocate with transparency on their behalf.

Please don't underestimate the effect that this can have on families. For a while, our mantra that got us through it was, "If money can solve it, it's not a problem," but this failed us when the impacts of the law directly affected our families in matters of health, well-being and, most recently, life and death.

I have little doubt that giving a strong, independent voice to homeowners will disrupt the delicate balance that has been found between the industry stakeholders, but we cannot forget there's also an intricate web that

exists between our laws, and you cannot strengthen this legislation without weakening our fundamental property rights.

The Chair (Mr. Monte McNaughton): You have 20 seconds.

Ms. Mary Phillips: Homeowners must be represented as stakeholders too.

The Chair (Mr. Monte McNaughton): Thank you very much. We'll move to the official opposition and Mr. Bailey.

Mr. Robert Bailey: Thank you for your presentation, Ms. Phillips. Great presentation, by the way. You pointed out some things that I hadn't heard before.

I had two questions. First of all, if you care to share, how much did your legal fees end up being?

Ms. Mary Phillips: Just the legal fees to defend—they abandoned the claim because there was nothing to it, but the legal fees to get it off were $30,000 or $40,000, and it's still not over. I still can't say we're not going to lose the house.

Mr. Robert Bailey: First of all, I don't know the ins and outs of this legislation, but it seems grossly unfair if it leaves homeowners like yourself that way. I'm sure there's some other person who can explain to me why this bill has left you guys hanging.

Ms. Mary Phillips: Yes, I hope so. That's what I'm hoping for. I just want you to ask the questions.

Mr. Robert Bailey: What were the provinces—just before my time is up—where you would be treated differently? What were the provinces?

Ms. Mary Phillips: Well, I know BC, because I found lots of case law in British Columbia, and I'm pretty sure one of Alberta or—there's one, but there are other provinces. They don't all have trust provisions like we do, so it's hard to compare it to all of the provinces, because not all provinces have created the trust.

Ask the question to a lawyer. It's good to ask.

Mr. Robert Bailey: They've always got lots of answers, those guys.

All right. Thank you.

The Chair (Mr. Monte McNaughton): Is that everything, Mr. Bailey?

Mr. Robert Bailey: Yes, that's fine.

The Chair (Mr. Monte McNaughton): We'll move to Mr. Bisson.

Mr. Gilles Bisson: A couple of questions: First of all, we're trying to fix one problem, and I guess what you're saying is we're creating another problem, the problem being that contractors need to be paid as subcontractors. It's been a long-standing issue.

Ms. Mary Phillips: Yes.

Mr. Gilles Bisson: How do you protect yourself without affecting them in a negative way with something they didn't create? How would you do that?

Ms. Mary Phillips: My only suggestion is to give us rights as beneficiaries of the trust, or even just the right to ask for information so that we can make sure it's going to the proper places. I'm thinking of the people at the bottom who aren't getting paid.

Mr. Gilles Bisson: So you're not allowed to get that information, as I understood it?

Ms. Mary Phillips: No. Yes, that's my understanding. Because we're not beneficiaries of the trust, it's not technically our money, so we don't have access to information for that.

Mr. Gilles Bisson: Can I ask research to give us a bit of information on what she's raised, so that we can think about this as we go toward amendments?

The Chair (Mr. Monte McNaughton): Sorry, does the whole committee agree? Okay. Great.

Go ahead, Mr. Bisson.

Mr. Gilles Bisson: I assumed everybody would be fine with that.

In your particular instance, was the contractor unpaid or paid?

Ms. Mary Phillips: The contractor?

Mr. Gilles Bisson: Yes. This has nothing to do with him.

Ms. Mary Phillips: Well, our opinion was we overpaid him by $100,000, but then to cloud it all over, he gave us the—

Mr. Gilles Bisson: Yes.

Ms. Mary Phillips: I don't want to tell stories about that. It's just the fact that they said the law says it could lien for work that isn't done. He hasn't done it, he didn't finish it, and he included it in the value of his lien, so we couldn't do anything.

Mr. Gilles Bisson: Okay, I get it.

Ms. Mary Phillips: Then the Court of Appeal is saying that might be okay.

Mr. Gilles Bisson: Okay. I understand what you're getting at now. Thank you.

The Chair (Mr. Monte McNaughton): Okay, we're going to move to the government: Mr. Berardinetti.

Mr. Lorenzo Berardinetti: Thank you for your presentation. It was a different perspective on things.

The bill is a big overhaul of what presently exists to what we're planning to do. One of the things we're planning to do is create an adjudication body so that when there's a dispute, whether or not someone gets paid, there will be an adjudication body—let's say, a person from the construction industry—and they will be able to sit and work out the argument that goes on between the two parties and get an answer done pretty quickly—within less than a month, I think. I'm not sure if you're aware of that, because I think that's a good thing. Do you have a comment?

Ms. Mary Phillips: Well, my concern with that is that homeowners don't know what a lien is. I've tried to explain it, and it's very complicated. So I'm afraid that there might be timelines that pass before they've even figured out what's going on. It's great that it's quick, but when they don't know what's happening to them, they're vulnerable and there are not enough legal professionals who can do this with competence. There's lots of negligence in this area of law because of all the fine little rules about it.

Mr. Lorenzo Berardinetti: For example, if an electrician doesn't get paid, or disputes the amount they get

paid, they can take it to an adjudication body. In the United Kingdom—we're not exactly doing what the United Kingdom did, but they have an adjudication body, and I think over 95% of the cases decided are not appealed.

Ms. Mary Phillips: That's a concern, because sometimes we don't get the representation that we need. There's lots to talk about from a homeowner's perspective, and it's sad for me that I'm the only person who's here trying to tell you because I'm not qualified for this. But I've been through a lot so I can just tell you from personal experience. Thank you.

The Chair (Mr. Monte McNaughton): And that's all the time today, but thank you very much for your presentation.

CONSULTING ENGINEERS OF ONTARIO

The Chair (Mr. Monte McNaughton): I'd like to now call upon the Consulting Engineers of Ontario. Good afternoon. You'll have up to 10 minutes for your presentation. The questions this time will begin with the third party. If you would state your name for Hansard and begin with your presentation.

Mr. Barry Steinberg: Barry Steinberg.

Mr. David Zurawel: David Zurawel.

Mr. Barry Steinberg: Good afternoon, Mr. Chair and members of the committee. Thank you for the opportunity to speak to you this afternoon as part of the government's development of Bill 142, An Act to amend the Construction Lien Act. My name is Barry Steinberg. I am the chief executive officer of Consulting Engineers of Ontario. I'm joined by David Zurawel, director of government and stakeholder relations.

The significance of these hearings and the work that has been undertaken to produce this proposed legislation is not lost on any of us here in this room—certainly not anyone who is responsible for running a successful business or who otherwise makes their living in Ontario's construction sector.

For more than 30 years, Ontario's Construction Lien Act has presented substantial challenges for our industry. Providing professional services on infrastructure projects ranging from environmental studies to asset design to contract administration and subcontracting of services, consulting engineers have never fit neatly into conventional definitions of "contractor" or "subcontractor." The Construction Lien Act was not drafted with professional services in mind. Rather, it has been applied to our members over the years with frustrating inconsistency.

Bill 142 presents us with an opportunity to leave those challenges behind. We are pleased to appear before you today to be able to say that this legislation presents a potential for positive change for our industry and Ontario's construction sector. It is the product of diligent and thoughtful work and negotiation by Bruce Reynolds and Sharon Vogel, the Attorney General's staff and officials, and a vast majority of Ontario's construction sector community.

We are looking forward to celebrating the passage of this legislation. However, we have one remaining issue that needs to be resolved. That issue is the form in which our clients take their holdback funds from our members. Under the Construction Lien Act, some clients believe they are compelled to take cash. The draft act defines permissible forms of holdback to offer a remedy to this practice. It states:

"Some or all of any holdbacks may, instead of being retained in the form of funds, be retained in one or more of the following forms:

"1. A letter of credit in the prescribed form.

