Construction Lien Act Review Consultation Meeting Summary
Construction Lien Masters

December 2, 2015 (1:00 p.m. to 3:00 p.m.)

Attendees: Master Carol Albert, Master Calum McLeod, Master Charles Wiebe, Bruce Reynolds, Sharon Vogel, James Little

Sheryl Cornish, Counsel at the Ministry of the Attorney General, attended the meeting to record a summary.

For the introduction provided by the Review, please see document titled BLG Consultation Introduction.

1. General Comments from the Construction Lien Masters

The Masters have approached the Review from the perspective of the intersection of the Act with the court and court resources. They have no comments on the policy issues. They can offer insight where the court may be involved in applications or procedures that may require the court's assistance. This includes how things have or have not worked under the current Act and how it may be improved. They can also talk about resource issues, mainly in Ottawa and Toronto. For other areas of the province, they do not have information about how things are working.

The Review has heard from the Ontario Bar Association section committee established to comment on the Review ("OBA Section Committee") that people who practice in Toronto and Ottawa have access to the construction lien masters, but it much harder outside Toronto. The masters advised that the County and District Law President's Association is the industry group that deals with the regions outside Toronto.

2. Adjudication and Prompt Payment

The Review explained that two of the most prominent issues that have evolved throughout the Review are prompt payment and adjudication. Whereas prompt payment is not really a point of intersection with the court, the adjudication issue has an intersection because it is an alternative form of proceeding. There has been a lot of discussion around adjudication, and the Review is being urged to seriously consider recommending the model of the United Kingdom ("UK") adjudication in Ontario.

The Review discussed the UK system and the track record of success in the construction industry there.

Enforcement of the Adjudicator's Determination

The Masters asked whether the parties would take the adjudicator's determination and move *ex parte* for enforcement or if it is a notice on motion where the other party can make representations on whether or not it can be enforced. If it is the second way, it would be a court resource issue. The determination is enforced as a judgment.

Much of the delay in construction projects is about the flow of money. If it is a contested motion, the speed is lost in getting the project moving.

The Masters suggested considering the intersection with the *Statutory Powers Procedures Act* ("SPPA") and the *Judicial Review Procedures Act* ("JRPA"). There may be an SPPA issue.

Adjudication may not conflict with the lien system because you could still have lien rights. For example, it could allow for a counterclaim from the owner to reclaim everything they have paid.

One of the elements that attracted Latham to this concept is having a process that would look at the merits and unlock the set-off issue at the beginning of the process. It includes change orders, draw requests, and delay claims.

Based on reports from the UK, it appears that even where there is a major delay claim, the adjudicator comes up with an allocation of responsibility and the money flows based on that. People are often satisfied with rough justice. Their cash flow and balance sheets are modified to accommodate the order. They do not tend to go back to reopen the dispute.

Roster of Adjudicators

In the UK, initially the government developed a roster of experienced people and then a process was created for additional adjudicators to be added to the roster. Licensure requirements were also created. There are well-known institutions in the UK that give training for people who want to be adjudicators. They get a certificate and then their name is added to the rota.

Once you deliver the notice of adjudication, the parties can agree who they want as an adjudicator, but if they do not agree, they get the next name on the list. In Ontario, the process of choosing an arbitrator can get bogged down.

Thresholds

The Masters inquired as to how the system would be triggered. The Review noted that in the UK a large variety of projects are adjudicated, but that certain projects such as residential and public-private partnership ("P3") projects were not included. The UK is considering whether to include P3 projects.

There could be very complex claims with large dollar amounts attributable to them and also cases with very small dollar amounts and relatively straightforward issues that are adjudicated. Some adjudicators focus on small matters and others on larger cases. If the Review recommends adjudication, the first group of adjudicators would include experienced lawyers and masters.

The Masters mentioned that lawyers may be opposed to adjudication on the basis that it may be perceived as a violation of natural justice. The Review explained this argument had been made early on in the UK experience.

The Review noted that the London construction bar seems to be doing well with adjudication. The 20-year report on the system indicates that UK stakeholders are happy with adjudication.

Stakeholder Reaction to the Concept of Adjudication

The Review team has raised the issue of adjudication with every stakeholder group and many support the concept. The OBA Section Committee supports adjudication. Some groups want to consider it further. Some owner groups want any alternative dispute resolution process to be optional. They do not want mandatory mediation.

Prompt Payment Ontario ("PPO") did a very detailed trade contractors survey that talks generally about the way payment terms are elongated. The lien rights of trades expire and they have not been paid. The other bucket of issues is the "gridlock" issue where there is a big dispute and money stops flowing. These disputes end up in litigation. It is these types of disputes that adjudication may address.

Integrating Adjudication with the Act

Consideration should be given to integrating the Act with adjudication. One of the problems may be the holdback. It represents an ongoing holdback of funds. The owner may say that it cannot release the money because of the holdback requirement.

