



Ontario
Home Builders'
Association



November 30, 2016

Honourable Yasir Naqvi
Ontario Attorney General and Minister of Justice
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Honourable Yasir Naqvi,

Thank you for the opportunity to meet and present our initial response to the Expert Review consultation report: "Striking the Balance: Expert Review of Ontario's Construction Lien Act". At our meeting we discussed four thematic recommendations in the report which, we believe, did not fully consider the on-the-ground realities of the payment process in residential construction.

This letter expands on the points made in our submission. Based on our analysis of the recommendations we believe a path forward for your Ministry would be striking a residential specific committee to address the payment realities that exist in our sector and establish specific residential sector legislation and regulations that would accomplish the three objectives in the review: promptness of payment, efficiency of dispute resolution, and modernization of the Act.

As we explained in our meeting, residential construction sector contracts are fundamentally different from those in other construction sectors. The end user is a homeowner who expects possession of their home or condo based on the dates in the purchase of sale agreement and the qualities assured under the legislative requirements of the *Ontario New Home Warranties Plan Act*. Home purchasers create a set of obligations and considerations that do not exist for other types of construction. Fundamentally, we believe the current system with the present contractual obligations on all parties in construction has provided payment stability in residential construction. As in the United States there is often special consideration for private sector contracts and in other jurisdictions there is specific consideration for residential contracts. We believe that similar consideration should be provided to residential construction in Ontario.

The proposed model is in direct conflict with collective agreements in residential construction across the Province, where such agreements govern billions of dollars in wages and thousands of workers. The proposed model is a significant departure from freedom to contract. Although the model allows for freedom to contract when the invoice can be delivered, once it is delivered, it establishes payments terms that are non-negotiable and cannot be altered. Those contract terms contradict collective agreements across the province. Before the government proceeds, further analysis and study needs to be undertaken by government.



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Lot by lot liens (Recommendation 20)

The Ministry needs to be mindful that *Section 20(2)* of the current Lien Act was added *after* the first iteration of the 1983 Act. The addition of this clause was made in order to address the concern that many homeowners were not able to take possession of their homes because of outstanding liens disputes on work performed in other parts of the subdivision. OHBA and RESCON are opposed to the recommendation that would eliminate *Section 20(2)* of the Construction Lien Act that would mandate all liens within a subdivision take the form of a general lien. We believe that this will negatively impact home buyers' ability to take possession of their homes because of contract disputes that may have nothing to do with work related to their specific home. Adding Section 20(2) also perfectly highlights why residential construction is different and requires our own legislation and regulations.

For the vast majority of contracts in a residential subdivision a subcontractor's work must be defined, recorded and invoiced on a lot-by-lot basis (see appendix for Collective Agreements). This model of invoicing is consistent with the ability for different subcontractors performing work on different homes on a subdivision to register a lien. Therefore it is consistent with administrative accounting and invoicing practices of the trades in residential construction.

Some of the stakeholders have responded that the current language makes it "far too difficult and expensive for lien claimants to register a lien." We do not view lot-by-lot liens as administratively complicated but as a necessary step for a subcontractor to go through should they want to exercise their lien rights without impacting or delaying non-liened homes and home owners.

The current system protects innocent home buyers from liens that would delay them from moving into their new homes. In this way home owners are not casualties in any contractual dispute. Moving to a general lien would mean that homes in a subdivision where work was completed and not paid would block other home owners who have no work associated to the lien from taking possession. There is an important policy rationale in maintaining this provision as it is in the best interests of the thousands of new home purchasers across Ontario.

Construction Lien Act and the New Adjudication Model Recommendations 57-78

The adjudication model outlined is an ambitious attempt to speed up the payment process in construction by introducing mandatory adjudication after an invoice has been submitted. However, this model is untested in the Canadian context. If implemented incorrectly, it may actually lead to a more costly method of resolving disputes as it creates a brand new avenue for litigation between parties. The owner, general contractor, and subcontractors will be obliged to incur significant new costs which will impact all parties and raise the cost of housing.

The Expert Reviewers emphasize the benefits of the 'British Model' which relies on the adjudication model *instead of* a Construction Lien Model. However, what the Reviewers have recommended maintains ***both a Lien structure on top of a new adjudication model***. It is notable that no jurisdiction in either the United States or Canada has an adjudication model like the British model. ***Internationally where adjudication does exist there are no Lien rights***. This is a significant departure from current practices which requires a deeper analysis of the impact on different construction sectors.