"2. A demand-worded holdback repayment bond in the prescribed form.

"3. Any other form that may be prescribed."

What troubles us are statements some clients have been making since the introduction of the proposed act, commenting that "cash is king." They don't see why they should deviate from their current practice. They have commented that they like things just the way they are and will not change their requirements for cash holdback.

There also exists an unrealistic assumption that inclusion in the draft act of the option for phased release of holdback monies and annual release of monies for multi-year projects negates the need for consultants to use letters of credit. As anyone who has run a business can understand, the ability for businesses to maintain positive cash flow is essential. For public officials to ignore the option to use letters of credit and other securities simply because they can runs counter to the spirit of this legislation. Why offer an option to use securities if they have no hope of being accepted?

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The problem our members have boils down to the fact that they do not enjoy the fundamental principal of freedom of contract as assumed in the act.

The presumption that parties entering into the project agreements are free and equal is incorrect. This systemic inequality is well known, and even more disturbingly, serves the purposes of some stakeholders, and must not be permitted to continue. Because our members do not enjoy freedom of contract, they do not have equality before the law. This inequality hinders their ability to negotiate reasonable project terms and conditions, and interferes with timely payment for certified completed work. Reform legislation that fails to resolve this condition will only perpetuate the current condition that sees contractual power reside with client owners and constructors. Our members would be relegated to minority-class status, subject to terms and conditions forced upon them by a system perpetuating a fundamental, market-driven inequality.

Letters of credit or bonds have lower financing costs. Therefore, cash-only holdbacks result in additional cost to the owner as a direct result of engineering firms passing on their financing costs in the form of higher prices. Additional costs ultimately result in less funding for public projects and services.

Also, the use of cash-only holdbacks is somewhat unique to Ontario. Because firms will become less able to

work under such contract terms, this practice may be limiting competition for public projects. It is generally accepted that limiting competition will generally lead to less innovation and higher fees.

It's our belief that Bill 142 must include some form of provision that will prevent the option to use non-cash holdbacks from being arbitrarily dismissed. This practice is not good business and does not reflect the spirit of this legislation.

Thank you again for the opportunity to speak to you. We'd be pleased to answer any questions.

The Chair (Mr. Monte McNaughton): Thank you very much. We'll move to Mr. Bisson.

Mr. Gilles Bisson: Are you currently allowed to use non-cash holdbacks, prior to this legislation?

Mr. Barry Steinberg: It's silent. So it's not allowed.

Mr. Gilles Bisson: Is that the practice, though?

Mr. Barry Steinberg: No. The practice is cash.

Mr. Gilles Bisson: And you're saying you don't want cash as the practice.

Mr. Barry Steinberg: We're saying that letters of credit and bonds are now equal, but we are hearing that with the concept of freedom of contract, which our members do not enjoy, this can be eliminated, and it is detrimental to the business.

Mr. Gilles Bisson: What do other jurisdictions do on this issue? Alberta, British Columbia—

Mr. David Zurawel: That I can't say right off the top.

Mr. Barry Steinberg: We're not 100% sure.

Mr. Gilles Bisson: So the effect of this is increased cost—the long and the short of it—because you have to come up with the cash.

Mr. Barry Steinberg: It also negatively impacts the sustainability of a business.

Mr. Gilles Bisson: But if you're already having to put up cash—I guess that's where I'm having the problem. You're saying that currently you have to put up cash in order to secure. Did I miss this?

Mr. Barry Steinberg: No, we don't put up cash. It's a cash holdback. We're saying that now there's a letter of credit put up to replace a cash holdback.

Mr. Gilles Bisson: Gotcha. Thank you.

The Chair (Mr. Monte McNaughton): We'll move to Mr. Berardinetti.

Mr. Lorenzo Berardinetti: We have surety bonds instead of cash, so money is held back and paid out after the work is done, and if it's not paid out then we can go to adjudication. Do you have any comments about the adjudication part? This is brand new. We're creating an adjudicative body that can handle disputes. It won't be years in court; they have to have their decision within a month or so—I forget the exact number of days. I think that would help deal with your problem.

Mr. Barry Steinberg: It might help deal with the problem. But put in the new legislation is the ability to use letters of credit and bonds, and what we're saying is, if it's there, why not use it and eliminate the ability to stop using it?

So there's a sound adjudication process, but that's not our issue. Our issue is the fact that the act is allowing something to happen and clients are trying to get out of it.

Mr. David Zurawel: We're dealing with an issue of a power imbalance when it comes to our members working for clients who are looking for infrastructure assets to be constructed, to be built.

Mr. Barry Steinberg: The assumption in the act is that when two parties come together and sign a contract and look at the terms of that contract, they're equal. In our case, it's not true. We have always suffered an inequality. We do not have freedom of contract.

Mr. Lorenzo Berardinetti: And you don't think this act will—obviously, this act and the provisions in the act, in your opinion, will not solve the problem.

Mr. Barry Steinberg: That's correct.

Mr. Lorenzo Berardinetti: And you would like to see some kind of amendment to come forward, or some kind of change.

Mr. Barry Steinberg: Yes. We would like to see an amendment that won't allow the elimination of the alternative instruments for holdback.

Mr. Lorenzo Berardinetti: Okay. I understand what you're saying. We're listening to deputations today and Wednesday the week after next, and then we'll be in clause-by-clause. So I think there will be some amendments that may go through. I mean, I'm speaking as a member here of the government, but I think your point is well taken.

Mr. Barry Steinberg: Thank you.

The Chair (Mr. Monte McNaughton): No further questions? Mr. Bailey.

Mr. Robert Bailey: Thank you for your presentation today. It seems like a reasonable issue that the people you represent have. As Mr. Berardinetti said there a minute ago, when the recommendations and amendments come before us, it would be helpful if you guys could send us some examples of how the wording could change. Otherwise, you're happy with the bill, other than that one part where it could be—so they don't have the option to demand only cash. You would like that taken out of the description.

Mr. Barry Steinberg: Yes.

Mr. Robert Bailey: Okay.

The Chair (Mr. Monte McNaughton): Any further question?

Mr. Robert Bailey: No.

The Chair (Mr. Monte McNaughton): Okay. Thank you for your presentation today.

Mr. Barry Steinberg: Thank you very much.

TRAVELERS INSURANCE COMPANY OF CANADA

The Chair (Mr. Monte McNaughton): I'd like to call upon Travelers Canada, please. Welcome. You have up to 10 minutes for your presentation, and the questions this time will begin with the government. If you could just state your name for Hansard and begin.

Mr. Raymond Bassett: Raymond Bassett. Thank you for the opportunity. I'm here for Travelers Insurance Company of Canada. Travelers is an international company. We're part of the Travelers companies from New York and Hartford, Connecticut. We employ about 1,600 people across Canada, with offices all across Ontario, and support a number insurance brokerages and enterprises in all communities across Ontario.

I have a few prepared remarks, and then I'm happy to answer any questions.

For Ontario's construction industry, Travelers Canada provides insurance products and protects businesses and projects. We're also the industry leader in providing surety credit product bonds that guarantee completion of project and payment of subcontractors, suppliers and labourers. Travelers is the largest underwriter of surety credit of this kind in North America.

We've been a member of the Surety Association of Canada for 25 years, from its inception, I believe. Steve Ness, my colleague, the president of that association, had a chance to speak with you last week.

Travelers Canada strongly supports the passage of Bill 142. We believe the bill strikes a reasonable balance amongst stakeholders in the construction industry and the community of public project owners in Ontario.

In construction, everybody is on both ends of the payment process, depending on the time and the project. Sometimes you're a receiver of money; other times you're a payer of money. That means that you may want strong rights at one time, but those rights will constrain you at another time. So that balance is critical. We think that's something that was picked up extremely well during the consultative process that Mr. Reynolds and Ms. Vogel managed.

