

**Construction Lien Act Review Consultation Meeting Summary
Residential Construction Council of Ontario and the Ontario Home Builders
Association**

December 17, 2015 (10:00 a.m. to 12:00 p.m.)

Attendees: Derek Freeman, David Bernstein, Richard Lyall (RESCON), Joe Vaccaro (OHBA), Steven Hamilton (OHBA) (collectively, the “Residential Stakeholders”)

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. General Comments from the Residential Construction Council of Ontario

The Residential Construction Council of Ontario (“RESCON”) is pleased that the government decided to do an expert review and analysis. RESCON asked for this in its opposition to Bill 69. You cannot do it absent consideration of the Act. They had concerns about the underlying premises and propositions in Bill 69.

RESCON explained that housing occupies a very unique position in the market economically and socio-economically. RESCON is very careful about any changes in the legislation because of the implications on housing (e.g. prices of housing). It will vigorously oppose anything that is unnecessary or does not add a benefit to the consumer or public interest.

The Review has not heard from the homeowner community. According to RESCON, the collectivized representation of homeowners resides with the builders. New home buyers are not represented outside the residential builder industry. Builders must care for their market. There are also systems like Tarion, with an extensive checks and balance process with respect to the registration of builders.

RESCON has a direct interest for business purposes. They endorse a cost-benefit analysis approach and there must be a demonstrated benefit relative to the cost.

2. General Comments from the Ontario Home Builders Association

The Ontario Home Builders Association (“OHBA”) is the provincial voice for 30 local associations. It has a broad provincial scope. OHBA explained that the Act has a different impact in cities outside the GTA. There are different perspectives on how things work in different regions of Ontario.

The OHBA’s membership has developers, builders, renovators, and contractors. It represents the builder, developer, and renovator perspective. Other groups will speak to

the perspective of contractors. The OHBA shares membership with RESCON. They are aligned on this issue and took it as an opportunity to work together.

According to OHBA, the report of the subcommittee of the *Attorney General's Working Group on Residential Construction Trust Compliance under the Construction Lien Act* ended up as a consensual position on behalf of everyone, from worker to owner-developer.

For the Residential Stakeholders, the Act is a known commodity. The members of the organization work well within the known boundaries of the Act. The message is that the Act is not broken, so do not fix it.

Some stakeholders have said that banks are saying that the *Bankruptcy and Insolvency Act* ("BIA") and the *Companies Creditors Arrangement Act* ("CCAA") trump the Act; however the system is working for members of the Residential Stakeholders. Insolvencies in the residential sector are very low in their view. Every year builders have to go to Tarion and demonstrate that they have the finances for their projects. If subcontractors are not being paid, the issue will make its way to the builder to determine how to make them whole. It is a relationship obligation because the builders want to finish the homes for the homebuyer. The obligation to finish the project is on the builder.

3. Residential Project Structure

The typical project in Ontario has the owner at the top, the general contractor, and then subcontractors. In contrast, the Residential Stakeholders explained that in many residential projects you may have a developer or a builder. Some do both. Tarion wants to ensure the financial ability of the builder and that there are trades to build the homes.

According to the Residential Stakeholders, if there is no general contractor, there is no risk of insolvency because there is a direct relationship with the trade. Sometimes the builder gets a general contractor, but this is the exception rather than the rule.

The Residential Stakeholders explained that a purchaser buys a home and there is a date for completion. Tarion is tracking the date. The builder owns the real estate and builds the home. On closing, you register and the buyer takes title. The builder puts out a tender for its trade needs. They may use the same excavator for each project. If the builder goes bankrupt, the direct line breaks down and Tarion gets involved.

The Residential Stakeholders explained that the residential sector does not have the losses that occur in other sectors. There is an extra provision such that if there is a problem, the union can notify the builder to freeze funds to the contractor. This is a result of the collective agreement. The Residential Stakeholders explained that when you freeze funds, you protect the workers.

Some pension and welfare fund stakeholders have told the Review that they are at risk because payments are delayed and by the time they realize it the lien rights have expired.

The Residential Stakeholders explained that Tarion requires personal guarantees from the builders. Even if there are shell companies, there is a parent company with indemnification requirements and they are regulated. The flow of money goes back to the developer/builder which must build the house on time. In Toronto, if a general contractor becomes insolvent, the fact that the house must be completed and there are Tarion obligations allows the trades to deal directly with the developer-owner that says they need to be paid.

In many cases, the builder-developer contracts directly with sub trades. For a specific class of work, the developer may want a direct relationship because they want a better product. The builder wants to keep the work going so they want to establish a relationship with the subcontractors.

Some trade stakeholders have said that the 10 percent holdback accumulates with the owner and the general contractor has no interest obligation until after the holdback flows down to the general contractor (because of pay when paid provisions). The Review has heard that the float in the project is being carried by the sub trades.

The Residential Stakeholders suggested that any amendments should be minimally intrusive, but effective. With respect to the project trust account, some stakeholders have suggested that the Review look at the global situation, not the residential sector specifically.

4. Prompt Payment

RESCON and the OHBA indicated that the residential sector has characteristics that differentiate it from others.

Some stakeholders have suggested that there should not be a one-size fits all approach. The Review has had stakeholders suggest that carve outs or threshold amounts should be considered. It would be helpful to have information that explains the differentiators in respect of residential construction.

