

**Construction Lien Act Review Consultation Meeting Summary
Greater Toronto Sewer and Watermain Contractors Association**

December 10, 2015 (9:00 a.m. to 11:00 a.m.)

Attendees: Anthony Scane, Jim Durrazio, Gene Woodbridge, Patrick McManus, Brian Hope (Norton Rose), Giovanni Cautillo, James Little, Bruce Reynolds, Sharon Vogel

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.

General Remarks

The Greater Toronto Sewer and Watermain Contractors Association ("GTSWCA") has reached consensus on the following four issues:

1. The length of preservation and perfection periods;
2. Certification of subcontractors. Subcontractor members of the GTSWCA are often "early subcontractors". For large projects, they may have to wait years before receiving payment from the holdback. The GTSWCA supports any mechanism that would allow early subcontractors to get paid before waiting for litigation at the end of a project;
3. Separate holdback accounts. The GTSWCA supports separate holdback accounts. Several other provinces have legislation that requires owners to keep the holdback in separate accounts; and
4. Assignability of lien claims. Several other provinces have legislation that allow lien claims to be assigned.

1. Length of the Preservation and Perfection Periods

The GTSWCA believes that the preservation period should be extended from 45 days to 60 days. Often 45 days is too short of a time period to determine whether placing a lien on the property is necessary. It often takes 60 days plus a week to get paid. Most of this happens contractually where the payment terms are imposed on members as both general contractors or subcontractors, depending on project. Most of the GTSWCA's members are both subcontractors and general contractors.

In the 1980s, contractors, subcontractors, and suppliers were being paid in 30 to 40 days. Since then, the payment certification process has become more complex and the payment cycle has elongated. Now, 45 to 60 days is the norm. You are forced to lien a client or property that is still a very good and viable receivable, and it freezes the flow of money.

According to GTSWCA the shorter the time period for preserving and perfecting a lien, the sooner the relationship between owners and contractors becomes adversarial. Owners do not want to work with contractors who place a lien right away; and contractors do not want to have to register a lien right away. The more time contractors have to assess whether a lien is required, the better.

GTSWCA explained that on the municipal side, it is not as difficult. Typically the payment certifier is a professional engineer employed by the municipality. There is still a problem from a large component of the membership on municipal payment, but they know that the money will come. A larger issue is the private sector as to determining whether the money will be paid.

From GTSWCA's perspective, complex processes give more opportunities for things to fall off the rails and more people to be involved. The Review has heard from same owner stakeholders that you cannot count the payment cycle from the submission of a flawed progress payment request. You have to count from the issuance of the payment certificate.

GTSWCA suggested that consideration could be given to requiring the quasi-independent consultant/engineers to have a bit more responsibility in determining whether the payment draw is substantially compliant. This would start the running of the clock. There is a sense that the payment certifier is being bullied to take a certain position.

Triggering the Commencement of the Preservation Period

The trigger issue is an important one to GTSWCA. It not only affects a contractor's ability to receive the holdback, it also affects the contractor's ability to get paid on a payment certificate. It may result in the initiation of an adversarial lien process.

The GTSWCA believes that there should be one trigger for general contractors and another for subcontractors and suppliers, particularly in the case of bundled projects. Their members are on the project early with underground works and could be waiting for long periods (three to four years) to get paid.

The GTSWCA also supports an annual release of amounts held back in large projects (e.g. \$25 million or higher). This might address things like problems with clarity of phasing and projects that get put on hold for a year while things get worked out. An annual release would also work well for any large public-private partnership project or large municipal projects.

Another option would be to have a phased release of the amounts held back in multi-year projects (e.g. \$25 million or higher).

2. Adjudication

The Review noted that the prompt payment issue may be viewed from two perspectives:

1. Prompt payment in the ordinary course of business, where there are monthly draws and the change orders are properly administered. The holdback is released upon substantial performance. This is the aspect of prompt payment that the *Prompt Payment Act, 2013* (“Bill 69”) was focused on. That aspect of prompt payment is founded on the proposition that the Act should regulate in a way that will reduce elongation.
2. “Gridlock” of payment when there is a major dispute between the owner and contractor. Delay is usually a major factor. These disputes often expend a great of financial and judicial resources.

There is a general consensus among the stakeholders that the “gridlock” issue is not a good thing. Several stakeholders have recommended that Ontario adopt adjudication to help resolve the gridlock.

The Review discussed the United Kingdom experience on adjudication.

The GTSWCA supports the adjudication dispute resolution model.

According to GTSWCA, it would resolve many issues quickly and would make the system less adversarial. It would also change attitudes and behaviours in the industry. However, the GTSWCA is concerned that the adjudication model would not be helpful when payment is delayed, or a set-off argument is raised near the end of a project. This situation often occurs because there is a dispute over the “punch list” (e.g. a \$50 deficiency is valued at \$1,000) or there is delay in the completion of the project. If this arises shortly before, or after, a certificate of substantial performance, suppliers will place a lien on the property.

Of greater concern to GTSWCA are cases where the owner only raises these issues after the period for perfecting a lien has expired. In those cases, suppliers and contractors do not have any security.

3. Project Trust Account

The Review noted that some stakeholders have recommended that a project trust account be created. The holdback would be put into the project trust account as the job progresses. Before the liens expire and the funds lose their character as a holdback, an owner who intends to raise a set-off must give prior notice to the contractor. The contractor would then have an opportunity to preserve the lien before its expiry period.

The GTSWCA supports this recommendation. It also suggests extending lien rights through adjudication. More specifically, the GTSWCA believes that adjudication should be a factor in the process of triggering the lien period. For example, the notice of adjudication could require parties to adjudicate the dispute in a certain number of days, after which, the contractor would have a certain number of days to place a lien on the property. This would extend the resolution period without jeopardizing the ability of contractors to secure their interest in the property.

4. Certification of Subcontractors

The GTSWCA believes that subcontractors should be allowed to go directly to a payment certifier to get a certificate of substantial performance signed. The payment certifier should not be allowed to refuse to sign the certificate for any reason other than substantial performance not being completed. Certain general contractors who refuse to sign certificates for no justifiable reason would be removed from the equation.

The GTSWCA is also concerned that many of its members are early subcontractors. Early subcontractors often lose their lien rights because they wait too long (perhaps to the completion of the project) to see if they will get paid. The GTSWCA supports an amendment that would extend early subcontractor's lien rights so that they would not lose their lien rights until a later time period. One issue that would have to be resolved is how to define an "early subcontractor".

The Review noted that any amendments to the Act must establish an appropriate balance between freedom of contract and statutory regulation.

5. Bidder Exclusion Provisions

The GTSWCA does not support the use of bidder exclusion provisions. Because of the litigious nature of the industry, you ultimately remove everyone from being able to tender. It should be limited to vexatious litigants. Contractors should have a chance to rehabilitate their behaviour or challenge the decision.