KOSKIE MINSKY

JUSTICE MATTERS

December 8, 2015

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Via Email

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Attention: Bruce Reynolds and Sharon Vogel

Dear Mr. Reynolds and Ms. Vogel:

Re: Expert Review of the Construction Lien Act
Our Clients: Provincial Building and Construction Trades Council of Ontario and I.U.O.E. Local 793
Our File No. 12/1069

As you know our office represents the Provincial Building and Construction Trades Council of Ontario ("PBCTCO"), and the International Union of Operating Engineers Local 793 (I.U.O.E. Local 793").

On behalf of our respective clients, we enclose herein a brief summary which responds to the numerous issues and headings set out in your July, 2015 Information Package. To that end, we provide our clients' position in regards to most of the proposed changes/issues being considered by your office. We note that some of the issues do not relate to the Unions such that we did not provide any comment to those particular issues. In addition, some of the issues were either unclear or required further discussion such that we simply included the comment "to be discussed".

In regards to the issues which are most important to the Unions, we provide the following brief overview which we hope is of assistance.

Lienability Issues 1(a) and (b)

Defendants in a lien action often try to utilize the CLA definitions for purposes of defeating a lien claimant's rights. There can be no doubt the intent of the CLA is to be inclusive and to protect the rights of lien claimants such that amending definitions to make them broader and more inclusive would clearly support the intent of the CLA and will benefit the parties relying upon the Act. As

such, the Union supports such amendments. Insofar as "railways, universities, etc.", the Union also supports amendments to the CLA which will simplify a lien claimants' ability to prepare and register a Claim for Lien against projects that have difficult legal descriptions such as universities, etc. Again, the intention of the Act is to protect lien claimants not to restrict their rights. As such, any amendments which simplify the ability to prepare and register accurate Claims for Lien would be supported by the Unions.

Early Release of Holdback 2. (b) and (c)

Firstly, the Union strongly opposes any reduction of the 10% Statutory Holdback to a smaller percentage. There is simply no valid reason to make any reduction.

The Unions are open to discussing potential revisions to the Holdback provisions in order to allow for early release of Holdback. However, there will be complications in doing so which require the wording of any such amendments to be carefully crafted so as to ensure such amendments actually protect the parties who are to receive those funds. Any early release of Holdback that does not protect delivery of those funds to the parties who are to receive same will defeat the purpose of amending the Holdback provisions. In addition, early release of Holdback may benefit certain parties who complete their work in the beginning of the project but will be detrimental to parties who perform their work later in the project. The rights of these competing parties must be weighed and considered in making amendments to the Holdback provisions.

Having said that and subject to the specific language of any proposed revisions allowing for the early release of Holdback, the Unions will likely support such amendments.

Preservation and Perfection 2(a) and 3 (a) and (c)

The Unions are open to extending the lien preservation period from 45 days to a longer period of time, perhaps 75 days in order to provide lien claimants with more time in which to assess, prepare and register their respective Claims for Lien. If that is to be done, obviously the time in which to perfect a Claim for Lien must also be extended, perhaps from 90 days to 120 days.

In conjunction with an extension of time to preserve and perfect liens is the time in which to release the Holdback funds. Presumably this timeline would also need to be extended so that Holdbacks are not released until lien rights have expired. Specifically, if the time in which to register a lien is extended from 45 days to 75 days, the Holdback should not be released until 75 days after Substantial Completion of a project. While the extension of time to preserve and perfect liens is something the Unions would support, this is not necessarily a critical amendment, although doing so would be beneficial to all parties including general contractors

and owners as it would give the parties more time to work out their differences before the need to register a Claim for Lien.

Prompt Payment 4(a)

The Unions would definitely support appropriate amendments which make payments to contractors, suppliers and Unions "mandatory" and which remove any ambiguity or ability for parties to delay making payments that are clearly due and owing. However, what must also be considered in regards to such amendments is how to include language which will allow parties to aggressively enforce any breaches of such prompt payment provisions and to provide severe penalties for such breaches. The Unions are happy to be part of the discussions in regards to this issue.

