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SENT BY EMAIL

Bruce Reynolds and Sharon Vogel
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King Street West, 44th Floor
Toronto, ON M5H 3Y4

Dear Mr. Reynolds and Ms. Vogel:

RE: Toronto Transit Commission's Additional Submissions on the Expert's Review of the *Construction Lien Act* regarding New Issues List

TTC has reviewed the New Issues List dated January 13, 2016 (the "List"). Save and except for the select comments provided below, many of the issues raised have been addressed in TTC's Submissions dated November 17, 2015 and where they have not, TTC recommends no further changes to the Act. TTC thanks the panel for the opportunity to provide these additional submissions.

1. *Consider whether Municipal Lands should be considered in the same manner as federal and provincial crown lands vis-à-vis liability.*

- TTC's comments in respect of this issue can be found at pgs. 1, 6, 10, 12 and 18 of TTC Submissions dated November 17, 2015, however TTC would like to highlight the need to modernize the Act to consider more than just the concept of "ownership" in "lands". In addition to the concern about the sale of municipal public property in a lien action, the fact that public projects often involve complex property scenarios should be addressed. Projects sometimes straddle lands to which liens attach and lands to which liens do not attach. Additionally, complex public projects sometimes include lands in which the public entity does not have any legal interest but are performed on private property by a licence or permission to enter.

- This may include monitoring, shoring work or other temporary work that is undertaken on a home owner's or business property, or it may be actual permanent works that are undertaken such as landscaping or driveway building in areas where the public works have disrupted the private property or its owners. Focus on ownership or other property interest in land ignores the reality

of complex public projects in crowded urban spaces, which generally involve work on lands not owned by the municipal entity.

- In addition to treating municipalities and their agencies the same as the Crown for the purpose of non-attachment of liens, the Act ought to be modernized to better consider the concept of owner of the improvement separate and apart from the ownership or other interest of a particular parcel of land.

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

6. Consider, with respect to release of holdback, drawing a distinction with respect to services (such as design services) rendered prior to commencement of construction;

9. Consider releasing tranches of holdback as the project achieves designated percentages of completion; and

10. Consider annual release of holdback.

- TTC's comments on mandatory and early release of holdback can be found at pgs. 2, 8, 15-16 and 24 of TTC Submissions dated November 17, 2015. In particular, TTC would like to reiterate the problematic nature of early release on subcontracts outlined on page 2 note 2 and pages 15-16.

- Issues 4, 5, 9 and 10 of the List reflect two concerns with the Act which may have a common solution: a) contracts that contain both "improvement" work and non-improvement work (i.e. an IT contract that is 5% installation and 95% help desk services) and b) how to provide for early release of holdback in a manner that makes sense.

- The Act ought to be modernized in two related ways: a) to clarify definitions such that holdback is only required on "improvement" work of a contract and not non-improvement work if the contract contains both and b) permit holdback to be released early on milestones created by the contract (and in doing so allow for certificates of substantial performance of milestones/phases of a contract).

- The proposed solutions of annual or percentage completion releases may work in certain scenarios however they may also create artificial distinctions that in practice are difficult to administer but which permissive milestones defined in the contract may avoid.

- For example, it may be difficult to determine what work was performed on December 31, 2015 vs. January 1, 2016. While not currently problematic for the purpose of payment since contractor will eventually be paid for all work, when holdback is being released on that basis it opens it up those determinations to attack by later subcontractors that release was improper and thus creates potential liability to the owner who gains nothing from the early release.

- In percentage completion release, it is not clear how that percentage completion will be measured – will it be based on value or contract time. Both are problematic. Many projects adjust contract time and contract price throughout, by change orders or if compensation is on a time and materials basis.

- In the example of the IT contract that has installation complete in 2 months and help desk services for 5 years, annual release would delay holdback release of the installation portion whereas percentage prescribed portion may only have holdback released well into the service portion of the agreement. Contract driven milestones could be crafted so there is holdback on the installation portion released after a CSP of that milestone and clarify that no holdback is required on help desk portion.

- In design services contracts, both annual releases and percentage completion releases may artificially cut work for a particular drawing or RFI response in two. Contract driven milestones could be crafted so there is holdback released after all design work up to award of the construction contract after CSP published of that milestone and a separate holdback released after the construction support portion of the design contract is complete.

- Even in the most simplistic construction projects annual or percentage completion releases may be more problematic than permissive contract defined milestones. For example, in building a road with a bridge in the middle, annual or percentage release may require assessment of the work partway through construction of the bridge, whereas permissive contract milestones would allow the releases to be structured in phases for when the road before the bridge is complete, when the bridge is complete and when the road after the bridge is complete.

- A permissive, flexible approach to early release based on the particularities of the contract work, rather than mandatory or prescribed tranches, would be easier to administer and have a logical connection to the work.

11. *Consider punitive "interest" as a mechanism for breach of payment terms.*

- TTC disagrees that interest should be mandated by legislation and it should never be punitive in nature.

17. *Consider False Claims legislation similar to that used in the United States.*

- TTC's comments on this issue can be found at pgs. 2 and 47-48 of TTC Submissions dated November 17, 2015 however since that date the

Charbonneau Commission investigating Quebec's construction industry, recommended the enactment of legislation similar to the U.S. False Claims Act.[1]

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

- An electrical subcontractor ought not to be allowed to remove items from site in the face of a dispute.

Sincerely,

LEGAL DEPARTMENT

Samantha Ambrozy
Solicitor
45-70-66

[1] CBC News. "Charbonneau commission finds corruption widespread in Quebec's construction sector". Posted: Nov 24, 2015 5:00 AM ET http://www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577.