The Masters try to disentangle small lien claimants, if possible. In order to resolve disputes, the Masters suggest that you must resolve the big dispute. They referenced the role of Canada Revenue Agency, i.e. its position that it attaches to anything owed to the general contractor, including any holdback payable to them. The only way to avoid that is if the owner's counterclaim wipes out anything owing.

In the UK, where adjudication has been adopted, the 'pay when/if paid' provisions that appear in all subcontracts have been rendered unenforceable. The contractor has to pay. This takes away some of the impetus to involve the subcontractor. If there is a problem between the general contractor and subcontractor, either party can invoke adjudication.

The Masters inquired as to how to resolve multiple disputes. Specifically, they questioned whether one adjudicator has the ability to handle all disputes or if they will be piecemeal, with different adjudicators and different levels being adjudicated separately. Currently, section 60 of the Act brings everyone together. The Masters suggested that we should bring together the issues that should be dealt with together and not overly burden the adjudicator with what should not be there.

There are a range of disputes from home renovations to major contractors, where there are CCDC contracts and people ignore the dispute resolution provisions in these contracts. There are also provisions for payment certification to resolve disputes and keep money flowing, but they are ignored. The other model in the United States is the standing neutral concept, which has morphed into the dispute resolution board. It works well in some situations, but has a cost implication. There is a legal issue with respect to

the enforceability of standing neutral provisions. With adjudication, the determination is rendered and it is enforceable.

The Review must struggle with competing interests, including the spectrum of simplicity and complexity. Another tension is between freedom of contract at one end and regulation at the other. Sir Michael Latham recommended against the adoption of a lien regime in the UK because he said it was too complicated.

3. Home renovations and other small value cases

According to the Masters, the Review may want to consider whether it is appropriate for small contractors to go through the lien process. It forces them into Superior Court, rather than small claims court. Some have said that home renovations and liens and projects under a certain value should be taken out of the Act.

The Masters have had several references where the amount is modest enough to go to the small claims court and get a determination of quantum and come back for enforcement. The parties often do not want to do that because they have a foot in the door at the Superior Court and that is where they want to be. There have not been cases where the Masters have had to enforce a lien remedy of under $25,000 on a property.

The Masters suggested that procedurally, you could make a deputy judge a referee. The alternative is to say they have their Superior Court rights, but the contract goes to small claims court.

The Review is also hearing about the gray economy generally and that the Act is ignored for example in home renovations. There may be no written contract. In some home renovation cases, contractors do not get paid and the Master may order that they get paid. The threat of the lien may compel a homeowner to pay. Eliminating the ability of the contractor who does work on someone's property, and improves it, to have a priority claim may be perceived as saying that they are not entitled to that priority.

The Review does not have statistics that would assist in determining what is bogging down the system. This includes the number of cases that get litigated. The Review has heard that the cases with significant "gridlock" concerns include insolvency cases.

The Masters explained that there are also a lot of home renovation cases with no formal contract and major misunderstandings. These cases can often be very difficult for a variety of reasons.

This may not be an issue that can be addressed through legislation. There is no lien legislation involved in these cases, the only question is the quantum owed. It may make sense to send these cases to small claims court.

The Masters suggested that many cases could have been dealt with in adjudication. Residential projects are bogging down the system and could be included in adjudication. Sir Michael Latham excluded these cases because when something is a "home" it is politically sensitive.

The Masters expressed approval for the idea of using small claims court for these types of cases. They really encourage parties to go to small claims court because it tends to move things along. There is a resource issue for the Masters, which is not going away.

Motions

The Review is hearing about the resource issues because the Master's calendars are jammed in terms of hearing motions to clear title. This is an issue with matters outside Toronto. The Masters have not had to turn people away. The lien masters are a very important resource in this respect.

4. Mandatory Mediation

The Masters stated that mandatory mediation is a very good idea. Masters have the authority to order mediation however in certain cases, it would be more expeditious in some cases to just get to a one day trial and get it resolved, rather than go to mediation and not settle and have to go back to court.

If people know that there is a court order, it would prompt them to move forward with mediation. It is helpful for mediators when there is an order.

The Masters explained that full case management is a great tool to keep cases moving and achieve settlements. The settlement provisions in the Act could be amended.

5. References

The delay between the close of pleadings and getting the reference is cumbersome. This system was put in place to get around the constitutional challenge to have masters conduct references. As provincially appointed adjudicators, they do not have the ability to do it other than through a reference system. The Masters asked the Review to consider whether there is a more expeditious way to get to a reference. Specifically, they queried whether the judgment has to be a judgment of the judge or the court. The Master suggested that if it was the court, then a master can do the reference.

The Review team should consider whether it is possible to get an order for a reference and trial all at once. It is unconstitutional to refer the trial to someone who is not a section 96 judge. You could do it for matters under $25,000. There are very few cases under $25,000, and when they are, the counterclaim is over $25,000. There are some matters where you have to go to a judge. No one has challenged the constitutionality of the current legislation.

