

# Prompt Payment Ontario

9/15/2015

Vol. 5

## GEARING UP FOR THE CLA REVIEW CONSULTATION

### CONSULTATION DATE HAS BEEN SET

Now the summer is waning the activity has picked up for the Construction Lien Act Review and for PPO. *PPO will be meeting with the review on October 27<sup>th</sup>*, and between now and then we will be very busy

with our research and submission preparation. We will be looking for your input numerous times over the coming weeks.

*Welcome to our new member:  
Ontario Glass and Metal Association*

## BENEFIT PLAN SURVEY

### CONTACT YOUR PLAN ADMINISTRATORS

The survey of benefit plans is a unique piece of research the PPO is undertaking, working with Michael Mazzuca from Koskie Minsky and John O'Grady from Prism Economics & Analysis. Looking at the impact of delayed payment and how it affects pension and health & welfare plans was not considered in the

original information package released by the CLA Review, but they are most interested in hearing the findings.

It is important that we get good results from the survey. And for this we need you to follow up with your plan administrators to fill out the survey at:

<http://www.prismsurveys.com/surveys/PPO/PPO.htm>

INDUSTRY  
PERSPECTIVES: A  
CLOSER LOOK AT THE  
PROMPT PAYMENT  
PROBLEM  
BY GEZA BANFAI  
DCN JUL 16, 2015

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**Paying a bill is the final step in an exchange of value between the payer and the payee. That this is an exchange is a crucial point, and the fact that payers – who have already received their value – sometimes seem to overlook this is the cause of much rancor. Delayed or non-payment instantly triggers a deep-seated sense of injustice (con't).**



## PPO CONTRATOR SURVEY:

.PPO through Ipsos-Reid has implemented its own survey of trade contractors, using online access and phone surveys. Our objective is to get a statistically significant sample to illustrate the depth and breadth of payment and lien issues. If you would like to fill out the survey and don't have the link, please contact your trade association and they will provide you with that information. PPO is targeting the end of September for survey results.

## CLA REVIEW:

In July the CLA Review released its Information Package, which was a very detailed and comprehensive look at the payment systems and it raised many issues to be considered as part of a submission. You can access the information package at <http://www.constructionlienactreview.com/information-package/>

In late August the CLA Review also conducted a survey, where they were looking to get "directional" as opposed to statistical feedback on the key issues. Links to the survey were emailed out to PPO members. It was structured in a way that one link could be filled out only by one email recipient. They are collecting feedback until the end of the month.

## PPO SUBMISSION:

The Legal/Research Team has begun work on the submission, with Geza Banfai and Dan Leduc addressing the issues arising in the Information Package, and Michael Mazzuca working on the Impact on Benefit Plans section. John O'Grady is working on both sections. The plan for the submissions is to have a bullet point outline available for PPO members to review. The turnaround will be quick because of our deadline of October 27<sup>th</sup>. PPO will set up teleconferences to obtain your comments and feed them back to the Team. For the Benefits Plan section PPO will request a smaller group, with a strong labour presence to review that work. You will be notified over the coming days as to when this material will be available for review. If you have any questions please contact Sandra Skivsky at (905) 564-6622

## CLOSER LOOK AT THE PROMPT PAYMENT PROBLEM (CON'T)

A monthly payment cycle is a norm enshrined in all of the industry standard form construction and design contracts used in Canada and elsewhere. There is good reason for this: it regularizes the flow of cash throughout the construction pyramid, as well as with others outside the pyramid who typically operate on a monthly cycle. Some obligations such as wages

## ALBERTA - SURVEY OF SLOW PAYMENT PRACTICE

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**The Alberta Trade Contractors Coalition has just completed a survey on payment practices.**

**Some key results include:**

- **86% of contractors experience payment problems**
- **Average age of receivables 79 days**
- **Average amount outstanding (over 60 days) per company = \$224,000**
- **Nearly 10% of accounts are over 120 days**
- **Late payments were reported to negatively affect (sample):**
  - o **Working capital**
  - o **Financing fees**
  - o **Downstream payments**
  - o **Number workers employed**
- **The survey also covered causes of late payment, how is addressed currently and future recommendations.**

and salaries are shorter, but these are accepted and accounted for. Overall, it is safe to say that a cycle of monthly payments accords with the reasonable expectations most participants

in the construction process hold most of the time. Any interruption or delay in that payment flow has consequences which are only too familiar.

**A recent survey conducted by Raymond Chabot Grant Thornton, however, has reported that the average payment time in the construction industry in Quebec is currently 80 days and has been**

**increasing.** Furthermore, the gap between the average payment time in the construction industry and in non-financial industries as a whole has almost doubled in the past decade. This is in line with strong anecdotal evidence from elsewhere in Canada. Why is this?

In principle, there can be only these possibilities: payment terms longer than one month are being accepted and/or agreed payment terms, however long, are being ignored. Each brings slightly different considerations to the problem.

