

**Construction Lien Act Review Consultation Meeting Summary
Building Owners and Managers Association**

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

Attendees: Dean Karakasis, Bala Gnanam, 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. BOMA's Comments on the Act

There are 500 members of BOMA. One-third of these members are the big players and two-thirds are medium size developers. The medium size players tend to be more interested in the Act than the larger ones.

There are a number of key issues for BOMA. The overall theme is clarity and speed. Understanding what it is and how it is done and the speed of payment. This includes prompt payments for suppliers and speedy resolution for owners.

a) Early Release of the Holdback

Provisions should be clearer, particularly when finished work can be easily identified. The holdback could be released if work can be identified.

Some stakeholders have proposed phased release. Others have suggested annual release.

b) Clarify the Lien Claimants for an Improvement

The definition of "improvement" is not clear according to some stakeholders. Also, certain stakeholders have submitted that there are issues with the definition of "owner" and who is an owner. For example, some stakeholders have noted that the definitions do not fit the public-private partnership ("P3") model. BOMA agrees with this.

c) Enhanced Lien Rights for Public Facilities

Some stakeholders have noted that there was a need for enhanced lien rights on public facilities (e.g. universities, colleges and hospitals). The Review has heard that there is a lack of clarity about whether you register the lien on the land or not, and who you serve the lien on, etc.

A new issue raised in the consultation process is that the municipal sector has said that the liening of municipal lands should follow the same protocols as provincial and federal Crown land. The Review is considering this issue.

d) Conflicts with the Act and Other Legislation

It was suggested by some stakeholders that there should be clarification about conflicts with the Act and other provincial and federal legislation, such as the *Companies Creditors Arrangement Act* (“CCAA”) and *Bankruptcy and Insolvency Act* (“BIA”). Canada Revenue Agency’s super priority may also create issues.

This issue has come up in other meetings. The Review has met with the Ontario Bar Association committee established in relation to the Review (“OBA Section Committee”) and the Advocates Society and they focused on the insolvency conflict issue given recent case law where there have been conflicts with the Act. There has been a debate about which legislation governs.

The OBA Section Committee made submissions related to the idea of project trust accounts, which would be jointly administered by the owner and general contractor so that trust funds would be maintained in a separate bank account.

The trust account would be funded incrementally as the project is built. The holdback would go into this account. The money would simply accrue up to the end of the project. It could not come out of the account without the approval of the owner and general contractor. When there is substantial performance is achieved and the holdback becomes payable under the contract, some subcontractor stakeholders want mandatory release.

The other approach that has been suggested by stakeholders is that if the owner is of the view that the work is incomplete or it has a set-off right, the owner could provide a notice of set-off prior to the end of the lien period and the trades could preserve their liens. The owner’s rights would be sorted out before the money is withdrawn from the account.

e) Provide Clarity for Certifying the Date of Substantial Performance

The Review team has heard about the difficulties of certificates of substantial performance and the need to make it clearer so people understand what they are supposed to certify.

One stakeholder suggested that it is antiquated to publish in a hard copy newspaper. BOMA thinks it should be more modern. There should be an ability to use technology to access this information.

f) Lien Rights Against Landlords Need to be Strengthened

BOMA suggested that it is very difficult to lien leases. The OBA Section Committee had suggestions on how to clarify the process for liens against landlords, including who to serve and who to name.

According to those submissions, the lien claimant may not have a copy of the lease and it is not on title. The existence of the lessee’s rights are not recognized anywhere on title. You need to be creative when liening leases. One way that has evolved is performing a title search and registering a lien against the landlord and tenant and then discharging the lien against the landlord. The other way is showing that the landlord has

been actively involved in the work. If you get enough indicia of a request to perform work, than you can lien both the freehold and tenancy interest.

g) Enhanced Summary Procedures

In the discussion around prompt payment, the Review team has proposed that there are two different aspects of promptness of payment. There are ordinary course payments, which includes monthly draws and release of the holdback. Bill 69 was directed towards prompt payment and reducing the length of the payment cycle.

According to some stakeholders, the payment cycle has become elongated, which has stranded large amounts of working capital of the subcontractors in a way that is economically difficult. The general contractors have a 'pay when paid' provision so they incur no interest obligations in payments to trades. The Review has heard that the economic burden of financing the float is on the sub trades.

The second aspect of prompt payment is the "gridlocked" project, which is a project that has encountered a major dispute. Frequently, the Review has heard that delay is a big part of the problem. Once this happens, the owner is suffering damages because they do not have the property so they notify that the contractor of the delay and might say that the damages owed to the owner are greater than the amount owed to the contractor. The money then could stop flowing and the general contractor and subcontractors ultimately could see payment stop. In such circumstances, the Review has heard that the subcontractors still have to pay their suppliers. The subcontractors can then exercise their right to lien and the case goes into the judicial system.

These are very complicated cases with multiple lawyers that may take 36 to 48 months or more.

Adjudication

The Review discussed the concept of adjudication in the context of the UK and other common law jurisdictions.

The Review is being urged by a broad array of stakeholders to seriously consider recommending that adjudication be included in the Act. The contrary submissions have been heard by a few municipal stakeholders who are strongly in favour of freedom of contract. In their written submissions, municipalities and the broader public sector owners have said that it should not be mandatory because they prefer freedom of contract in terms of dispute resolution. BOMA explained that they wanted to think about adjudication.

BOMA questioned how adjudication would remain fair and unbiased. The Review explained that adjudicators in the UK are typically senior quantity surveyors, architects, engineers or lawyers. Those who do not practice fairly typically will not be called on in the future.

BOMA will bring this issue to its members, but thinks that adjudication is good because it applies to everyone.

2. Prompt Payment

BOMA members would say that sometimes, general contractors are not paying subcontractors. The Review has heard from subcontractors that money flows on the backs of subcontractors and that general contractors do not have the payroll burden that the subcontractors have. Also, some subcontractors have advised that they have to make remittances for pension and health benefits. They also have to pay the full price for materials.

Prompt Payment Ontario (“PPO”) conducted a trade contractor survey, which deals with the issue of late payment being a systemic problem in Ontario in the construction industry. The Review discussed the results of the survey generally.

BOMA suggested that the facts would depend on how you determine the timelines. Trade contractors count from the submission of the progress payment request and owners count from the certification of the request.