Proposed Regulatory Amendments Following Independent 2024 Ontario Construction Act Review

Discussion Paper

Ministry of the Attorney General

August 25, 2025

Contents

A. Introduction

The *Construction Act* (the Act) plays a pivotal role in Ontario's economic growth and prosperity. Ontario's construction industry employs over 588,000 people representing approximately 7.6% of Ontario's total workforce. In 2022, the construction industry contributed approximately $57 billion (7.4%) to Ontario's GDP.[1] The Act governs payment practices within the construction industry and provides reasonable certainty that those who have contributed services or materials to the improvement of real property will be paid for their contributions.

On November 6, 2024, Bill 216, the *Building Ontario For You Act (Budget Measures), 2024*, received Royal Assent. The bill introduced amendments to the Act that, once brought into force, will have the following key benefits:

1. Improved access to and use of statutory adjudication, enabling more disputes to be resolved quickly and efficiently while reducing reliance on the court system.

2. More timely payment for materials and services on construction projects, enhancing cashflow and reducing payment disputes, particularly with respect to holdback, which will be paid on an annual basis.

3. Greater certainty within the construction industry by making technical changes and addressing potential ambiguities in the Act to ensure rules and requirements are clear and easy to follow.

Before these statutory amendments can take effect, supporting regulatory amendments must first be developed. Until then, the Act as it was on November 5, 2024, remains in force.

Consultation feedback on potential supporting regulations is being sought through Ontario's Regulatory Registry, with submissions due by **September 24, 2025**.

[1] Government of Canada Job Bank, *Construction (NAICS 23): Ontario, 2023-2025*.

Background

In 2016, the expert report, *Striking the Balance: Expert Review of Ontario's Construction Lien Act* ("Striking the Balance") recommended a series of amendments to the Act, following a comprehensive review and consultation process. In 2017, the Act was amended to modernize lien and holdback rules, introduce prompt payment requirements and establish a new statutory adjudication process in support of those requirements. The report recommended that a further independent review of the Act be conducted several years after the amendments came into force.

In March 2024, the Ministry of the Attorney General (MAG) retained Duncan Glaholt, a leading construction law expert, to conduct an independent review of the Act. Mr. Glaholt led an industry-wide consultation in summer 2024, which included submissions from adjudicators, engineers, lawyers, owners, municipalities, contractors, subcontractors, and building trade organizations.

Three foundational principles guided the 2024 Ontario Construction Act Review ("2024 OCAR"): respect for party autonomy, respect for property rights, and respect for simplicity and transparency.[2] The 2024 OCAR Final Report was released on October 30 of last year. It made 44 recommendations.

Bill 216 implemented priority recommendations from the 2024 OCAR Final Report, falling under three key themes:

1. **Enhancing access to statutory adjudication** to encourage more widespread use of this process, allowing more disputes to be resolved quickly and efficiently without relying on the court system, which tends to be lengthier and more costly.

2. **Mandating the annual release of holdback** and implementing other changes to simplify the holdback regime, ensuring improved cashflow throughout the construction pyramid to contractors, subcontractors and trades.

3. **Providing greater clarity and certainty** within the construction industry by making technical and housekeeping amendments.

Transitional rules for these amendments are set out in section 87.4 of the amended Act.

[2] Duncan Glaholt, 2024 Independent Review: Updating the Construction Act (Final Report), (October 30, 2024) at 7, online (PDF): <https://ontarioconstructionactreview.ca/wp-content/uploads/OCAR-Final-Report-October-2024.pdf>.

How to Participate

MAG welcomes responses to the questions in this paper, as well as any additional comments or suggestions regarding its regulatory proposals. Responses can be submitted without a word limit. Where possible, please provide examples or evidence to support your suggestions.

You may download this paper and submit your completed responses by **September 24, 2025**. Responses can be submitted via email at constructionactreview@ontario.ca.

Please include your name and contact information, including an email address, when submitting your response.

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Please also check a box to indicate whether you are commenting primarily as a:

☐ Academic

☐ Adjudicator

☐ Business

☒ **Business Association**

☐ Lawyer / Law Firm

☐ Legal Organization

☐ Other

Thank you for taking the time to review this paper. If you have any questions about this consultation, please email constructionactreview@ontario.ca.

Privacy Statement

Please note that unless agreed otherwise by MAG, all submissions received from organizations in response to this consultation will be considered public information and may be used, disclosed and published by MAG to assist with evaluating and revising the proposals. This may involve releasing any response received to other interested parties. MAG will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization.

