



Proposed Regulations Under the *Construction Act*

Submitted to: Ministry of the Attorney General

Submitted by: Ontario Bar Association

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association makes the following submissions with respect to the draft regulation proposed to replace existing Ontario Regulation 306/18 – Adjudications under Part II.1 of the *Construction Act* and the proposed amendments to other regulations under the *Construction Act*.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 18,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Construction and Infrastructure Law section. Members of this section include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience dealing with all aspects of the *Construction Act* and its regulations and processes.



Comments & Recommendations

Draft Regulation to Replace Ontario Regulation 306/18: Minimum hourly rate for private adjudications

As stated in our response to the July 2024 Consultation Paper, while the OBA takes no position regarding the introduction of private adjudicators, the OBA shares the industry's concerns about the escalating costs of adjudication and its interest in ensuring that adjudication remains accessible to all industry participants. As a result, the OBA has serious concerns with the proposed minimum adjudicator fee of at least \$1,000 per hour and recommends that it be removed entirely from the draft regulation.

The OBA acknowledges the potential benefits to private adjudication. It can improve parties' ability to retain an adjudicator with the specific skillset most appropriate for the subject dispute. The number and availability of adjudicators may also increase, as acting as an adjudicator becomes more economically feasible (since they would not have to remit 40% of their fees to ODACC).

Accordingly, giving adjudicators the ability to be retained directly by parties has the potential to enhance the industry's accessibility to qualified adjudicators, such as lawyers who have expertise in contractual interpretation and the Construction Act's prompt payment provisions.

We are deeply concerned by the proposed inclusion of a mandatory minimum hourly fee of \$1,000 for private adjudicators. Such a high threshold risks placing private adjudication beyond the financial reach of many parties – especially individuals and smaller organizations – thereby undermining accessibility and defeating the intended purpose of offering private adjudication as a viable alternative.

The regulation also risks creating the unfortunate perception of regulatory capture by appearing to protect ODACC's current monopoly on adjudication at standard market rates, which could undermine public confidence.



To ensure availability of private adjudicators at rates reasonable and appropriate to Ontario's projects, there should be no mandated minimum.

Amendments to Ontario Regulation 302/08: Joinder of lien and trust actions

The OBA remains supportive of the amendment to explicitly permit joinder of lien and trust proceedings. We think that it may be prudent to clarify that motions brought under Rule 5.05 must still meet the test for leave under the Act, and would suggest the following change:

1. Section 3 of Ontario Regulation 302/18 is amended by adding the following subsections:

(3) A party may, in an action, join a lien claim and a claim for breach of trust under Part II of the Act.

(4) Subject to Section 13 of Ontario Regulation 302/18, nothing in this section shall be read as affecting the application of rule 5.05 of the Rules of Civil Procedure.

Amendments to Ontario Regulation 303/18: Missed amendment to Written Notice of Lien form

We believe that there may have been an inadvertent oversight in the draft regulations. In his Final Report, Duncan Glaholt noted the risk that the notice holdback provisions of the Act could inadvertently require the double-retention of basic holdback following the delivery of a written notice of lien (Item 10, pages 63-64). His Recommendation 26 stated:

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.

We note that no amendments to Form 1 are proposed in the regulations. Form 1 should be amended in accordance with Mr. Glaholt's recommendation. This is important to avoid the double-retention of basic holdback following receipt of a written notice of lien.

The OBA would be pleased to discuss this further and answer any questions that you may have.