

**Construction Lien Act Review Consultation Meeting Summary
Labourers' International Union of North America, Local 183**

October 30, 2015 (11:30 a.m. to 1:30 p.m.)

Attendees:

Tracey Henry, Ryan McKeen, 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 Overview of LIUNA, Local 183

Labourers' International Union of North America, Local 183 ("LIUNA") is the largest construction union in North America. It represents workers in all sectors – from heavy civil to residential. LIUNA explained that its members are the most vulnerable people in the construction industry. Many are immigrants with language barriers and limited formal education. The most vulnerable workers are those the Act is designed to protect. In the absence of the union and trust funds commencing lien and trust actions on their behalf, the workers would be in a more difficult position with respect to the recovery of wages and benefits. Approximately 70 percent of claims made are for pension and welfare benefits.

The workers receive a weekly wage, but pension and welfare contributions are not due until the 15th day of following month. For example, for the work month of September, contributions are not due until October 15th. There is a lag in when they are due. The worker may still be able to draw on benefits for some time before they notice there is a deficiency.

From other stakeholders, the Review has heard an explanation of how pension and benefits work. For the workers, the immediate repercussions may not be as immediately apparent because the failure to pay benefits is not seen right away. It was noted that the trust fund may not know whether the failure to remit the benefits is due to non-payment or to the fact that the worker was not actually working.

Remittances are made directly to the trust by the subcontractor employing the labourers. LIUNA relies on the reporting of the subcontractor on behalf of the workers. There may be a discrepancy where the subcontractor has not sufficiently reported. If they have underreported there may be a delay in the time before the member asks about the deficiency.

There are provisions on the collective agreement regarding the collection of benefits and the parties can either refer disputes to private arbitration or go to the Ontario Labour Relations Board under the *Labour Relations Act*. The union can obtain an order

and if the contractor does not satisfy the order, there can be civil proceedings to enforce it.

In terms of statutory enforcement mechanisms for workers, where there is a defaulting contractor, the Act is more consistent and reliable for collecting wages and pension than any other statutory remedy. LIUNA has been successful with enforcement under the Act. If the union has a lien, it may take some time but it will be generally able to collect the money. This is because the Act provides a remedy where you can make a claim to the holdback, which is being held by the person in the level above in the pyramid. If you get an order, it can be for a certain company but it is very difficult to enforce because they do not have the money.

The members of LIUNA work for many participants on construction projects, including general contractors and every level of subcontractor. In masonry, residential, landscaping, and road construction, there are subcontractors who can be working on a shoestring budget. It is very difficult to collect through the mechanisms for enforcing orders under the *Labour Relations Act*. The combination of the priority for workers and the holdback allows LIUNA to effectively collect under the Act. The worker priority is very important.

Insolvency Legislation and Trust Provisions

LIUNA would be concerned if, based on a constitutional argument, the receiver were to take all of the holdback based on the fact that the *Bankruptcy and Insolvency Act* trumps the holdback. There are several instances where LIUNA has had a priority claim where Canada Revenue Agency ("CRA") has intervened and said they would make a constitutional argument exerting priority over all of the holdback.

There are some stakeholders who feel that the way to get around the trust issue is to create segregated project trust accounts, like in British Columbia, where the holdback is paid incrementally over the life of the project.

LIUNA agrees that the Review should consider this issue and is in favour of segregated trust accounts.

LIUNA explained that there is a difficulty demonstrated by the *Norex* case. In this 2009 British Columbia Supreme Court decision, the CRA attempted to assert super priority over holdback funds owed to a defaulting subcontractor by the general contractor. The party below the defaulting subcontractor (workers trust) claimed the holdback fund. The general contractor took the position against the defaulting subcontractor that it had a set-off claim in excess of the holdback. The lien claimant said there was nothing for CRA to take because the general contractor had 100 percent set-off against the defaulting subcontractor. The court held that CRA could not make a claim because the subcontractor had no right to the holdback funds.

Applying *Norex*, if a subcontractor defaults, CRA may issue requirements to pay and workers may have to prove that there was a 100 percent set-off and the defaulting subcontractor had no right to the holdback. It allows the union to make its claim and protect the holdback from CRA. The application of *Norex* can be arbitrary because the

extent to which the union has a claim depends on whether there was a valid set-off claim against the defaulting subcontractor. If there is no 100 percent set-off, the CRA may assert a super priority. If you have a general contractor or subcontractor who does not want to be involved, it can become difficult for the union to fight CRA.

