

The Construction Act “2.0”: What’s just around the corner?



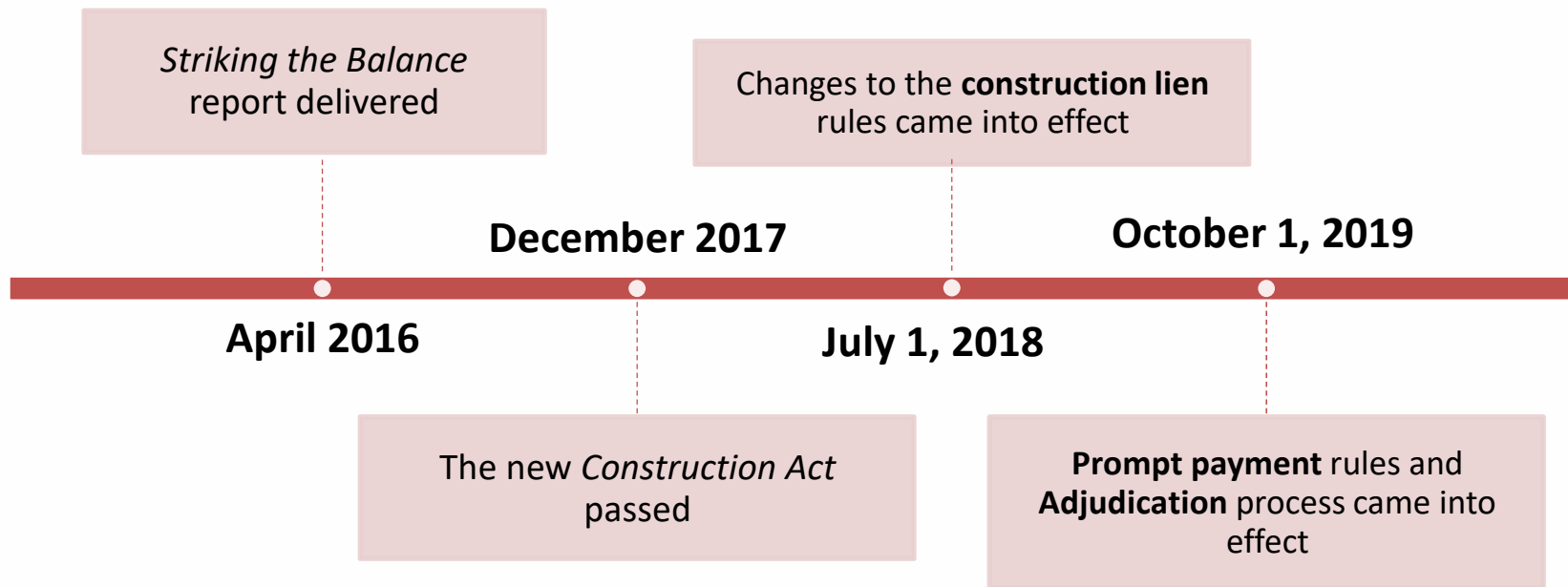
Glenn Ackerley

**Council of Ontario
Construction Associations**

***Hosted by Grand Valley
Construction Association
February 24, 2025***

WeirFoulds^{LLP}

Timeline of Introduction of *Construction Act 1.0*





Time for a Review

Recommendation

100. We recommend that an independent review of the *Act* to be conducted within 5 years of the enactment of the recommendations of this Report, and every 7 years thereafter (keeping in mind that the pilot project for project bank accounts will be subject to a much shorter review period, as described in Chapter 7 – Construction Trusts).