Responses from individuals who do not show an affiliation with an organization will not be considered public information. MAG may use and disclose responses from individuals to help evaluate and revise the proposals. MAG may also publish responses received from individuals. Should MAG use, disclose, or publish individual responses, MAG will not disclose any personal information such as an individual's name and contact details without the individual's prior consent, unless required by law. MAG may use your provided contact information to follow up with you to clarify your responses. If you have any questions about the collection of this information, please contact MAG by email at constructionactreview@ontario.ca.

Regulatory Development

MAG is seeking feedback on specific proposals to inform the development of regulations under the Act. This document explains the proposals in plain language. Consultation drafts of the amendments have also been posted on the Regulatory Registry for illustrative purposes:

- A new adjudication regulation to replace O. Reg. 306/18 (ADJUDICATIONS UNDER PART II.1 OF THE ACT).
- Amendments to O. Reg. 304/18 (GENERAL).
- Amendments to O. Reg. 303/18 (FORMS).
- Amendments to O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII).

Please note that the substance of the proposals and the draft regulatory language may change as they undergo further review, and they are subject to approvals.

In addition, MAG is also gathering input on the time needed for the construction industry to prepare before the amendments are brought into force. If you have additional comments or feedback, beyond any of the proposals outlined here, please feel free to include them in the general comments section at the end.

B. Adjudication Proposals

Many of the recommendations in the 2024 OCAR Final Report focused on strengthening and expanding access to Ontario's statutory adjudication scheme. Some of these recommendations are being implemented entirely through the legislative amendments contained in Bill 216. Others are being implemented partially or entirely through regulations under the Act. The proposals below are those requiring regulatory amendments.

Background:

Following the 2016 Striking the Balance report, Part II.1 (Construction Dispute Interim Adjudication) was added to the Act to create a system of interim binding adjudication.

Now successfully adopted in many common law jurisdictions over the past twenty years, statutory adjudication has proven to be a swift, efficient dispute resolution process that facilitates prompt payment and encourages cooperative contract performance on construction projects of all sizes.

Key features of Ontario's scheme include:

- **Choice of Adjudicator:** Parties may select an ODACC-certified adjudicator or ask the Ontario Dispute Adjudication for Construction Contracts (ODACC) to appoint one from its roster.

- **Informal and Inquisitorial Process:** Adjudication is informal, inquisitorial in nature, significantly faster, and significantly less expensive than private arbitration or proceedings in the Superior Court of Justice (SCJ).

- **Interim Binding Determinations:** Adjudication provides "*rough justice*" on an interim basis. If the parties accept the adjudicator's determination, it is final and binding. If either or both parties reject the adjudicator's determination, it remains binding until the issue is resolved by a court, arbitrator or settlement.

- **Ease of Enforceability:** An adjudicator's determination is enforceable just like a court decision, simply by filing it with the SCJ. There is no right of appeal. Judicial review is available but only with leave and even then, only on specific, limited grounds.

Statutory adjudication of construction disputes offers several important and well-documented benefits. As statutory adjudication occurs while a project is proceeding, it promotes cashflow down through the entire construction pyramid, reducing insolvency

risks, and helping avoid work delays and stoppages due to payment issues. Statutory adjudication fosters honest contract performance and encourages collaborative problem-solving, by de-escalating commercial disputes.[3] Experts globally have long argued that "*compulsory adjudication supported by legislation appears to be the most suitable mechanism for dealing with disputes that occur in construction contracts*".[4]

While increasing the use of adjudication lessens the burden of dispute resolution costs on the industry, administrative costs arise earlier in the construction process. The 2024 OCAR Final Report notes that the added cost of adjudication "*is a mere fraction of the cost and long-term administrative burden of taking even a single dispute through litigation or arbitration over a number of years after the end of the projec*t."[5]

The 2024 OCAR Final Report notes, "*Ontario's current targeted adjudication scheme has been a success, to the extent that it has been used*."[6] The Final Report also states,

> *The industry wants simple, straightforward, easily administered statutory adjudication at all levels for all disputes under their contracts and under the Act. Consultees agreed that a more comprehensive statutory adjudication scheme would allow adjudication to fulfill its promise more fully here in Ontario, as it has done elsewhere. We have already made the difficult culture shift to real time dispute resolution. Now all we need to do is dismantle artificial barriers to its full adoption. We must give statutory adjudication a chance to work as well here in Ontario as it does in other jurisdictions globally.*[7]

Part of the reason for the gradual uptake of statutory adjudication in Ontario was timing: statutory adjudication was first launched on October 1, 2019, immediately prior to the COVID-19 pandemic. The transitional rules were also a factor. They made statutory adjudication unavailable for contracts entered into prior to October 1, 2019, or if a procurement process had been commenced prior to that date.[8] Since then, however, the number of ODACC statutory adjudications has increased significantly each year, although the rate of increase slowed in the most recent year for which data is available.

