

Construction Lien Act Review Consultation Meeting Summary Ontario Electrical League

December 2, 2015 (9:00 a.m. to 11:00 a.m.)

Attendees: Stephen Sell, Louie Violo, Glenn Sturdy, 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.

General Overview of the Ontario Electrical League

The Ontario Electrical League ("OEL") has about 7,800 electrical contractor members and represents about 500 companies. There are another 6,000 non-union companies that do not belong to an association. If they are part of a union, they have to belong to the Electrical Contractors Association of Ontario ("ECAO").

The ECAO is the larger electrical contractor association because it represents large contractors with large numbers of employees. The OEL represents smaller companies which make up the bulk of companies in the province. It has a broad range of membership. The issue of liens is similar to the larger contractors; it is just a matter of scale.

The OEL's concern is that payment is not guaranteed. Electrical contractors need to protect themselves. OEL wants a change in the system because it can take up to eight months to receive payment.

The basic purpose of the Act is to provide a reasonable, but limited, amount of collateral to protect trades who are providing services or materials to an improvement against the risk of insolvency of the general contractor. Layered on this are trust provisions which protect the money from the banks in the event of insolvency. The Act is also aimed at efficiently resolving disputes so that the money will flow down to the trades. The Review has heard from some stakeholders that this aspect of the Act is broken.

Holdback

From the electrical contractor's perspective, OEL stated that there is the issue of the punch list of things that have not been done. This elongates the project. The OEL noted that owners sometimes do this on purpose. The Review noted that some owner stakeholders may disagree. The Review has heard from some stakeholders that the holdback can be used as leverage in relation to set-off and making sure that deficiencies get fixed. Specifically, the Review has heard that after the holdback loses its character as the holdback, some owners will raise set-off claims and want to utilize holdback funds to set-off for alleged deficiencies.

There are two issues related to holdback that the Review has heard about: ensuring that deficiencies get fixed and making sure that everyone has been paid. The OEL explained that a good contractor will go back and fix deficiencies. The OEL explained that the problem is when the owner is holding the money back from the general contractor. If the holdback does not go to the general contractor for a long time, the subcontractor has to wait until the general contractor has received it.

OEL Proposal for Authority to Seize Equipment

The OEL proposes that the Act should be amended to allow electrical contractors to seize machinery and equipment from a customer who does not pay for it. The OEL explained that there are situations where electrical contractors install electrical equipment or machinery at the beginning of the job and it stays on site but the electrical contractors have not been paid for it. In this example, as soon as the equipment or machinery is installed, the owner could see it as their equipment or machinery even if they have not paid for it completely.

Electrical contractors want the ability to go in and remove the equipment or machinery if the client has not paid. By way of another example, the OEL brought up in a situation where they do the wiring but do not get paid. They want the ability to seize the equipment or machinery to ensure payment.

According to the OEL, there is a big difference between what the electrical contractor has supplied and what an equipment supplier has supplied. The OEL suggested that a proposed amendment should involve whatever the electrical contractor has supplied through the contract.

OEL explained that when hooking up the equipment, sometimes there is no payment until it is commissioned and running. This can happen a month or two after it has been installed. This type of equipment frequently gets paid for on a milestone basis after it is commissioned. In some cases, there are progress payment milestones throughout the project. The way most contracts work, title to the transformer, switchboard, and other elements pass to the owner. Some contracts allow for passage of title upon payment.

The Review has heard that prior to the 2010 amendments case law about whether or not equipment was lienable was confusing. In 2010, the definition was changed so that certain equipment was expressly included. One of the issues that has been discussed with the Review is what is and is not lienable (e.g. contracts supplying services such as IT) following the amendments to the Act in 2010.

The OEL's proposal refers to machinery and equipment (e.g. transformers), but in the Act, and in construction contracts generally, there is a distinction drawn between material and equipment. Cable is thought of as material and a transformer would be equipment. The OEL is referring to equipment, not material.

This issue was considered by the OEL committee and they said the electrical contractor would just need to remove the main disconnect. If you take it out, there would be no electricity to the building. It is a lot of work to remove it.

The OEL noted that mechanics can seize your car if you do not pay them. They have a lot of power and electrical contractors should have some sort of power if they do not get paid if they could remove equipment. The electrical contractor would not remove the whole machine or piece of equipment but rather seize just the essential parts.

Mandatory Financial Disclosure

The OEL submission discusses mandatory financial disclosure for owners and general contractors. The Review noted that some stakeholders have said that the financial disclosure provision is often crossed out in CCDC contracts. Certain stakeholders want to know whether the owner has the financing in place to complete the project. On the owner side, the Review is hearing from some stakeholders that they are transparent, they are not going anywhere, and all of their financial information is publicly available.

