MISSISSAUGA

February 2, 2016

Construction Lien Act Expert Review
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King Street West
Toronto, Ontario M5H 3Y4

Attention: Mr. Bruce Reynolds and Ms. Sharon Vogel

Dear Mr. Reynolds and Ms. Vogel:

Subject: Construction Lien Act Review - New Issues List

You have provided a list of 26 new issues that have been identified through the consultation meeting process that you would like stakeholders to consider. At this time, I am providing you with comments on behalf of the City of Mississauga to the new issues, which supplement our earlier comments in my letter to you dated November 24, 2015. However, we are unable to provide comments on all matters raised as some of the questions did not provide details or context for us to engage in further consideration.

Overall, among the new issues you have provided for stakeholders to consider, we believe that several of those matters should not be addressed through reform to the Construction Lien Act. Payment terms and interest rates are contractual rights that should remain the subject of negotiation among contracting parties. While we can appreciate that one of objectives of the review is to address the issue of prompt payment under the Act, legislating punitive interest rates and payment terms would impose unfair limitations to the fundamental freedom of contract. Moreover, punitive damages are extraordinary remedies that are imposed only in the most egregious circumstances and are determined by a court. We warn against any legislative imposition that could lead to a misuse of powers by any party in a construction project and generate unfair outcomes that require litigation to rectify.

We are also curious as to the reasons and context for legislating technological payment tools. Is that something that should be in legislation, or is this better left to the parties? Would this impose additional costs and administrative burden to owners and contractors? Without context or further information, we are unable to comment in too much detail. However, we would also warn against being too prescriptive in legislation, especially if the intention is to specify technological solutions, which by their nature are constantly changing.

We are also concerned with the proposal to allow electrical contractors the ability to seize machinery from a customer that has not paid the contractor. Again, without context and further information, we are not sure how this would apply to public owners. However, the question posed seems to suggest preferential treatment to a particular trade; and more importantly, the proposal allows for an extraordinary remedy to seize any material and equipment (without specificity) for non-payment. There may be many reasons why payments are not made in different circumstances (e.g. deficiencies, set offs). The ability to seize property without due process is not good public policy.

In addition to the new questions raised, we take this opportunity to provide comments on the Joint Holdback Trust Account that was discussed at the public owner's consultation meeting on November 25, 2015 and provided for in the Information Package.

We have concerns with the proposed joint owner/contractor holdback trust account that would hold holdback funds for the duration of a project and would require both parties to sign off before any funds could be withdrawn.

We are aware that the British Columbia Builders Lien Act mandates a joint holdback account and it has been cited to support consideration of a similar regime in Ontario. Section 5 of that Act requires an owner to establish a holdback account at a savings institution for each contract under which a builder's lien may arise, to pay into that account all builders lien holdback retained from the contractor and to jointly administer the account with the contractor. Notably, however, projects of designated public bodies, including municipalities, are specifically exempted from this requirement.

Presumably, consideration of a joint holdback account is motivated by the apprehension of owner insolvency or to prevent the diversion of holdback funds. Public bodies such as the City are not at risk of insolvency and have checks and balances built in to their financial and accounting systems that essentially safeguard the retention and preservation of holdback funds. Further, municipalities are required to comply with the Municipal Act, 2001 and public sector accounting rules to ensure fiscal responsibility.

Practically, the requirement for joint administration of a holdback account would result in additional administrative burden on public owners and effectively eliminate an owner's right of set-off for outstanding debts, claims or damages, which is currently provided for in the Construction Lien Act but not in the British Columbia legislation. The ability to set off for deficient work is an important right to owners of a project, especially when faced with uncooperative contractors refusing to return to site to complete the work. Therefore, we are very concerned with respect to the erosion of owner's rights currently provided for in the legislation. And in the event that a joint holdback trust account is determined to be included in any new legislation, respectfully, we believe that public owners should be exempt from such requirements as in the British Columbia Builders Lien Act.

In sum, we would caution against any legislative reforms that would create an overly prescriptive Construction Lien Act, and undermine the ability of parties to contract freely for services. Freedom of contract is a sacrosanct principle in law that should not be infringed. Moreover, an overly complicated legislative regime could make it difficult for parties to comply without the benefit of legal advice. This could significantly add to the cost of construction projects and would certainly not be in the public interest. Finally, some changes to the legislation may be geared towards addressing certain risks to the industry that may not be applicable to public owners. Please be cautious in any proposed legislative changes that create one-size-fits-all solutions that may not be necessary or applicable, and which inadvertently impose additional administrative burden and costs to public owners. Ultimately, any such additional costs will be assumed by Ontario taxpayers.

Yours truly,

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