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[3] Michael Latham, *Constructing The Team: Final Report of the Government / Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*, (1994) at 86, 87, online (PDF): <https://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>.

[4] Edwin HW Chan et al, "Construction Industry Adjudication: A Comparative Study of International Practice" (2005) 22:5 *Journal of International Arbitration* 363 at 373.

[5] *Supra* note 2 at 38.

[6] *Ibid* at 30.

[7] *Ibid* at 10.

[8] Andrea Lee, "Construction Adjudication Takes Root in Canada" (2022) 3:1 *Canadian J of Commercial Arbitration* at 4, 8, online (PDF): <https://cjca.queenslaw.ca/sites/cjcawww/files/CJCA%20Vol%203%20Issue%201/Lee%20-%20Construction%20Adjudication%20Takes%20Root%20in%20Canada.pdf >.

Fiscal Year (Ends July 31)	Number of Adjudications Commenced	Number of Determinations
2020	32	3
2021	50	29
2022	121	67
2023	269	161
2024	277	135

Publicly Available ODACC Adjudication Statistics

1. Subject Matters Eligible for Adjudication

Recommendation #5 of the 2024 OCAR Final Report states:

> *Amend s. 13.5(1) to permit adjudication by any party to a contract or subcontract of any matter set out in the Regulations. Amend the regulations to include any issue arising under a contract or subcontract, and pertinent decisions under the Act itself.*

Bill 216 moved the list of subject matters eligible for adjudication into the regulations, providing greater flexibility and allowing for ongoing consultation with construction industry stakeholders on appropriate subject matters for statutory adjudication.

Under the version of the Act currently in force, section 13.5 limits adjudication to the following payment-related matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

Current regulations do not make any additional matters eligible for adjudication.

Analysis:

The list of adjudicable matters in section 13.5, which was added to the Act in 2017, reflects a cautious and incremental approach to the introduction of statutory adjudication. The new scheme required a significant change in construction industry commercial and dispute resolution culture. In part, the original idea was to minimize opportunism while the industry adjusted to the new adjudication system.[9]

The Ontario industry is now well-versed in statutory adjudication. An impediment that the industry is currently encountering is that payment disputes are often functionally

[9] Bruce Reynolds & Sharon Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, (April 30, 2016) at 215, online (PDF): < https://www.ontariocondolaw.com/wp-content/uploads/sites/841/2016/10/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf>.

intertwined with other contractual performance issues in three categories: scope, price and time. The 2024 OCAR Final Report states:

> *Even the idea that there is any such thing as a "simple payment dispute" in the construction industry was challenged by some consultees. They argued that all payment disputes are in their essence performance disputes, and performance disputes in the construction industry are always an amalgam of scope, price, and time issues. Even the simplest prompt payment dispute can engage all three.*[10]

The 2024 OCAR Final Report also highlights current uncertainty in the industry as to the scope of statutory adjudication:

> *Many consultees addressed the lack of substantive reach of a targeted adjudication scheme. I heard from several consultees (adjudicators, institutions, and individuals) that what is and is not to be included in our current targeted adjudication regime depends primarily on who ODACC assigns as an adjudicator. Some adjudicators take a liberal view of their jurisdiction, essentially that "if it is somehow within an otherwise 'proper invoice', then it is properly before me as an adjudicator". Other adjudicators take a conservative or restrictive view and decline jurisdiction in any adjudication that does not fit neatly within the four corners of a simple payment dispute.*[11]

This is a strong indication that the construction industry needs greater clarity and predictability on the subject matters that are eligible for statutory adjudication.

Additionally, there are a number of rights and obligations created by the Act that are not yet subject to statutory adjudication. The 2024 OCAR Final Report suggests expanding adjudication to cover administrative statutory trust and lien issues such as whether a written notice of lien or notice of termination has been properly given under the Act. These areas require further analysis.

<u>Proposal:</u>

MAG proposes updating and expanding the list of subject matters eligible for statutory adjudication under the Act:

A. **Adjudicating contractual performance issues linked to payment disputes.** MAG proposes allowing the adjudication of contractual performance issues if they are reasonably necessary to resolve in order to make a determination on another matter currently listed in section 13.5. This would include: (i) the scope of work required to be performed under a contract or subcontract, (ii) a request for a change in the contract or subcontract price, and (iii) a request for an extension of time in the completion of work required to be performed under a contract or

[10] *Ibid* at 34.
[11] *Ibid* at 33.

subcontract. This change would clarify for adjudicators and the construction industry when it's permissible to address issues outside the 'four corners' of a proper invoice, while maintaining adjudication's core focus on payment disputes that could delay and derail construction projects.

