Ontario Sewer and Watermain Construction Association

OSWCA Submission to the Expert Review of Ontario's Construction Lien Act

November 2015

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Submitted via e-mail: (cla-review@blg.com)

c/o Bruce Reynolds
Construction Lien Act Review
Borden Ladner Gervais LLP
Scotia Plaza, 40 King Street W
Toronto, ON M5H 3Y4

Dear Mr. Reynolds,

Re: Construction Lien Act Review

On behalf of our members, the Ontario Sewer and Watermain Construction Association (OSWCA) would like to submit the below comments to the *Expert Review of Ontario's Construction Lien Act*. The Construction Lien Act (CLA) is a complicated and dividing document that creates a divergence of opinion within our membership. In an effort to remain succinct, OSWCA has chosen to focus in on only the key issues and recommendations that have been consistently put forward and supported our member companies. Although this does not represent the full breadth of opinion on this subject in the heavy civil construction sector, it is representative of the consensus areas.

About the OSWCA

The OSWCA has been representing the sewer and watermain construction industry since 1971. We currently serve over 750 member companies, including contractors, manufacturers, and distributors who build, supply, and service the sewer and watermain construction sector. Our membership is made up of ten local Heavy Construction Associations, two Pipe Producers, and one Independent Association.

We maintain a number of organizational goals, but our central objective is to enhance and protect the interests of the sewer and watermain sector of the construction industry. We work towards this goal through different avenues, including lobbying to improve the operating environment for our member companies, to reduce the "red tape" burden, and to mitigate unnecessary risks placed on companies in our sector. It is for these reasons that we are providing feedback into this review process.

Overall Comment

In our view the CLA, on paper, is an important piece of legislation that seeks to keep the construction payment process equitable by ensuring that contractors and suppliers are

able to recoup the money that is contractually owed to them for improvements made to a property. In practice, however, the CLA is not prescriptive enough, instead relying on suggestive language which has ultimately created problems and numerous “tweaks” to its operating rules since it was initially drafted in the early 1980s.

More than 30-years on, the CLA is convoluted and difficult to navigate. The intermingling of construction lien and prompt payment components seem to have made it more, rather than less, difficult to get paid. We would ultimately recommend a redrafting of the Lien Act to make the payment process much more comprehensible, transparent, and less suggestive in nature. This will help resolve many of the issues that presently exist at all levels of the construction payment process as a result of this Act.

Focal Points

The overall message received from OSWCA members was that the CLA is not responsive to the modern construction environment. Primarily, comments focussed on issues related to: 1) the payment of holdback funds; and, 2) the length of the lien period. The reason companies in our sector have focussed on these areas is because sewer and watermain contractors and suppliers are typically the “first in” on new development and rehabilitation projects. As a result of the nature of the work performed (or products supplied) the payment structure has proven to be inequitable, particularly on longer-term projects where companies can wait months or even years to receive final payments for their work or materials. A more equitable system is necessary so that those who are first in and first out on a construction project are not left with liquidity issues as a result of waiting on owed payments.

We will make a number of recommendations below which often borrow components from Lien Acts in other jurisdictions. Our objective is to help improve the fairness of the construction payment process in Ontario.

Briefly on Public vs. Private Contracts

The CLA should be made to explicitly apply in the same manner for both public- and private-sector contracts. Treating the different buyers of construction services and materials with different sets of rules is unfair, as it creates a double standard for payment in the industry. This is a central problem with the existing Act and should be remedied moving forward.

Briefly on Prompt Payment

As provisions around prompt payment represent an area of incongruity within our broad membership base, we have chosen not to make any direct comments in favour or against these types of provisions.

Holdback

The overwhelming majority of responses that we received cited issues with the payout of contract holdback as the most significant problem with the CLA. The requirement to retain a 10% holdback of the entire contract price until all liens have expired or been satisfied/discharged creates an unfair environment for those first-in and first-out companies. Given that the size and scope of construction projects now, compared to when this Act was first drafted, this is a provision that seems very out-of-touch with the modern construction environment.