Relationship between the CLA and Insolvency Legislation 7 (a) (b)

There are more and more cases involving the CCAA and BIA and parties enforcing their rights under the CLA. Often times lien claimants enforcing their rights under the CLA are forced to take a back seat or subordinate their rights to those enforcing rights under the Federal Legislation. Having said that, the Statutory Holdback amounts under the CLA must be protected for the benefit of the lien claimants and the language in regards to the Statutory Holdback amounts must therefore be amended/improved in that regard.

This is because secured creditors under the BIA or CCAA are attempting to claim priority to the Statutory Holdback amounts even though such amounts are clearly for the benefit of lien claimants. It is therefore critical to amend the CLA by including language which specifically defines Statutory Holdback amounts as "not owing to the defaulting contractor in the event Claims for Lien are registered" or such similar language to ensure the Statutory Holdback amounts are "not" the property of the defaulting contractor so long as Claims for Lien are registered/served. The Unions fully support such amendments which protect the Statutory Holdback amounts in these situations.

Alternative Dispute Resolution 12(a) & (b)

The Unions also support amendments to the Act which would provide for mandatory mediation or alternate adjudication mechanisms. The Court process is slow and the number of construction liens is increasing while the number of Masters and available Judges is effectively decreasing. As a result, any amendments to the CLA which allows lien claimants to use alternate adjudication mechanisms and/or forces the parties to mandatory mediation would be to the benefit of all parties and the Unions are in support of same.

Miscellaneous (Residential Subdivisions) 15(d)

The Unions support amendments to the CLA which simplify or make it easier to register Claims for Liens against residential subdivisions. Currently, the "lot by lot clause" in the Act and in various construction contracts makes it far too difficult and expensive for lien claimants to register liens especially when the amount in issue is less than $25,000.00. The intention of the CLA was to protect lien claimants and their rights not to restrict those rights. As a result, any amendment to the Act which allows for easier registration of Claims for Lien against residential subdivisions would be supported by the Unions and such amendment would also be consistent with the intent of the CLA.

We hope the above are of assistance and look forward to meeting with you on Thursday, December 10th and Monday, December 14th, along with our respective clients.

Yours truly,

KOSKIE MINSKY LLP

Jeffrey J. Long
JJL:on
Enclosure
c: PBCTCO
I.U.O.E. Local 793

KOSKIE MINSKY – CLA REVIEW OF PROPOSED AMENDMENTS ON BEHALF OF PBCTCO and I.U.OE. LOCAL 793

ISSUES

1. **Lienability**

   a) proposed amendments to definitions of improvement, materials, supply of services and owner;

   [The Union believes that amendments to the definitions of improvement, materials, etc. should be as inclusive as possible with the intention being that a lien claimant or improvement should be defined broadly as the intention of the Act is to protect the workers, suppliers and contractors. Any ambiguity or restriction on the definitions should be removed and/or amended to more fully support the intention of the Act]

   b) for railways, Universities and other projects;

   [With the same concepts as set out in 1 a) above, any amendments for lienability of railway or university or other complicated projects should be made to the Act to ensure the intention of the Act as followed and to make it easier to lien such properties. In addition, perhaps the "curative provision" i.e. section 6 of the Act, should be expanded to protect liens when difficult properties or legal descriptions or locating the necessary owners occur.]

   c) should liens include damages for delay;

   [This is not an issue for the Unions to comment on as a delay claim is not something that would be put forward by the Union or its members.]

   d) expanding definition of improvement;

   [the Unions supports any expansion of the addition for an improvement and relies on the basis set out in 1 a) and b) above.]

   e) small home renovation projects

   [This is not an issue for the Unions to comment on as a delay claim is not something that would ordinarily be claimed by the Union or its members.]

2. **Holdback and Substantial Performance**

(a) consider changing 10% holdback to 5%

[The Unions do not support nor agree with any reduction in the 10% holdback percentage.]