We commend the government of Ontario for creating the process that allowed the expert review of the Construction Lien Act, especially the broad and transparent consultation that was conducted by Mr. Reynolds and Ms. Vogel in preparing the report and their work with the advisory group and with MAG in drafting the bill.

The resulting consensus within the industry and among public owners on the bill, we believe, is a direct result of the decision to engage with industry and public owners throughout the consultation process, which allowed all the issues, all the concerns, all of the challenges and the hidden issues that would not normally hit the table to come out during the process.

Travelers Canada works with all sizes and kinds of construction companies, from the largest to family businesses across Ontario, one- and two-person enterprises—family businesses with their assets on the line. So we're not aligned with just one tier or just one stakeholder. The alignment is across the industry. It's just the nature of our business. We're engaged with public owners who rely on our products to complete contracts that go sideways. When subcontractors, suppliers or labourers are unpaid, they call on our products for payment of what they're owed. That's the business that we're in. We share interests with many tiers in the industry, from owner to general contractor to supplier and sub to labourer, so our alignment is somewhat unique among stakeholders.

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Travelers Canada and other surety companies in Ontario and throughout Canada provide the surety credit to the construction industry to secure performance and payment obligations—both ends of that transaction. The process of underwriting involves a due diligence with contractors of all sizes and all kinds. The financial well-being of those companies depends on good business practices and good financial and capital management.

Part of our day job is to have a continual dialogue with business owners and management about how they manage their businesses and, through that dialogue, to influence good business practice and good capital management in the construction industry across Ontario. So what does this have to do with the bill, describing the sort of business that we're in?

What it has to do with the bill is that all construction companies, but especially smaller and mid-sized companies, need a level playing field that's predictable and allows them to compete and grow their businesses with confidence. We believe that the three legs of Bill 142—the modernization piece, the prompt-payment piece and the adjudication piece—working together mark a very significant improvement in levelling the playing field in Ontario, and create a more predictable flow of money on construction projects. That clarity and the effectiveness of those prompt-payment and adjudication pieces, in particular, we think will enable the construction industry to become even stronger.

As the provisions of the bill and the regulations are implemented, the new balance of interests around the payment and the flow of money on projects, we think, will help all companies, but especially the smaller and mid-sized companies, run their businesses with confidence, allowing them to grow, create construction capacity to build their infrastructure, and to provide high-quality employment in Ontario.

Travelers Canada has been very privileged to be involved, through our association, in the consultation process that led to the bill. We've been part of the dialogue and part of the consensus around that bill. We believe the bill is good policy and it should be passed, and we're committed to working with stakeholders and government to assist in any way we can to finalize the bill and regulations.

I would be happy to try to answer any questions you may have. Thank you.

The Chair (Mr. Monte McNaughton): Excellent. Thank you very much. Mr. Berardinetti?

Mr. Lorenzo Berardinetti: I think my colleague wanted to ask a couple of questions.

Mrs. Amrit Mangat: Thank you, Mr. Bassett, for your presentation. As you said in your statement, you were involved in the review process and you strongly support Bill 142. I'm sure, as we move forward, once this is passed, you will be consulted when we will be developing regulations as well.

Some stakeholders are strongly opposed to the requirement for surety bonding on public projects. There is a lot of criticism about that. Can you shine some light? What is your response to that?

Mr. Raymond Bassett: Sure. There are two elements to it, I think. One is that the focus of the bill is payment, ensuring the flow of payment. The product, the credit, that our industry and Travelers really provides to the market is a focused, 100-year-old product that designs—it's a commercial product, there's no question. There's a benefit across this, but it's a product designed to do this. It's designed to be sure that amounts owing to a subtrade, supplier or labourer are paid. That's the security around that. There are other kinds of things that are in the marketplace but they're very costly due to capital, so this is kind of a unique product. I won't get into that now, but it was dealt with in the report at some length. That's one half of it.

The other side, where the objection comes in, is not on the payment side. I think the objection that you hear is often around the performance side. That's the challenge. Really, the answer to that is that the credit that's extended is a single decision. So whether a contractor is unable to pay a trade or unable to perform the work—it's just unable to perform, and that's the credit that's being provided to the marketplace.

It's a consolidated and integrated credit product that you can't split apart. It's been convenient for 100 years to slice them into paying down and paying up, but it's really one. It's the performance of that entity and its ability to manage its capital and to respond to its obligations. We're guaranteeing that. We respond whether the problem goes downhill or uphill.

Mrs. Amrit Mangat: Thank you.

Mr. Raymond Bassett: You're welcome.

The Chair (Mr. Monte McNaughton): Mr. Bailey?

Mr. Robert Bailey: Thank you for coming in today, Mr. Bassett. I've got two questions. First of all, is the product, for want of another word, based on a percentage of the cost of the project? How do you fund it? What's the cost to the developer or the builder? Is it a percentage of the project?

Mr. Raymond Bassett: There are two questions. One is, how big is the bond, and the other is, how much does it cost.

Mr. Robert Bailey: Yes.

Mr. Raymond Bassett: I'm not sure what the question is; I'm sorry.

Mr. Robert Bailey: Okay, I'll cut to the chase: Would this work in the private sector for an individual homeowner? Could they get this product so that it would alleviate the question we heard earlier from our first presenter? Or is this only for big projects for companies, school boards and cities?

Mr. Raymond Bassett: To be candid—and I know that's what you need—

Mr. Robert Bailey: Yes, be candid.

Mr. Raymond Bassett: The builders that are often involved in the home construction market may not have the wherewithal to qualify for the credit. That's kind of what it will get down to.

The cost of it across the marketplace depends on the quality of the company. It's a credit product, so it varies in cost depending on the abilities of the company. It's anywhere from half a per cent to one-and-a-bit per cent. It's not prohibitive in terms of cost; it's more the qualification for the credit. That's where the roadblock may be in that private sector.

Mr. Robert Bailey: So an individual—say I was building a home and I was concerned about the contractors and all that. I could apply for one of these and maybe qualify to buy one?

Mr. Raymond Bassett: Yes. It usually happens on a luxury home or something that's quite large. Large homeowners with good credit qualify for the instruments. We've seen them; we provide them on large residences—but not broadly across the market because of qualification issues.

Mr. Robert Bailey: All right, thank you.

The Chair (Mr. Monte McNaughton): Great. Mr. Bisson.

Mr. Gilles Bisson: It was a pretty clear presentation. No questions.

The Chair (Mr. Monte McNaughton): Thank you very much. Thanks for your presentation.

Mr. Raymond Bassett: Thank you.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

The Chair (Mr. Monte McNaughton): I'd now like to call the International Union of Operating Engineers, Local 793, please. Welcome to committee. You have up to 10 minutes for your presentation. If you'd both begin with your names for Hansard, please, and then begin with your presentation.

Ms. Kirsten Agrell: My name is Kirsten Agrell. I am in-house legal counsel with the operating engineers. This is my colleague Mr. Jeff Smith. Thank you very much for having us here today.

All I'm going to do is say a little bit about who we are and why we're here, and then I'm going to turn it over to Jeff Smith, who is our expert on the Construction Lien Act and who deals with it for our members. He's going to let you know how those amendments that are proposed particularly affect us, from a construction trade union standpoint.

For those of you or for anyone who might not know, the OEs are a construction trade union. Our scope is province-wide. We cover the entire province. What we do is the operation of heavy equipment—that's tower cranes, big excavators, bulldozers. Anything you see tearing up roads and interfering with your commute, that is probably us doing that.

We have about 15,000 members in the province at the moment and we work in all sectors of the construction industry—its refineries, its public projects, its private projects, its residential developments, its everything. We

have contracts with contractors at every level of the food chain, from the big general contractors that are managing the projects and engaging the other subs, to specialists, right down to maybe one guy who's bought his own backhoe and is charging himself out on a project to do the work.