Below we would like to offer a number of recommendations for how to potentially remedy some of the existing problems with holdback payments in the construction industry.

Recommendation #1 – Require certificate of completion for all sub-contract work in order to accommodate for the progressive release of holdback.

Make Certificate of Completion mandatory for complete sub-contracts and carefully spell out the process for how a sub-contractor/supplier would obtain a certification of completion directly in the CLA. For instance, a notice of completion of subcontract work must be provided within ten business days of project work concluding *and* this work must be certified by a "payment certifier." The definition of "payment certifier" can be borrowed from section 7.1 of the BC Builders Lien Act, which expands on the current definition in the CLA:

> 7.1 In this section, **"payment certifier"** means
> (a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or
> (b) if there is no person as described in paragraph (a),
> (i) the owner acting alone in respect of amounts due to the contractor; or
> (ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.[1]

The Law Reform Commission of Nova Scotia, in their review of the *Builders' Lien Act* made certain references on this item specifically that may be borrowed from as well:

[1] Government of British Columbia, *Builders' Lien Act, SBC 1997*, section 7.1, http://www.bclaws.ca/civix/document/id/complete/statreg/97045_01.

> At the request of the contractor or a subcontractor, an architect or engineer upon whose certificate payments are to be made may certify a subcontractor's work to be complete. In the absence of such person the subcontract may be certified complete by the owner and contractor in agreement, or in the absence of such agreement, by the court.[2]

Upon receipt of the certificate of completion, public notice should be made so that sub-contractors and suppliers know that their lien period has begun.

Recommendation #2 – Modify the definition for what constitutes "completed work" to make it more responsive to modern construction contracts.

The CLA, for a subcontract, indicates that work may be certified as complete when the correction of a defect or last supply is not more than the lesser of: 1) 1% of the contract value; or, 2) $1,000. In the current construction environment where contract sizes are rapidly increasing in scope and dollar value, this notation means that unless there is less than $1,000 of work left, you cannot certify a subcontract. By way of example, if a subcontract is issued at a value of $10 million, a certificate of completion could only be issued when the project is 99.99% complete. This is an unrealistic value, especially if a sub-contractor is unable to correct a final default due to delays by the owner or general contractor to provide direction or site access.

The rules around substantial completion should be the same for all levels of contract, including sub-contracts (i.e. same percentage values defining substantially completed work).

Recommendation #3 – Make mandatory the automatic dispersal of holdback upon the expiry of lien rights, including for sub-contracts and supply contracts.

The annual progressive release of holdback should be mandatory for work performed and materials supplied on a long-term project (defined as in excess of one year). Historically, sewer and watermain contractors and suppliers have been disadvantaged by the holdback payment process, as they may wait months or even years for the project to complete to receive their portion of the holdback payment with no interest accrued. On many occasions, this exceeds the profit on a project. As such, a company is left waiting an inordinate amount of time financing part of the owner's improvement.

While Section 25 of the CLA appears to account for this, the language is permissive, meaning it is not required. We recommend the adoption of a mandatory progressive release of holdback for all contracts, similar to provisions found in other provinces, where the holdback attributable to a sub-contractor's specific supplied service or product is released when their work is complete or product supplied, even if this occurs before the

[2] Law Commission of Nova Scotia, *Builders' Lien Act: Final Report*, March 2013, p. 10.

larger construction project itself is complete. This will ensure a fairer payment process for those who do work earlier-on in a long-term project. It will also reduce the number of potential lien claimants as the construction project progresses.

In addition to the above noted modification of language in the Act, we also propose that a 14-day payment timeframe be explicitly noted for the release of holdback monies after the legally mandated public notification period has expired.

Recommendation #4 – Require the use of a project-based holdback trust account.