B. Update the list of adjudicable matters. The list in section 13.5 requires technical updates to reflect the recent amendments in Bill 216, particularly regarding holdback:

I. Paragraph 5 would be updated to refer to holdback payments under section 26 of the Act, covering the annual release of holdback and holdback payments after all potential liens have expired (e.g., following substantial performance). Note the amendment to subsection 13.5(3) of the Act which will allow adjudication to be commenced up to 90 days after the completion, termination or abandonment of a contract.

II. Paragraph 6 would be removed as section 27.1 of the Act is being repealed to implement a recommendation of the 2024 OCAR Final Report.

III. Paragraph 7 would be deleted as it will be redundant (see subsections 13.5(1) and (2) of the Act, as amended).

Do you have any comments on this proposal?

CDAO supports the proposed regulation, to clarify the scope of what can be the subject of adjudication.

2. Private Adjudicators

Recommendation #10 of the 2024 OCAR Final Report states:

> *Amend s. 13.9 to permit the parties to agree on the appointment of any natural person who has completed ODACC training as a private adjudicator for any referred dispute, provided that the appointment is made in writing, signed by the parties and the proposed adjudicator, and discloses all commercial terms between the parties including provision for the payment by the parties of ODACC's one-time administration charge for such private adjudications. The one-time administration fee should be recalibrated periodically as necessary to fairly compensate ODACC for the actual cost of administrative services to be provided together with reasonable recovery of overhead and profit.*

The Final Report also states that the current ODACC roster and fee structure for ODACC-appointed adjudicators should remain in place as far as possible.

Bill 216 responded with several amendments to Part II.1 of the Act, establishing a framework for "*private adjudicators*", while renaming the existing adjudicators on the ODACC roster as "*registry adjudicators*".

Analysis:

ODACC plays an important role as the Authorized Nominating Authority for Ontario's statutory adjudication system. ODACC develops and oversees programs for the training of adjudicators, qualifies individuals as adjudicators, establishes and maintains a publicly available registry of adjudicators, and appoints adjudicators to a particular adjudication where requested to do so by the parties. As the 2024 OCAR Final Report explains,

> *The current ODACC system works in two ways: first, it allows low dollar value disputes between unsophisticated parties to be adjudicated at a fair price (this is an access to justice issue); second, it currently operates "in terrorem" to persuade everyone else to agree on an ODACC roster adjudicator.*

It is in the public interest to ensure that adjudication remains accessible for construction disputes of all sizes, while maintaining the quality and credibility of the adjudication process.

Introducing private adjudicators (i.e., individuals not on the roster of ODACC adjudicators who may be selected by the parties to adjudicate a particular matter) alongside the existing ODACC system is intended to expand adjudication to address additional disputes that are currently not being adjudicated. The 2024 OCAR Final Report notes that the right for parties to choose their own adjudicator, even if off the ODACC roster, was a particular and significant issue for "*high dollar value, highly complex adjudications. These parties would use statutory adjudication if they could choose their own adjudicator, but the adjudicators they would choose are not attracted to ODACC's 60/40 fee model*."[12] The Final Report further pointed out that a "*repeated concern*" among consultees was that the "*fee structure artificially limits the pool of adjudicators*."[13]

If the parties and the Adjudicator cannot agree on the Adjudication Fee for a particular adjudication, ODACC sets the fee in accordance with its Schedule of Fees. Fees for disputes under $50,000 are fixed, while those above $50,000 are charged by adjudicators at hourly rates ranging from $275 to $800 per hour. ODACC's Schedule of Fees also specifies that if an Adjudication Fee is $3,000 or less (excluding HST), ODACC's Administrative Fee is 50% of the amount paid by the parties to the adjudicator. If an Adjudication Fee is above $3,000, ODACC's Administrative Fee is 40% of the amount paid by the parties to the adjudicator.

All adjudicators must be treated fairly and equitably. As much as possible, private adjudicators brought in by the parties, on consent, outside of the ODACC roster should adhere to the same standards as registry adjudicators.

Proposal:

MAG proposes the following framework for registry adjudicators and private adjudicators:

1. **Create a new fee tier for all adjudicators, registry and non-registry.** Any adjudicator – whether a registry adjudicators or private adjudicator – who charges $1,000 or more per hour would pay ODACC a fixed Administrative Fee of $350 per hour (inclusive of all ODACC fees). This fixed Administrative Fee would protect the integrity of the existing adjudication regime, while ensuring fairness between different adjudicators and allowing for more complex, higher-value disputes to be adjudicated by either type of adjudicator. In short, for these

[12] *Ibid* at 42.
[13] *Ibid* at 31.

adjudications, the same fees would be payable to ODACC for both registry adjudicators and private adjudicators.