Often, but not always, our members are working on big projects in the very early stages—the big bulk earth-moving, the big erection of the external—and they are often, but not always, long gone by the time the project is fully completed and you're putting in those final touches.

Unfortunately, sometimes, even though our guys are long gone, they're still waiting or their employers are still waiting to get paid. When employers don't get paid, one of the things that falls off the system is—quite often, part of what we negotiate for our members are premiums for pension benefits coverage and pension plan contributions. Those are the things where members don't necessarily know if they don't get paid right away, because they get remitted to us instead, so we have to keep an eye on it. If they start to fall behind because we've got contractors in financial difficulties, we're the ones who try to deal with them.

Specifically, my colleague Mr. Smith and his entire team spend their lives monitoring, on behalf of all of our members, how our contractors are doing, whether they're able to make those payments. In contrast to me—I deal with contractors who we feel are being bad and we have disagreements with—he deals mostly, I think, with contractors who we want to work with, but who are having financial difficulties.

In that stage, he works quite closely with the Construction Lien Act. He's going to tell you now about the particular amendments that help us.

Mr. Jeff Smith: I would actually like to start with a thank you. I'd like to thank the numerous parties and individuals who have worked very hard to get this very important piece of legislation for the construction industry to the shape and place it is today. The Construction Lien Act was very much due for an overhaul and modernization, and this piece of legislation, painstakingly put together, has done that in a comprehensive and inclusive manner. I'd like to focus on that inclusive manner, if I could, just for a second.

Right from the start, the government, the Attorney General and the Attorney General's office, and all the partners they had involved have had a very transparent process in crafting Bill 142, where all stakeholders and individuals have had many opportunities to provide insight, feedback and thoughts all through the process. We really believe this open process has resulted in a very fair and reasonable bill that Local 793 fully supports.

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Most important at this point, from the view of the operating engineers, is that Bill 142 gets passed quickly in its entirety, without any significant alterations, changes or modifications. In more detail, some of the key points and pieces of the bill for Local 793 are as follows:

(1) Promptness of payment and adjudication is an essential component of Bill 142. Generally, Local 793 believes that the new prompt payment section in the proposed legislation will be one of the most vital tools in reducing the number of delinquent contractors and the late payments of trust fund monies to Local 793 for health and welfare benefits and pension benefits for our members by helping to move the funds through the construction pyramid much quicker.

We are often aware that a contractor is delinquent for remittances or other payments for their employees. It's not because they don't want to pay, but because they can't pay. Why is that? Because their invoices haven't been paid in a timely manner and now they have a cash-flow crunch, or they don't have the funds to pay. To that end, it's very important that the language of the bill in these sections is not watered down or diluted in any way, or changed to make any wholesale exceptions the norm. Any changes or amendments that result in funds being delayed either purposely or inadvertently, or that lengthen the time for payments or the resolution process, will significantly lessen the positive impact of the prompt payment schedule, which we do not believe is the Legislature's intent with respect to Bill 142. In short, we're hoping there's no significant weakening of this section with respect to the bill.

(2) Preservation, perfection and expiry of lien changes are crucial to Local 793. Local 793 believes the proposed amendments related to the preservation, perfection and expiry of liens is a crucial improvement to the current scheme. Lien actions are one of the tools at the union's disposal when seeking to collect outstanding trust fund monies on behalf of our members. In the last five-year period, we've had to file somewhere in the neighbourhood of 40 liens, and through those liens collected over $1 million. The proposed changes to increase the number of days for the preservation and perfection periods for liens will give all the parties involved more time to hopefully resolve matters before making it necessary to register or commence a lien action.

The union is also very pleased with the new subsection clarifying the expiry date of a lien period for amounts owing to workers' trust funds. We anticipate this change will make it clear that the lien rights for all trust fund monies only expire 60 days after the final worker leaves a job site, as opposed to any incorrect interpretation that lien rights expire on a worker-by-worker basis.

Local 793 believes it is imperative that this new subsection be included in the final version of the legislation to clarify the true intent and spirit of the act and provide clarification to the common practice which has gone on for the past 30 years.

(3) Mandatory release of holdback and substantial performance are very positive changes. Local 793 fully supports the proposed changes that will make the release of holdback amounts mandatory. Local 793 believes this amendment will assist in getting funds down the construction pyramid faster.

The type of work typically done by Local 793 subcontractors, as raised by Ms. Agrell—earth-moving, excava-

tion, site service, crane rental—often occurs in the early stages of a project. It is therefore not uncommon for projects to continue many months and sometimes years after Local 793 subcontractors have been off the job site. In these cases, Local 793 subcontractors may wait years until the ultimate completion of the project, during which time the general contractor continues to maintain and hold the holdback, despite the fact that the lien rights have long since expired.

The long delay in the release of holdback causes a detrimental effect on cash flows for our contractors—I know first-hand from them telling me—and in turn on the vulnerable workers and employees of the subcontractor. As stated earlier, Local 793 views any changes which result in the flow of funds more quickly down the construction pyramid as beneficial to our membership and others at or near the bottom of this pyramid.

Finally, the proposed amendment adding a definition for "monetary supplementary benefits": Local 793 believes that the recently proposed amendment to add a definition of monetary supplemental benefits is very useful, although all it really does is clarify the current practice. The current definition of "wages" in the Construction Lien Act is clear that payments to a union on behalf of its members constitute wages in the form of monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement. Adding the definition of "monetary supplementary benefits" will make it more understandable that health and welfare benefit payments, pension payments and other similar amounts do, in fact, constitute wages on behalf of an employee. These amounts have always been included in wages in prior liens filed by Local 793, and this definition will only help to provide clarity to an ongoing and common practice.

I'd just like to thank the standing committee for the invitation to provide our thoughts and input on this very important piece of legislation for the construction industry. We appreciate the opportunity.

In closing, Local 793 stresses the need to have Bill 142 enacted into law as quickly and with as few significant alternations as possible. The updating and modernization of the Construction Lien Act has long been overdue. The proposed changes should, among other things, serve to assist in payments flowing down the construction pyramid much quicker and reduce construction delays and costs, and most important to 793, hopefully reduce the number of hard-working people and our members in this province going home without pay that they've earned. Ultimately, the bill will benefit not just the union, but all contractors, suppliers and the thousands of individuals working and employed in the construction industry in Ontario.

The Chair (Mr. Monte McNaughton): Thank you very much. We'll move to the official opposition and Mr. Bailey.

Mr. Robert Bailey: I'd like the record to show that I was a long-time member of Local 793 many years ago. Years later, I had the opportunity to work in management and procured services from Local 793, along with many other locals too. I always tried to ensure when I was on the other side paying the bills that we paid everyone promptly, as best as I could. Accounts payable sometimes got in the way, but I did what I could at my level.

Anyway, I applaud your presentation today. I'd like to see the bill—are there any improvements, or are you happy with it the way it is? Do you just want to get that money out to people sooner?

Mr. Jeff Smith: That would be the overriding thing for us today. For the most part, we're very happy with the bill. We could probably find ways to tinker and play with it, but overall we're very pleased with it. We think the quicker it becomes law, the better.

Mr. Robert Bailey: How many outstanding people today would you be negotiating with—the contractors who are in arrears?

Mr. Jeff Smith: That number is always varying, but it wouldn't be surprising if I'm dealing with anywhere between 40 to 100, given the time of the year. Again, I would guess that more than the majority want to pay us—

Mr. Robert Bailey: So if this bill were passed, it would probably make that list of yours a lot smaller.

Mr. Jeff Smith: That's what we're hoping. That's our belief.

The Chair (Mr. Monte McNaughton): Mr. Bisson.

Mr. Gilles Bisson: That was going to be my question. What percentage of your members have been delayed payment as a result of non-payment?

Mr. Jeff Smith: The percentage I wouldn't be able to exactly guess. But at any given time, I would guess that of our 15,000, at least a couple hundred may be running out of benefits or be on the verge of running out of benefits because of delinquency that we have to be chasing.