Striking the Balance: Expert Review of Ontario's Construction Lien Act

Bruce Reynolds, Sharon Vogel, April 2016

Proposed Amendments

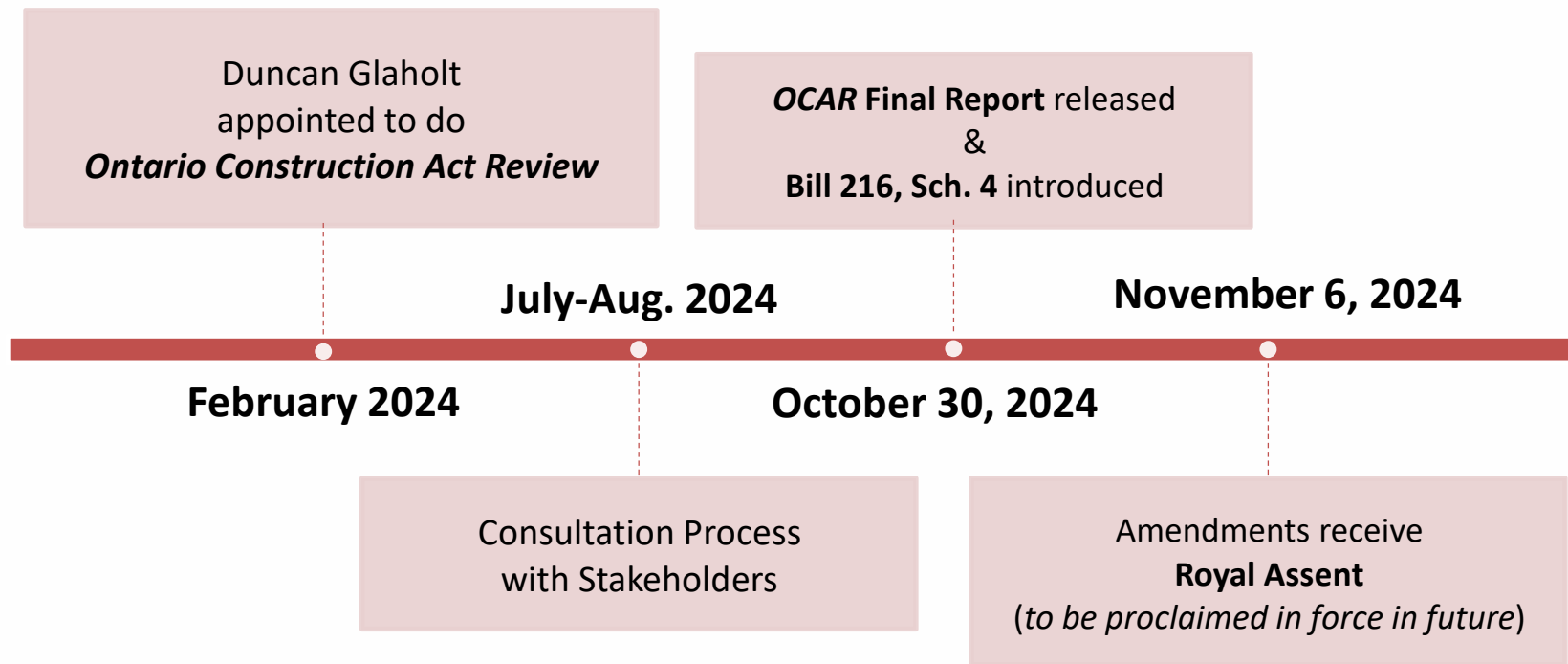
- construction lawyers and industry identified issues with the *Construction Act* as the new provisions were being used
- Construction and Design Alliance of Ontario (CDAO) and the Council of Ontario Construction Associations (COCA) jointly asked GWA to prepare a report and list of recommendations for improvement:
 - fleshing out **procedures** and **processes** to better implement initial recommendations from *Striking the Balance* in the Act and Regulations
 - addressing *gaps, inconsistencies, ambiguities* between and among sections
 - **generally, not new policies but fixes to existing policies**



Proposed Amendments

- Ministry of the Attorney General (“MAG”) received CDAO/COCA’s recommendations in **July of 2023**
 - 150-page report with ~85 recommendations for changes to the Act and Regulations
- Duncan Glaholt appointed by MAG in **February of 2024** to conduct *Ontario Construction Act Review* (“OCAR”) and advise MAG on changes

Timeline of *Construction Act “2.0”* Amendments





PART I – Lien Modernization



Original Key Changes (effective July 1, 2018):

- 45-day lien period extended to 60-day period
- new “termination of contract” provisions
- ***mandatory*** release of holdback (**but subject to notice of non-payment of HB**)
- ***optional*** annual/phased release of holdback
- provisions added for P3 projects
- mandatory 50% bonding on public projects over a certain “contract price”
- enhanced trust provisions

