Construction Lien Act Review Consultation Meeting Summary
Council of Ontario Construction Associations

November 9, 2015 (11:00 a.m. to 1:00 p.m.)

Attendees:

Ian Cunningham, Edward Dreyer, Glenn Ackerley, Jim DiNova, 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 Remarks

The Council of Ontario Construction Associations ("COCA") is a federation of 20 to 30 construction associations, representing 10,000 general contractors and trade contractors. For its participation in the Review, COCA developed an internal process where it selected 12 people to participate on a *Construction Lien Act* (the "Act") task force, most with a good knowledge of the Act. Those individuals are listed in the submission. COCA also did a survey based on the information package and had a series of conference calls with its members. The result of this process was the written submission.

COCA had a full briefing from Sandra Skivsky on the Prompt Payment Ontario ("PPO") stakeholder meeting.

The Information Package gave a great survey of all of the issues. In its written submissions, COCA tried to take positions on most of the issues raised. There are, however, issues that are of much greater priority to COCA than others. There are five key issues.

1. Prompt Payment

The top priority for several years is prompt payment. COCA has been involved in the CLA reform issues for almost 20 years, including the changes to the Act in 2010. In terms of prompt payment, COCA was involved in the first Private Members' Bill, and with the trade contractors on the *Prompt Payment Act, 2013* ("Bill 69"). It was a strong supporter of Bill 69.

2. Holdback in a Separate Trust Account

According to COCA the holdback seems to operate as a loan, which is a problem for subcontractors and contractors when a project goes insolvent and they have to wait until the project is sold for the holdback to be paid out.

COCA explained that the idea of a separate trust account for the holdback was pitched by the Ministry of the Attorney General in 1983 and the committee recommended against it. A number of the reforms that COCA will discuss deal with banking, which is easier now than it was in 1983. At that time, it was seen as an administrative burden.

3. Trust Funds Should be Deposited to a Separate Trust Account

COCA members did not have a unanimous view on the issue of separate trust accounts. COCA proposes that for contracts greater than $5 million, there should be a separate trust account for the project. Contracts that are less than this amount could have a mixed trust account.

There are cases where the court has found that if trust funds are comingled, it is impossible to administer the account as the Act intends. According to COCA this proposed change to the Act would assist contractors to administer the accounts in the way the Act intended and not expose them to breach of trust. It is also beneficial because it may help to circumvent the problems created by the *Atlas*[1] case for large contracts. For contracts under $5 million, comingling will still be a problem, but COCA's proposal may help to reduce the burden on smaller contractors while providing protection for trust claims.

From an owner's perspective, there are practical issues in terms of lenders and where the monies would come from.

4. Problems with Receiving the Holdback

COCA explained that the holdback has become a loan and subcontractors who are involved at the early part of the project have to wait until the end to get paid. In the written submission, COCA suggests that there be mandatory payment of the holdback at the request of the subcontractor. If the subcontractor does not request the holdback, the lien rights would remain until substantial performance of the contract. The problem may be that every subcontractor will ask for early release.

5. Restoring the Priority of Lien Claimants with Respect to the Notice Holdback

According to COCA, the *Basic Drywall*[2] case was wrong and is bad policy. In considering subsection 78(2) of the Act, the court read in the word "only". On its face, the provision didn't confer any right on the building mortgagee. It took rights away.

In 1983, the committee considered this issue and noted that mortgagees can already get protection. The Act should be amended to restore priority for lien claimants with respect to the notice holdback.

6. Adjudication

The Review discussed Adjudication as experienced in the UK and the "gridlock" issue occurring in Ontario.

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[1] *Royal Bank of Canada v. Atlas Block Co. Limited* 2014 ONSC 3062
[2] *Basic Drywall Inc v 1539304 Ontario Inc*, 2012 ONSC 6391 (Div Ct)

The COCA submission mentions mandatory adjudication in certain types of contracts. It also suggests that an owner should not be able to adjudicate with respect to funds that a payment certifier says is payable. COCA is concerned about who the adjudicator would be, because there is a potential for conflicts among the parties on this point. The thought was that there should be some certification for adjudicators.

The Review noted that that the parties could identify an individual to become the project adjudicator and make determinations as disputes arise. In some recent Infrastructure Ontario agreements, contractual adjudication is provided for using the UK model but without an adjudicator identified upfront. The difference with the UK model is that once the adjudicator makes a determination, it is enforceable as a judgment. In Australia, there are two different approaches, one of which excludes monthly draws or change orders. The UK model allows for invoking adjudication in regards to any dispute, including a monthly draw. If you have an accumulation of disputed change orders, someone may invoke adjudication to get the change orders resolved.