Mr. Gilles Bisson: Of that number, how many end up not getting any money?

Mr. Jeff Smith: That number, again, is a smaller number. That will depend on if we're able to collect from the contractor by the end of the day. But I would just be guessing at this point.

Mr. Gilles Bisson: Is it a higher percentage collected than not collected?

Mr. Jeff Smith: Yes, it's a higher percentage collected. It's the timeliness of it that's letting guys go out of benefits—so they're out of coverage for some period of time while we're trying to collect the money.

Mr. Gilles Bisson: In the end, does this legislation fix all of the problem or just fix some of the problem?

Mr. Jeff Smith: It's never going to fix all of the problem, because there are some guys who don't want to pay.

Mr. Gilles Bisson: Yes. That's what I was—

Mr. Jeff Smith: Yes. It's never going to fix the whole problem, because there are going to be bad apples. They're not paying, not because they don't have the money, but because of—

Mr. Gilles Bisson: So it will make it better, but it won't eliminate the problem.

Mr. Jeff Smith: I don't think you can ever eliminate the problem, because people are just not going to pay for some reasons outside of not having cash or not having the cash flow. But we believe it would improve the situation.

Mr. Gilles Bisson: Fair enough. Thank you.

The Chair (Mr. Monte McNaughton): Mr. Berardinetti?

Mr. Lorenzo Berardinetti: Thank you for your presentation. I just had a few questions.

Most presenters provide us with a handout of their submission. Will you be able to do that?

Mr. Jeff Smith: We will be filing submissions, but we don't have anything to file today.

Mr. Lorenzo Berardinetti: Okay. It helps us a lot, because we do read these.

My understanding is, you like the bill.

We want to keep the disputes out of court and get it done through adjudication. We're giving a longer time period if you're going to court or adjudicate, and we're also providing for the option to go to Small Claims Court with a certain monetary restriction. These things keep disputes out of the court system. For example, I'm sure you are aware of some people who are in court right now or have a court date coming up for a matter that they've been dealing with for years.

1350

Do you see that as an improvement, the whole idea of—a lot of this legislation has to do with staying out of court and trying to adjudicate it outside of court, and we're creating an adjudication process where we will have adjudicators to hear the disputes about being paid or not being paid.

Mr. Jeff Smith: Yes, we do see that as an improvement, for sure. We ourselves sometimes get involved in liens that go on for multiple, multiple years. We have ones going back for—I'm just thinking of one off the top of my head that I have ongoing that's, I think, in its third to fourth year now. If you can get a quicker resolution to that, I think we're all for that.

Mr. Lorenzo Berardinetti: We will have an adjudication process in place, so that there will be an adjudicator who can hear the case and decide how much is to be paid. Don't you see that as a way to eliminate some of the—you mentioned the bad apples—

The Chair (Mr. Monte McNaughton): Mr. Berardinetti, that's all the time we have for questions. Thank you very much for your presentation today.

Mr. Jeff Smith: Thank you.

ASSOCIATION OF MUNICIPALITIES OF ONTARIO

The Chair (Mr. Monte McNaughton): I would like to now call upon the Association of Municipalities of Ontario. Welcome to the standing committee. If you would just state your name for Hansard. Questions, this time, when you're done your presentation, will begin with the third party.

Mr. Gary McNamara: All right. Thank you. Good afternoon, Chair and committee members. My name is Gary McNamara. I'm the past president of the Association of Municipalities of Ontario and also the mayor of the town of Tecumseh. I'm joined today by Wendy Law, deputy solicitor at the city of Mississauga.

We are pleased to be here today, and thank you for this opportunity to contribute to your deliberations on Bill 142. Bill 142 is an example that illustrates the positive outcomes of a comprehensive consultation process. Bill 142 includes significant improvements to modernize an act that is now well over 30 years old.

In the time we have with you today, we would like to highlight AMO's key outstanding issues, which we call recommended areas of refinement. The Clerk has given you a copy of our submission.

The first recommendation is that payment should not be made without first receiving a municipal owner's express approval or certification that work was completed properly. AMO believes in prompt payment and is supportive of a regime that requires payments be made promptly for work that is completed to a standard that an owner has deemed to have been met.

The issue we have is the same as the one tabled last week by the Toronto Transit Commission regarding certification: "Requiring payment to be made from the date of a proper invoice instead of certification or owner's approval means there may not be enough time to properly scrutinize an invoice and risks payment for improper or incomplete work. In the US, 20 states allow the trigger event to be either set out in the contract or is expressly certification/approval."

The government is now proposing that owners have the ability to conduct testing and commissioning of a project. However, it does not account for every scenario and would only add an additional cost for municipal governments if it applies.

However, we understand that the AFP projects would allow certification of payment prior to the submission of an invoice for AFP projects. If the committee passes the government's proposed motion, AMO wonders why these exceptions cannot apply also to municipal projects. Otherwise, the province will be providing significant protection to one type of project over another.

The bill, as written, does not give nearly enough time for a municipal government—large or small—to verify that the work has been completed and to enter into discussions with contractors for any discrepancies that may be identified. It will result in paying for contracts that are not completed properly and increasing the cost of litigation to resolve those disputes through adjudication.

All municipal governments have a duty to their taxpayer to be diligent in how projects are managed and to ensure that taxpayer money is only paid for work that is properly performed and meets all of the specifications under the contract. Therefore, AMO is requesting that the trigger for payment for public projects be testing, com-

missioning and certification, or, alternatively, extend the timelines in the prompt-payment regime to ensure that public funds are prudently managed.

Our second recommendation is to, before proceeding, align the lien rights and mandatory adjudication regimes. AMO would like the problematic time lags and other practical considerations addressed.

AMO is very concerned about implementing both lien rights and mandatory adjudication regimes, as Bill 142 would make Ontario the first jurisdiction to have both at the same time. Even if a matter is not resolved to the satisfaction of a contractor or subcontractor, they may bring a lien action during construction. In contrast, an owner does not have any ability to bring an action until the end of the project.

Under the prompt payment regime, owners and contractors will not have the same ability to settle a decision because the timelines are so strict. To make matters more challenging, the government may propose a motion that the subcontractor would be required to invoke adjudication if the contractor does not pay. These scenarios only drive up project costs and risk delaying important construction projects.

AMO recommends that the province rethink enacting both sections at the same time, and that stakeholders have the ability to comment on regulations before they are enacted. We have come too far in this process. With a significant alignment amongst stakeholder groups, why not work together to get it right the first time?

Lastly, it is important that municipal staff receive training, support and resources to ensure the legislation is implemented properly at the local level and that they, as owners, are operating in compliance with the law.

AMO encourages the ministry to find ways to explain the changes in Bill 142 should this legislation pass. After all, the size and capacity of municipalities are equally as broad as the value of the projects they deliver. Regardless of size, Bill 142 will require every municipality to redraft all of their construction contracts, develop new project management procedures and change processes to ensure faster payment. This will require hiring more legal and project management resources, especially if the timelines don't change, and adding more administrative burden on every municipal clerk.

One way the province could help is by implementing a recommendation by the city of Toronto: that "there be a ministry website for construction in Ontario for the publication of all notices under the act and to provide additional information on individual projects."

In conclusion, AMO believes that Bill 142 should be considered an achievement for industry and owner groups, and it is a much better piece of legislation than Bill 69. That said, we hope that the committee will carefully consider our remarks and those of our member municipalities. Making further refinements in these areas would help avoid unintended consequences, mitigate against the potentially costly and burdensome impacts of the legislation, and ensure that the modernization of the Construction Lien Act can be as successful as possible.

Thank you for your time today. We would happily answer any questions that you may have.

The Chair (Mr. Monte McNaughton): Excellent. Thank you very much.

Mr. Bisson.