The Review has heard that where a project budget is not approved, the general contractors are asked by owners to hold their prices for up to a year and they have difficulty flowing down to their subcontractors. Some stakeholders have said that it is difficult to hold the price for a long time because the cost of material is uncertain.

OEL explained that in some cases, electrical contractors have had to put two price increases out because of the exchange rate. Conversely, wire manufacturers will not guarantee their prices for longer than 24 hours. Electrical contractors often cannot hold their prices for a year. This is because of the price of copper. The price could go down, but it could also go up considerably. Most likely, the price is going up so contractors are taking a risk if they have to hold their price. It is a very unpredictable risk. Electrical contractors are asked to hold their prices in this situation, but they refuse to do so. There is a clause in the contract regarding the potential for increased cost.

The OEL explained that there are a lot of things electrical contractors do for due diligence. With respect to private companies, they get credit references. In some cases, there is a new company for every development.

The OEL wants the Act to provide for mandatory disclosure because the owner may be able to pay, but the general contractor is not and, as a result, the subcontractor does not get paid. As such, the OEL suggested that there should be a document between the owner, general contractor and trade contractor stating that there is money for the project.

Residential Renovations

For the residential sector, the Review has heard that there is often no written contract and no holdback. It has been suggested to the Review that in relation to residential renovation work, the Act is ignored because people do not know about it. The Review has heard that this sector has significant challenges associated with it. Some stakeholders have suggested that the Review should exclude residential renovations from the Act.

In one example, the OEL described that these cases are not economical and that trying to get paid from a homeowner is very difficult.

The OEL suggested that some people in the residential area are doing this work illegally and may try to use the legislation to their advantage. There should be a contract that encompasses the owner, general contractor and subcontractor before any work is done on residential and commercial jobs. A lot of homeowners are not knowledgeable about the legislation. If there is a document like this, it could reduce underground work.

Extending Lien Rights

The OEL submission suggests that the lien period be extended beyond 45 days. The Review has heard about this from other stakeholders.

The OEL suggested that it should be 90 days as a minimum for liens to be preserved as when it is only 45; you have to put the lien on when you start the job. The period to perfect a lien should also be extended to 120 or 180 days. The OEL stated that if there is prompt payment legislation, there would be no need for these timelines.

The OEL wants an extension of lien dates because it extends honour to the owners by saying 'we believe you will pay us and we can wait 60 days'. Most owners may not be able to pay within 45 days. Contractors do not file liens because 45 days is too short.

The Review has heard from some stakeholders that owners want 45 days because of certainty of time and maintaining the status quo. Further, the Review noted that some stakeholders had expressed frustration in relation to the promptness of payment, elongation of the payment cycle, the holdback being used as leverage to get work done, and a focused effort to say that there is a problem to be addressed.

In contrast, the Review has heard from some owner stakeholders that they are comfortable that the Act's respect for freedom of contract.

The Review has heard from some owner stakeholders that they often receive poor quality progress payment applications and they want to incent contractors and subcontractors to put paperwork in in a timely way. These owner stakeholders have checks and balances that they need to follow because they can make the payments. Owners say that they want to pay and want projects to proceed on schedule and on budget. They are guardians of the public purse and they need certainty, and the status quo provides that certainty.

The OEL explained that one issue in relation to draw requests is that the requests themselves are getting more demanding and complex. When the complexity of the submission goes up, the likelihood of a defect also goes up. The problem with some general contractors is that even though the subcontractor puts their progress draw in at a certain time, the general may not have put their draw in and the subcontractor does not get paid as a result.

The Review noted that some owner stakeholders have said that whether the payment cycle is being elongated depends on how you count. You could count from the submission of progress draw request or from the date a properly documented progress draw request is certified. Some public sector owners have said that they want to count

from date of certification as there are many sub-processes (such as consultant review, in house financing review, etc) that require time to complete properly.

The OEL explained they were concerned with the lien period which starts the last day they are on the site. The electrical contractor could have the equipment installed, but not energized yet and owner does not want to pay until it is energized.

Adjudication

The Review discussed with stakeholders that prompt payment has two aspects: first is the issue that Bill 69 was getting at, which is to shrink the elongation of ordinary course payments; and the second is the “gridlocked” project where the project has encountered a major dispute between the general contractor and the owner and money stops flowing.

The Review explained the concept of Adjudication and the UK model.

The Review has heard that many stakeholders want the Review consider introducing adjudication in Ontario.

The OEL agrees with the idea of adjudication.

Pay When Paid Provisions

The OEL submission did not reference ‘pay when paid’ provisions. It was not in its top five issues, but it was in the top ten.

Non-Waiver

The OEL mentions the release or waiver form in its submission. Members are being asked to sign a release or waiver before they get paid. The Review explained that these waiver provisions are not enforceable in Ontario.