Prompt Payment Ontario

360 Superior Blvd.
Mississauga, ON
L5T 2N7 Canada
Tel: 905-564-6622 | Fax: 905-564-5744

Submission on New Issues

January 29, 2016

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

The Review received submissions suggesting that municipal lands should be considered in the same manner as provincial and federal Crown lands. Registration of a claim for lien would not be made against those particular municipal lands. The exclusion of federal Crown lands from lienability arises from jurisdiction and is therefore not germane to the Review.

It is clearly unreasonable to preclude municipalities from coverage under the Act. Nor, do we understand this to be the proposal of some municipal organizations. Rather, we understand them to be proposing that municipal lands, *per se*, should not be subject to a lien being registered on them. PPO opposes this proposal.

PPO submits that there is an administrative benefit to municipalities in having claims for lien registered against their lands. The liens are *registered* and thus there is a fixed registry for those liens. This procedure serves a municipality. When funds are to be released, the municipality can easily search title to ascertain if a lien has been registered. In the absence of liens being registered against the municipal lands, the municipality would have to establish a new procedure to receive notice of lien. This would have its own administrative problems, especially for large municipalities. The TTC submission alerts one to this eventuality when it says: "many project staff may not even know they have received one [notice of lien]."

Eliminating the lienability of municipal lands would create new risk for a municipality in that it might inadvertently advance funds when notice of a lien has been given, but this has not been brought to the attention of the payment issuing authority. This risk is much greater when there is no registration on title.

PPO is unaware of any incident in Ontario where a municipality was ordered to sell lands in light of a construction claim for lien. As long as the municipality is maintaining its holdback obligations, that risk remains nominal at best.

The proposal to eliminate lienability of municipal lands is worse than a 'solution' in search of a problem to fix. It is a 'solution' that will actually create a problem.

2. Consider clarifying the process by which a lien is given.

PPO offers no comment on this issue.

3. Consider removing the notice of lien provisions.

PPO was surprised to see submissions, in reference to Written Notice of Liens pursuant to section 24(2) of the current *Construction Lien Act*, suggesting that: "[a written notice of lien] stops the flow of funds on a project and may even require a vacating order," and "[W]hen the effect is so significant as to stop the flow of funds…" The underlying premise to these submissions is incorrect. The effect of written notice of lien is not to suspend all payments but simply to create a further notice holdback in addition to the 10% statutory holdback. The process of a written notice of lien serves a useful purpose. It provides a degree of further security for payment without impeding the full flow of funds on a project. Although the written notice lien as considerable utility in terms of security for payment, it is limited in that it remains valid only so long as the claimant has lien rights.

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

PPO offers no comment on this issue.

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

There are two issues with respect to liening condominium properties when the unpaid claim pertains to either new construction or to renovation and repair work on common elements.

The first issue pertains to the current requirement to apply liens on a unit-by-unit basis. This is both cumbersome and costly. As proposed by PPO in our submission to the Review, there should be an ability to apply a general lien. We made a similar recommendation with respect to new construction projects in the low rise sector where we recommended that there should be an ability to apply a general lien to the project rather the current requirement to file liens on a lot-by-lot basis.

The second issue pertains to repair or renovation work on 'common elements' of a condominium that is already occupied by the unit owners (or their tenants). Examples of this type of work would include a new roof, replacing the heating and cooling system, new elevators, *etc*. PPO recognizes that the current requirement to lien each unit in the condo potentially interferes with an individual owner's ability to close a sale transaction. However, applying a lien only against the condo corporation and not against individual units would be ineffective. There would be no capacity of the lien applicant to force the sale of the common elements to satisfy the unpaid invoice. However, sec. 44 of the current Act provides a workable solution that addresses the legitimate needs of all stakeholders. Under sec. 44, a condo corporation can post alternative security.

The appropriate change, therefore, for new condomium construction is to provide contractors and suppliers with the option to apply a general lien in place of the current requirement for unit-by-unit liens. For repair or renovation work on existing condominiums, the option provided by sec. 44 for condominium corporations to post alternative security appears to work well and should be maintained.