LIUNA explained that the CRA is not consistent in its approach in Ontario. When you do not have a set off, there is a case-by-case negotiation with CRA. It is difficult if the union is just dealing with a CRA officer and the file has not yet been referred to the Department of Justice ("DOJ"). The case must be referred to a master so it can be referred to the DOJ. This reference delays the time that workers get paid.

LIUNA understands that the DOJ is trying to discuss a policy where they do not intervene in lien claims under a certain threshold. Those are the cases where a union would be involved with respect to liens filed on behalf of workers. Suppliers will not file claims for low amounts but pension funds may because they have a fiduciary obligation to their members. It is very costly to go through these processes for small amounts. If there were coordination at the various levels, it would help LIUNA in terms of improving the process. There should be clarity for all of the parties. These cases can be inefficient and time consuming for the federal government as well.

Maintaining the Holdback

At a minimum, LIUNA submits that the holdback must be maintained at 10 percent. To enhance protection for workers, LIUNA submits that the holdback should be increased to 15 percent.

The holdback is the most fundamental protection the Act provides. The holdback, combined with worker's priority, can lead to quick resolution of liens for workers' wages and remittances.

To date, no stakeholders have advocated to the Review that the holdback be reduced. Some have said they think the status quo of 10 percent should be maintained. LIUNA would be in favour of increasing the holdback. The combination of the priority and the holdback is often sufficient, but not always. If there is a claim for pension and benefits, it is unusual that 10 percent would not be sufficient. If wages are included and there is a large contractor, the holdback may not be sufficient. Suppliers would benefit from the higher holdback because sometimes workers take all of the holdback through their priority claim and there is little left for suppliers.

LIUNA submits that increased holdback to 15% would allow for better recovery of wages and remittances where the workers' priority is insufficient. Increasing the holdback would also bring it in line with other jurisdictions, such as New Brunswick and Prince Edward Island.

Finishing holdback

The finishing holdback must be maintained. Eliminating this holdback would prejudice finishing trades that only provide labour towards the end of the project. LIUNA relies on the finishing holdback to recover wages and remittances for its members.

LIUNA stated that the finishing holdback is very important in terms of workers who are on the job until the very end. Typically, the claim comes when you have a finishing trade and you need to rely on the holdback. In the absence of this holdback, people would not have any rights under the Act for the improvement.

Some stakeholders have said it is difficult to manage, rarely utilized, administratively cumbersome, and not really necessary. The point made by others is that it is only necessary on a few projects but imposes an administrative burden on all projects. In LIUNA's view, the balance should be struck in favour of workers over administrative burden.

Phased Release of the Holdback

LIUNA's main concern with this concept is the effect of phased release on the workers' ability to lien in order to recover unpaid wages and remittances. There should be no phased or early release of the holdback in relation to workers that provide services throughout the duration of the project. LIUNA cautiously supports phased release of the holdback for certain large projects (i.e. over \$25M)

Some stakeholders have suggested that the holdback should be released on the completion of phases/milestones. This makes sense to LIUNA because the release should take place at reasonable point in the project and not simply a calendar time period. It may be useful for the phased release to take place at the end of demolition and excavation when the parties know that the work has been completed. Otherwise, there could be an arbitrary situation where it is released in the middle of work. Labourers who work for the general contractor and some subcontractors may be on site for the whole project.

Prompt Payment

LIUNA explained that prompt payment legislation must not undermine the protection the Act provides to workers. The amount of holdback must not be reduced to bring prompt payment legislation into effect.

'Pay when paid/pay if paid' clauses undermine the security of workers and should be explicitly prohibited in the legislation. All the financial risk on a construction project would be downloaded onto the most vulnerable group – the workers. Such clauses should be prohibited or deemed unenforceable.

Many aspects of prompt payment affect the employers of union members more than the members. However, for those supplying labour, a subcontractor employer may fail to pay pension and welfare benefits on the theory that they have not been paid by the general contractor. This increases support for prompt payment.

