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ONTARIO GENERAL CONTRACTORS ASSOCIATION

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November 21, 2016

Hon. Yasir Naqvi
Attorney General
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario
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Dear Minister:

Thank you for the opportunity to provide our response to the "Striking the Balance" recommendations submitted by Bruce Reynolds and Sharon Vogel. The OGCA supports the findings and direction of the report, and using it as a guide to develop legislation.

We commend the authors for identifying the practices in the industry that have lengthened the average collection period and impaired the ability of contractors and suppliers to get paid. The recommendations focused on three areas: A) Modernizing the Act; B) Promptness of Payment and C) Adjudication. We believe that the recommendations in all three areas must be reflected in the new Act in order to maintain a balance.

It is important that the industry stays fully engaged in the process as you move to legislation and implementation. We understand that Reynolds and Vogel have been retained to support the continuity from the Report to implementation. We fully support this as they have a deep understanding of the issues and participants, and a sense of the balance that is required in order to maintain broad support for such substantive reforms. The credibility they have gained in conducting their Review will be helpful in developing solutions to detailed processes that must be developed in the legislation.

We also support the continuation of the Advisory Committee that has been a valuable resource to Reynolds and Vogel. The OGCA is concerned, however, that there is no direct representation from the general contracting industry. This is required to provide valuable input on the legislation, particularly as to how it relates to commercial matters and other practical applications. We recommend that the Advisory Committee be expanded by two persons to include direct representation of general contractors and subcontractors to be appointed by Reynolds and Vogel. We are confident that each group could put forward a representative that would maintain the climate of professional discourse that we understand was a critical element of the success of the Advisory Committee meetings.

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OGCA recommends that a short second round of consultation occur before legislation is introduced in the spring 2017 session. This will be a review of the proposal that you intend to introduce as legislation. It is vital that the new Act maintains the balance set in the Report and that provisions that will create unintended consequences are identified and eliminated before being formally introduced. This legislation will be very technical and its application must coordinate with commercial realities in diverse subsectors of the construction, development, design, finance, surety and insurance markets, to name only a few. Consultation with industry experts is critical to develop legislation that effectively serves the province.

It is the OGCA's intention to not only support the development and implementation of this legislation, but to work with our members and the construction industry to embrace the reform and educate stakeholders. If successful, the reforms will act as a stabilizing force bringing certainty to the development, design and construction industries in Ontario.

The OGCA has reviewed the Report and have identified recommendations. While we are supportive of the report and its recommendations, these are significant issues that must be addressed.

Please consider the detailed commentary attached.

Yours sincerely,

ONTARIO GENERAL CONTRACTORS ASSOCIATION

Clive Thurston
President

DETAILED COMMENTARY

No.	REC #	RECOMMENDATION	COMMENTARY
1	27	**Recommendation 27: Mandatory Release of Holdback** The Act should be amended to provide for the mandatory release of holdback, but not the mandatory early release of holdback; that is to say, "may" should be revised to "shall" in sections 26 and 27 of the Act. The owner should be required to publish a notice of nonpayment/setoff to interdict the obligation to pay where the owner, in good faith, intends to assert a setoff in relation to the contract (as further provided for in Chapter 8 – Promptness of Payment).	It is unclear why only the owner is entitled to assert a right of setoff, given that any payer may have a good faith setoff against any payee. The last sentence should be revised as follows: The owner / payer should be required to publish a notice of nonpayment/setoff to interdict the obligation to pay where the owner / payer, in good faith, intends to assert a setoff in relation to the contract. Also, the benefit of "publication" versus notice is unclear. The owner should simply be required to provide notice down to the general contractor of its intention to setoff, and if the general contractor intends to rely on that notice to cascade the setoff down to its subcontractor(s), the general contractor should provide notice, attaching the owner's notice, to such subcontractor(s).
2	28	**Recommendation 28: Partial HB Release** We recommend that the Act should be amended to permit partial release of holdback on either a phased or annual basis, if provided for in the construction contract entered into by the parties, subject to a significant monetary and time-based threshold in the case of annual release (p 85).	We recommend that partial release of holdback be mandated on an annual basis but apply only to projects in excess of $25 million in value and two years in duration.
3	43	**Recommendation 43: Project Trust Accounts** We recommend that the Act should be amended to require that a trustee must follow specific statutory requirements in relation to trust fund bookkeeping similar to that applied in the New York Lien Law, including the following (p 148): The trustee is not required to keep the funds of separate trusts in separate bank accounts or deposits provided that his books	Project Owners should be required to fund holdback accounts in sync with the progress of the work. In order for the proposed book keeping regime to be effective in ensuring holdback funds are available for the beneficiaries, the funds need to be deposited into the account progressively.