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Promptness of Payment (Recommendations 47-56)

Expert Recommendation - 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.

Comment:

This recommendation, coupled with the payment period provision, creates a substantial onus on the owner to pay within certain timelines but does not create any timelines for the certification for payment. In other words, the delivery of the invoice is what triggers the clock, not verification that the work has been completed satisfactorily. If a payment certifier cannot be arranged within the 28 day or 7 day time period, the owner may be forced to pay without knowing if the work was done.

Expert Recommendation 50:

- **As between owner and general contractor a 28 day payment period be applied that is triggered by the submission of a proper invoice.**
- **As between general contractor and subcontractor, a further 7 days from receipt of payment from the owner would be required, and so on down the contractual chain.**

Comment:

This recommendation is imposing a pay-when-paid model on the payment process. This is not the residential model of invoicing and payment and is in conflict with numerous residential collective agreements. Under the proposed model the General Contractor has enormous power relative to the owner and the sub-contractors working for the GC. Disputes between owner and GC would only delay the sub-contractors from being paid in a timely fashion. At this time the GC has no legislated requirement to 'pay when paid', which we believe ultimately would cause significant delays for subcontractors compared to the current system.

In addition the 35-day time period proposed only begins once the GC has forwarded the invoice of the sub-contractor to the owner. The recommendation creates no conditions on when the General Contractor would be obligated to send the invoice to the owner. Only when the invoice is submitted to the owner would the 35-day clock begin to start. Therefore, while this model suggests timely payment, it relies on the efficiency of the GC to begin the process.



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Preservation and Perfection Periods (Recommendation 9)

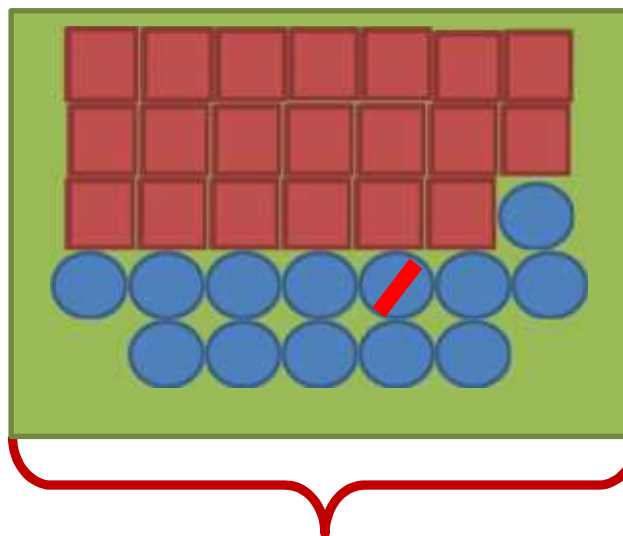
Under the present model, the builder is required to deliver the home pursuant to the purchase and sale agreement timelines protected by the Ontario New Home Warranties Plan Act. The new home purchaser rightfully expects that unnecessary delays to occupancy are not acceptable. If a contractor or subcontractor has a lien on a subdivision, it could compromise the ability of the builder to hand over the keys to a non-liened new house. Under the Construction Lien Act, if a home buyer's deposit exceeds 30 percent and she has registered a mortgage after construction began, any lien claim made after closing will have priority over that mortgage.




Therefore, both the changes in the preservation and perfection periods along with the changes to "lot-by-lot liens" could significantly impact home buyers' ability to finance their new house.

The recommendation to lengthen the lienability period to 60 calendar days and the change in the perfection period to 90 days has the potential to significantly lengthen disputes and may negatively impact the date when the home owner can take possession of the house or condominium. Therefore the total perfection period will now be 150 days (90 calendar days following the last date upon which the lien could have been preserved).

The change to preservation and perfection periods could both increase the number of liens as well as increasing the dispute period in which the new home purchaser can obtain possession until all liens have been vacated.

RESIDENTIAL CONSTRUCTION PROJECT



-  = Homes Completed
-  = Homes under construction
-  = House where trade worked

All homes are impacted in a subdivision because of a payment dispute by a single trade related to work performed in a single house.

