Metropolitan Plumbing & Heating Contractors Association

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Mr. Bruce Reynolds, Counsel
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Ontario Construction Lien Act Review
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November 11, 2015

Dear Mr. Reynolds and Ms. Vogel,

The Metropolitan Plumbing and Heating Contractors Association (MPHCA) is pleased to provide this submission to the Ontario Construction Lien Act Review (the Review).

The MPHCA is the voice of the residential high-rise mechanical plumbing and heating industry in the Greater Toronto Area. Our 30 member companies directly employ more than 2,200 skilled tradespeople and support the growth of our local and regional economies. On behalf of our members, the Association leads union relations and collective bargaining, advocates with government and regulatory bodies for fair and effective industry policies and engages with our counterparts across the building and construction trades.

Our attached recommendations address three specific areas of the Review:

1. Payment of holdbacks
2. 10 percent holdback amount
3. Trust provisions

We would appreciate the opportunity to meet with you or members of your team to discuss the recommendations outlined below.

Sincerely,

Michael Zentil
Chair, Board of Directors
Metropolitan Plumbing and Heating Contractors Association

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MPHCA Recommendations: Ontario Construction Lien Act Review

Recommendation 1: Payment of Holdbacks

Currently, there is nothing in the *Construction Lien Act* that stipulates when holdback monies must/shall be paid to general contractors, subcontractors or suppliers after substantial completion has been achieved on a project and verified by the appropriate third party consultant.

Current wording in the *Act* states:

> *Construction Lien Act, Part IV, Payment of basic holdback*
> 26. Each payer upon the contract or a subcontract may, without jeopardy, make payment of the holdback the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44. R.S.O. 1990, c. C.30, s. 26.

New legislation must stipulate when holdback monies must/shall be paid to general contractors, subcontractors and suppliers.

This should be achieved by stipulating in legislation there should be at least a five (5) day window between the date when holdback monies must/shall be paid and by when a contractor, subcontractor or supplier can invoke a lien.

The solution provided above is meant to address the reality that the conventional timeline for payment after substantial completion for contracts between commercial parties (30 days) and those with municipal parties (often 60 or 90 days) differs. We understand from various discussions that the payment timeline with municipalities most likely won't change in new legislation. The solution above therefore provides a standard five day window between payment and lien deadlines, regardless of the date of substantial completion.

Examples to illustrate this recommendation are below.

Example 1: Contracts Between Commercial Parties
If the deadline for liening under a commercial contract remains at 45 days post-substantial completion, the date in new legislation by which payment must/shall be made to general contractors, subcontractors or suppliers would be 40 days.

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Example 2: Contracts with Municipal Parties:

If the timeline for municipalities to pay general contractors, subcontractors or suppliers is 90 days after substantial completion is verified, new legislation should be explicit about the 90 day deadline and also include the deadline for liening under a contract of this nature -which in this case would be 95 days.

Recommendation 2: 10 Per Cent Holdback Amount

New legislation should deal with the 10 per cent holdback amount.

Currently, 10 per cent is commonly viewed in the sector as an out-of-date holdback amount that is not only excessive given current profit margins on projects but also forces general contractors, subcontractors and suppliers to essentially act as banks for primary proponents on a contract (owners and primary proponents rarely request financing for 100 per cent of project costs. They often request only 90 per cent given the 10 per cent holdback).

MPHCA's position is that the best way to address this is that new legislation should not in fact alter the 10 per cent amount but should rather outline partial payment of the 10 per cent holdback over the course of the contract. Therefore, legislation should stipulate that once 50 per cent of the cost of a project (representing 50 per cent completion of the project - to be verified by a third party consultant) has been billed by the general contractors, subcontractors or suppliers, five per cent of the holdback should be released to the general contractors, subcontractors or suppliers. The five day window as outlined in Recommendation 1 would apply here. The remaining five per cent should be released once a third party consultant verifies that substantial completion of the full project has been achieved.

Recommendation 3: Trust Provisions

The *Construction Lien Act* is silent, contains weak language or provides no enforcement or penalty wording on various issues related to trust provisions. The result is that the spirit of current provisions is either not adhered to or enforced in real terms.

Current wording in the *Act* states:

> *Construction Lien Act, Part II, Trust Provisions*
> 7. Owner's trust
> Amounts received for financing a trust
> 7. (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior

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encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (1).

Obligations as trustee

7. (4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner. R.S.O. 1990, c. C.30, s. 7 (4).

To address the issues outlined above, generally enforcement and penalty wording regarding trust provisions should be considered as part of new legislation.

Specific recommendations to strengthen trust provisions are below:

i. New legislation should stipulate explicitly that trust funds should be financed for the full amount of the project. As noted in Recommendation 2, projects are often only financed to 90 per cent given the 10 per cent holdback.
ii. Trust funds for each project must be held separately and not mixed in with other projects, non-trust monies, etc. There is wording in current legislation that deals with this but separate trust funds almost never materialize in real terms. Legislative wording should therefore be strengthened and/or include enforcement or penalty measures.
iii. New legislation should stipulate that trust funds should be held by a bank or lending institution. This ensures that a third neutral party is the holder of the trust in order to ensure its integrity. In order to enforce this provision, owners, as part of the normal course of business, would be required to provide to general contractors, subcontractors or suppliers an official 'proof of trust' document from the bank or lending institution. Wording outlining the requirement, acceptable forms of 'proof of trust' as well as related penalty/enforcement provisions would need to be included in new legislation.

END