(b) early release of holdback for multi-phase projects;

[We assume that sections 25 and 26 of the Act are not being utilized or do not do enough to provide for an early Holdback release. As a result, the Unions are open to discussing revisions for an early Holdback release as long as same are fair to all parties. Having said that, the wording must be carefully crafted to ensure clarity and to ensure that a reasonable Holdback is still available at the end of the project to protect the parties who carry out the final works.]

(c) consider mandatory/automatic release of holdback;

[The Unions are agreeable to language which makes the release of Holdback mandatory and prevents an owner or general contractor from improperly retaining the Holdback.]

(d) consider eliminating finishing holdback;

[TO BE DISCUSSED]

(e) consider revising minimum requirements for substantial performance;

[The Unions are open to discussing a revision to the minimum requirements for Substantial Performance as same have not been revised since 1983.]

(f) to add specifics for requirements of a Certificate of Substantial Performance;

[**TO BE DISCUSSED**]

(g) consider a mandatory Certificate of Intention to Release Holdback

[TO BE DISCUSSED]

3. **Preservation, perfection and expiry of Liens**

1(a) consider "termination as a trigger for lien rights

[The Unions agree that termination is a good trigger to mark a commencement of one's lien rights and that same could be included in the revisions to the Act.]

(b) verifying Release of Liens and alternatives to Release and Discharge;

[**TO BE DISCUSSED**]

(c) consider effects of posting security to vacate liens

[This should be discussed as more and more often security is posted into Court to vacate the liens but the lien claimants can only look to the owners' Holdback without any other rights to security or payment. This is definitely an issue that should be discussed and considered.]

2. **Preservation**

a) consider length of the preservation period

[**Should extend the lien period from 45 days to 75 days so as to make it easier for lien claimants to assert their rights under the Act and also to allow for 60 days of non-payment to occur before the lien needs to be registered. However, this will extend the time for Holdback release.]**

b) consider impact of written Notices of Lien;

[TO BE DISCUSSED]

c) consider introduction of mandatory certification of subcontract completion;

[This is not a Union issue.]

d) how to avoid potential abuse of lien rights;

[This is not an Union issue]

e) consider lien registration as to different type of properties, i.e. condominiums, work performed on common elements, work against leasehold interests and home renovation projects;

[This is definitely an issue that should be discussed especially in regards to condominium projects and leasehold interests as the wording of the Act makes it too onerous for lien claimants and should be amended]

f) consider preserving liens on multi-phased projects;

[This issue should also be discussed and dealt with the proposed amendments to the Act and the amendments should make it easier for lien claimants to register liens on multi-phased projects. The goal should be to avoid multiple liens being registered at various times or through the course of a project

and extending the parties' lien rights so as to avoid the need to register multiple liens, if possible.]

3. **Perfection**

   a) consider changing the time in which to perfect a lien

   [Should extend the deadline to perfect a claim for lien from 90 days from 120 days.]

   b) consider alternatives to perfection requirements and multi-phase projects;

   [TO BE DISCUSSED]

   c) consider length of perfection period

   (**As set out in (a) above, the perfection period should be extended from 90 days to 120 days but this will need to be coordinated with timing of the Holdback release.**]; and

   d) consider alignment of time limitations with the Limitations Act;

   [TO BE DISCUSSED]

4. **Expiry Under S.37**

   a) consider two year limitation; and

   [This is not a Union issue.]

   b) consider alignment of the Act with the Limitations Act/Breach of Trust Actions;

   [The Unions agree that aligning the Act with the Limitations Act would make sense so as to create some form of consistency between the two Acts.]

5. **S. 39 Demands**

   a) should further clarity be required in regards to s.39 demands

   [Yes. The responding party should also be required to provide an estimated Statutory Holdback position along with basic documentation to support said position.]