Where adjudication is available to contractors the fact that it exists changes the discussion about finalizing change orders. If there will be a quick resolution, owners would be more motivated to resolve disputes.

In its submission, COCA also suggested that where the payment certifier certifies but owner does not agree and decides not to pay, the owner should be required to pay. There should not be a right to set-off against funds certified as payable.

COCA explained that certain contractors do not want adjudication to be all-encompassing because there could be a risk of them giving away their rights.

Exception for Home Renovations

COCA is concerned about contracting out, with parties changing the rules and excluding consumers from adjudication to protect their own interest. In talking about adjudication, there should there be no exception for home renovation.

There are differing views on homeowner exclusions, ranging from small bathroom renovations to a $20 million dollar home. Some say that large home projects should be included. Some small subcontractors do not want home renovations excluded. It has been suggested that these matters be dealt with in small claims court. In the vast majority of small home renovations, there is no contract and no holdback.

COCA surveyed its members on this issue and they thought the Act should continue to apply to home building.

7. Freedom of Contract

According to some stakeholders, there are a number of contesting principles involved in looking at how the Act should be amended. Complete freedom of contract forms one end of the spectrum and statutory regulation the other. The Act says that suppliers of services and materials have the ability to unilaterally charge the land of the owner and recover from the owner an amount up to 10 percent of the price of the services or

materials. Ontario decided to head towards the centre of the spectrum to provide an element of collateralization to contractors and subcontractors improving real property so that they can get money back in the event of insolvency.

In the 1980s, there were high interest rates and insolvency was very common. The element of collateralization was very important at the time. Bonds were also important. When the 10 percent holdback was arrived at, it was thought to be the profit and overhead of the general contractor. Freedom of contract was still high on the radar of the committee that considered the Act in 1983.

When you look at the spectrum, the proposition that has been brought forward by stakeholders is that prompt payment is a very significant movement towards statutory regulation. It is a step to the regulatory side of the spectrum and away from freedom of contract. A concern that has been used is with regard to milestone payments, which are important in the P3 world and mining contracts. One suggestion is that it would be ill-advised to impose payment terms on every contract because you would eliminate the freedom to have different kinds of payment mechanisms.

Another key aspect is simplicity versus complexity. It is important to strike a balance so that the Act is improved, but is not too complex. There are proposals about excluding certain sectors or creating exceptions for certain sectors. There is also the suggestion of carving out projects below $25,000 and requiring that any disputes go to small claims court.

COCA noted that the way the contract describes payment mechanisms should not alienate it from prompt payment or holdbacks. The Act should not include an exemption for certain industries. Trades deserve to be paid and not wait for milestone payments.

Stakeholders have disagreed where the line should be drawn with respect to the spectrum of freedom of contract and statutory regulation.

8. Milestone Payments

According to COCA, Bill 69 would have required every construction contract to provide for a very specific payment cycle. If you are involved in a mining contract and phase one is site clearing, it may take a year to complete. The second phase could also take a year. Under the Bill, the miner and general contractor would not be able to make the agreement because the 30 day payment cycle would be implied in the contract. Bill 69 would have prohibited milestones of 30 days. The policy issue is whether the restriction of freedom of contract is to be negated by statute by imposing a statutory obligation.

The general contractor agrees to the contract because they do not fund any of the payment. When they tender, they know that it will be a multi-year project but the subcontractors are not aware of the timeline. Family owned businesses are involved in these contracts and need to be paid within 30 days. Payment legislation is designed to address the imbalance of bargaining power.

Some have said that general contractors are, in part, money managers. They manage the money coming to them and flowing down. From a financial perspective if they have

to pay money they do not have, it increases the price of the project or they have to finance the difference in the case flow.

COCA did not discuss the issue of milestone payments, which attempt to address payments over the entire contract. Bill 69 may have gone too far with this. There must be some arrangement that allows for the flow of funds over the whole contract, rather than full payment at the end of the job. There is no automatic right to progress draws.

A few stakeholders have said that when a subcontractor signs on to tender, they have priced their scope of the work but have no meaningful knowledge of the rest of the project, timing or payment terms. They end up with whatever payment process is in place. General contractors have said that when they are bidding they do not have any assurance that they will get paid either. Another issue that has been raised is the right to access to information in the pre-bid phase. It is difficult for the general contractor and subcontractor to price an unknown risk.

COCA suggests that security and financial information should be provided to contractors.