Definition of “Contract Price”

Original Change:

- ▶ Certain thresholds like mandatory bonding are determined by “contract price”

Problem:

- ▶ Definition of “contract price” doesn’t work for CM contracts, cost plus contracts, integrated project delivery contracts, *with no initial fixed price*

Definition of “Contract Price”

Recommendation (#1):

- ▶ Add new additional definition of “contract price” based on reasonable estimate of anticipated costs

Solution:

- ▶ Add new additional definition of “contract price” in the regulations (i.e. TBD)

Design Professionals and the Improvement

Original Wording (from Construction Lien Act)

- ▶ When the making of the *planned improvement* is *not commenced*, the supply of a design, plan, drawing or specification that *in itself enhances the value of the owner's interest in the land* is “the supply of services”

Problem:

- ▶ What are the legal rights under the *Act* (e.g. construction liens, prompt payment, holdback etc.) of anyone working during “pre-construction” before “commencement of the making of the improvement”?

Design Professionals and the Improvement

Recommendation (#2-4):

- ▶ Clarify wording with new concept of “pre-improvement services”

Solution:

- ▶ **New:** If an owner *retains holdback* prior to start of planned construction from designer, then design work is *presumed* to enhance value, and designer has lien rights, unless the owner proves otherwise

Multiple Improvements

Original Change (s.2(4)):

- ▶ multiple projects can now be carried out under one contract, which are “deemed” to be separate contracts

Problem:

- ▶ **Narrow applicability (“...for purposes of this section”) meant rules not clear around substantial performance, completion, holdback release, etc. for “multiple improvement contracts”, and subcontracts under them**

Multiple Improvements

Recommendations (#19,20):

- ▶ Amend to refer to *all* contract-related provisions throughout Act
- ▶ Allow right to information about “multiple improvement” contracts

Solutions:

- ▶ s.2(4) moved to s.1(5) so *whole Act now applies to multiple improvement contracts*
- ▶ **New right to information about multiple improvement contracts added**

Extension of Lien Periods for Adjudication

Original Change (s.34(10)):

- ▶ Allowed extension of lien period for up to 45 days to allow for adjudication before rights to lien expire

Problem:

- ▶ Created uncertainty around when holdback could be released, including after substantial performance certificate is published

Extension of Lien Periods for Adjudication

Recommendations (#7-9):

- ▶ Restrict section to subcontracts only or delete entirely

Solutions:

- ▶ **Section 34(10) is repealed**

Notice of Termination

Original Change (s.31(6)):

- ▶ New “Notice of Termination” (Form 8) must be published when contract is terminated
- ▶ Date of termination specified in notice starts expiry of lien period

Problem:

- ▶ **Act did not say *when* notice is to be published**

Notice of Termination

Recommendation (#10):

- ▶ Specify time period to publish notice after termination of contract (e.g. 14 days)

Solution:

- ▶ Notice of Termination must be published 7 days after termination of contract
- ▶ Lien periods for everyone start on date of publication of notice

Mandatory Release of Holdback

Original Change (ss.26 and 27):

- ▶ Holdback *shall* (not “may”) be paid when lien rights expire downstream

Problems:

- ▶ Act did not say *when* holdback payment is to be made following 60-day lien expiry
- ▶ Act did not say *how* holdback is to be paid (i.e. from owner to contractor to subs, etc.)

Mandatory Release of Holdback

Recommendation (#23):

- ▶ Create payment cascade for release of holdback monies like prompt payment (e.g. 14/7/7 days...)