LIUNA explained that certifying electrical or mechanical work would defeat the securitization of the Act. If there is mandatory certification of subcontracts, there should be a reasonable cut off so that you do not hollow out the 10 percent inadvertently.

LIUNA explained a situation where there may be a subcontractor who defaults towards end of job and the company that takes over retains the same workers. The problem is that the lien rights attach to specific contracts. It could be cumbersome for members, because lien rights are based on who the employer was at the moment. A general contractor may temporarily take over the payroll of a subcontractor to keep the company afloat. This could impact lien rights for work performed under the first contract. The removal of one trade from a site can cause havoc on a project.

According to LIUNA, in Ontario 95 percent of contractors comply with the collective agreement and pay every month. Only a small number are delinquent. The Act is the most effective mechanism that unions have because the threat of a lien will incent employers to pay very quickly. It is also effective for the union to advise the subcontractor that it will inform the general contractor that workers have not been paid.

LIUNA has not encountered problems with obtaining financial information from general contractors and subcontractors. Many are willing to provide information and the union has a good relationship with them. Owners do not provide detailed information and it would be helpful if the requirement were better defined in the Act. People are generally reasonable with providing responses in the required time.

Through the consultations, the Review has heard that prompt payment has two major aspects: one is the ordinary course of payments where advocates of prompt payment want a 30 day requirement. Proposals for a phased release of the holdback and certification of subcontracts also apply to this issue. The second is the “gridlock” issue where a project generates a major dispute at the level of the owner and general contractor. The project is significantly delayed and the owner may alleged that its losses exceed anything owed under contract and it may refuse to pay. The case may go into the court system and it can take years and significant costs to resolve. There is frustration and dissatisfaction with the capability of dispute resolution mechanisms to engage effectively in such situations. The Review explained Adjudication in the United Kingdom.

LIUNA has been involved in those types of cases and tries to get removed based on the worker priority and the basic holdback. Sometimes it cannot be removed and it believes that adjudication would help with this issue.

Worker Priority

The worker priority is a key issue for LIUNA. This priority should be maintained. There are often disputes with suppliers or other lien claimants. These other parties may try to say that the union only gets priority for the people who were on the site in the last 45 days of the project. The Act works but there could be greater clarity.

Lengths of the Preservation and Perfection Periods

The current 45 day timelines can be arduous and difficult to meet according to LIUNA. There are often delays in pension and benefit claims because contractors do not pay until the next month. A longer preservation period would allow the lien claimant to try to negotiate with the subcontractor, who is also waiting for payment. The union has to put

a lien on the property to preserve lien rights and can incur expenses needlessly. Sometimes discharging the lien can be an issue if the union has to get a court order.

LIUNA suggested that 45 days to preserve a lien is often not enough time to decide whether a lien is necessary. The current perfection period does not provide enough time to attempt to settle a claim before having to file a statement of claim. A good time to negotiate is between preservation and perfection. It would be beneficial if there were more time to do so.

Registration of Construction Liens for Condos and Subdivisions

LIUNA is not in favour of the lot-by-lot expiry of liens. There may be written notice for condominiums, but this is very cumbersome and it seems excessive to register on lots. This could be streamlined to be more efficient and economical.

Waiver

There has been some discussion by stakeholders about whether certain classes of projects, such as P3s, should be excluded.

It has also been suggested that home renovation projects be excluded.

LIUNA would be opposed to these exclusions.

LIUNA regularly registers liens for less than \$25,000. The proposal would affect individual residential new builds (e.g. in fills where an old home is demolished to build a new one). There should not be an exemption for these types of residential projects.

Alternate Dispute Resolution and Bonds

According to LIUNA, arbitration and mediation are the most effective way to deal with complicated disputes. Section 60 of the Act is not mandatory. Some masters are great at trying to resolve issues and encourage settlement, but having a third party would be more expeditious. Unions not usually part of litigation. Disputes about extras, change orders, etc. should be arbitrated or mediated. There could be arbitration and mediation agreements where the matter goes to mediation and if that fails it goes to arbitration.

LIUNA supports adjudication for more complex projects.

LIUNA supports a requirement for mandatory labour and material bonds on public projects. There should be multi-tier bonds on public projects, similar to federal projects.