		and records of account clearly show the allocation to each trust of the funds deposited in the general account; The trustee must keep separate books for each trust for which it is trustee (and if funds of separate trusts are in the same bank account, the trustee is to keep a record of such account showing the allocation to each trust of deposits and withdrawals); and The books and records of each trust must show specifically articulated particulars with respect to assets receivable, assets payable, trust funds received, trust payments made with trust assets and any transfers made for the purpose of the trust.	Alternatively, we support a B.C. style project trust account regime where joint trust accounts are established at the owner/general contractor level only.
4	44	**Recommendation 44: Pilot Trust Accounts** We recommend the identification of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. Over a period of two years, the selected pilot projects should be evaluated based on appropriate metrics in relation to their effectiveness and cost. After two years, the performance of project trust accounts on the pilot projects should be published and industry consultation conducted regarding their general adoption in the private and public sectors (p 149).	We support the piloting of project trust accounts similar to the system in place in B.C. We do not support the use of project bank accounts as (a) the administration would layer on significant administrative cost across the sector and (b) project bank accounts would not provide material additional security beyond the recommendations already being considered. In addition, the pilot project for project trust accounts should only apply in the private sector where there is greater risk that the private developers proceed on projects that have not been fully funded. Public sector projects are generally fully funded and should not be part of the pilot project.
5	45 79	**Recommendation #45: Mandatory Surety Bonds** We recommend that, in order to adequately protect suppliers of labour and materials from the risk of contractor insolvency on public projects, all public sector projects be required by the Act to be surety bonded, adopting the Miller Act and Little Miller Act approach to the protection of subcontractors and suppliers from the risk of contractor insolvency on public projects (p 151). **Recommendation 79: Public Project Bonding**	We disagree that performance bonds and labour and material payment bonds should be mandatory for public projects in Ontario. This requirement would increase the cost of all public projects in Ontario while providing little to no benefit. For example, AFP projects are consistently highly securitized as required by the project lenders. Further, the lenders often take an unfavourable view of bonds as security instruments and will typically assign very little value to them. Accordingly, a mandatory requirement to use bonds on AFP projects will

		The Act should be amended to require broad form surety bonds to be issued for all public sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the Act (p 258).	add costs to projects with little reduction in other security instruments and little benefit to the public. Ultimately the purported benefit provided by mandatory surety bonds does not justify the increased costs. In the United States, the Miller Act and Little Miller Acts approach to public projects is necessary because those projects cannot be subjected to liens. The situation in Ontario is obviously much different. Where contractors and subcontractors already have lien rights (and considering that the recommendations regarding trust fund bookkeeping and the trust account pilot project will be implemented), mandatory surety bonds will provide little to no benefit to industry stakeholders, while increasing costs for everyone. We also note that the mandatory use of surety bonds prevents industry participants from using alternative forms of security that may be more cost effective for certain projects, including subcontractor default insurance. Freedom to contract should not be limited in this way. Finally, Recommendation #79 requires "broad form" surety bonds, which permit sub-subcontractors to claim against general contractor's bonds. This creates a moral hazard where second tier subcontractors are not incented to pursue responsible credit policies as they are effectively backstopped by the general contractor. To our knowledge, broad form payment bonds are not commonly used in any sector of the Ontario construction industry.
6	48	**Recommendation 48: Prompt Payment** We recommend that the prompt payment regime should apply at the level of the owner- general contractor, general contractor-subcontractor, and downwards, and that the	Given that the Report recommends back-to-back adjudications, we do not see the need for a requirement that a general contractor "commence or continue proceedings". A payee should be able to simply initiate an adjudication.

		legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations (p 194).	However, if an obligation is included in the new legislation, then the new legislation should clearly state that the obligation to "commence or continue proceedings" is satisfied if the payer exercises any of its rights under the dispute resolution terms of the construction contract (e.g. escalates the issue to senior management, issues a dispute notice, engages in negotiations, etc.). We also recommend that, similar to the UK Construction Act, the legislation permit a sharing of credit risk between general contractors and subcontractors by permitting pay if paid clauses in the event of an owner insolvency. Spreading owner risk is the most efficient approach for the market, otherwise the general contractor, faced with 100% of owner insolvency risk on its own, will be forced to increase its capitalization (decreasing its ability to grow, thus lessening competition in the market), add a risk premium to its bid (making it less competitive relative to less responsible contractors and/or increasing cost across the industry), or simply take the risk of insolvency (which would yield the same result for subcontractors as pay if paid).
7	**49**	**Recommendation #49: Payment Trigger:** We recommend that the trigger for payment should be the delivery of a proper invoice; provided that certification for payment (if there is certification for payment provided in the contract) must follow submission (p 196).	We recommend that the term "proper invoice" by defined by the terms of the associated contract. If a contract does not define the term, the Act should impose a definition. Payers should not be permitted to establish onerous invoicing requirements that were not expressly set out in the contract as a means to delay payment.
8	**50**	**Recommendation 50: Timing of Payments** We recommend that: As between owner and general contractor a 28 day payment period be applied, that is triggered by the submission of a proper invoice.	This recommendation is reasonable on its face. The challenge is that it assumes there exists a simple payment structure, such as is often found in the ICI sector, i.e. each month the general contractor combines its subcontractor's invoices and 28 days later the owner pays the general contractor for that prior month's work. The Report itself contemplates invoicing

		As between general contractor and subcontractor, a further 7 days from receipt of payment from the owner would be permitted.	mechanics that are customized to the needs of each project (Recommendation # 51). The situation becomes more complicated where there is an asymmetry of payment terms between the levels of owner, general contractor and subcontractors. For example, there may be one set of milestones as between owner and general contractor (typical on large infrastructure and energy projects) and a different set of milestones between contractor and subcontractor (typical for design subcontracts). In that case, it may not be clear how much of owner's payment to the general contractor pertains to the subcontractor's invoice, confusing the concept of "receipt of payment" because it is unclear *which* payment from owner is the trigger and in what amount. We are not able to provide specific language until we see the draft of the legislation, but would encourage the drafters to carefully think through the many possible permutations.
9	**51**	**Recommendation 51: Default Payment Terms** We recommend that parties be free to contract in respect of payment terms, but that if they fail to do so, monthly payments should be implied (i.e. every 28 days).	The OGCA strongly supports the concept in this recommendation that the freedom to contract between parties is preserved. We have several technical recommendations. The interplay between recommendations # 50 and 51 is unclear. The text of the recommendation (section 4.5) suggests that recommendation # 51 is related to timing of invoices, but the text of the recommendation says it is "in respect of *payment terms*". We are assuming that it is meant to mean: We recommend that parties be free to contract in respect of timing and requirements of invoicing, but that if they fail to do so, monthly invoicing should be implied (i.e. every 28 days).