6. Alternative Dispute Resolution

The Act allows a reference to be made to a referee who is not a master. This is really arbitration with the teeth of a court order. It is governed by the *Arbitration Act*. This provision is not being utilized and it may be an effective way to arbitrate. It would likely be private because it would be off-site.

The Review noted that the Ministry of Transportation ("MTO") is introducing into their contract the notion of a project referee using the British Columbia model. The new

standard terms will include a referee for disputes. It will be binding on an interim basis and similar to adjudication.

Many of the benefits that are perceived to be in the arbitration sphere are in a reference as well. This includes complete flexibility on the process (i.e., how complicated or simplified) and efficiency. The Masters explained that they always invite people to come up with a creative process and ask the court to adopt it. People do not have to go through the Rules-based civil procedure. You can do in a reference what you do in arbitration. The difference is that courts are public so there is a record.

Another option stakeholders have raised is to provide more adjudicative resources. We are already short on resources in the court.

Consolidation of Arbitrations

One suggestion in the Information Package was to consider giving the court the ability to consolidate arbitrations. The court could determine who pays, the terms of reference and consolidation.

According to the Masters, the idea of consolidation in the Act is confusing. People try to consolidate when they do not have to. They have to serve the other parties in any event and they all become parties. The greatest weakness of arbitration is the ability to bring multiple arbitrations on the same project together. There is often an arbitration clause in the general contract, but not the subcontract.

Summary Procedure

The Review is hearing that the Act was intended to make this a summary procedure but this is not the case anymore. The Masters explained that parties routinely obtain orders for discoveries and affidavits of documents. In some cases, they can disclose their documents before they come to court. The Masters suggested that there could be greater clarity around what is required for standard disclosure.

Some parties are very reluctant to disgorge the documents in their possession. There are often a large volume of documents in construction cases. When you get into the scope of e-discovery it can get very bogged down. Early clear disclosure requirements would help.

Compliance with Directions

The Masters suggested that the Review ask parties what they would have done to make cases less complex. The reason there are many directions in cases is because people do not do what they should have done when directed initially. The Masters explained that they typically provide parties with some standard directions because parties show up for directions and are ordered to do things that they fail to do so. They then request another set of directions and the iterative process results in delay.

The Masters will bring the parties back to make sure they have done it and are ready for trial. Because parties know that they are coming back, they do what they are supposed

to do. There is a built-in discipline and things proceed. This is why case management works. Things do not have to be unduly complex.

According to the Masters, under the Rules a court can order a case conference in any case. The Act says that all interlocutory steps need to be authorized by the court. It is not clear to people how to get a direction. It is unclear whether there is power for the court to compel parties to attend a case conference.

A master may case manage as a reference and then make a direction for trial. The Masters suggested that the Review should consider whether the reference system should remain, and if so if there is a way to enhance the efficiency of it. The production of documents before starting a proceeding is a good mechanism to be prepared for trial.

Limitation Period

There is a two year limitation period in the Act and the Masters explained that many parties wait for two years and then get order for trial. They then ask for a judgment of reference. In Ottawa they try to get a clause in saying that the reference constitutes an order for trial. Many parties are confused about this.

The expiry of the limitation period is very fixed and there is no discretion to extend it. Some complex projects may need discretion to extend the limitation period. It is an action where the lien may be proven. This makes it vague for people to understand if the two years has expired. The Review could consider whether the two year period is appropriate in the circumstances, rather than a longer period. .

The other thing that has not been clear in the Masters' opinion is when parties move *ex parte* for a declaration that the lien has expired, what is the process to determine if they claim proceeds in contract or not. Generally, they can proceed with breach of contract claim. It is just the lien remedy that has expired.

7. Interrelationship between the *Construction Lien Act* and the *Registry Act*

Another issue raised by the Masters is the interrelationship between the *Construction Lien Act* and the *Registry Act* and the problems of the way instruments are registered on title. At one time, we could check whether lien rights had been vacated. Some counsel seek orders to bond off liens and an order that the land register shall register it as an Application to Amend.

The Land Registrar is working on a model that will have a single document called a Motion to Clear Title

Vacating is important because these lien rights are alive and they need to have notice. If there is a way to make the *Construction Lien Act* consistent with the *Registry Act,* that would be helpful. There could be a prescribed form under the *Construction Lien Act* saying that vacated liens must be registered using the form. It would have to be specific. There are statutes that allow different things to be registered and they can be registered as a Document General.

8. Letters of Credit

There is a reference in the Information Package to posting of security by using an internationally recognized letter of credit. The letter of credit has to satisfy the Master that it as secure as the land. The Masters suggested that if someone is going to make the contract subject to an extraneous code, they will have to bring the code with them for the Master to examine to see whether or not it is as secure as the land. If there is anything less than an absolute security, it would not be accepted.