

Construction Lien Act Review Consultation Meeting Summary Metropolitan Plumbing and Heating Contractors Association

December 8, 2015 (2:00 p.m. to 3:00 p.m.)

Attendees: Gabrielle Gallant, Gianni Agozzino, Marsha Seca, 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. Overview of Metropolitan Plumbing and Heating Contractors Association

The Metropolitan Plumbing and Heating Contractors Association ("MPHCA") represents mechanical work in the high-rise condominium sector in the Greater Toronto Area. It represents plumbers and steam fitters that work mostly in high-rise buildings. This includes plumbing, mechanical, air conditioning, steam fitting, and fire protections.

MPHCA has 30 member companies who employ over 2,200 people. A growing part of the work of member firms is fire protection (sprinklers). There is new legislation for this work. MPHCA has partnered with another association who represents this demographic.

MPHCA members are primary contractors when there is a developer. They work with developers directly. Sometimes they have a construction manager in the middle. The major developers are building themselves. They do not have a middle man.

In a regular contract, MPHCA members would be the subcontractor. However, for about 80 percent of their work, there is no general contractor. The membership occupies two different places depending on the model of the project.

The members of MPHCA feel that the Act is watered down and ineffective, especially in the private sector. The spirit of the Act is to protect trades. It seems to protect the builders more. They get more benefit from it.

The problem is an anxiety period where you need to determine whether to perfect a lien or just hope for payment. The members of MPHCA have good quality relationship with their clients. Because of this issue, there is an anxiety created once you file a lien.

2. Holdback

MPHCA explained that there is a level of anxiety among members once they reach 45 days after the last date of supply. Generally, given the relationship with the people they enter into contracts with, they let the lien rights expire and hope that they get paid.

It is a precarious position to be in. Fortunately, because there is a unique situation where the developer is the general contractor, they want to get the job done and close

the project. MPHCA members are on the job throughout the duration of the project. This extends the holdback period. Members rarely register liens.

In the United States they have intent to lien. MPHCA suggested there could be a cooling off period or a time when subcontractors could be assured things are happening properly. Currently, the Act only specifies when subcontractors can lien but does not specify when they are to be paid. They do not want to give up their lien rights, but they do not want to sever the relationship.

The contractual payment terms are generally 30 to 45 days. This is the way the progress draw flows. The subcontractor submits the draw and it is reviewed by a consultant. Government work can take up to 90 days for payment. There should be a time frame in the legislation during which they must pay (e.g. 40 days). This gives more certainty to determine when to lien.

The MPHCA is familiar with what happened with Bill 69 where public sector owners were not happy. The Association is happy to include longer payment timelines in the legislation. It could be up to 90 days for those contracts.

The Review team has heard that in relation to materials supplied to subcontractors, there are tight time frames to pay suppliers and if they do not pay, then they do not get their materials. Suppliers will not accept a holdback. This happens to MPHCA's members as well. The economic reality is that equipment, materials and labour must be paid in full. They are financing the holdback and their margins are very tight.

The Review has not heard suggestions that the holdback be reduced. One stakeholder has suggested that it be increased to 15%. MPHCA has left the holdback alone, but suggested phased release of the holdback. Tranches of the holdback could be released as the project achieves percentages of completion.

The idea of providing for earlier access to the holdback in some sensible way is being suggested by multiple stakeholders. Some have suggested annual release of holdback for big infrastructure projects that extend for years. Others have recommended phased release, especially for milestone-based contracts. The holdback would be released at certain phases. Design consultants have suggested release of the holdback in relation to some design services before the construction starts (75 percent of work is done before construction).

Another option the Review has heard is in relation to the early trades. It has been suggested that these subcontractors should get an early release of holdback. Mandatory certification of subcontracts is an option that some groups have raised.

MPHCA also raised the idea of requiring the paying of holdback on a specific day following the certification of a progress draw (i.e. 40th day).

There is also an employment aspect. MPHCA members employ the trades and they are being stifled. They could hire more people if the holdback flowed faster. It is freezing up capital. Builders do not pay until they get a certain level of occupancy and they have the money to pay the subcontractors.

3. Trust Provisions

MPHCA explained that the trust provisions in the Act are not being followed. There should be a real third party trust where actual monies are deposited. The trust provisions should be clearer. Builders and developers may have concerns about this because they do not finance the holdback. MPHCA members are banking the 10 percent holdback.

In British Columbia, there is a legislated project bank account. Another idea that has been raised is an idea that owners be required to deliver proof of financing. Several stakeholders have suggested this. Certain owner stakeholders have said that they do not approve of this idea.

MPHCA felt that if the trust provisions were fixed, many other issues in the Act would drop off in terms of importance or impact.

4. Proof of Financing

The CCDC standard contract has a proof of financing requirement but it is often the first thing that is taken out. Some contractors and subcontractors have said that they are not in a position to bargain for it, given the nature of the bargaining relationship, so they want it legislated. Public owner stakeholders have said that they have the money and there is no information about budgets that is not already publicly available. They would not want any additional legislation that conflicts with statutory and regulatory requirements imposed on them.

In response, the Review has heard from municipalities that they have certain capital budgets, and they may not know whether funds have been allocated to a certain project. There could be a hold placed on a project. Contractors have said they have to hold their prices for up to a year, which has a detrimental impact.

The MPHCA noted that proof of financing would demonstrate that the funds are available. The spirit of the legislation is to protect both parties in different ways. Suppliers would know they will be paid at a certain time so they can price projects beforehand. Builders want to ensure that everything is done properly. Both issues should be dealt with in any change. If the trust issue gets looked at in a more concrete way, it will resolve a lot of issues. It is about certainty.

5. Adjudication

Some projects encounter major disputes and the money “gridlocks” and it stays this way while the judicial system and lawyers figure out how it should be unlocked. The Review explained the concept of Adjudication and the experience in the UK. Generally stakeholders have been supportive of the concept of adjudication. Some broader public sector owner groups are thinking about it. Freedom of contract is very important to them. They want the contract to apply as it does now because they have certain demands that make them comfortable with the status quo. Proponents of prompt payment and certain other stakeholders, and all industry-specific groups are strongly in favour of this concept.

MPHCA explained that it likes the concept of adjudication to deal with gridlock. The MPHCA will take the issue of adjudication back to the membership and think about it.