Construction Lien Act

Review

NEW ISSUES LIST

Comments from

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Lienability

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

   Extrapolating the issue to school board properties, there would be cost savings for school boards and general contractors in managing disputes without liens being registered on title. In most situations, the lien is a formality only and is vacated shortly after being registered, so it is applied more as a leverage and notification of a lack of payment.

2. Consider clarifying the process by which a lien is given.
   Agreed, the process could be better described in the Act.

3. Consider removing the notice of lien provisions.
   It appears that there would be limited value in retaining this section and there is support for deleting this reference.

4. Consider further clarification of the definition of improvement (e.g. distinguishing between construction and IT projects and service agreements). No comment (NC)

5. Consider whether the process with respect to liening condominium units needs to be modified. NC

Holdback and Substantial Performance

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.
   There are pros and cons with a two phased approach for releasing the consultants' holdbacks. Firstly, the consultants would benefit by receiving an early release for the design phase which would be important on a project that extends over a long period. The downside would be a reduced sum held in trust at the end of a project. Generally, there is support for having separate consultant holdbacks for the design and construction phases; however, it should remain as a permissive rather than an obligation within the CLA.

7. Consider use of certain financial instruments (i.e. letters of credit or bonds) or cash for holdback purposes.

Letters of credit could be considered as an alternative to retaining the lien holdback in trust subject to their ability to be used for set-offs similar to the lien holdback. The use of bonds is however not recommended due to the challenges of owners being able to access [other construction contract] bonds.

8. Consider implementing a deficiency holdback.

The continued use of deficiency holdbacks, separate from the lien holdbacks, is strongly supported. It is important that sufficient funds be retained throughout a contract for deficient work, with the final valuation being completed at Substantial Performance. This allows the general contractor to be aware of and make the necessary financial allowances for each of the sub-trades as a contract progresses rather than being advised of the issues towards the end of the project when project funds may have already been released to their subcontractors.

Under the CLA, there is the opportunity for the Owner to use the lien funds as a set-off against deficiencies, however, this should be applied cautiously as to allow the lien holdback to be released to its maximum extent for the benefit of all of the subcontractors. Notwithstanding, it is very important for the Owner to retain the rights of set off from the lien holdback.

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

Partial releases of holdback could be considered although there would be additional administrative work by all parties to perform these transactions. The downside would be a lower value of lien holdback at Substantial Performance, thereby limiting the sum of funds available for set offs, so it would be even more important for Owners to retain reasonable deficiency holdbacks to cover these costs.

10. Consider annual release of holdback.

Same response as at paragraph 9 above.

<u>Prompt Payment or Timely Payment for Construction Work</u>

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

Under the CCDC 2 contract, Article A-5 Payment, there is a provision for interest payment "should either party fail to make payments as they become due,…". The use of standard interest charges are supported under the contract however, punitive interest or other charges are not reasonable. Looking at freedom of contract, it is suggested that any interest or penalty costs not be mandated under an Act and be left under the terms of a construction contract.

12. Consider potential conflicts with prompt payment legislation and regulatory legislation such as the *Professional Engineers Act* and/or *Architects Act*. NC

13. Consider the causes of payment delays and how they can be addressed in the Act or other legislation.

The determination of the reasons for payment delays is critical in defining what the corrective actions need to be, whether defined within or outside of the Act. This was one of the numerous problems with the Prompt Payment Act and associated documentation: the background payment problems were not presented.

One of the prime reasons for delays of payment for some school construction contracts pertains to incomplete or inaccurate general contractors' progress draws: valuations for completed work are not reflective of the on-site status including deficient work, incomplete WSIB and Statutory Declarations, construction schedules not provided, etc.

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

The best way to address the issue is to have progress draws properly completed and submitted as required under the contract.

Some technological solutions are already employed by school boards. They can make payments electronically and this reduces the time period for a cheque to be in the contractors' accounts. However, the review of a progress draws is not a basic clerical issue that can be addressed with a technical solution. There would still be a need for the consultants to review the submitted draw and provide a written response detailing the problems with the incomplete progress draw. Considering the technological changing landscape, and the challenges in defining acceptable technical solutions, this matter should be outside of the revision of the CLA.