The importance of the public interest and cost-benefit analysis are key differentiators. Within the sector, the Residential Stakeholders view is that prompt payment has not been an issue. Specifically because the residential sector is very regulated, disciplined, and successful and there is not a problem with promptness of payment.

Some stakeholders have said that the 90-day payment terms are very extreme and unfair. RESCON will canvass its colleagues and communicate what their views are.

Prompt Payment Ontario Trade Contractor Survey

The Review observed that various stakeholders have referred to the residential sector. PPO retained Ipsos Reid to conduct a trade contractor survey. The survey data speaks to many parts of the industry, including low rise residential construction. The Review discussed the results of the survey generally.

The Review has also heard that the elongation of payment has serious implications on an industry that is crucially dependent on the continuance of cash-flow and on receivables financing. Late payments have caused a threat of insolvency.

Freedom of Contract

The OHBA noted that this is a powerful story. In terms of the structure of the payment schedule and how it works at different levels, the question OHBA had is whether the industry believes in freedom of contract or if it wants every contract to look the same in terms of payment.

There are different variations of prompt payment. PPO provided a lot of research on the American situation. In the US, there are various approaches. The federal statute was enacted first and then the states passed prompt payment legislation. Some are more regulatory than others.

American statutes are focused on public projects and they tend to have carve outs for residential projects. There is a distinction between public and private projects. You cannot lien a public project, so they have to have labour and material bonds.

Changes in the Industry

The Review asked the Residential Stakeholders about the way the process is working now and how it could work better. RESCON noted that anyone would say they want to get paid earlier. RESCON and the OHBA have not had a group say that they want to have a discussion with them because they have a big payment problem to fix. Since 1995 the industry is performing well.

According to the Residential Stakeholders there should be cost-benefit analysis and metrics. RESCON has had discussions about Bill 69 and the lack of objective analysis. The Prism Report was troubling to RESCON as it was thought by RESCON to be flawed.

5. Lot-by-Lot Expiry of Liens

The residential sector has come up in some of the stakeholder consultation meetings. One of the issues that have been raised by stakeholders is the lot-by-lot expiry of liens. Some in the trade stakeholders have suggested that it should come out of the Act because it is hard for them to know what to register their liens against. Certain stakeholders say lien rights expire and lot-by-lot is difficult.

When a developer signs a contract with the electrical trade, it could be for the whole project or a few houses. The subcontractor still has rights they can exercise. In a low-rise it would be an issue if one subcontractor liens the whole subdivision. The Residential Stakeholders noted that there was a concern with waiving all the existing remedies in trying to simplify any current procedures, which were accessible options to parties already.

The Review has heard that the judicial system is bogged down and a lot the time of the masters is spent on residential cases and renovations. RESCON explained that the residential industry is very large compared to other industries. Just on this level, it is not surprising that a lot of time is spent on these cases. The big hammer according to RESCON is that you have to deliver the home on time or encounter penalties from Tarion.

According to the Residential Stakeholders, the prompt payment movement was outside of the residential sector and then came into this realm. RESCON talked to the proponents of prompt payment at the time and opposed Bill 69.

6. Dispute Resolution

The OHBA is interested in ADR but noted that its perspective is that it is not broken in the residential sector so there is nothing to fix. There is a purchaser and there is Tarion with a seven year warranty. Dispute resolution is not a significant problem in the residential sector. There are moments of engagement where the union gets involved in disputes. These mechanisms are very efficient according to the Residential Stakeholders.

RESCON noted that the residential sector produces 60,000 to 70,000 units of housing annually. They have one of the most difficult regulatory environments in the world. By the time the builder gets to the point where they are building, they want to get the project built and occupied. They are usually already behind the timelines to get to construction. The Residential Stakeholders recommended that there should be as seamless a process as possible.

The members of RESCON and the OHBA have long standing relationships with many trades and things get done properly. Disputes are not a significant issue for members. The residential industry is very successful and a big part of this is the successful management of relationships at all levels. People are motivated to come to quick solutions.

According to the Residential Stakeholders, the nature of the residential industry and its successful ecosystem means that a number of issues that are of concern to others are not issues for this sector. The Residential Stakeholders explained that it is the relationships and volume, but it is also driven by the purchaser. Typically they are individual units and the purchaser is happy. Tarion is there to protect them and the trades are getting paid. The purchaser is important. In most other models, the money flows down through the owner. When you lien a private company or the government, they can bond off the lien and work their way through it. In the residential sector disputes are dealt with through different mechanisms.

7. Home Renovations

On renovations, the Review has been told by some stakeholders that mostly there are no written contracts in this type of project. These are cash deals which do not attract HST and the Act is not in play (no holdback). Trades want to retain their right of lien.

The release of the holdback is a problem when the project is over and the homeowner is not happy with the work.

The Residential Stakeholders noted that there is a layer of good contractors in the renovation industry and others that are not as sophisticated. The OHBA has professional renovators with a code of conduct and the Get it Right Program. OHBA suggested that the Review not make recommendations to respond to any underground economy.

The Review has heard that any claims that would normally fall within the jurisdiction of small claims court should not go to the Superior Court. OHBA members do not want to lose any of their remedies. The OHBA will take this issue back to its members.

The Residential Stakeholders suggested that the Review needs to be careful not to destabilize an already successful ecosystem. RESCON will consider research that can help the Review understand the way the sector operates, explain the differentiators, and the concern about not disrupting the ecosystems.