GREATER TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION

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

December 2015

GTSWCA
Greater Toronto Sewer & Watermain Contractors Association

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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 Greater Toronto Sewer and Watermain Contractors Association (GTSWCA) would like to submit the below comments to the *Expert Review of Ontario's Construction Lien Act*. This review of the Construction Lien Act (CLA) represents a very important opportunity to reform the construction payment process in the province to make it more equitable for all those operating within the construction payment pyramid. We appreciate having the opportunity to provide input on behalf of our industry into this process.

In order to focus the process and communicate the most important topics to the GTSWCA, a steering committee was struck to lead the member discussions, take note of the various ideas, and to liaise with BLG during the Expert Review period. This submission represents the key issues and recommendations that have been consistently put forward and supported by our member companies during this process.

About the GTSWCA

The GTSWCA has been representing the sewer and watermain construction industry in the Greater Toronto Area since 1957. We currently represent 175 member companies, including contractors, suppliers, manufacturers, and consulting engineers who build, supply, and service the sewer and watermain construction sector.

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.

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A Brief Comment on Prompt Payment

The GTSWCA members support the goals and process which Prompt Payment Ontario has undertaken, and is prepared to simply associate itself with Prompt Payment Ontario's initiatives.

Recommendations for Reform of the CLA

What follows is a list of ideas which the GTSWCA steering committee believes need to be communicated to BLG as representative of the leading member concerns and hopes for legislative reform to Ontario's current *Construction Lien Act*.

1 Extension of time to preserve and perfect claims for liens

1.1 The GTSWCA believes that a modest amount of additional time should be allowed to preserve a claim for lien.

1.2 While there has been significant discussion about changing or modifying the trigger events to start the period within which a lien claimant must preserve its claim for lien, no consensus as to how best to do so was achieved, and accordingly the GTSWCA makes no recommendations on this important issue. It does, however, have recommendations as to timelines to preserve liens.

1.3 While it may have been the norm years ago for payments to be processed between 30 and 40 days, this time frame is no longer representative of the majority of projects. Members indicate that payment times are being extended and that a more realistic time frame is between 45 days and 60 days.

1.4 The GTSWCA also understands that there needs to be some reasonable period of time requirement to preserve liens, and believes that **60 days** is a more realistic and fair period of time to preserve liens. Contractors and subcontractors alike are more likely to know by about the 50th day following payment application whether there is going to be a timely payment, or whether there are likely to be problems with payment necessitating resort to preservation of lien rights.

1.5 The GTSWCA believes that a substantially longer period of time should be allowed following preservation of a claim for lien to perfect that claim for lien.

1.6 Members have expressed a desire to extend the time to perfect to permit more time for their payors to investigate (and if necessary test by cross-examination) the validity and quantum of the liens, and to permit (and hopefully promote) a period of time within which to achieve resolution of the lien claim, before an action is

commenced and the incurring of costs (and negative emotions) associated with suing your payor are required.

1.7 The GTSWCA believes that **120 days** from the date of preservation of the lien represents a balanced approach to modifying this aspect of lien enforcement. Forty-five days is simply too short a period of time and all but forces payees to commence actions which, once commenced, can be difficult to unwind and resolve.

2 Certification of Subcontracts

2.1 There is general agreement among GTSWCA member that the "permissive" approach to certification of subcontracts under s. 33 of the *Construction Lien Act* is unsatisfactory.

2.2 Unless they have been able to negotiate a requirement with the general contractor that the general contractor must apply to the payment certifier for a certificate of completion, which is an increasingly unlikely event, subcontractors who have completed their installation work for services during the early stages of commercial (and some residential) projects are required to wait for payment of their holdback, sometimes for significant amounts of time.

2.3 The feeling amongst members is that contractors, especially the larger contractors, are not motivated to assist their subcontractors and voluntarily apply to have their work certified as complete and get the last remaining payments, including holdbacks, out to them.

2.4 The members believe that there should be a legislative requirement which permits certification of subcontracts even in situations where contractors are not inclined to seek same from the payment certifier.

2.5 The members are prepared to place their trust in and upon the professionalism of a third-party payment certifier.

2.6 Accordingly, the GTSWCA recommends that the legislation be changed **to allow any subcontractor who believes that it has completed its work to make an application for certification of completeness directly to the payment certifier**.

2.7 The payment certifier will then be obliged to consider the subcontractor's application and, if satisfied that the subcontract is complete, taking into account all information it deems relevant, the payment certifier shall:

(a) issue a certificate of completion of subcontract to the owner, contractor and applicant subcontractor; and

(b) recommend payment of the holdback upon expiry of that subcontractor's time to preserve a claim for lien.

2.8 GTSWCA members are also of the view that payment of holdbacks under this process should be made directly to the subcontractor. As set out below, the GTSWCA is also recommending the requirement to open and maintain holdback accounts with a qualified financial institution which will allow payments to be made from the account to those subcontractors whose work has been certified as complete. Therefore, as work is completed, the net amount is paid to the contractor, while the remaining holdback portion is paid into the project account for release in the future.

2.9 Members of the GTSWCA, especially its subcontractor members, have voiced concern over the apparently growing practice amongst some contractors to delay payment of holdbacks even when there is no statutory basis to do so.

3 Payors' separate holdback accounts for each project and mandatory payment

3.1 The GTSWCA believes that the benefits of a statutory requirement that all payors establish and maintain a holdback account at a qualified financial institution will outweigh any additional administrative costs and logistical issues.

3.2 It is the desire of the GTSWCA to improve the flow of holdback funds to contractors and subcontractors. Too often, members are experiencing what it feels are unnecessary and unwarranted difficulties and delays in getting their holdbacks paid out.

3.3 One of the most prevalent reasons for delays in payment of holdback funds is the assertion of set-off claims for alleged deficiencies or delays. Payors are reluctant to have money flow to their payees where they believe (or in any event assert) some form of set-off.

3.4 The GTSWCA recommends that the legislation be changed to require payment of a holdback immediately following expiry of the applicable lien period, regardless of whether there is a set-off claim upon those very funds.

3.5 While payors will lose their leverage to assert and secure claims of set-off against funds that were previously holdback funds, this change may actually discipline

them into performing some due diligence as to the financial strength of the companies with whom they propose to subcontract.

3.6 Financially sound subcontractors are more likely than not able to make good on both warranty claims and other claims the payor may wish to assert such that the payment of the 10% holdback is unlikely to materially affect the ability of the payor to collect upon any judgment or award upon proof of the claims against the subcontractor. The project owner may choose to request a bond from the contractor/sub-contractor, however this needs to be included in the project tender documents of purchase order before the project begins.

4 Adjudication

4.1 The GTSWCA supports imposing mandatory alternative dispute resolution mechanisms, such as the adjudication process that it understands bas been used successfully in the United Kingdom for more than two decades and referred to in the Information Package provided to stakeholders.

4.2 Although the GTSWCA does not have specific experience with such adjudication, it believes that the access to timely and efficient dispute resolution process(es) is paramount to mitigating delays in payments and ensuring that funds are properly disbursed. The GTSWCA believes that the typical dispute resolution models in Ontario, such as lien proceedings and arbitrations, often lead to protracted and costly disputes, and are better suited as a “last resort” when other dispute resolution methods have failed.

4.3 In particular, the GTSWCA notes that traditional litigation, whether under the *Construction Lien Act* or ordinary procedures, does not provide timely resolutions during the life of a project or interim relief by way of payments to address the on-going financial commitment of its members completing work in the face of a dispute.