2. **Distinct features of private adjudicators:**

   I. Private adjudicators must charge a minimum fee of $1,000 per hour or more for all adjudications they perform, and ODACC's Administrative Fee will be capped at $30,000 per adjudication. This would ensure that private adjudicators will work only on complex, higher-value disputes and that no matter what the upper end value of those disputes might be, ODACC's Administrative Fee would remain proportionate to the value ODACC provides.

   II. Private adjudicators could not be on the ODACC roster. To ensure the coherence of the system, a person could not serve as both a registry adjudicator and a private adjudicator at the same time. Thus, private adjudicators would be ineligible for appointment by ODACC in the event that parties do not agree on an adjudicator.

   III. Private adjudicators must still be qualified and certified by ODACC, albeit by a shorter process, and would be subject to the same code of conduct as registry adjudicators. This would ensure non-roster private adjudicators understand and can successfully navigate ODACC's systems and processes, and have undertaken to uphold and maintain the same high standards as roster adjudicators, to ensure public trust and confidence.

   IV. Private adjudicators would be subject to reduced ODACC training and meeting requirements. After completing their initial training, private adjudicators would not be required to undergo ongoing training. Since private adjudicators *must* be selected by the parties (rather than assigned from the ODACC roster), their skillset would be independently validated by the market's willingness to pay a high hourly rate for their services. This is also consistent with the principle of respect for party autonomy.

Do you have any comments on this proposal?

CDAO supports the proposed regulation, to allow more choice of adjudicators for high-value/complex disputes. However, we are concerned that the $1,000/hour minimum fee may be unnecessarily restrictive and exclude highly qualified professionals who charge below that threshold. Moreover, the high rate for some parties may *defacto* have parties be required to use roster adjudicators to avoid high

costs. That is, this may be a basis for one party to object to a private adjudicator proposed by another party. We recommend the proposal be amended to remove the $1,000 minimum billing rate.

Payment of Fees to ODACC

Recommendation #11 of the 2024 OCAR Final Report states:

> *Amend s. 13.10 and s. 23 of O. Reg. 306/18 (Adjudications under Part II.1 of the Act) as necessary to require the adjudicator fee to be deposited within five days of a request by the ODACC, and for the fee to be the amount agreed by the parties and the adjudicator if there is one, or the estimate of ODACC in the absence of such an agreement. A corresponding amendment to s. 23 would permit an adjudicator to resign if the stipulated retainer has not been paid to ODACC within the relevant time period.*

Bill 216 amends subsection 13.10(1) to provide that the Adjudicator Fee is to be paid "in accordance with the regulations and any direction given by the Authority".

Analysis:

The 2024 OCAR Final Report notes that if an adjudicator is being paid on an hourly basis, the final fee amount will not be known until the adjudication has concluded.[14] Requiring the Adjudication Fee, or an estimate of the fee, to be paid in advance of the adjudication would ensure that adjudicators and ODACC are consistently paid for their services on a predictable timeframe.

Proposal:

MAG proposes the following parameters to implement this recommendation:

1. The parties to an adjudication will be required to pay ODACC's fee or fee estimate within 5 days of direction from ODACC to do so.

2. If the parties to an adjudication fail to pay ODACC, the adjudicator may resign from the adjudication after giving written notice to the parties.

[14] *Ibid* at 45.

3. Following the completion of an adjudication, if a fee estimate had been provided and paid, any difference between the estimate and the final fee shall either be paid by the parties if there is a shortfall or refunded to the parties by ODACC if there is a surplus.

Do you have any comments on this proposal?

CDAO supports the proposed regulation.

4. Corrections

Recommendation #13 of the 2024 OCAR Final Report states:

> *Amend the Act to add a "slip rule" like that found in the Arbitration Act 1991, with a very short time period, and adjust other time periods to accommodate this new period. Precedent language from the Arbitration Act, 1991 could be considered and adopted with any necessary changes.*

Bill 216 inserts a new section 13.17.1 into the Act to implement this recommendation, and amends subsection 13.18(2) and 13.19(2) to extend by five days the time period to bring an application for judicial review and for a party to be required to provide payment following a determination. This ensures that parties will not suffer from shortened timelines to take necessary steps under the Act in the event of a correction to a determination.

