Construction Lien Act Review Consultation Meeting Summary
Advocates Society

December 7, 2015 (9:00 a.m. to 11:00 a.m.)

Attendees: Dave Mollica, Jeffrey Armel, Sharon Astolfo, 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.

1. General Overview of the Advocates Society

The Advocates Society has a strong Construction Law Practice Group, which represents the interests of the members who are construction lawyers (the "Society").

The Society focuses on the protection of the practice of litigation. This means anything that has to do with the practice of litigation, including litigation, arbitration, mediation, and settlement conferences. They deal with any issue that has to do with a dispute.

In its written submission to the Review, the Society did not focus on the substantive issues. When it makes submissions on advocacy and policy issues, it wants to protect the profession of legal advocacy. The focus is on the protection of the relationship between the advocate and the client, improved efficiency of the court system, and enhanced access to justice for clients. The Advocates Society did not focus on the substantive areas of construction law. It is most comfortable focusing on advocacy and procedural aspects.

The Society's submission started with the Construction Law Practice Group executive, which put together researched submissions. The letter went to the standing committee of the Board of Directors, which provided feedback. The committee's comments were considered, and changes were made to the letter. The letter has been approved by the Board for release. It was well-vetted by a variety of people in different areas.

2. Interlocutory Processes

The Society explained that what happens in practice is different than what is contemplated in the Act. Parties regularly bring motions for production and discovery. Motions are usually granted on consent. Even where it is unopposed, you still need to go to the jurisdiction where the land is situated to get the motion heard.

According to the Society, sometimes there is a lot of time spent on home renovation cases. There could be a financial threshold. This would be the most neutral approach. The Ontario Bar Association section committee established to comment on the Review ("OBA Section Committee") suggested a financial threshold of $25,000 for these cases and proposed that they be dealt with in small claims court. Some stakeholders have

suggested excluding these cases from the Act as a lot of the court docket is tied up with such small cases (including, for example, home renovation cases).

The Society suggested there may be constitutional issues about liens being enforced in small claims court. Masters will sometimes move a case to small claims court, but only on consent of the parties. They will bring it back to enforce the judgment. Sometimes people refuse to go to small claims court.

From some stakeholders in the contractor community, the Review is hearing that the ability to lien a home is important for small contractors because it is an unusual remedy that gets the homeowner's attention.

The Society did not have a view about whether home renovation cases should move to small claims court. They just considered the issues related to production and discovery.

3. Provisions Resulting in Multiple Proceedings

There was conflict within the Advocates Society on the issue of multiple proceedings. Where you have a prohibition, you could address it by allowing the court to be a gatekeeper and seek leave. The courts or parties could decide whether to join a lien claim with a trust claim. If there are multiple liens, and the potential for confusion, the court could be a gatekeeper and decide whether joinder should be used. This could be done on a case-by-case basis.

The Society suggests that multiple proceedings should be brought together. It may not be possible to bring proceedings together because there are multiple liens on title and breach of trust allegations. In these situations, the discoveries could be crafted to deal with different issues at different times.

The Society explained that the court would have to regulate how to avoid bringing in other people unnecessarily. It would be unfair to have an owner present for the trust portion of a proceeding if they are just involved in relation to the holdback. It is about proportionality. If the owner has no interest in participating in the financial parts of the discovery, they should not be required to attend. Crafting the discovery is part of the discovery plan process.

Subsection 55(1) of the Act

The Society explained that if you do not remove this provision, the Review would have to consider a way to supplement the ability for the court to help the parties manage the case. The Act takes longer, rather than being a summary procedure.

According to the Society, sometimes the lien action is outside the Greater Toronto Area ("GTA") but the trust action is in Toronto. You would need to try to get it in the same jurisdiction, which can increase the cost.

Section 56 of the Act

The Society noted that leave to issue a third-party claim is generally given. There could be a reverse onus applied. If the third party wants to oppose the claim, they could do so after the claim is issued.

In respect of engineers and architects, in some cases, the courts have found that where professional negligence is being asserted, the nature of the allegation is sufficiently grave in regards to the professional that they should not be denied the full procedural protection under the Rules of Civil Procedure (the "Rules").

The Society suggested that perhaps lien actions where there is a real professional negligence issue such cases should be heard by a judge. A Superior Court judge may be reluctant to refer a negligence action.

Another issue raised by the Society is the invocation of a motion to commence proceedings against third parties as an inoculation against a mandatory arbitration provision. Where one party wants arbitration and the other does not, trying to bring in a third party can be used as part of an argument to not allow the arbitration to proceed.

One of the issues referenced in the Information Package was giving the court the jurisdiction to consolidate arbitrations. The Society noted that there is no jurisdiction to order that the subcontractors, owner and general contractor all participate in a single arbitration. Each may have a separate agreement to arbitration and a right to nominate an arbitrator. If you combine them, you deprive people of their right to an arbitrator.

The Society suggests allowing third-party claims as of right to avoid logistical issues. The Rules could allow for a motion to strike it if it is not appropriate to bring it at a certain point in the action. This is similar to the issue of a counterclaim against a non-party.

4. Setting a Matter Down for Trial

According to the Society, there is a need for consistency in different jurisdictions. In Hamilton for example, they want a pre-trial and it is not addressed in the Act. The practice of the various jurisdictions is not in harmony with what the Act provides.

5. Posting Security and Vacating Liens from Title

The Society explained that there is a problem in relation to posting security outside Toronto. You could be at court all day and not get heard. Judges may not appreciate the urgency. The recent experience is that outside Toronto, you are put at the end of the list.

Near London, for example, it could be five to seven days. The Society explained that it is a resource and education issue outside of the GTA. If it is done in five to seven days, then you are in breach of the contract but this is a difficult issue to resolve by statute.

The Society suggests that the Act be amended to provide for an order permitting a person posting security to vacate a lien be released to that person immediately. The Act

could mandate that if you are outside the jurisdiction, the court can accept it and send it to the Accountant's Office. This eliminates the problem because the court has control over the process.

In Toronto, the Society queried why if you give the lien bond to the master you then have to give it to the Accountant. The local registrar could possibly be deemed to be the agent for the Accountant and they could send it to the Accountant.

6. Mandatory Mediation

Mandatory mediation makes sense to the Society and it is not clear why construction lien actions should be exempt from this requirement. There was a lot of success when there were enough resources to implement mediation. This would achieve the objective of the Act of providing a summary procedure.

7. Adjudication

Two of the major issues for the Review are prompt payment and adjudication. Many stakeholders to date have been supportive of the concept of adjudication in Ontario for resolving disputes.

The Review has suggested to all stakeholders that the prompt payment issue has two aspects. The first is the ordinary course of payment as work proceeds on a project that never goes into litigation. The other aspect is the project that is in a major dispute and there is "gridlock". The owner stops paying because of the dispute and set-off may be claimed. This may lead to protracted litigation.

The Review discussed the concept of adjudication to resolve the "gridlock" issue.

The Society noted that the Review would have to consider how to integrate adjudication with the Act and lien rights.

The Advocates Society advised that they will consider this issue and provide feedback by the end of the year.