4. **Prompt Payment/Timely Payments**

(a) consider causes of payment delays and how they can be addressed/prompt payment/posting of security/remedies in the event of breach/prompt payment on public sector v. private sector projects;

[This is definitely an issue that needs to be discussed but it is also a very complicated issue. There is no doubt that builders and general contractors take advantage of workers, contractors and suppliers in delaying payments that ought to be made more promptly. The question is how to force those payments by revising the Construction Lien Act and what penalties should be imposed in the event of a breach. The Unions are open to such amendments subject to appropriate wording and enforcement provisions.]

b) consider mandatory release of holdback after expiration of lien rights;

[The Unions support the mandatory release of Holdback once lien rights expire.]

c) consider potential effects of prompt payment on industry lenders and sureties;

[TO BE DISCUSSED]

d) consider prompt payment applications to different types of contracts;

[TO BE DISCUSSED]

e) consider pay when paid or pay if paid clauses and whether same should be made unenforceable;

[Yes. Pay when paid and/or pay if paid clauses should be made unenforceable as they are far too onerous on subcontractors and suppliers who should not be forced to take the risk of general contractors or owners in the course of a construction project.]

5. **Proof of Financing**

(a) consider access to proof of financing rights for owners, contractors and subcontractors/ where their pre-qualification may be overly onerous/whether the surety bonding process may eliminate the need for financial pre-qualification;

[This is not a Union issue.]

6. <u>Trust Provisions</u>

(a) in order to eliminate, clarify or strengthen the trust provisions;

[It is difficult to imagine that contractors and/or general contractors will create separate accounts for every construction project. As such, we do not believe mandatory Holdback trust accounts would actually be implemented. Having said that, such accounts would make the most sense if applicable to builders, owners and general contractors. However, a strengthening of the trust provisions in the Act would be supported by the Unions, including the addition of greater liability for any party who breaches those trust provisions.] The Union is also open to discussing such amendments and to having same as specifically survive bankruptcy.]

b) consider a mandatory holdback trust account, mandatory project bank account;

[Same as above]

c) consider the effectiveness of the trust provisions and remedies presently;

[Same as above]

7. <u>Relationship Between the Act and the Insolvency Legislation</u>

a) consider conflicts between the Act and the BIA or CCAA;

[This is a critical issue to all parties in the construction industry in Ontario. The Statutory Holdback and trust language in the Act must be intensified/clarified to ensure that funds are protected from the bank or other secured creditors in the event of a bankruptcy or CCAA Application. This is a critical issue for the Unions.]

b) consider statutory mechanism to regulate Stay of Proceedings in the face of liens;

[It is unclear how the Act could regulate a "stay of proceedings". Currently the CCAA bankruptcy Order allows a party to preserve and/or perfect its lien, but the lien actions gets caught up in the bankruptcy proceedings and must ultimately deal with the Commercial Court in that regard. Having said that, the Unions are open to discussing amendments to the Act which protect the lien and lien actions that become tangled in CCAA or Bankruptcy proceedings.]

c) consider CRA's super priority;

[J. Long has negotiated numerous settlements with CRA in regards to claims for super priority. In fact, further discussions with CRA were undertaken in attempting to create some form of agreement between the CRA and Lien Claimants, but those discussions were never reduced to writing or finalized. There is likely nothing that can be included in the Act which will defer or prevent CRA from imposing its super priority when CRA chooses to do so, but the Unions are certainly open to discussing this issue.]

8. <u>Priorities</u>

a) consider proposed amendments to clarify rights intended to be conferred upon Lien Claimants and/or mortgagees;

[The Unions would support amending the Act to provide priority to Lien Claimants over mortgagees who advance funds without first obtaining proper Statutory Declarations and/or who fail to comply with the loan documents. The Act should also be amended to make it more onerous on the mortgagees to prove their priority when being asserted under section 78 of the Act. The Unions are certainly open to discussing this issue and to any amendments in that regard.]

b) consider new obligations on mortgagees as a pre-condition to registration whether the mortgage is for acquisition or construction.

[Same as above.]

9. <u>Public – Private Partnerships</u>

a) consider the application of the Act in regards to PPP projects; and

[TO BE DISCUSSED]

b) consider aligning definitions and structure of the Act with PPP projects delivery system.