Under the proposed model where lot-by-lot liens are not allowed, a single lien by one trade for work performed on a single house within a subdivision means that the home builder will not be able to transfer ownership of finished homes.



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Unionized Residential Models

The attached Charts, 1 and 2 illustrate the differences between how the payment process currently works on a low-rise residential construction project and how it would work under the proposed model without factoring in the Union Collective Agreements.

Chart 1 outlines the current model of payment in residential construction that governs the vast majority of collective agreements in Ontario. Under this model, there is an expedited payment structure to the subcontractors as well as a speedy method of verification that the work has been completed.

Chart 2 is a graphic representation of the proposed model by the Expert Review.

Generally

OHBA and RESCON appreciate the opportunity to be consulted again on recommended changes to the Construction Lien Act. Residential construction is fundamentally a different payment ecosystem compared to ICI construction, with individual home purchasers as the end users, creating a completely different set of warrantees, pressures and expectations for home builders. Our sector is also notably different in that it is small-business dominated with a large amount of economic activity. Ontario builds on average over 60,000 units annually – including over 20,000 single-detached units and 40,000 multiple housing units. We believe that the residential new home building sector each year builds more than the ICI, P3 and IO sectors *combined*.

The changes proposed fundamentally change the payment structure in construction. We need separate legislation and regulations specific to residential construction. Alternatively, as we discussed at our meeting, there has to be a carve out for our sector, as occurs in the United States.

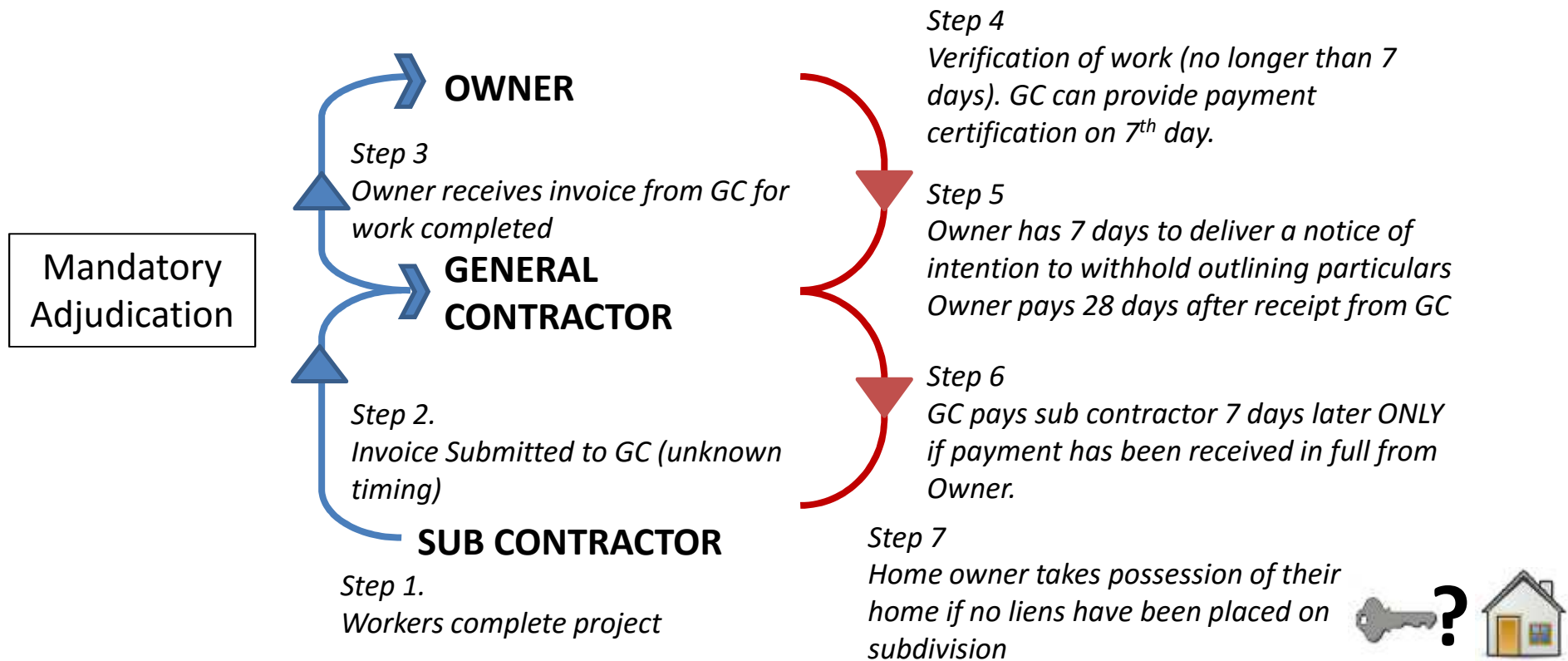
Please contact Stephen Hamilton (shamilton@ohba.ca) for additional follow-up.