Solution:

- ▶ Payments of holdback must be made by owner to contractor within 14 days after lien expiry (*or liens cleared*)
- ▶ Payments must be made by contractor to sub-contractors within 14 days after receipt from owner... (and so on)

Annual and Phased Release of Holdback

Original Changes (ss.26.1 and 26.2):

- ▶ Holdback could be released on an annual or phased basis *if owner and contractor agree in contract*

Problems:

- ▶ Act did not specify mechanism for notice of pending release
- ▶ Act did not allow subcontractors the right to information about contract terms

Annual and Phased Release of Holdback

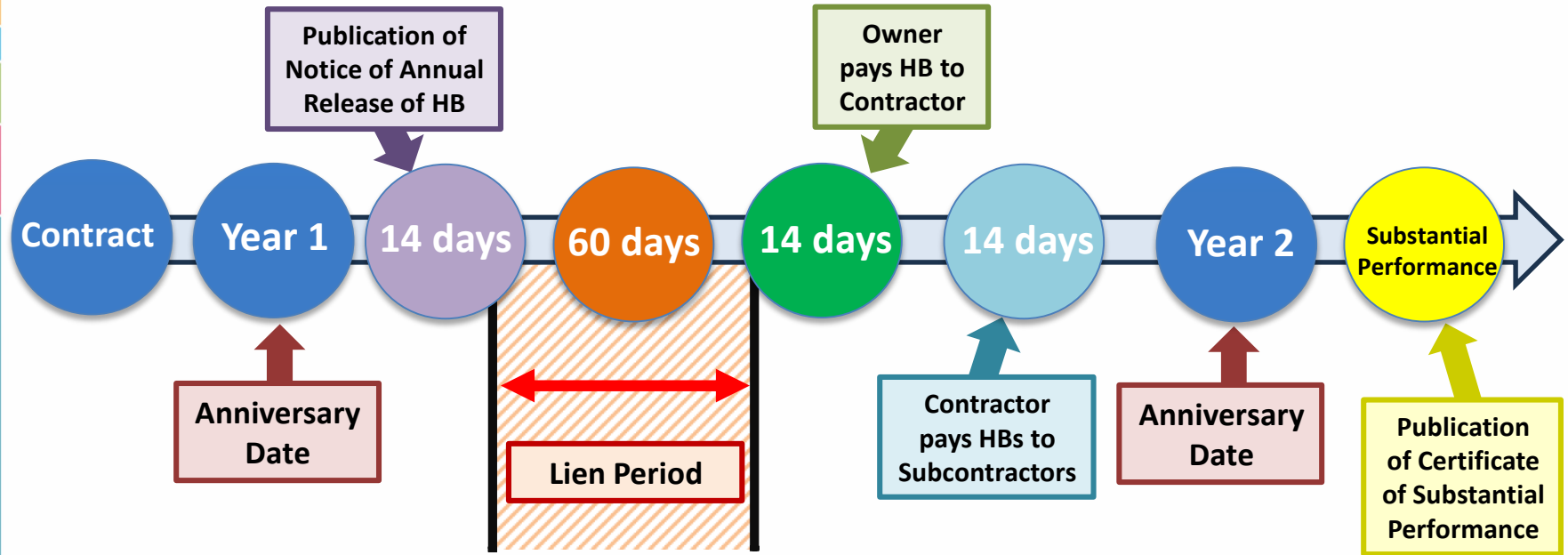
Recommendations (#23,37):

- ▶ Mandatory annual release on contracts of 2+ years
- ▶ Notice of intention to release HB should be published

Solution:

- ▶ ***Mandatory annual release of holdback on all contracts based on anniversary date of contract (i.e. no more phased release allowed)***
- ▶ ***Publication of notice of annual release required within 14 days of anniversary date***

Annual Release of Holdback



Notice of Non-Payment of Holdback

Original Change (s.27.1):

- ▶ Owner could avoid paying holdback by publishing a notice of non-payment of holdback (**Form 6**)

Problems:

- ▶ Owner did not have to give reasons for non-payment on Form 6
- ▶ Ability to avoid payment defeated mandatory holdback release

Notice of Non-Payment of Holdback

Recommendations (#24-26):

- ▶ Require reasons be given for non-payment
- ▶ Clarify requirements to commence adjudication

Solution:

- ▶ **Section 27.1 is repealed**

Construction Trusts

Original Wording (s.7(2)):

- ▶ Monies payable under a “payment certificate” are deemed to be trust monies in the Owner’s hands

Problem:

- ▶ What is the status of monies payable under the new “prompt payment regime”?