Proposal:

MAG proposes the following to implement this recommendation:

A. Revoke subsection 22(2) of O. Reg. 306/18 (ADJUDICATIONS UNDER PART II.1 OF THE ACT) which sets out the existing corrections rule, which is narrower than the new section 13.17.1.

B. Provide that an adjudicator who makes a correction in accordance with the new section 13.17.1 is required to provide the parties on the same day with an electronic copy of the corrected determination and a certified copy of the corrected determination within 5 days (see subsection 29(4) of the proposed adjudication regulation).

Do you have any comments on this proposal?
CDAO supports the proposed regulation.

5. Publication of Adjudication Determinations

Recommendation #15 of the 2024 OCAR Final Report states:

> *Amend the regulations to require ODACC to establish within one year of the regulation and to maintain thereafter a database of indexed, anonymized determinations accessible to any party to an adjudication, or any adjudicator conducting an adjudication, on a fee-per-use basis, with the fee set by ODACC independently.*

Bill 216 added a new regulation-making authority in paragraph 88(1)(j.1) of the Act to allow for regulations requiring the Authorized Nominating Authority to make adjudication determinations publicly available.

Analysis:

Adjudicative determinations are currently kept confidential between the parties. In making the above recommendation, the Final Report states, "*to be credible, the adjudication system must be transparent*".[15] With regards to this proposal, one law firm has commented:

> *The ability to rely on previous adjudication decisions has been difficult and uncertain, often dependent on the preference of the particular adjudicator hearing a dispute. Without decisions being publicly available, parties and lawyers only become aware of potentially helpful or challenging adjudication determinations through word of mouth. This is a significant, and likely welcomed, development for consistency's sake, and should allow parties to be more strategic about which issues to adjudicate. However, this may also add extra complexity to the determination of disputes.*[16]

[15] *Ibid* at 44.
[16] Meghan Fougere, "Ontario updates ODACC construction adjudication rules" (18 December 2024), *Norton Rose Fulbright*.

The public release of adjudicative determinations would ensure consistency in the application of the Act by creating a body of precedents from which adjudicators, parties and construction lawyers could draw.

The benefit of making determinations public must be balanced against privacy interests. Adjudications may involve sensitive commercial information, and those that have taken place since the adjudication regime first launched in October 2019 were conducted with an expectation of confidentiality. The current Notice of Adjudication and Response to Notice of Adjudication documents require each party to agree that "communications, documents and the Determination … shall not be disclosed to anyone who is not a Party to the adjudication" except in limited circumstances.

Anonymizing determinations may also require a significant number of changes and redactions because even minor details may allow others with knowledge of construction projects in Ontario to infer the identity of the parties and the project at issue.

Proposal:

MAG proposes that for adjudications that are commenced one year or more after the effective date of the amendments, ODACC would be required to anonymize the determinations and make them accessible online to the public. This may require the involvement of the adjudicator. However, a fee-per-use access model may not be feasible as there would be no way to prevent copies of decisions from circulating informally. Therefore, the cost of anonymizing determinations will need to be borne by the parties or the adjudicator.

Do you have any comments on this proposal?

CDAO generally supports the proposed regulation and agrees that anonymized adjudication determinations should be made available for reference.

ODACC will be responsible for posting the decisions and maintaining the database of decisions. The simple task of making the decisions "anonymous" before posting them should also be a responsibility of ODACC. The cost of doing so should be negligible for ODACC and should not be borne by the parties or the adjudicator.

C. Additional Regulatory Proposals

The 2024 OCAR Final Report also made a number of recommendations for technical and housekeeping amendments intended to improve the effectiveness of the Act and to provide greater clarity and certainty to the construction industry. Many of these recommendations have been either fully or partially implemented through Bill 216. This section seeks feedback on the recommendations requiring regulatory amendments.

6. Joinder

Recommendation #24 of the 2024 OCAR Final Report states:

> *Amend O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) to expressly allow for the joinder of trust claims in lien actions, with discretion to the court to sever claims or require separate trials or procedures.*

Analysis:

The Act was amended in 2017 to repeal the prohibition against joinder of lien and trust claims, but without adding enabling language in either the statute or the regulation. This led to uncertainty and confusion over whether joinder was or was not permitted.

The Final Report states, "*Liens and trust claims are created by a single remedial statute and often fall to be determined on a common set of facts. This alone presents a strong case for joinder, under judicial supervision to avoid a multiplicity of proceedings*."[17] No compelling argument was presented to keep trust and lien claims out of the same legal proceeding.