Specific wording related to the set up and management of a project-based holdback trust account should be included in the CLA, similar to section 38 of the Saskatchewan Builder's Lien Act, which requires an account to be established for every contract under which a lien may potentially arise that is jointly administered by the owner & contractor, or contractor and sub-contractor.

This approach affords much greater protections in the event that the project owner goes bankrupt and can ensure that monies are available to at least satisfy a portion of the claims for work performed.

Contracts where the aggregate value of work and material provided is less than $250,000 should be exempt from this provision.

Recommendation #5 - Interest should be paid on holdback to create a disincentive for those higher in the construction payment pyramid to hold on to payments for any longer than is necessary.

This recommendation is fairly straightforward and appears in Lien Acts in other jurisdictions. The interest accrued in a holdback account is to the benefit of the contractor and an interest payment of prime-plus-one should be made on all holdback monies.

Lien Period

The length of lien period is also an issue that received considerable mention from our member companies. The currently allotted 45-day window is much too short of a time period for a contractor or supplier to confidently register a lien. Most sub-contractors and suppliers operate on personal relationships with prime contractors or private developers in order to secure contracts. They therefore depend on maintaining strong relationships in order to obtain work. Registering a lien for monies owed, especially after 45 days, has often been cited as the reason for the end of a professional relationship. It is why many contractors are hesitant to register liens.

Recommendation #6 – Extend the lien period so that is does not start until the end of the contractual payment date.

In both municipal and private construction contracts, the contractual payment periods are lengthening. It is becoming common to see 60-120 day payment periods stated in contract documents, meaning the current lien period of 45-days expires long before the contractual payment period has even passed. A contractor's lien rights should be preserved in the absence of payment for work completed by noting that the lien registration period begins for 30 days immediately following the contractual payment date noted in the contract.

Recommendation #7 – Include separate and distinct language for lien rights on materials supplied to a construction site.

The Builders Lien Acts' in New Brunswick, Nova Scotia, and Prince Edward Island include specific language for the supply of materials to a construction project. A provision should be adopted in the CLA that is similar to sections 17.1 and 17.2 of the Nova Scotia Builders' Lien Act, which states:

> 17 (1) During the continuance of a lien no part of the material affected thereby shall be removed to the prejudice of the lien.
>
> (2) Material actually brought upon any land to be used in connection with such land for any of the purposes enumerated in Section 6, shall be subject to a lien in favour of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due to the person furnishing the same. *R.S., c. 277, s. 17.*[3]

Supplied materials should also be subject to a 60-day lien registration time period.

Conclusion

The current state of the construction payment process in Ontario is significantly flawed. Contracts, procurement models, and the nature of project work have all changed significantly since the CLA was first drafted. While changes have been made along the way, much of what has been changed was reactionary to problems as they arose. As a result, the CLA is disjointed document, making it very difficult to understand and navigate through. It truly needs a redrafting to consolidate the changes that have occurred in the construction industry over the last three decades.

There are a number of lien systems in other jurisdictions across Canada, the United States, and the EU that offer more palatable payment processes than what we presently

[3] Government of Nova Scotia, *Builders' Lien Act, 1989*, section 17, http://nslegislature.ca/legc/statutes/bldersln.htm.

have. Ontario has an opportunity to develop the *de facto* best practices document for lien acts by modernizing the CLA to create a more responsive and equitable construction payment process. This process begins by moving away from permissive language that appears throughout the CLA and instead mandating how the payment process should work.

It is all too common that funds are not released in a timely fashion, creating cash flow problems that are particularly difficult to manage for small and medium-sized companies. In the absence of interest payments by project owners down through the construction pyramid, small businesses find themselves financing the proponent's project which stresses small and medium size firms who are major job creators in our economy.

A transparent and easily understood Act will go a long way to improving how the payment process for construction work operates in the future.

Please do not hesitate to contact me (905-629-8819 or patrick.mcmanus@oswca.org) if you have any questions or need information regarding OSWCA and its membership.

Sincerely,

Patrick McManus
Stakeholder Relations Manager