Construction Trusts

Recommendations (#45,46):

- ▶ Monies payable on a proper invoice should be considered to be trust monies

Solution:

- ▶ Trust claims will be included in the scope of adjudication in the Regulations
- ▶ Holdback monies are now expressly trust monies



PART II – Prompt Payment



Key Changes (October 1, 2019):

- Owner must pay Contractor within **28 days** after receiving “proper invoice” from Contractor
- Owner has **14 days** to give “notice of non-payment” (**Form 1.1**) for any disputed amount
- default invoicing period is *monthly*; could be milestone payments
- Contractor must pay Subcontractors within **7 days** of receipt of payment from the Owner and so on...down the subcontracting chain
- if payment not received, Contractor must either still pay Subcontractors or undertake to adjudicate with Owner

The Proper Invoice

“**proper invoice**” means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor’s name and address.
2. The date of the proper invoice and **the period during which the services or materials were supplied.**
3. **Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.**
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. **The name, title, telephone number and mailing address of the person to whom payment is to be sent.**
7. Any other information that may be prescribed.

Proper Invoices

Original Change (s.6.1(1)):

- ▶ Requirements of what constitutes a “proper invoice” is very detailed and specific

Problem:

- ▶ **Contractors may not submit “compliant” invoices which would fail to trigger prompt payment**

Proper Invoices

Recommendations (#48-50):

- ▶ The requirements for a “proper invoice” should be clarified to encourage greater compliance

Solution:

- ▶ **“Proper invoice” requirements have been modified**

The Proper Invoice

“proper invoice”...

...

2. The date of the invoice and the period, **milestone or other contractual payment entitlement** to which the invoice relates.

3. Information identifying **the contract** or other authorization under which the services or materials were supplied, **such as a contract number, contract line item number or purchase order number.**

...

6. The name, title, mailing address and telephone number of the person to whom payment is to be sent **or, if payment is to be sent to an office or department, its name, mailing address and telephone number.**

6.1 Any other information that is necessary for the proper functioning of the owner's accounts payable system that the owner reasonably requests.

...

“Improper” Invoices

Original Change (s.6.1(1)):

- ▶ A “proper invoice” must be paid by the Owner in 28 days under prompt payment

Problem:

- ▶ The Act had no requirement for the Owner to advise the Contractor if the invoice was “improper” or non-compliant with the Act

“Improper” Invoices

Recommendation (#48-50):

- ▶ Owners should object to any improper invoice within a short timeframe (e.g. 3 days) or the invoice should be considered to be proper

Solution:

- ▶ Owners must object in writing within 7 days of receipt; or the invoice is *deemed* to be *proper*



PART III – Adjudication



Key Changes (October 1, 2019):

- new dispute process called “adjudication” to settle in-project disputes over payment, value of work, disputed change orders, holdback release
- disputes decided by adjudicators in 30 days
- adjudicators governed by ODACC in Ontario
- decisions (or “determinations”) are “interim binding” until changed by court or arbitration
- \$\$ payable in 10 days; enforceable like court judgment; can stop work if not paid

Scope of Adjudication

Original Change (s.13.5(1)):

- ▶ Parties can refer six described categories of disputes to adjudication (plus anything parties agree to)

Problem:

- ▶ The categories (or “matters”) were unclear

Scope of Adjudication

Recommendations (#58,59):

- ▶ Matters which can be adjudicated should be clearer, including whether more than one dispute of the same kind can be joined together (e.g. change orders)

Solution:

- ▶ Scope of adjudication removed from Act and placed in Regulation (TBD); intention is *broad jurisdiction*

Adjudication and Contract Completion

Original Change (s.13.5(3)):

- ▶ Adjudication is not available to deal with disputes after contract is “complete” (i.e. <\$5,000 left to perform)

Problems:

- ▶ Most disputes about *changes orders* and *holdback release* occur at the end of the contract
- ▶ Act was *silent* about timing following *termination* or *abandonment* of contract

Adjudication and Contract Completion

Recommendations (#60,62):

- ▶ Adjudication should be available for contract disputes up to 90 days after *completion, termination and abandonment*

Solution:

- ▶ Adjudication is available for 90 days after completion, termination or abandonment of contract

Adjudication and Subcontract Completion

Original Change (s.13.5(3)):

- ▶ Adjudication is not available to deal with disputes after *subcontract* is “complete”

Problem:

- ▶ There is no definition of what “subcontract completion” means

Adjudication and Subcontract Completion

Recommendation (#61):

- ▶ Adjudication should be available for disputes up to 90 days after *subcontract* is *certified complete*.