Mr. Gilles Bisson: I take it you support the idea of contractors and subcontractors being paid promptly; the issue is you don't like the way it's being done in this legislation.

Mr. Gary McNamara: I'm going to defer to Wendy for that.

Ms. Wendy Law: Yes, I think our position is that prompt payment is a good concept. The issue is the timelines that are within the prompt payment regime are very tight, as they're currently presented in the bill.

Mr. Gilles Bisson: But when I listen to contractors and others who have come into my office over the last number of years, time—how quickly they're being paid after work has been completed—is sometimes a huge issue, in the sense that they're not being paid. Clearly there's a bit of a disconnect here. Do you want to speak to that?

Ms. Wendy Law: That's probably where we need to consult all interested parties to find the right median.

The biggest issue for us, from the perspective of owners, is that in the legislation, it takes away our right to rely on certification of the work being done. It's one thing to have a small job where we don't do the certification; it's another thing when we have progress payments that are worth north of $1 million, where you could have a variety of trades completing a variety of levels of work, where we would not be able to just eyeball and see whether the work is actually done properly and then issue payment accordingly. I think the timelines—

Mr. Gilles Bisson: But on larger jobs, my understanding is you do get certification of completion, right, for the work being done?

Ms. Wendy Law: In the current practice that's what we do. We go for certification. Under the legislation, we cannot, so we need to make payment irrespective of certification. We only have 14 days to issue a notice of nonpayment with particulars identifying why we're not paying the full invoice as submitted.

1400

Mr. Gilles Bisson: And that would go off to mediation.

Ms. Wendy Law: Potentially, yes.

The Chair (Mr. Monte McNaughton): We'll move to the government: Mr. Berardinetti.

Mr. Lorenzo Berardinetti: Thank you for your presentation. I really appreciate it.

Were you involved at all in the consultation process? AMO is a big entity. We've done a lot of consulting on this bill. Were you able to bring these concerns forward?

Ms. Wendy Law: Yes, AMO as well as Mississauga, where I am—we've been involved throughout the consultation process.

Mr. Lorenzo Berardinetti: But your concerns were not adequately dealt with in this—

Ms. Wendy Law: Yes. I think the government has actually listened and adopted a number of the suggestions that we have made in the past, but there are still certain things we wanted to identify that, if adopted by the government, would significantly improve the bill, at least from our perspective.

Mr. Lorenzo Berardinetti: This legislation, if passed—liens could no longer be registered on municipal lands. Do you have any comment on that?

Ms. Wendy Law: We welcome that.

Mr. Lorenzo Berardinetti: Just to assure you: We're going to go through the whole bill clause-by-clause, and I think there will be some amendments.

Thank you for your written submissions.

The Chair (Mr. Monte McNaughton): We'll move to Mr. Bailey now.

Mr. Robert Bailey: I'm glad you raised the issue about smaller municipalities in your submission. In the area I represent, there would only be one city—the city of Sarnia would have their own building department, their own inspectors, and I don't know whether they could even meet some of these timelines. So I certainly appreciate you raising that issue. I think of the township that I was born and raised in, Enniskillen township. There are maybe five employees, six at the most, in administrative. They would be hard-pressed, I think, even with an outside engineer that they'd have to hire to do some of this, because they'd probably have to have some qualifications—a professional engineer or P.Eng., whatever—to prove that the work was satisfactorily done. And you have 14 days, I think you said, from—

Ms. Wendy Law: Yes.

Mr. Robert Bailey: So that does look like an awfully tight timeline.

I look forward to when we get to the recommendation and amendment stage. As Mr. Berardinetti said, hopefully there will be some recommendations and amendments brought forward that can meet your desires.

The Chair (Mr. Monte McNaughton): Thanks for your presentation. It was good seeing you again.

CITY OF MISSISSAUGA

The Chair (Mr. Monte McNaughton): We'll move to the city of Mississauga.

You'll have up to 10 minutes for your presentation. Questions will begin with the government this time. Please state your name for Hansard and begin.

Ms. Wendy Law: Thank you for the opportunity to come today and make submissions on behalf of the city of Mississauga on Bill 142. My name is Wendy Law. I'm the deputy city solicitor in Mississauga. Next to me is Raj Sheth, director of facilities and property management in Mississauga. Raj is in charge of all the buildings, from construction to maintenance—city hall, transit terminals, community centres, you name it. All buildings are under Raj's purview.

In addition to today's submissions, Mayor Crombie will be providing written comments on behalf of the city to the standing committee next week. She wanted to be here personally, but due to scheduling conflicts she was not able to make it, so we're here instead.

Let me start off by thanking the government for engaging in an extensive consultation process that allowed all interested parties, including Mississauga, to make submissions at various stages of the Construction Lien Act review process. We appreciate the willingness of the government to listen to the voices of the many parties involved in the construction industry in crafting the new legislation, and your attempt to strike a balance among the various interests. We appreciate the government's adoption of some of the submissions that we have made in the past. We understand that Minister Naqvi will also be introducing several government motions that will address some of the concerns we raised this past summer on the technical merits of the bill, such as exempting professional services from mandatory surety bonds and adding transition provisions that would capture not only contracts signed but tenders issued prior to the effective date of the legislation. So thank you for that.

Today we want to outline some of the remaining issues that we have with respect to Bill 142. First, we fully support AMO's submissions. As AMO has pointed out, municipalities generally operate within a tight budget, without a large body of staff to manage projects. This applies to Mississauga as well. We may have more staff overall than some of the smaller municipalities in Ontario, but we must also engage in a larger number of contracts and construction activities every year in order to build appropriate infrastructure and maintain existing ones to provide services to our community.

In Raj's group, for example, which is one of four main groups within the city of Mississauga to carry out construction, he has 18 project managers and coordinators who each—each person—carry out eight to 15 projects at any given time. This is the same ratio as our capital works department, which has an annual average of 50 projects carried out by six project managers.

When we look at the bill, we need to think about this: What does this legislation mean, practically, to our staff, who are carrying out at least 10 projects at any given time in a year? We can no longer rely on third-party certification under the current prompt-payment regime under Bill 142, and we only have 14 days to issue a notice of non-payment with particulars after receipt of a proper invoice. I don't envy the job of project managers at the end of each month.

It seems, then, that the only way to reduce—and I stress "reduce," not eliminate—the risk of paying for work not properly done is to increase monitoring activity throughout the construction so that we can be as ready as we can be to issue any notice of non-payment within two weeks. But some of the progress payments are rather large, covering a wide range of work completed by a number of trades. Fourteen days might not be possible at all to verify all the work that has been completed. To put this in practical perspective—remember, it's one project manager for at least 10 projects—it's going to be a lot of

work for each project manager every month if that's what they need to do within 14 days.

We recommend that the government consider extending the time to issue a notice of non-payment from 14 to at least 28 days, perhaps, to align with payment timelines.

Mr. Gilles Bisson: Align with?

Ms. Wendy Law: The payment timelines.

Another concern that we have is with respect to mandatory adjudication. We're not against adjudication per se, subject to clarification of the rules currently contained in the bill, but mandatory adjudication is very concerning.

I understand that the government may be bringing a motion to amend Bill 142 to require subcontractors to undertake to invoke adjudication if the contractor does not pay. I assume this is in place of the current bill, which states in section 6.4(5) that the contactor must provide an undertaking, within seven days of receiving a notice of non-payment from the owner, to invoke adjudication.

Regardless of who is required to invoke adjudication, if it remains a mandatory requirement, this has serious resource implications for all parties involved, from owners to subs, especially if the government intends to keep to the current timelines under Bill 142. We urge the government to consider not making adjudication mandatory. Litigation is litigation, whether it be in court, a tribunal, arbitration or adjudication. Does the government truly want to make litigation mandatory? Please give us time to work out our differences. Litigation does not bring parties together; it alienates people. It forces people take sides and to fight. This is particularly concerning when parties are required to fight when they're supposed to be working together to finish a project.