Yours respectfully,

Joe Vaccaro
Chief Executive Officer, OHBA

Richard Lyall
President, RESCON

PROPOSED MODEL

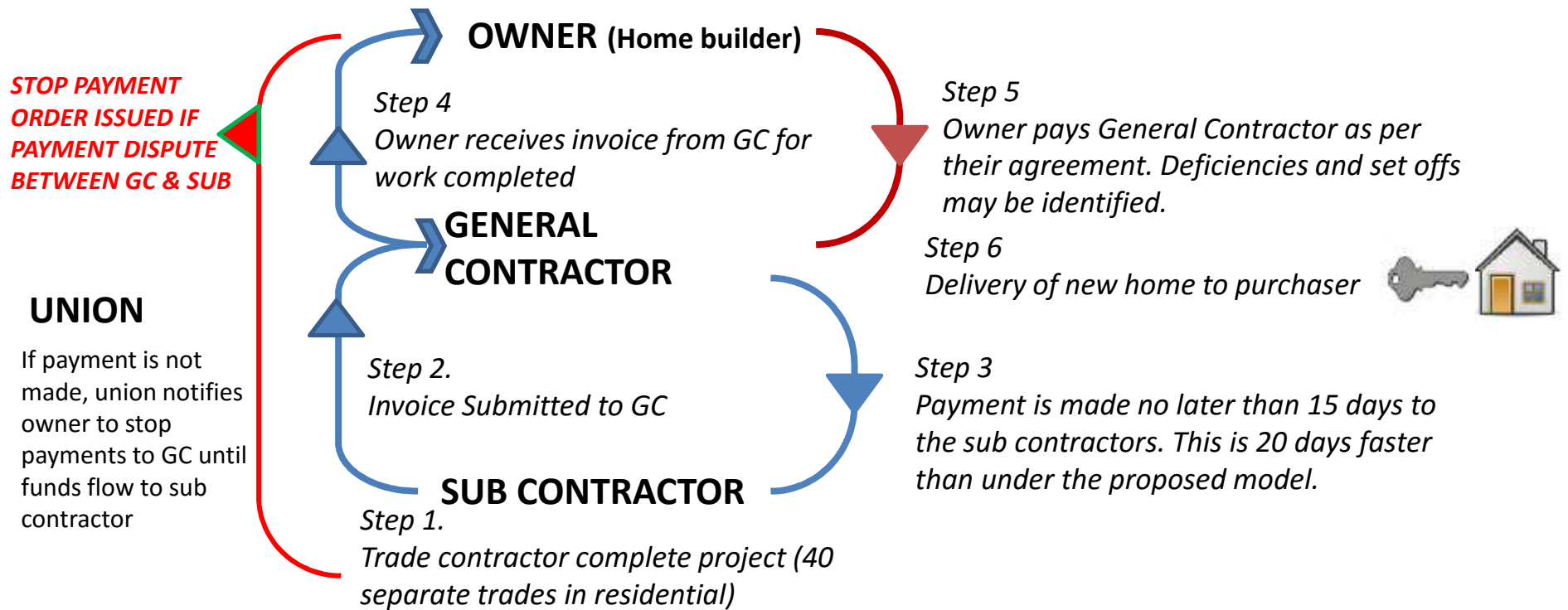


PROBLEMS IDENTIFIED

1. Unknown time elapsed from Steps 1-3.
2. In Step 4 the invoice triggers the timelines, *not the certification of work*. Certification could be delivered at the “11th hour” on the 7th day, making it difficult for owner to act.
3. GC is highly leveraging the sub contractor based on their own timelines as they control Step 3 in process.
4. Sub relies on owner to pay the GC.
5. Large GCs can leverage non-payment from owners to drag out payment to subs.
6. Model incorrectly implies invoice from sub to GC is “flowed-through” automatically with particulars to the owner to verify accuracy.
7. Places significant onus on owner (not GC) to verify work is complete.
8. New costs introduced through additional litigation with mandatory adjudication.