Proposal:

MAG proposes to implement the recommendation by amending section 3 of O. Reg. 302/18 (PROCEDURES FOR ACTIONS UNDER PART VIII) to allow a party to join a lien claim and a claim for breach of trust under Part II of the Act in an action. Subsection 50(2) of the Act already provides that the *Courts of Justice Act* and *Rules of Civil Procedure* apply to actions under Part VIII of the Act. The regulation would further clarify that it does not affect the application of rule 5.05 of the *Rules of Civil Procedure*, which allows the court to provide relief against joinder.

[17] *Supra* note 2 at 61.

Do you have any comments on this proposal?

CDAO supports the proposed regulation on the basis that relief against joinder is recognized as being available in the appropriate circumstances, as noted in the draft regulation.

7. Forms

Recommendations #16 and #26 of the 2024 OCAR Final Report states:

> *Amend any forms prescribed by regulation to conform to the above amendments.*
>
> *Amend Form 1 to the Act to require a notifying party to clearly state the amount claimed that is holdback, and the amount claimed that is non-holdback.*

Analysis:

Written Notice of Lien

The 2024 OCAR Final Report notes that there should be a retainage obligation, similar to section 24 of the Act, if the lien claimant serves a copy of the registered claim for lien under clause 34(1)(a) or "gives" the claim for lien to the payer where the lien does not attach to the premises under clause 34(1)(b). The Final Report states, "*the minimum requirements for validity of a written notice of lien should include a statement of amounts that are holdback and non-holdback. This change would not be administratively complex and is information that should be within the knowledge of every prospective lien claimant, even those unrepresented by counsel*."[18]

Bill 216 amended the definition of "*written notice of lien*" in subsection 1(1) of the Act to to include a copy of a claim for lien registered under clause 34(1)(a) or given under clause 34(1)(b).

Annual Release of Holdback

Bill 216 amended section 26 of the Act to require the annual release of all holdback in respect of services and materials supplied during the previous year. An owner will be required to publish a notice of annual release of holdback in the prescribed form within 14 days of the anniversary of the date the contract was entered between contractor and owner, and that the owner be required to pay holdback within 14 days of subsisting liens

[18] *Ibid* at 63.

expiring, unless a lien has been preserved or perfected in respect of the contract and the lien has not been removed from title in the land registry system.

Notice of Termination

The Final Report states, "*it was suggested that the date of termination for the purpose of section 31 should not be the date specified in the notice, because that date is subjective, arbitrary, and often highly contentious*."[19] Bill 216 amended section 31 of the Act to provide that the date on which the notice of termination is published is the date on which the contract was terminated for the purposes of section 31. In addition, the notice of termination must be published within seven days of a contract being terminated.

Proposal:

MAG proposes the following parameters to implement the recommendations:

A. Amend Form 1 (Written Notice of Lien under Subsection 1(1) of the Act) to require lien claimants to indicate the amount claimed as holdback and non-holdback.

B. Create a new form entitled Notice of Annual Release of Holdback which would include a statement indicating the amount of holdback that will be paid to the contractor in respect to services or material supplied by the contractor during the year immediately preceding the anniversary of the date of the contract.

C. Amend Form 8 (Notice of Termination under Subsection 31(6) of the Act) to update the reference to the Act and indicate that the contract is terminated on the date of publication of the notice.

D. Make a housekeeping amendment to Form 21 (Financial Guarantee Bond under Section 44 of the Act) to update the reference to the Accountant of the Ontario Court to Accountant of the Superior Court of Justice.

Do you have any comments on this proposal?

CDAO supports the proposed regulations and revised forms, with the exception of Form 1 amendments. Having lien rights running from the date of the publication of the notice of termination provides certainty for the industry. By contrast, the amendments to Form 1 requiring lien claimants to split claims into holdback and non-holdback portions would increase complexity without reducing disputes, counter to the

[19] *Ibid* at 66

Act's objective of simplicity. As such, we recommend the proposal be amended to remove the changes to Form 1.

8. Bonds

Recommendation #35 of the 2024 OCAR Final Report states:

> *Work with the Surety Association of Canada to amend the Form 31 bond to provide that a claimant need not comply with provisions of such legislation setting out steps by way of notice, registration or otherwise as might have been necessary to preserve or perfect any claim for lien or privilege which the claimant might have had.*

Analysis:

The 2024 OCAR Final Report notes that while the bond forms used on public projects under section 85.1 of the Act are well-understood for traditional contracting models, new forms of collaborative contracting are now being used.[20]

There is strong support among stakeholders, including the Surety Association of Canada (SAC), that the Act and O. Reg. 304/18 (GENERAL) be amended to permit alternate forms of bonds. Section 85.1 currently allows for different forms of bonds. The SAC has developed a performance bond based on Form 32 (Performance Bond under Section 85.1 of the Act) for use in conjunction with the CCDC 30 IPD contract, which may be flexible enough to be used in other contract arrangements and is compatible with the Form 31 (Labour and Material Payment Bond under Section 85.1 of the Act). Developing alternate forms of bond will require extensive consultations with key stakeholders and the surety industry.