[TO BE DISCUSSED]

10. <u>Non-Waiver</u>

a) consider allowing waiver of lien provisions;

(The Union is against any attempt to amend the non-waiver of rights set out in section 4 of the Act)

11. **Bidder Exclusion Provisions**

a) consider regulating bitter exclusion provisions by legislation or regulation, etc. / and in various domestic and international jurisdiction;

[This is not a Union issue.]

12. **Alternative Dispute Resolution**

a) consider effectiveness of available procedures and remedies;

[The Unions support amendments to the Act which would provide for mandatory mediation and/or alternate adjudication mechanisms for construction disputes including arbitration and alike. These are amendments which would take some of the stress off the Courts and perhaps provide quicker access to a potential resolution for lien actions which would benefit all parties in the construction industry. As such, the Unions support these types of amendments.]

b) consider introducing an adjudication mechanism for construction disputes in Ontario;

[There can be no doubt that our current Act does not provide an expedited litigation process even though the intention is to do so. As such, the Unions would support amendments to the Act which allow for interlocutory steps such as discoveries and productions, etc. The Unions would also be open to amending section 50 to allow for joinder of trust claims and lien claims. Often times a party must wait several months before getting in front of a Judge or Master to obtain an Order for productions and discoveries. Perhaps a quantum threshold can be imposed which would allow the parties the rights to proceed with discoveries and productions prior to obtaining a Court Order and such amendments would be supported by the Unions.]

c) consider mandatory mediation of lien actions;

d) consider planning for an arbitration mechanism in lien actions; and

e) consider a Dispute Review Board for certain types of projects.

13. **Summary Procedure**

a/b/c) consider whether changes should be made, efficiency of the procedure, and/or eliminating sub-section 67(2) to permit some interlocutory steps such as discoveries, etc., and consider eliminating sub-section 50(2) which prohibits joinder of trust claims and lien claims.

14. <u>Surety Bonds and Default Insurance</u>

a) consider requiring Labour and Material Payment Bonds to properly pay undisputed amounts;

[The Unions support amending the Act to include language which will compel Bonding Companies and Sureties to make payments under Labour and Material Payment Bonds more promptly and/or that such mandatory payment language be included, if possible. Often times Bonding Companies and Sureties refuse to make payments under the bonds even though such payments are required, due and owing. As such, language which forces those payments to be made would be supported by the Unions.]

b) consider potential for requiring Labour and Material Payment Bond payees to complete subcontracts;

[TO BE DISCUSSED]

c) consider mandatory Labour and Material Payment bonding of public projects;

[TO BE DISCUSSED]

d) consider requirements in respect of the adjusting of bond claims;

[TO BE DISCUSSED]

e) consider providing for electronic delivery of surety bonds;

[Not an Unions issue]

f/g/h) consider whether bond claims should be subject to adjudication, whether changes to third party beneficiary rules are appropriate to enable payment by owners directly to sub-contractors and suppliers, to consider any revisions to the Act in regards to default insurance.

[TO BE DISCUSSED]

15. <u>Miscellaneous</u>

a) consider providing a greater precision regarding technical irregularities that could be cured under the Act;

[As previously stated, the Unions support amending the Act to expand the powers of section 6 for curing technical irregularities in liens so as to better comply with the intention of the Act in protecting such liens.]

b) consider using Letters of Credit with international commercial conventions;

[This is not a Union issue]

c) consider utilizing security for costs to award interest;

[The issue of interest should be discussed and considered as lien claimants are currently unable to register a lien for interest nor do lien claimants ever receive payment of interest on their Claims for Lien. If the interest issue can be addressed in the amendments to the Act, the Unions would support such amendments].

d) consider clarifying the application of liens to subdivision lots;

[Yes. There must be some amendments made to simplify and/or streamline the registration of liens against residential subdivisions and to deal with the current "lot by lot" clause in the Act. The lot by lot requirements should be removed from the Act as same is far too restrictive and onerous on Lien claimants.]

e) consider a periodic review of the Act on a go forward basis.

[Yes. The Unions would support a periodic review of the Act on a go forward basis.]