CURRENT RESIDENTIAL MODEL

As outlined under Articles 5 and 6, Schedule B from the Collective Agreement between the Residential Framing Contractors Association and LiUNA Local 183



BENEFITS AND REALITIES OF PRESENT SYSTEM

1. Speed of payment to sub contractor/trades
2. Speed of work completion verification. This model is 20 days faster for payment from the GC to the sub compared to the proposed model.
3. Pressure on GC to pay the sub contractors as per contract agreement. The terms of the collective agreements and the union notification that requires stop payment from the owner to General Contractor creates pressure for speedy payment to sub-contractor.
4. Verification of work completed and corrections for deficient work are up to the general contractor to determine.
5. Owner is paying GC usually with a management fee. Owner is not the one certifying work completion. The proposed model would have the owner certifying work, even though they currently are not administratively capable of doing this.
6. Benefits are being registered on a lot-by-lot basis, since each homeowner is buying just the one lot.

RESIDENTIAL FRAMING CONTRACTORS ASSOCIATION & LIUNA LOCAL 183 2016-2019 COLLECTIVE AGREEMENT

ARTICLE 5 – PAYMENT OF WAGES

5.01 When house framing or rough-in assigned to a pieceworker is completed the pieceworker will issue a standard Union Piecework Carpentry Sector Invoice (“the invoice”) to the Employer. The Employer will inspect the work assigned within five (5) working days of receipt of the invoice and issue the pieceworker either a completion slip or a deficiency list. If the pieceworker is issued a deficiency list, the pieceworker will complete all deficiencies listed within two (2) days provided that the pieceworker still works on the same jobsite where he has to complete deficiencies. If the pieceworker has relocated to another jobsite he will have three (3) days to complete deficiencies.

The invoice for all completed work, will include the names and Social Insurance Number or Union Membership Number of all workers engaged by the pieceworker. The Employer must make payment by cash or cheque to the pieceworker not later than fifteen (15) days from the issuance of the invoice. In the event the pieceworker fails to provide the invoice to the Employer outlining the names and Social Insurance Numbers or Union Membership Numbers of the workers engaged in the piecework operation, the Employer may withhold all further payments until the process outlined above has been complied with. The pieceworker will build the structure in accordance with the specifications indicated by either the blueprints or as indicated in writing by the Employer or a representative thereof.

5.02 Once the house has been inspected, the pieceworker will not be required to re-enter the house to repair any damages caused by vandalism or other damage that he is not responsible for, the pieceworker will only be required to re-enter the house to correct any errors, omissions or faults in workmanship before the structural frame of the house is covered with any materials.

ARTICLE 6 – PAYMENT

6.01 In the event that the Employer fails to pay to a person performing work under this Collective Agreement, including a dependent and independent pieceworker, the full piecework or other rates and/or fails to make payments and contributions required under this Collective Agreement on behalf of the persons, the Employer shall pay to the Union a sum equivalent to the amount of payments in default, including piecework or other rates and other contributions, and in addition, the Employer shall pay to the Union all reasonable collection costs including legal fees, accountants’ fees, arbitrators’ fees and all other expenses associated with the cost of collecting the amounts owing.

6.02 When an Employer makes payments required by the Collective Agreement to each of the pieceworkers, he shall require the independent pieceworker to submit the standard form invoice provided by Local 183 setting forth the following information:

- (a) A full description of the location of the houses worked on by such pieceworkers;
- (b) The total square footage of the houses;

- (c) The basis for the calculation of the payments to such pieceworkers based on the piecework rates required by the Collective Agreement and on the square footage of the houses worked at;
- (d) The total amount of extras required by the Collective Agreement to be paid to such pieceworkers;
- (e) The basis for the calculation of the contributions required by the Collective Agreement to be paid for such pieceworkers;
- (f) The basis for the calculation of the G.S.T. paid by the Employer.

6.03 The Employer shall send a copy of the standard form invoice required by Article 6.02 of this Schedule to the Union together with the Employer Contribution Report by the fifteenth (15th) day of the month following the month in which the payments have been made.