The Final Report indicates that Form 31 is *"the result of extensive consultation with the surety industry and key stakeholders. One purpose of the new form was to provide limited protection against non-payment to second tier subcontractors ('sub-subcontractors'). This protection was limited to recovering their share of the holdback and any contract monies that the defaulting contractor would have been liable to pay to the sub-subcontractor if the sub-subcontractor had filed a claim for lien. The language in Form 31 suggests that the sub-subcontractor must have a subsisting or even*

[20] *Ibid* at 71

"preserved" lien claim to recover under the bond."[21] This appears to be an inadvertent deviation from the Federal Government form of bond which was used as a template for Form 31.

Proposal:

MAG proposes to amend Form 31 (Labour and Material Payment Bond under Section 85.1 of the Act) to confirm a sub-subcontractor's right to claim under the bond, even if they do not preserve or perfect a lien.

Do you have any comments on this proposal?

CDAO supports the proposed revision as it avoids unnecessary legal steps having to be taken by sub-subcontractors as a condition to getting the benefit of labour and material payment bonds on public projects.

We note that alternative bond forms for collaborative contract models (such as CCDC 30) remain unaddressed, and therefore recommend the Ministry provides clarity to the industry on whether and when further consultation on alternative bond forms will be undertaken.

9. Publication in Construction Trade Newspapers

Recommendations #40 and #41 of the 2024 OCAR Final Report state:

> *Designate by regulation a maximum of three "construction trade newspapers" for the purposes of the Act, beginning with: 1) The Daily Commercial News, 2) Link2Build, and 3) the Ontario Construction News.*
>
> *Provide designation for a fixed period and review and renew designations, or add designations, as may be necessary to serve the industry.*

Section 1 of O. Reg. 304/18 (GENERAL) provides a broad definition of the term "construction trade newspaper" that includes both paper-based and electronic publications.

Proposal:

[21] *Ibid* at 77.

The 2024 OCAR Final Report states that the "*lack of official designation has created some uncertainty as to where to search for statutory notices and where to validly publish notices*."[22]

MAG proposes to implement the recommendation by defining a "*construction trade newspaper*" as the Daily Commercial News, Link2Build, and Ontario Construction News.

Do you have any comments on this proposal?

CDAO supports the proposed regulation, which provides options for publication but minimizes the possibility of overlooking or missing critical notices.

D. Effective Date

The amendments to the Act set out in Bill 216 will be brought into force on a date named in a commencement order made by the Lieutenant Governor in Council.

Transitional rules governing the application of the amended Act are set out in section 87.4. Subsection 87.4(2) states,

> **Immediate application**
> (2) An amendment made to this Act by Schedule 4 to the *Building Ontario For You Act (Budget Measures), 2024* applies with respect to an improvement on and after the day the amending provision comes into force, except as otherwise provided by this section.

In other words, upon the day the amendments are brought into force (the "effective date"), most of the amendments will apply with immediate effect to all improvements in the province.

Subsections (3), (5), (6) and (7) provide more specific transitional rules where the amendments touch on lien rights.

[22] *Supra* note 2 at 84.

Subsection (4) provides a detailed transitional rule governing how the new annual release of holdback requirement in section 26 of the amended Act will apply to improvements that are subject to contracts that were entered into prior to the effective date. It ensures that there will be, at minimum, one year following the effective date before holdback needs to be paid out on an annual basis, and all holdback accrued prior to that date must be paid out on the first anniversary date to which section 26 applies.

The new amendments will not disturb existing transitional rules in section 87.3 of the Act. For example, if a contract for the improvement was entered into before July 1, 2018, the old *Construction Lien Act* will continue to apply to that improvement.

Do you have any comments on when the legislative amendments should take effect?

CDAO recommends that the amendments made under Bill 216 together with the regulations and further related minor statutory changes being made all go into effect on January 1, 2026. These changes are important to the industry and should be brought into force as soon as possible.

E. Other Feedback

Do you have any other feedback for MAG's consideration related to the Act, the 2024 OCAR Final Report, or the legislative/regulatory amendments?

The onerous requirements around service of Form 1 (Written Notice of Lien) remain an issue that should be addressed, since s.87(1)(1.1) still requires Form 1 to be served in the same way as a statement of claim in a civil action. This very high standard of service remains impractical, unnecessary, and overly burdensome for the industry to comply with.