Reasons for not making payment within the agreed time (monthly or otherwise) are many and varied, but all are reducible to this: **delay in payment benefits the payer. Payment closes the loop of exchange in value that the payer may wish to keep open or about which the payer may simply not care. The payer's motivations may range from the overreaching and malicious to the clear, convincing and fully justifiable.** Whatever the reason, the payer benefits by

delay in making payment, at least in the short term.

There are countervailing pressures tending to prevent the payer from delaying payment forever. These can be formal, such as the threat of legal action, or informal, such as reputational considerations. **Considering the evidence that payment cycles have been extended, it would appear that these formal and informal mechanisms are not as effective as they once might have been.** One reason may be that the existing system of legal enforcement is essentially useless in efficiently and economically resolving a payment delay of, say, 20, 30 or 40 days, and is only marginally useful when the delay is longer. If there is a dispute, that delay is measured in months or years.

**People play that broken system. And when many people play a broken system, the threat of reputational harm is felt less. Ask the taxpayers of certain Mediterranean countries.**

People also play one another. Being too pushy about enforcing timely payment may be seen as hurting the chances for future work, and some recalcitrant payers are not shy about so reminding their payees. **At the extreme, we have blacklist clauses in the tendering by-laws of certain municipalities which provide that any previous or current litigation or claim by the tendering contractor against the municipality disentitles that contractor**

**from bidding on further work.** That such claim may be grounded upon the municipality's own unjustified failure to pay is quite irrelevant.

**Some payers maintain that they simply cannot make payment within 30 days because their internal review and approval processes are such that they need more time.** It is interesting that amid such feedback as took place concerning Ontario's abortive Bill 69, the design community, which has a primary responsibility for certifying payments, did not raise this as a concern. **One might reasonably ask why internal approval following consultant certification takes so long. In any event, this seems like a hard sell in a world of instantaneous electronic communications and nearly instantaneous electronic payment.**

Payers who are able to impose extended payment terms upon their payees of, say, 60, 90 or more days present a different set of issues. **These tend to be larger organizations with considerable market clout, and they do this because, well, they can.** In a highly competitive marketplace, someone will accept their terms even if others refuse.

This raises an ethical dimension. Agreeing to pay within 30 days in circumstances in which the payer has no real intention of complying is clearly unethical. But less clear are the ethics of forcing an agreement for

extended payment terms in circumstances in which the payer knows that the financial burden of those terms will be absorbed by the payee, or is indifferent to that fact.

A libertarian would see no ethical issue here at all - choosing to contract on such terms is a choice freely made, if not by that party than by someone else. **If the payee cannot absorb the financing cost, it's her problem, and devil take the hindmost. That's the way a free market works, and that's what freedom of contract is all about.** For the libertarian, the proper role of the state is to remain hands off and let the market regulate itself.

Others, however, might point out that the libertarian's unrelenting focus on commercial freedoms ignores other important considerations, and besides, his entire argument is grounded upon a fiction. **There is no such thing as unrestrained freedom of the market, they would say – the Competition Act and lien legislation itself being two obvious examples – and the law has always constrained freedom of contract where doing so achieves some higher societal purpose or the common good.** It's about maximizing that common good, they would argue, and it's entirely appropriate in the right cases to restrict freedoms to the limited extent necessary to protect the good of all. These people would

maintain that the survey and anecdotal evidence mentioned earlier strongly suggests that **this is one of those cases, where unchecked market forces have allowed too many powerful players to distort the market to the detriment of too many payees, and that this requires correction.**

Still others might go even further. It's not about maximizing freedoms, they would say, or even about maximizing the common good. Rather, **it's about achieving a just construction industry, in which the right qualities are nurtured.** As Harvard political philosopher Michael J. Sandel has pointed out: "Justice is not only about the right way to distribute things. It is also about the right way to value things." **Shouldn't we above all be valuing good, competent construction and design work, they would argue, over the vagaries of the balance sheet and the serendipitous ability of some firms to weather payment delays over other firms?** And if distortions in the market and systemic problems of legal enforcement are hurting people, shouldn't we be repairing those problems rather than allowing them to continue because it is right and just that we do so?

Reasonable people can disagree about all this, and will. Ultimately, these kinds of ethical questions merge into questions of politics and the

need to make political judgments. The essential thing is that we engage in a wide consultation and respectful sharing of views in deciding them. **While doing so, we might consider the experience of other jurisdictions** including the United States, Australia, New Zealand, the United Kingdom and others, who have already considered these problems within their own construction industries and have enacted some form of prompt payment legislation. In the U.K. and Australia, processes for the fast-track interim adjudication of disputes have been introduced in an effort to address collateral systemic problems in the legal system. **It may now be time for Canada to do the same.**

*If you have any questions about Prompt Payment Ontario please contact: Sandra Skivsky at (905) 564-6622*