

Construction Lien Act Review Consultation Meeting Summary
Provincial Building and Construction Trades Council of Ontario, International
Brotherhood of Electrical Workers, Local Union 353 and Toronto Electrical
Industry Benefit Administrative Services

December 10, 2015 (10:00 a.m. to 12:00 p.m.)

Attendees: Marnie Niemi Hood (IBEW Local 353/Toronto Electrical Industry Benefit Administrative Services), Steven Martin (IBEW Local 353), Robert O'Donnell (Greater Toronto Electrical Contractors Association), Jeff Long, James Hogarth, Igor Delov (collectively, the "Stakeholders")

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. The Construction Lien Act and Insolvency Legislation

The Review has heard from some stakeholders that there is a *Companies Creditors Arrangement Act* ("CCAA") and *Bankruptcy and Insolvency Act* ("BIA") insolvency issue when a contractor goes bankrupt.

The Provincial Building and Construction Trades Council of Ontario ("PBCTCO") and the International Brotherhood of Electrical Workers, Local Union 353 ("Local 353") have concerns about this issue. The holdback provisions should be amended to state that as long as liens are registered, the holdback is not the property of the defaulting payer.

Project Bank Account

One proposal the Review has heard about from some stakeholders is the concept of a project bank account. It could potentially help solve the certainty issue. The general contractor and owner would have joint control. The Act could be amended to insert a provision that requires the holdback to be paid into a project trust account with the owner and contractor as signatories. This language could be added to characterize the nature of the account. This would identify the trust and define it so that it cannot become the property of the defaulting contractor until all suppliers, unions, and others are paid.

The Review has heard from some stakeholders that some level of the construction pyramid has to finance the float in projects and often those people are the subcontractors. These stakeholders point out that the general contractors have 'pay when paid' provisions, so there is no obligation to pay. Trades are paying material and equipment suppliers in full. There is no holdback at that level. The Review is hearing from some trades that this is a huge burden when there is an elongation of the payment structure.

Some owner stakeholders have said that imposing a bank account may increase cost of the project. Some owner stakeholders have said that they view the holdback as a maintenance holdback or leverage to get the punch list complete. In contrast, the labourers and sub trades see the holdback as money held in their benefit and want to be paid once the project is completed.

Early Release of the Holdback

In terms of the early release of the holdback, the Stakeholders suggested that some will support it and some will not. The Stakeholders' position is different than other trade contractor stakeholders. They have pushed hard for mandatory early release of holdback.

One idea that has been presented to the Review is phased release of holdback, especially on bigger jobs such as public-private partnerships ("P3s") where they are sometimes paid on a milestone basis. There could be phased release based on milestones.

Another idea presented to the Review by some stakeholders that has been adopted contractually by some stakeholders, is annual release of the holdback so that no one is confused about timing or whether a milestone has been achieved. The Stakeholders suggest that annual release is a good idea.

An idea presented by the design community to the Review is for a release of the holdback once the design element is complete as most of their work is done before construction starts.

Mandatory certification of subcontracts (section 33 of the Act) is another idea raised to the Review by some stakeholders. The Stakeholders noted that Sections 25 and 26 of the Act already allow you to do an early release of holdback but that people are afraid to do use these provisions.

Some contractor stakeholders have suggested mandatory payment of interest if they are not paid.

2. Adjudication

The Review suggested that promptness of payment has two aspects: the first is the ordinary course of payment aspect, which is the issue that the Prompt Payment Act, 2013 ("Bill 69") was trying to address (elongation of payment, including the holdback).

The second aspect is the "gridlock" issue where a project encounters a major dispute. The judicial system is engaged and the dispute may not be unlocked for some time. The "gridlock" situation is inefficient.

Many stakeholders are saying that the Review should consider recommending the adoption of an adjudication mechanism.

The Review explained Adjudication and the United Kingdom experience.

The Stakeholders asked about the interaction with lien legislation and suggested that the Review would need to figure out how the two fit together.

Local 353 is very familiar with this type of justice because it has the Ontario Labour Board. It is rough justice but there is a quick decision that is generally beneficial.

3. Prompt Payment

Local 353 has 11,500 members and retirees and their pension fund plus their spouses and dependents. It is insuring about 50,000 people. For every hour of work, an additional \$10 comes from the contractor to fund pension and health and welfare benefits. There are also additional training funds.

The members of Local 353 pension plan earn about \$12 to \$13 dollars every month for pension. The average pensioner is getting about \$2,000 per month. If he goes a year where the contractor is not making the remittances, the impact is about \$150/month of pension that he is not getting. If you are a retiree on a limited income, there is a loss of \$150/month. It also affects the pension plan for everyone.

To diversify the fund, the Local 353 pension plan considers investing in infrastructure projects. They have been told that the risk is shifted down to contractors and workers. It is the workers that really bear the risk in such circumstances.

Some stakeholders have said that adjudication would stop frivolous issues and the owner from using the money for another project. This is where the concept of quick adjudication comes in because it would force funds to flow. The Stakeholders suggested that the adjudication concept could develop into a construction arbitration board. The Stakeholders are fully in support of the idea of adjudication.

Some stakeholders have told the Review that if a trade is not being paid, the labourer and plan would not find out that the benefits have not been paid for 60 to 90 days. The Stakeholders noted that labourers may not find out until they try to use the benefits. A lot of them work on a dollar or hour bank. If insufficient dollars are coming in to fund life insurance, the life coverage can lapse. The person works for a month and the remittance is due on the 20th day of the next month.

If premiums have not been remitted within a 30-day grace period, the insurance company can deny the policy. A worker may work for a contractor who is not getting paid. The member gets his wages, but nothing is being paid for the pension. The contractor must make a decision to pay the remittances. .

4. Preservation and Perfection

According to the Stakeholders, timing for preservation (75 days) and perfection (90 days) should be longer. Half of the companies that are supplying have 60-day terms. The union may need to lien because the contractor is in default. This must be tied to

release of holdback and perfection. Some subcontractors have suggested that rights should expire after the payment term of the contract. Sometimes there is no contract.

The Stakeholders do not like that liens go on so early. They want more time. It is not necessarily a negative thing for builders.

According to the Stakeholders, payment is the number one issue among plan members. It has shifted over the years. Part of it is because general contractors do not have as much skin in the game because they do not do the work themselves. They may broker the risk.

5. Lot-by-Lot Expiry

The Review has heard from some stakeholders that the lot-by-lot expiry provision should be removed. The Stakeholders suggested that sometimes the owners can use the labour and sell the house. The contractor is owed money, but can only lien the last three lots. The liens go on and you estimate an amount and then get into issues that go to discovery. You are required to determine exactly how many hours you worked on each lot. It is punitive, onerous and not in line with the objectives of the Act according to the Stakeholders.

6. Small Projects

The Review has heard from some stakeholders that projects that are less than \$25,000 should be taken out of the Act and shifted to the jurisdiction of small claims court.

The Stakeholders explained that the Act is an important tool because it is a lien on title and easier to collect. Some trades rely on home renovation work. You may not want to restrict it because of a dollar amount.

The Stakeholders suggested that some homeowners act badly and refuse to pay the whole amount. Mandatory mediation can be an important tool. Most cases settle in mediation. If we do adjudication right, we will make a mindset change. Behaviours will adapt.