			As an administrative matter, we would suggest that it would be more efficient to default invoicing terms to calendar months (e.g. invoice to be sent on the last day of the month and paid within 28 days pursuant to Recommendation #50) rather than calendar days. If invoicing is every 28 days, parties will not be able to maintain a consistent or predictable payment cycle, which will increase administrative cost and confusion.
10	52	**Recommendation 52: Intention To Withhold** We recommend that payers be permitted to deliver a notice of intention to withhold payment within 7 days following receipt of a purported proper invoice and that the notice of intention to withhold must set out the quantum of the amount withheld and adequate particulars as to why that amount is being held back. Undisputed amounts should be paid. Also, the right to withhold should relate only to the contract at issue (p 199).	It should be clarified that the right to withhold payment is permitted where a notice of intention to withhold payment is delivered within 7 days of receiving either (1) a purported proper invoice, or (2) a notice of intention to withhold payment from a payer further up the construction pyramid. We also recommend that the legislation require that withheld amounts reflect that true value of the associated issue. In particular, the practice of apply a multiplier (eg 200%) to the cost of an issue when establishing the withholding should be prohibited. See our next comment regarding the right to withhold payment being limited to the contract at issue.
11	53	**Recommendation 53: Set off** We recommend that a payer continue to be able to set off all outstanding debts, claims or damages but that the right of set off not extend to set-offs for debts, claims and damages in relation to other contracts (p 199).	We strongly suggest that this recommendation not be adopted in the new act. Given the nature of the industry, the actions of a single organization may affect more than one project. Limiting set off rights in this manner would unnecessarily, and unfairly, tie the hands of parties further up the construction pyramid. A simple example would be an individual who purchases an old home and has it demolished to build two new houses on the lot as an investment. In that example, the owner hires the same general contractor to build two houses. The owner owes

			the general contractor the final $50,000 payment on House # 1 while House # 2 has not yet been completed and requires approximately $50,000 to complete. If the general contractor simply abandons the project, Recommendation # 53 would require that the owner pay $50,000 to the abandoning general contractor on House # 1, also pay at least $50,000 out of his/her own pocket to another contractor to finish House # 2, and sue the general contractor for damages. If the owner failed to do so, Recommendation # 53 would give the abandoning contractor the right to lien House # 1, a perverse result. The far more equitable and efficient approach would be for the owner to retain its equitable right of setoff, as it has currently, and simply use the $50,000 the owner holds on House # 1 to set off against the contractor for damages caused to the owner by the contractor's abandonment of the project at House #2. The concern raised in the Report regarding unsubstantiated set off claims that linger for lengthy periods of time has been addressed by the recommendations regarding adjudication. Adjudication will ensure that set off claims are dealt with in a timely manner. There is therefore no need to restrict the existing set off rights that industry stakeholders have under the existing lien act and at common law.
12	55	**Recommendation 55: Suspension Right** A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator's determination (p 200).	To clarify, a right of suspension should also arise if granted under the contract. It is typical in construction contracts to allow a payee to suspend performance if the payer ceases to make payments, is insolvent or in bankruptcy, receivership, CCAA or other such proceedings. In many contracts payees also negotiate the right to suspend work if the payer breaches the contractual payment term by a fixed number of days. Consistent with the freedom of contract underlying the recommendations (and explicit in # 51), the legislation should

			preserve parties' rights to provide for suspension rights by contract. If parties choose not to provide for suspension rights in their contract, the legislation should provide a default provision (as with # 51) providing for suspension rights immediately upon insolvency, receivership, bankruptcy, etc.
13	56	**Recommendation 56: Proof of Financing:** We do not recommend that financial disclosure be included in Ontario's prompt payment regime; provided that the Act should require disclosure to all subcontractors that they are bidding on a project with a milestone based payment mechanism (p 201).	We request that further consideration be given to requiring owners to provide evidence that sufficient financing is available to complete a project. The OGCA is aware of many examples in both the public and private sectors of delayed payments and sometimes failed projects that could have been identified in advance with access to reasonable financial disclosure.
14	57-78	**Recommendation #57 - 78: Adjudication General Comments** The parties should have two (2) Business Days after delivery of the Notice of Adjudication to agree on an adjudicator, failing which either party would request that the Adjudicator Nominating Authority appoint an adjudicator within five (5) Business Days (p 235).	We have a number of general comments in regards to adjudication. It is difficult to be specific in the absence of details about the structure and mechanics of an adjudication system. 1. We are concerned that the timelines that are set out in the recommendations will lead to adjudication by ambush, where a party that initiates an adjudication will have the ability to prepare its materials for weeks and/or months, but the respondent will only be given a short period to respond to a complex claim. This result would be unjust and is a concern/problem in jurisdictions that have a similar regime (i.e. the UK). A potential mitigant would be to permit an extension of the timelines for an adjudication to reflect the complexity of the issues being addressed. For example, the UK Act's timelines seem appropriate for a simple case of nonpayment where the payer has not provided notice of a setoff and there is no dispute that the funds are due and owing. Conversely, where the nature of

