



# Construction Act: Proposed Amendments to Regulations

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**Submitted to:** Ministry of the Attorney General

**Submitted by:** Ontario Bar Association



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## Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to comment on proposed amendments to regulations made under the *Construction Act* (the “**Act**”). The OBA has played an active role in the Ministry’s efforts to modernize the *Construction Lien Act* (the “**Previous Act**”), in a manner that will support a healthy construction industry.

Through this consultation, the Ministry has shared four consultation drafts outlining the proposed amendments to each regulation, namely:

- O. Reg. 302/18 - Procedures for Actions Under Part VIII
- O. Reg. 303/18 - Forms
- O. Reg. 304/18 - General
- O. Reg. 306/18 - Adjudications under Part II.1 of the Act

Our members provide their comments under these headings for your consideration.

## The OBA

The OBA is the largest voluntary legal association in Ontario, representing lawyers, judges, law professors and law students. This submission was prepared by the OBA’s Construction and Infrastructure Law Section (the “**Section**”). Members of the Section represent a broad cross-section of industry stakeholders, including owners, general contractors, sub-contractors and suppliers, lenders and insurers, government and homeowners.

## Procedures

The Ministry proposes to amend the Procedures regulations (O. Reg. 302/18) by adding to section 3: “(2) A plaintiff may in an action join a lien claim and a claim for breach of a contract or subcontract.” Section 3 relates to joinder and currently provides: “Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.”

The proposed amendment to section 3 would reintroduce section 50(2) of the Previous Act, now deleted, that provided that “a plaintiff may in an action join a lien claim and a claim for breach of contract”.

During the consultations undertaken by the expert review leading to their report (“**Striking the Balance**”), it had been submitted by the OBA (and others) that section 50(2) had been



interpreted as prohibiting trust claims from being joined with lien actions because of the express permission to join a lien claim with a breach of contract claim. The *Striking the Balance* report noted that Ontario was the only common law province to prohibit the joinder of trust and lien claims.<sup>1</sup> It was submitted that since courts, in practice, were willing to join trust and lien proceedings, the Act should permit joinder without requiring leave of the court for greater efficiency. In *Striking the Balance*, it was recommended that section 50(2) should be removed from the Act.

The proposed re-insertion of the old section 50(2) by way of the new section 3(2) of the Procedures regulation may lead to confusion and inefficiency regarding trust claims again. If the intent is to permit breach of contract claims and trust claims to be joined, it may be of assistance to expressly provide for this rather than revert back to the former section 50(2). An express provision that a plaintiff may join a lien claim with a claim for breach of contract and a claim for breach of trust will also clarify that the intent is not to permit joinder of other types of claims (for example, professional negligence) which will add complexity and delay to actions intended to be summary in nature.

## Forms

The Section has not received feedback with respect the proposed amendments to the Forms regulations set out by the Ministry.

However, we have received comments on some of the forms themselves. With respect to Form 5, there is incorrect numbering (specifically, a “3” is missing) and an inconsistent use of terms (e.g. defined terms “contractor”, “surety” and “owner” should be used throughout). We also suggest removing “and the Principal” from paragraph 2 of Form 5 as the Principal is not required to accept the Demand nor can the Principal’s dispute of the Demand interfere with the Surety making a payment in any event.

With respect to Forms 31 and 32, we suggest removing the additional lines under the “name of the surety company” line at the start of the Forms as there will typically only be a single line required for the surety.

## General

The Section has proposed comments with respect to the revisions to the General regulations. First, the Ministry proposes an amendment related to the notice of intention to register land

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<sup>1</sup> See [Striking the Balance](#) at p. 102.



in accordance with the *Condominium Act, 1998*. The proposed addition of “at least five and not more than 15 days, excluding Saturdays and holidays, before the description is submitted for approval under subsection 9 (3) of the Condominium Act, 1998” corrects the deletion of timing from the former section 33.1(2) of the Previous Act.

The Section has also received comments that the new section 34(9) of the Act, which adds a requirement that a notice of preservation of lien be given to owners when preserving a lien in respect of an improvement to common elements, will render it near impossible for any contractor to afford to lien a condominium. It is noted that this change not only diverges from the recommendation in *Striking the Balance*, which was that the common elements in the condominium should have a single PIN which would be subject to a lien, but in fact makes the preservation of liens much more difficult than in the Previous Act.

## Adjudications

The Section has several comments with respect to several sections proposed under the Adjudication regulation. The Ministry proposes to add section 15.1 as follows: “The Authority may provide administrative support services for the purpose of facilitating the conduct of adjudications.” The regulation does not make clear whether the cost of these administrative support services will be born by the parties, and if so, what those costs might be, and how they will be charged. Further details should be provided on this item.

Proposed section 16.1.1 provides that: “The documents shall be provided to the adjudicator together with the copy of the notice under clause 13.11(a) of the Act”. This appears to be redundant given section 13.11(a) of the Act, which requires that the party who gave the notice of adjudication to provide the adjudicator a copy of the notice, and section 13.11(b) of the Act which requires that the party giving notice also provide to the adjudicator and the other party a copy of the contract or subcontract and any documents intended to be relied upon.

The proposed section 16.1.2 is helpful in that it clarifies that the documents shall be provided to the other party (parties, in the case of consolidated adjudications) on the same day as the documents are provided to the adjudicator.

Finally, the Ministry seeks feedback on two specific questions. The first question seeks input on the provision of documents in the adjudication under section 13.11 of the Act. The Ministry notes that the term “provide”, as used in section 13.11 of the Act, proposed subsection 16.1 of the adjudication regulation, and other sections, is not defined. While section 87 of the Act specifies how documents may be “given” (generally, service in accordance with the rules of court), it does not specify how documents may be “provided”.



The comments received from members of the Section indicate a preference to implement both option 1, requiring the adjudicator to confirm receipt, and option 2, requiring that documents be served in accordance with the *Rules of Civil Procedure* unless otherwise directed by the adjudicator. This would give the parties certainty as to the date on which the adjudicator received the documents, triggering subsequent deadlines, and expressly allow the adjudicator to deviate from the strict requirements of service under the *Rules* when reasonable to do so.

The Ministry also seeks feedback on a second question regarding the implementation of a deadline for delivery of responses. Option 1 proposes a default deadline subject to any extension granted by the adjudicator, and option 2 proposes no default deadline. In responding to these options, there was support for the need to set appropriate deadlines, to maintain compressed timelines for adjudications, and to provide enough flexibility in the system to avoid unfairness that might arise through strict adherence (with some members going so far as to note the need to avoid ‘ambush tactics’ by a party to an adjudication).

## Conclusion

The OBA appreciates the opportunity to provide input and assistance to the Ministry of the Attorney General. We will continue to monitor the implementation of the Act and its regulations, and look forward to providing the Ministry with our feedback on these and other items in the coming days.