

Construction Lien Act Review Consultation Meeting Summary Colleges Ontario

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

Attendees: Emily Bain, John Hoicka, Tim Schill, Angelo Miranda, 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.

Lienability of Colleges

Colleges Ontario has been working with an informal owners group, which includes the Council of Ontario Universities, Ontario Hospital Association, City of Toronto, City of Mississauga, and Association of Municipalities of Ontario. The group has had regular conversations. Colleges Ontario does not have the in house counsel to go through the Information Package section by section with legal experts. It has similar views as the larger owner groups.

In September, the owners group reviewed the Information Package. Colleges Ontario felt that there was not a lot to comment on because colleges are crown agencies and they do not have the same issues about lienability as others. No one can place a lien on title. They have to go to the president's office to file a lien. There are holdback obligations.

Colleges and universities are very different from a financial administration standpoint. Colleges Ontario explained that colleges should be considered in a separate category from universities because capital is accounted for in a different way. They should be treated much more like a government ministry. Universities are private entities and do not have the same accounting and are not required to handle their money in the way colleges are. There are different statutes relevant to each entity.

Colleges are on the government's books, so any change in liability flows through to the government's books. This is not true for universities. Colleges Ontario would be concerned that being on the provincial books, and being subject to section 28 of the *Financial Administration Act*.

The Review noted that some are of the view that is unclear what happens when you lien a college or university. The Ontario Bar Association section committee created for the purpose of commenting to the Review ("OBA Section Committee") made a submission about clarifying lien rights in relation to colleges or universities. Under that submission, the OBA Section Committee noted that how you deliver the lien should be clarified in the Act. When a contractor wants to make a claim for lien, the process under the Act is not clear. The Review suggested that Colleges Ontario consider this issue.

The Review noted that Act applies to both private and public entities. It binds the crown and there is no waiver of rights.

Holdback

Colleges Ontario focused on the holdback issue, which is the major concern of the colleges. Generally, the Act has worked well in the opinion of Colleges Ontario. Colleges Ontario suggests that the holdback remain at 10 percent.

Prompt Payment

In relation to prompt payment, Colleges Ontario appreciates the value of paying promptly but wants to ensure that owners have a mechanism to verify that projects are completed in accordance with the contract and based on payment terms of the contract. The parties should be able to agree to their own payment terms. Colleges have ways to determine how payments are to be made, subject to rules set by government and Infrastructure Ontario.

During the Bill 69 hearings, Colleges Ontario worked with owners groups and there was consensus around prompt payment. Colleges Ontario notes that they recognize that contractor should be paid in a timely manner, but there should be a mechanism to ensure that projects are completed on time and to the quality that they are expected to be. There are things that should be in the contract and not prescribed in the legislation.

If there are owners who are not paying within a reasonable time, it is unclear whether colleges will be penalized for something they are not part of. They push contractors hard on projects and pay them on time. Certain colleges do not pay unless the work has been certified. When the draw comes in on a large project, it takes up to a month to get the contract administrator to certify payment.

The Review noted that some groups have said that they are not being paid promptly. For example, payment terms extending to 120 days may be imposed on the contractor, subcontractor, workers and workers' pension funds, this has real repercussions. Prompt Payment Ontario ("PPO") has provided a lot of empirical evidence from Canada and jurisdictions around the world about prompt payment and has done a survey of its membership to gather data locally.

Colleges Ontario is concerned about this issue because its members pay promptly. The time required to certify payment is dictated by the size of the job. For small jobs, it can be done quickly. It takes more time for large jobs. This needs to be considered in a prompt payment framework. Large institutions can take up to 60 days to pay. This is the way the accounts payable system works. Colleges Ontario thinks the Act should account for different sizes of projects.

The Review noted that some stakeholders have said that the payment certification process is too slow in this day and age where the electronic transfer of funds is straightforward. The length of time it takes can be influenced by factors like vacations of internal staff and this can have an effect on the general contractor who has 'pay when

paid' clauses in contracts. This means subcontractors and workers do not get paid and benefit plans are not funded.

From the owner's side, Colleges Ontario says members have seen contractors put in a schedule of values to be paid for work not done or not fully done, but the contractor wanted full payment. In terms of repercussions, colleges typically get the matters sorted out so that it never gets to the point where lawyers are involved. Contractors often have limited documentation systems and certain colleges have to get involved in those situations early.

Colleges Ontario explained that medium to small contractors its members dealt with regularly often have limited accounting systems. Contractors will often take what they make in one job to subsidize another job. The college may pay the general contractor promptly but then that money does not flow. In some examples, contractors have asked for 50 percent payment of the job when the material is not on site. Colleges Ontario suggested that its members seldom see a draft progress draw that does not get altered in the certification process.

The Review noted that some stakeholders have advised that there is an evidentiary basis for the positions being taken. For example, on the pension benefits issue, a presentation was made to the Review on the repercussions to pension and benefits plans and health benefits plans of a lack of prompt payment and the effects of non-payment. When you look at the purpose of the Act, it was designed to protect those at the bottom of the pyramid by giving them some limited form of securitization. In the early 1980s there were a lot of construction insolvencies. Today, interest rates are low and we do not have as many insolvencies, but this could change. These are the issues being brought forward for discussion.

Colleges Ontario noted that in terms of people at the bottom of the pyramid, it is not necessarily the owners fault. In one example given, a general contractor had been paid but the sub subcontractor had not been paid.

The Review noted that various proposals have been made on this issue by stakeholders, including strengthening the statutory declaration mechanism and recommendations on whether or not 'pay when/if paid' clauses should be allowed. In many of the general contractor contracts with subcontractors, there may be a provision that says the general contractor does not have to pay the subcontractor unless and until it is paid by the owner. This is the subject of much discussion.

Colleges Ontario explained that everyone enters into a contract and has the option to accept the terms or not. This gets into areas that are outside the control of the colleges.

Freedom of Contract

There is a fundamental tension between total freedom of contract, where parties determine the terms of the contract, and statutory regulation where you regulate the relationship. The tension is how much you regulate the relationship. To some extent, the Act is currently regulating the relationship because you cannot contract out of the Act.

The Review team is hearing that a one-size fits all solution would not work for all projects. Some have said that the definitions in the Act do not fit with the P3 model.

Colleges Ontario suggested that it is one thing to recognize that a subcontractor down the pyramid may or may not be getting paid, but the reality is that it is impossible for the owner to enforce occurrences several layers down. This is the job of the courts or standard contracts. Even if you change the language of certification, colleges do not have enforcement mechanisms to find out if payment has been made down the chain.

Colleges Ontario explained that the solution must be reasonably consistent with what colleges can ask for and enforce in their contracts. There should be changes in the rules enforced by government as to what is and is not acceptable.

Adjudication

One of the issues identified to the Review is adjudication as a model to resolve disputes. Colleges Ontario talked to the owners group about adjudication. It will review the notes of the discussion and prepare a written submission.

Many owners and contractors have given unanimous support to the idea of adjudication. Some wanted further time to think about. Colleges Ontario will go back and think about it.

Adjudication has a lot of benefits relative to the courts, but they need to think about how far down the chain it needs to go. Colleges Ontario wanted to know if all parties need to be on board with adjudication if the subcontractor wanted to initiate it. They were concerned from being involved if the big problem is three or four layers down as opposed to between the owner and general contractor. With multiple parties and legal counsel, it can get very complex and contentious. The initial thought of Colleges Ontario is that any process recommended by the Review should not slow down projects.