The same project manager and staff involved in the project under dispute will likely need to be involved in the adjudication proceedings at the same time. The same staff person will need to continue to manage the construction, meet the extremely tight timelines and get involved in the adjudication. To add to this, payment disputes and, therefore, adjudication may be taking place over various payment applications of the same project. Essentially, there could be multiple adjudications ongoing at different stages while project management staff are working to complete the actual construction. Should staff focus on the bill or should they focus on litigation?

More fundamentally, as a matter of principle, why should anyone be forced into litigation over their disputes? We don't force people to go to court; then we don't force people to go to adjudication. Maybe not everyone wants to go through adjudication to deal with a notice of non-payment. Maybe not every issue is worth adjudicating. It is a costly and labour-intensive process for all parties involved. If the disputed claim amount is low, it might be more expensive to adjudicate the dispute than it is worth.

We urge the government to consider a balanced approach to modernize the construction payment regime. While we agree that payments should be made promptly for work completed, we believe that public owners should only be paying for work verified to have been completed. We're spending public money and we need to spend it properly. While we appreciate the desire to allow for quicker determination on payment disputes through adjudication rather than through lengthy court processes, please do not forget that it is always better for parties to work out their differences amicably, rather than fighting for their positions through litigation. Time and money should be spent on building, not fighting. Thank you.

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The Chair (Mr. Monte McNaughton): Great. Thank you very much. We'll move to the government: Ms. Mangat.

Mrs. Amrit Mangat: Welcome, Wendy and Raj, to Queen's Park. Thank you for your presentation. It's my understanding that you have been involved in the review process before, as you have said in your presentation, so that the city of Mississauga remains the best place to live, play and invest.

Ms. Wendy Law: Thank you.

Mrs. Amrit Mangat: I know that you have raised some concerns, right? But as you know, there will be amendments that will change the legislation, and we will look at your concerns.

Can you share with the committee members what are the areas which you support on Bill 142? Are there any areas you are supporting?

Ms. Wendy Law: That we will support?

Mrs. Amrit Mangat: Yes.

Ms. Wendy Law: I think, as I've indicated before, that prompt payment in itself is something that we're not against; it's just the timelines that it currently contains. If there are modifications to the timeline of prompt payment, I think that is something we are ready to support.

I also raised the issue of not registering liens on municipal titles. That's something that we advocated for, and we really appreciate that being in the legislation.

Mrs. Amrit Mangat: Can you tell us more about how these changes would have a positive impact on municipal projects—which you are supportive of?

Ms. Wendy Law: In terms of not registering liens on title, it saves time. Right now, for every payment application, we need to go through and actually conduct title searches of the properties to ensure that there are no liens registered on the titles. If we can monitor that along the way rather than having to spend money and time conducting title searches, I think that's a positive.

Having said that, because of the changes in the legislation, we also need to look at how that would change our practices, say, with our clerks' division, on how we actually monitor the notices coming in. I think from that perspective, it's actually a time saver and a cost saver.

In terms of prompt payment, we're not against paying subcontractors on time. In fact, we actually want to see payment flow. From our experience, it's not us not paying; it's is it being paid through the chain. I think the legislation is striving to accomplish that. At the same

time, all we're asking for is, please do not accomplish that solely at the owner's expense.

Mrs. Amrit Mangat: Thank you.

The Chair (Mr. Monte McNaughton): Mr. Bailey.

Mr. Robert Bailey: Yes, thank you for the presentation—both presentations now. I look forward to the committee when we do the clause-by-clause. Hopefully we'll be able to accommodate some of these issues.

One thing I just wanted you to repeat again—maybe I misunderstood. Did you say that you can't use third-party validation if this bill is implemented? Did I misunderstand?

Ms. Wendy Law: The legislation allows for certification. It doesn't preclude certification. It's just that it cannot be used as a trigger for payment. So pay first and argue later is essentially what this legislation is written to say.

Mr. Robert Bailey: Thank you. That's all I have.

The Chair (Mr. Monte McNaughton): Mr. Bisson.

Mr. Gilles Bisson: So you're generally in support, but you need more time. That's the argument here.

Ms. Wendy Law: For prompt payment, yes, for sure.

Mr. Gilles Bisson: And you're thinking that 28 days is fair for you and fair for them? Fairness is the definition of whose side you're on, right?

Mr. Raj Sheth: Certainly fairness is a two-way street, but I think 28 days works for both parties because it allows us to process the payments properly and it would also allow cash flow for the actual contractor.

Mr. Gilles Bisson: Okay. That's good.

The Chair (Mr. Monte McNaughton): Great. Thanks for your presentation today.

LONDON AND DISTRICT CONSTRUCTION ASSOCIATION

The Chair (Mr. Monte McNaughton): I'd now like to call upon the London and District Construction Association. Good afternoon.

Mr. John Harris: Good afternoon.

The Chair (Mr. Monte McNaughton): You have up to 10 minutes for your presentation, and this time the questions will begin with the official opposition. Just state your name for Hansard and begin with your presentation.

Mr. Mike Carter: Good afternoon, Chair and committee members. Thank you for inviting us to meet with you today and provide you with our perspective on Bill 142. This is very important legislation to us, our members and our industry.

I am Mike Carter, executive director of the London and District Construction Association, fondly known as LDCA for short. With me today is John Harris. John is a director of the LDCA, a past president of the LDCA and, more importantly for this session, vice-president of ProAble Hardware Specialties. John will speak to you from the most important perspective you will hear at these proceedings. John represents all small trade contractors who have suffered harm under the current legal regime and who will benefit appreciably from the passage and implementation of Bill 142.

LDCA has been in operation since 1898, so we've been around for a few years. We are a member-owned and governed association comprised of 540 members. We serve Bruce, Elgin, Huron, Middlesex, Oxford, Perth and Haldimand-Norfolk counties in Ontario. We are a very wonderfully mixed-member association, and our members include property owners and developers, general and trade contractors, architects, engineers, lawyers and other professional advisers, financiers and material suppliers. Our members operate in the institutional, commercial and industrial and civil sectors of construction. We are basically not in low-rise residential.

Striking the Balance is an elegant, yet compact, easily graspable concept, expertly coined and executed by Reynolds and Vogel. It is what we will keep coming back to during our time with you, because our LDCA members very much desire that this legislation be implemented.

The vast majority of our members are small business owners who live and exist most regularly from project to project, facing ongoing cash flow risks that can put them out of business fairly easily. They exist on thin margins in a very competitive environment with limited financial and human resources. They will, by course of need to exist, compromise regularly and constantly. The compromise is in part driven by the need to remain in the good books of more powerful entities and in part by the knowledge that a limited workplace dispute can result in the withholding of entire payments that are extremely important to them.

The LDCA board of directors represents all categories of our members, and it's a blessing to have that. We have an owner, we have various professional advisors and we have general and trade contractors, both large and small, sitting on our board of directors.

Bill 142 has been an ongoing focus of our board for some time. LDCA directors, each of whom is an expert practitioner and representative of not only their specific area of interest, but the ICI construction sector in general, also intimately understand the behaviour and impacts of the current regime both to their own interests and to the more common interest of project teams when they're put together.

The LDCA board of directors supports enthusiastically the passage of Bill 142 as they collectively view it as a significant improvement to the current regime. We are a member of COCA, and we align ourselves with the expert advice that they have provided to the government and their representatives throughout this entire process. We also support and align with their proposed amendments to this committee that were tabled on October 25.

For insight into our community, I will provide this to you: Earlier this year, LDCA held an open forum for all members to come learn and discuss the Construction Lien Act and the Construction Lien Act reform, aka Bill 142. While the plumbing aspects of CLAR are very important—changing time to lien, holding back provi-

sions etc.—the most important aspects of CLAR, overwhelmingly, to the folks who attended the forum—and there were, I believe, over 120, maybe 130 individual companies that attended—was the dispute resolution process, aka adjudication. The hope of a process leading to an impartial, fair and efficient resolution of disputes whilst a project was ongoing was head and shoulders more relevant to this group of contractors than anything else that was discussed at that morning's forum.

