

Amendments to the Four Regulations Under the *Construction Act* (the “Act”)

The Ontario Society of Professional Engineers (OSPE) is pleased to present the following submission concerning the proposed changes to the Regulations Under the *Act*, which were released on February 20, 2019.

OSPE is the voice of the engineering profession in Ontario. As an organization, we advance the professional and economic interests of our members, many of whom work in the construction industry. We are pleased to provide our comments to the proposed changes.

We note that many of the proposed changes are administrative in nature and are required to ensure the consistency between the *Act* and Regulations, and we have not commented on the same. In the foregoing, we comment only on those proposed changes in which our comments could be of assistance.

Ontario Regulation 304/18

We have highlighted our below suggestions in **bold** font. We believe these additions clarify the intent of section 7.

Non-payment of holdback

7. (1) An owner shall publish a notice of non-payment of a holdback under subsection 27.1 (1) of the Act (Form 6) in a construction trade newspaper.

(2) For the purposes of subsection 27.1 (1) of the Act, the owner shall, no later than three days after publication of the notice of non-payment, notify the contractor of its publication.

(3) If the owner provides notice to the contractor in accordance with subsection (2), then notice for the purposes of subsection 27.1 (2) of the Act shall be provided by **the contractor to a subcontractor** no later than three days after receipt of the notice from the owner, and shall be accompanied by a copy of the notice from the owner.

(4) If the contractor provides notice to a subcontractor in accordance with subsection (3), then notice for the purposes of subsection 27.1 (3) of the Act shall be provided **by the subcontractor to (a OR another) subcontractor** no later than three days after receipt of the notice from the contractor, and shall be accompanied by a copy of the notice from the contractor.

(5) Subsection (4) applies with necessary modifications if a subcontractor provides notice to ~~another~~**(subsequent OR further)** subcontractor in accordance with that subsection.

(6) Notice to a contractor or subcontractor under section 27.1 of the Act shall be provided in writing, and may be provided in electronic or paper format.

Ontario Regulation 306/18

If section 20 is being removed because either the *Act* or Regulation already cover this power, then we are amenable with this proposed change. However, if there is no other section in the *Act* or Regulations that gives an Adjudicator the power to order the disclosure of documents, then the revoking of this section should be reconsidered.

In our experience, during the litigation or adjudication process, there is often one or more of the parties (usually an owner or general contractor) who has greater access to relevant documents as compared to those parties that are lower on the construction pyramid (i.e., subcontractor). For example, an engineer who acts as a consultant on a project is generally contracted with the owner and has a working relationship with the general contractor. Although the subcontractor may have the engineer's drawings, the subcontractor will not have access to the engineer or the discussions, reports, or documentations pertaining to an issue on site, and this creates an uneven playing field if key documents are not produced regarding an issue being adjudicated. In regular court actions, the parties have an obligation to produce all relevant documents to the matter in dispute, which includes any and all prejudicial documents. However, this same principle does not exist in the adjudication process. However, section 20 gives the Adjudicator the power to consider the situation and level the playing field by ordering the disclosure of relevant documents. The Adjudicator must be the gatekeeper to decide if a document is relevant or not to the issue in dispute and render the appropriate direction for disclosure.

Additional Questions and Proposals

1. Provisions of Adjudication Documents

Option 1

Due to the implications of subsection 34(10) of the *Act*, on the expiry of a construction lien, we welcome the addition of a provision requiring the adjudicator to provide written confirmation of the date when documents were received pursuant to section 13.11 of the *Act*.

Option 2

In accordance with section 13.12 (1) of the *Act*, the Adjudicator has the power to give directions for the manner of service. However, at the time of the initial notice and documents being served, the Adjudicator may not have had an opportunity to set the service rules. As such, it is best practice that the service rules in the *Rules of Civil Procedure* apply here, which is the case for actions involving construction liens pursuant to the *Construction Act*.

2. Default Deadline for Response

Option 1 is preferred. The Adjudicator should have the power to order or amend the deadline to serve documents, but a default position should be provided for clarity and to ensure that the adjudication process is timely. The initiating party requests an adjudication and when the adjudicator is appointed, the initiating party has an additional five days to serve its documents. As such, it is reasonable and fair that the responding party have at least seven (7) days to review the initiating party's documents, consider its position, and serve its documents.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Hack', with a large, stylized initial 'J'.

Jonathan Hack, P.Eng
President and Chair
Ontario Society of Professional Engineers

A handwritten signature in black ink, reading 'Sandro Perruzza', in a cursive style.

Sandro Perruzza
Chief Executive Officer
Ontario Society of Professional Engineers