the dispute is that the payee asserts it is entitled to a change order and extra payments for the impact costs of changes purportedly caused by the payer, the payee may take several months to prepare a complex schedule and cost analysis supporting its position, to which the payer would have no practical way of responding within the proposed timelines.

2. The Report does not address many of the details that will need to be incorporated into the new act as they related to the interplay with the current Ontario lien regime. For example:
    a. What happens to the lien rights/obligations of the parties to an adjudication?
    b. Do a parties lien rights disappear if they lose?
    c. Who is responsible for vacating/discharging a lien after an adjudication award?
    d. The lien remedy is on its face meant to be a summary procedure, therefore, when will the lien proceeding continue after the adjudication? (if not until the end of the project, how does this achieve the summary nature of a lien proceeding?)

    We believe that the combination of an adjudication system and a lien system together is simply too complex to efficiently serve Ontario. We suggest that a party to a dispute be required to elect to pursue either a lien action or adjudication and that its action to pursue one should foreclose its option to pursue the other; should a party to a dispute elect to file a lien, they could not also pursue adjudication. The counter party could still choose to pursue adjudication at their option. If adjudication decisions prove to be as conclusive in Ontario as the experience has been in the

			UK, the risk of foregoing a lien when adjudication is pursued should be relatively minor compared to the cost to the industry of administering both systems simultaneously over many disputes.
15	60 61	**Recommendation 60: Parties to Adjudication** Any party to a construction contract or subcontract should be given the right to adjudicate disputes arising under that contract or subcontract (p 232). **Recommendation 61. Back to Back Adjudication:** Back-to-back adjudications should be permitted at the owner-general contractor and general contractor-subcontractor levels (p 232).	Back to back adjudications should be mandatory all the way down the construction pyramid, and not limited to the owner, general contractor and first tier subcontractor. In particular, insurance companies and bonding companies should be subject to the adjudication regime either directly between parties or in a back to back configuration.
16	73	**Recommendation #73: Adjudicator Fees** In terms of the amount of the adjudicator's fees, the parties should be free to agree on the fees of the adjudicator and if they cannot agree, the ANA should determine the fees of the adjudicator. The general rule should be that the fees of the adjudicator will be apportioned equally (p 241).	In the UK adjudicators are quantity surveyors. The Report has recommended that any professional from a self-regulated body (e.g. professional engineers, lawyers, etc.) may act as an adjudicator. Given that the Report discusses the significant increases in legal fees over the last thirty years, we are concerned that adjudication in Ontario may end up being extremely expensive. We therefore propose that fees be capped and index linked.
17	76	**Recommendation 76: Recourse to Courts** We recommend that the decision of an adjudicator should be binding on the parties and they should comply with the decision until either: a) the dispute is finally determined by legal proceedings (including lien proceedings) or arbitration (if provided for under the contract or the parties agree to arbitrate) ; Or b) by agreement by the parties that the decision of the adjudicator is finally binding (p 243).	Adjudication decision should not be permitted to be entered in to evidence in a subsequent litigation or arbitration. While we are supportive of the "rough justice" of adjudication as a means to cause funds to flow in a timely manner, the right of parties to due process should not be compromised by an adjudication decision. Consideration should also be given to considering arbitration decisions as rule 49 settlement offers. That is, the judge or arbitrator should be able to consider the adjudication decision

		after the trial or arbitration decision has been rendered, on the narrow issue of cost awards. If an adjudicator concludes that $100k is the appropriate measure of damages to a payee but the payee still commences legal proceedings seeking $10M and the judge finds that the appropriate amount of damages is $100k, the payee in that case should be required to pay a greater portion of the payer's legal fees.