Upon reflection—because I actually found this somewhat surprising—I came to understand that many, if not most, of the small contractors in attendance have been harmed in some way by a regime that has been, on balance, nurturing to them. These are some of the terms that they used: hostage-taking—"I withhold a payment until you behave in a way that I want you to behave, and then you will get some amount of the payment that I owe you." While they blame the hostage-takers, they also blame the system. They think the system is perhaps more accommodative to those hostage-takers. They view in priority to all else the right and capacity for adjudication as limiting the capacity for abuse are providing systemic balance.

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Also at that session, because we thought it was important to turn it into something positive, we had a public owner, a general contractor and a TC who presently operate in a relationship that is prompt payment. The standard operating procedure of this public owner is that payment is made within 30 days and the GC will pay their trade contractors within five days, max. As an aside, the TC in this case indicates that this owner—because this is a non-standard practice of theirs—actually gets the best prices of any public owners that they deal with because there is certainty of payment, and certainty of payment is within 30 days.

For honest brokers, and this goes back to the systemic balance, the current regime does incent certain behaviours when disputes occur. It is not necessarily in a payer's best interest to not withhold until a dispute is resolved. "Carpetbagging" and "hostage-taking" are two common categorizations that I hear from my members, of entities that are more likely to abuse the current system. Those are their terms; I'm not making these up. When I talk to them, "hostage-taking" actually seems to be a common language that is used.

A significant amount of construction service is delivered locally and, consequentially, is very territorial. The less local players seem to be more problematic when getting paid is an issue.

Construction services, and this is something I found out just recently—with the passing of CETA, it becomes even an increasing problem. Your construction services are subject to CETA, and I believe all public tenders greater than $8.5 million have to be made available to European firms, which complicates the payment issue somewhat more into international territories.

Hostage-taking has its companion called "the prisoner's dilemma," and it has many variations. This is one that was actually just expressed to me this morning as I was driving up here, because I can call any of my members and they can tell me probably hours of stories of payment issues. It goes like this: You invoice for $500,000 and $25,000 is disputed. The payer takes hostage of the $475,000, and the payee faces the prisoner's dilemma of, what pain do they want to face?

Our primary concern is now less related to the specifics of the legislation, because you get great advice from folks like COCA, but my members are mostly here asking me to plead that the vast majority of our trades and other stakeholders will be well served by the passing and implementation of Bill 142. It will fundamentally improve the industry. We fear that if it's not done by year-end 2017, then 2018 will cause different political objectives to come to the forefront.

Reducing and/or eliminating the capacity for hostage-taking will be immensely helpful. Five years from now, I believe what we will look back and see after it has been implemented is that there will be a flurry of activity upon implementation as the stakeholders figure out their behaviour related to the core aspects and perhaps what the limits of their behaviour may be, what's acceptable. But more importantly, once understood, the system overall will become more efficient and effective as things like document quality, which is a key contributor of disputes, will improve. Contractors will bid better. Project financial management and reporting will improve, and many other drivers of disputes that we currently face will be overcome.

The Chair (Mr. Monte McNaughton): You have 20 seconds.

Mr. Mike Carter: I'll pass it over to John.

Mr. John Harris: I'll be quick.

The Chair (Mr. Monte McNaughton): Twelve seconds.

Mr. John Harris: Yes, really quick.

Mr. Gilles Bisson: Give him my time.

The Chair (Mr. Monte McNaughton): You can do it when we go around.

Mr. John Harris: We have 534 members in our association, and probably, conservatively, 450 are small business owners. We know that small business drives the economy.

We were entered into a contract in Windsor and the project was moving along fine. We actually entered into another contract with the same contractor. The first contract day, we started getting slow payment on it, and we had 45 days, so we liened the project. We liened the project for $65,000; we negotiated it at $45,000. Two and a half years later, and our legal bills were $52,000.

Contract B: We were winding down and people started liening that project to make good. Because we saw what our legal fees were, we decided to shave $25,000 off our contract.

We're a small contractor. We do $4.5 million a year and we employ 20 people. When you start adding those numbers up, that's $100,000 that we just took away from our profits. When you take it away from your profits, you take it away from your cash flow. When you take it away from your cash flow, you end up with the two partners

having to reinvest money and then you have to take salary cuts just to keep your 20 people afloat and keep your suppliers paid.

Adjudication would have made that—two things. Ninety days would have made that long—we might have made a different decision on whether we lien that project. But adjudication throughout the process: It was only about $15,000 that they were talking about out of a $65,000 bill. What we're asking for is we need adjudication. If there is an issue, hold that money, but pay the trades so they can keep paying their employees and pay their suppliers so that we can—

The Chair (Mr. Monte McNaughton): Sorry. I just have to move to the official opposition.

Mr. Robert Bailey: I'm going to give you my time and let you continue your story.

Mr. John Harris: I'm done. We just need adjudication and prompt payment. These things will help the small guys continue on. Without that, it's a struggle. Sixty days is hard. Your suppliers want 45, and you pay your employees every two weeks. It's a struggle, and there's not that much money to be made. It's a competitive world.

The Chair (Mr. Monte McNaughton): Any further questions? Mr. Bailey, do you have any questions?

Mr. Robert Bailey: Maybe a comment: My father was in a small business a long time ago now, it seems. I understand, certainly, what that was like, trying to manage. There was always more month than money, lots of times, because you had bills outstanding. We really depended on people to pay him so that he could pay me—because I worked for him at that time. So I certainly sympathize with you and I'd like to see this bill passed. If there are any suggestions that you want before we do the clause-by-clause, I'd like to hear them, and if I've got any more time—

The Chair (Mr. Monte McNaughton): Sure, 20 seconds.

Mr. Robert Bailey: If you'd like to comment some more and use my time up.

Mr. John Harris: The 90-day lien period to me won't be as near a requirement—maybe on holdbacks. The adjudication is going to be huge, because at the end of the month, if there is a problem, and let's just say that it's contractor A and contractor B and it's $15,000 out of $100,000, then $85,000 gets paid, and that keeps the people working. We don't have to face looking at layoffs. We don't want to lien projects because my time, our finances, the legal time—it just takes time away from small business.

The Chair (Mr. Monte McNaughton): We're going to move to the government: Mr. Berardinetti.

Interjection.

Mr. Mike Carter: You're a good man.

Mr. Lorenzo Berardinetti: Thank you for your presentation. It was a very well thought out presentation.

So you like the adjudication process and you like the bill. I think what some of the presenters last week mentioned, and I think COCA mentioned this as well, is that if you change one part of the bill, then it's going to affect something else as well. This has been thought out very carefully: the prompt payment regime, the adjudication process and so on.

Do you have any comments on—I think you like the bill the way it is.

Mr. John Harris: I do like the bill the way it is. I started in this 30-some-odd years ago, and back then you got paid in 30 days. Now it's just kind of gone to 60. Our average contract payout is 60 days. That doesn't even factor in that if you supply it on October 1, you don't bill it until October 25; the contractor bills it October 30. So we're already 29 days behind, and then you've got to wait 45 to 60 days. Your suppliers are looking for cash, and that is hard to come by. So then you become owned by the bank because you're into them, and it's not fair when you say, "I own a business."

Mr. Lorenzo Berardinetti: Okay, that's all.

The Chair (Mr. Monte McNaughton): Excellent. Thank you very much for your presentation today. Have a safe trip back to southwestern Ontario.

Mr. John Harris: Thank you.

The Chair (Mr. Monte McNaughton): I just wanted to let the committee know that the legislative research summary will be available on Friday, November 10, 2017, and our next meeting will be Wednesday, November 15, 2017, at 1 p.m. Thank you.

The committee adjourned at 1430.

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