Solution:

- ▶ Adjudication of subcontract disputes is available for 90 days from *the earliest* of (1) date of last supply, (2) date subcontract certified complete, or (3) completion, termination or abandonment of *prime contract*

Challenging Jurisdiction

Original Change (O.Reg. 306/18):

- ▶ Adjudicator can choose to resign if problem with jurisdiction

Problem:

- ▶ The Act did not have a formal process of challenging whether adjudication is proper

Challenging Jurisdiction

Recommendations (#63):

- ▶ Act should include right to challenge powers of adjudicator to carry out adjudication

Solution:

- ▶ New provision allows a party to challenge the adjudicator's jurisdiction at the earliest opportunity

Other Changes

Solutions:

- ▶ Parties under separate contracts or subcontracts can join disputes with others on same “improvement”
- ▶ Parties can choose a “private adjudicator” rather than an ODACC registry adjudicator
- ▶ An adjudicator can correct errors in the determination after the fact

Other Changes

Solutions:

- ▶ Grounds for judicial review revised to exclude “contract is invalid or has ceased to exist” (#66,67)
- ▶ Costs for “frivolous and vexatious” conduct includes conduct during adjudication process (#70)



PART IV – Miscellaneous



Key Changes (July 1, 2018):

- 50% bonding required on public projects
- curative provisions give examples of permitted errors
- new written notice of lien form
- electronic publication of notices allowed
- transition rules

Curative Provision

Original Change (s.6):

- ▶ Section was modified to give examples of where a problem with a document like a claim for lien is not fatal but can be “cured”

Problem:

- ▶ The examples of errors regarding the owner's name in a lien form did not make sense

Curative Provision

Recommendation (#75):

- ▶ The wording of new s.6 should be corrected

Solution:

- ▶ Correction has been made to the reference of the placement of the owner's name

Written Notice of Lien

Original Change:

- ▶ A new form of Written Notice of Lien (Form 1) was introduced to standardize the notice

Problem:

- ▶ **Form 1 must be sent to recipient, even if a formal claim for lien form has been registered (or given) and is also sent to the recipient**

Written Notice of Lien

Recommendation (#76):

- ▶ A claim for lien should also be able to serve as written notice of lien to avoid unnecessary duplication of steps

Solution:

- ▶ **The Act now allows for either Form 1 or a claim for lien to serve as “written notice of lien”**

Transition Rules

Original Change (s.87.3):

- ▶ Application of new regimes turns on date of procurement/contract “*for the improvement*”

Problem:

- ▶ **Uncertainty around which contract determines applicable legal regime, but “first contract” *to do with* improvement is latest judicial interpretation (e.g. initial design contract)**

Transition Rules

Recommendation (#83):

- ▶ Ensure new rules apply in a much clearer way, i.e. without reaching back in time

Solutions:

- ▶ The changes apply *immediately* upon coming into force, for all new contracts and subcontracts
- ▶ Existing contracts are granted until the second anniversary date for holdback release changes

Next Steps

- Government posts draft Regulations/forms, to address (as per OCAR Final Report):
 - Allowing joining of *trust claims* with *lien claims* (#43)
 - Broadening *scope of adjudication*, including *adding trust claims*
 - Creating a database of *adjudication decisions* for reference (#69)
 - Restoring “*pre-lien action*” motions (#42)
 - Designation of three “approved” *construction trade newspapers* (#81,82)
 - Amend *bond forms* for alternatives and avoiding need to lien (#72,73)
- Changes to the Act and Regulations likely in force in the Spring of 2025 after provincial election (e.g. **June 1, 2025**)



Questions?

Thank You.

Glenn Ackerley, Practice Chair

WeirFoulds LLP

(416) 947-5008

gackerley@weirfoulds.com