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Mr. R. Bruce Reynolds & Ms. Sharon Vogel
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RE: Construction Lien Act Review – New Issues List

Dear Mr. Reynolds and Ms. Vogel:

Thank you for your letter dated January 8, 2016 to Carol Layton, Deputy Minister and Mary Gersht, Director of Legal Services regarding a list of additional issues raised as a result of your consultations related to the Construction Lien Act Review.

We would like to provide some comments on a few of the additional matters under consideration. However, I wish to caution that in the absence of more information, are somewhat challenged to fully understand the concepts being proposed for consideration.

Accordingly, from our understanding from the brief description of the issues raised, we provide the following comments:

3. Consider removing the notice of lien provision.

   Currently, the ministry treats a written notice of a lien once received by the proper knowledgeable ministry staff.

   Often, to the potential prejudice of the owner/ministry, notices are delayed in getting to knowledgeable ministry staff, because the ministry is a large complex organization. The Construction Lien Act does not provide for a formal process for notices as with Claim for Liens.

   It may be reasoned that the notice of lien would follow the same procedures as provided for a claim for lien (s. 34(3) and Ont. Reg. s. 1(1)) but the statute does not provided for such a procedure. As a result on occasion notice is misdirected delaying receipt of the notice (have regard to s. 24 that just mentions the written notice of lien).

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As well, because the ministry is the Crown and liens do not attach to the premises of the Crown (s.16(1), the written notice of lien does not seem to be materially necessary on ministry construction projects so as to avoid the registration of the lien to the premises.

Given that the ministry, as a prudent owner, treats the written notice of a lien as a lien, significant legal rights and responsibilities arise just as with a claim for lien.

In the context of ministry construction projects where the lien does not attach to the premises, there is no significant difference between a written notice of lien and a claim for lien as to how the ministry reacts to the written notice for which the ministry holds back monies in respect of the lien. Procedurally, the written notice of lien has an informal procedure, which is problematic for a large organization like the ministry.

Based on the above, the ministry favours the removal of the written notice of lien that does not take away from the lien claimant to give its claim for lien.

4. Consider further clarification of the definition of improvement (e.g. distinguishing between construction and Information Technology (IT) projects and service agreements).

   The ministry believes that there is merit in clarifying the definition of improvement. This is especially necessary with IT projects. Of concern are the potential circumstances of the retainer of a consultant to undertake IT software work with a small amount of hardware installation work (i.e. cables and wires) on the premises to support the software upgrades. As well, there has been an increase in alternative contracting approaches (Design Build, P3s, Contract Manager/General Contractor, etc.), for which the "contractor" takes on the role of the owner and even finances the project such that a clarification on the definition of improvement to recognize that the "contractor" in these circumstances is the "owner" will be helpful in administering the Act.

8. Consider implementing a deficiency holdback.

   The ministry does not believe that a deficiency holdback should be imposed by legislation, if the current regime of allowing the freedom of the parties to contract upon the terms they believe are proper is maintained.

   As we understand this concept, the Act would proscribe conditions for a deficiency holdback either by front-ending a percentage of the contract price or by a trigger to allow an estimated sum for a deficient event.

   Because the ministry's contracts provide for a deficiency setoff of funds, we believe this issue should not be mandated, but left to the parties to manage as part of the contractual rights negotiated between the parties.

For the vast number of contracts where there is no need for deficiency holdback and this would have a negative impact on contractor cash-flow. For other cases where monies need to be setoff to address deficiencies, it would be challenging to ensure there are sufficient funds setoff to address the deficiency. The ministry would be further concerned about another layer of administration protocols. The current practice of setoff for deficiency directly in relation to the deficiency in question is appropriate and should be retained.

14. Consider whether or not technological solutions would improve prompt payment issues (e.g. automatic rejection of incomplete progress draws).

It is not considered appropriate to attempt to address technological solutions through legislation. With the pace of technology, solutions are very quickly obsolete. Also it is difficult to scale technological solutions from small projects to very large projects. A further challenge would be how such solutions would be regulated or enforced under the Act.

20. Consider implementing changes to documentary disclosure requirements.-

The ministry believes that the current status quo set out in s. 67 of the Act of requiring the consent of the Court upon proof that the production is necessary or would expedite the resolution of the issues in the dispute is the appropriate standard.

The ministry's experience is that the documents sought are generally available from the contractor, who is ordinarily a party to the dispute, and that production of the documents by the ministry is not a necessary step or would not expedite the resolution of the issues. In those rare cases that the standard of s.67 can be satisfied, then need for production would be likely obtained through this section.

Furthermore, in most cases, the ministry is a nominal party to the construction lien litigation. Often times, the lien is vacated on the posting of security and the judicial decisions hold that the owner shall not be a party to the construction lien litigation, so that production of documents would not be appropriate.

22. Consider allowing electrical contractors an ability to seize machinery and equipment from a customer that has not paid the contractor.

As we understand this consideration, the ministry strongly disagrees with this concept.

There is a concern that the ,inistry, as a customer, would see the seizing of highway safety devices such as traffic signals and power units for traffic signals removed from the highway. Such a right or ability would create chaos in the industry and impose a threat to the safety of the travelling public. This seems to run in conflict to the goals of the Act to address payment issues in an orderly way.

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27. Consider providing a practice guide or series of interpretive bulletins to accompany new legislation.

    The ministry supports efforts to educate and guide the industry (owners, contractors, subcontractors and suppliers). Interpretive bulletins and practice guides seem like a good idea to promote broad understanding of the changes and the overall legislation and not just to accompany new legislation.

Once again, thank you for the opportunity to comment on these new issues.

Sincerely,

Paul Lecoarer, P.Eng.
Director

c: Mary Gersht, Director, Legal Services
Colin Douglas, Deputy Director, Legal Services
Henry Weilenmann, Counsel, Legal Services
Tony Tuinstra, Manager, Claims Office
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