15. Consider implementing KPI's as a method of motivating prompt payment.

Yes, a positive system would provide support for timely payment of construction progress draws. It is suggested that the UK system of a Prompt Payment Code be considered as a possible model. The 2008 Code "encourages and promotes best practice between organizations and their suppliers. Signatories to the Code commit to paying their suppliers within clearly defined terms,…". Northern Ireland also has a "Fair Payment Charter, which is a non-binding agreement included in all public construction contracts" and is linked in with defined KPIs. Construction associations could also employ a 'self-policing' practice with their members, similar to the engineering and other professional associations. Refer to the school boards' May 2015 submission to the CLA for further information on this matter.

Alternative Dispute Resolution

16. Consider introducing an adjudication mechanism for construction disputes in Ontario:
    a) Consider how adjudication could work where there is the ability to preserve a lien.
    b) Consider the potential institutional bias of adjudicators.
    c) Consider a qualification process for adjudicators.
    d) Consider when an adjudicated decision would have to be appealed.

    Adjudication procedures could provide interim relief with construction disputes.

Miscellaneous

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

    This legislation could be a benefit relating to the signing of the Statutory Declaration of Progress Payment Distribution by Contractor [CCDC 9A] where contractors certify that all accounts for labour, subcontracts, products, etc have been paid in full.

18. Consider modifications to the statutory settlement meeting provisions. NC

19. Consider issues related to case management references. NC

20. Consider implementing changes to documentary disclosure requirements.

    The base CCDC2 contract has language requiring the Owner to provide financial information throughout the contract, however, these terms can be scripted out with Supplementary Conditions. This is done by a number of school boards as this project information can be proprietary.

21. Consider improving harmonization of the Act with the *Registry Act*. NC

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

    Allowing any subcontractor –not just the electrical subcontractor, to remove materials from a construction site would create a number of challenges. The Owner may have paid the General Contractor for work completed but for reasons outside of the Owner's control the subcontractor or subcontractors have not been paid. This puts the Owner, and the project in a compromised situation.

    Under the CCDC 2 contract Part 7 Default Notice, the Owner retains the right to "take possession of the Work and Products at the Place of the Work". Furthermore, should a Contractor suspend or terminate the contract they are not allowed to remove materials from the Place of Work. The contracts do not allow for the removal of installed machinery or equipment from the work site.

    This allowance is not supported within the terms of the CLA.

23. Consider a requirement for additional information in the certificate of substantial performance.

    School board Supplementary Conditions require the delivery of a number of

products prior to the application for Substantial Performance. These items include guarantees, testing and balancing reports, maintenance manuals, red-lined as-builts, etc. These terms allow boards to have the necessary documentation when taking over a newly constructed or renovated school.

It is however recommended that additional / new terms be excluded from the CLA and remain as part of the freedom of contract with terms being set within the construction contract.

24. Consider exemptions or carve-outs from lien legislation for specific forms of contract. NC

25. Consider the use of the Daily Commercial News as a medium for publications.

Under S.32.(1) 5 CLA. "The contractor shall publish a copy of the certificate [of substantial performance] once in a construction newspaper." Rather than having to publish in a circulated newspaper, with the DCN being the industry journal, it is suggested that notices of Substantial Performance be published on an electronic noticeboard that can be accessed on line.

26. Consider the effect of the Act on projects regulated by the Ontario Energy Board. NC

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

Yes, that would be beneficial to the industry.

ADDITIONAL ITEM:

28. Joint Lien Holdback Trust Accounts.

During the Stakeholders session there was a proposal from the Review group that joint Owner / Contractor lien holdback trust accounts be set up, as is the practice in British Columbia. There would be some challenges with this practice in that it would become difficult to apply the rights of set-off whereby support from the Contractor would be required. It would create another area of dispute as well in managing the funds.

It is also important to note that the B.C. Act "does not apply to (a) if it is an owner, the government, a government corporation,…, or any other public body,…" so it would not apply to school boards. Joint holdback accounts are not supported under a revised CLA.