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

PPO offers no comment on this issue.

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

PPO supports the option of allowing a trade contractor to provide alternative security in place of the 10% holdback. This security could be in the form of a letter of credit, bond, GIC, term deposit, *etc*. provided the security was both liquid and assured.

8. Consider implementing a deficiency holdback.

PPO has advocated for the elimination of any holdbacks in a prompt payment regime other than those prescribed by the *Construction Lien Act*.

In light of the submissions made by other stakeholders, however, two aspects have become clear. First, some stakeholders appear to persist in incorrectly viewing the CLA holdback as a holdback for the correction of defective or incomplete work, perhaps even to secure the performance of warranty obligations. Second, many owners consider the right to withhold money for deficient or incomplete work essential to their interests and wish to incorrectly read this right into the *Act*.

Stakeholders appear to be speaking at cross purposes on this issue. PPO has pointed out, and reiterates here, that no trade contractor expects to be paid for defective or incomplete work, but that the determination of whether work is defective or incomplete should remain, as it always has, a matter of certification of payment by payment certifiers. By definition, incomplete or defective work is work incapable of achieving certification, and issues surrounding the promptness of payment never arise in this context. However, the corollary is also true: work which has been certified for payment, by definition, is complete and free of deficiencies, and should be paid for in timely fashion, without being subject to further holdback for future work which "might" be defective or "might" be incomplete.

In any event, the amount for which certification is withheld (where the project involves an independent payment certifier) or for which any payment may otherwise be withheld by the owner (for projects where there is no independent payment certifier) must be limited to a reasonable valuation of the cost of correction or completion. This principle should be embodied in any new legislation. The practice of withholding grossly exaggerated amounts relative to the cost of correction or completion, or of withholding arbitrary amounts or percentages of the contract price on this account, is both unwarranted and completely antithetical to the objectives of improving cash flow to trades. This practice should be prohibited by legislation.

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

PPO recognizes that accelerated holdback release is consistent with its overall interest in speeding up cash flow down the construction pyramid. Care should be taken, however, in structuring any regime allowing holdback release in tranches so that it does not undermine an important underlying principle in the holdback system, namely that trades should be entitled to share in holdback on a *pro-rata* basis among themselves, on a class-by-class basis.

Holdback release using tranches favours early-completing trades (who will presumably receive 100% of their holdback entitlements) over those trades who supply the bulk of their labour, services and materials only near the end of the project and whose holdback recoveries would be limited to the amount of holdback left for distribution. PPO is concerned that these late-completing trades may be prejudiced relative to their early-completing counterparts, even accounting for holdback releases that they may have received in earlier releases by tranche.

PPO has advocated the mandatory, not optional, use of the early holdback mechanism already sitting within the existing *Act*. We suggest that this would better balance the interests of improved cash flow with the need to protect trades using holdback.

10. Consider annual release of holdback.

See the comments in item 9 above.

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

PPO does not believe that any mechanism prescribing punitive "interest" for breach of payment terms would be effective, if this were in lieu of a codified right to suspend performance or terminate a contract. (As noted in our original submission, PPO believes that the exercise of the right to suspend or terminate work would be stayed while an adjudication process was underway.) Entitlements to interest have long been embodied in Ontario's *Courts of Justice Act*, but have proven to be completely ineffective as a deterrent to late payment. While an increase in the "interest" rate or similar punitive measure *may* have some marginal effect, PPO does not believe that this would be an effective solution to the problem of systemic late payment.

PPO also points out that a statutory term prescribing what is effectively a fine or a penalty for breach of a contract (as distinct from the criminal or quasi-criminal violation of some obligation) may be subject to legal challenge.

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

PPO understands and respects the duty that both professional engineers and architects have to their clients. However, there is no conflict between this duty and the prompt payment systems set out in either the Consensus Draft (see PPO submission – Appendix A) or the Bill 69. While it is true that both professional engineers and architects can operate as payment certifiers on behalf of an owner, this role is

not exclusive to professional engineers and architects or to persons supervised by a professional engineer or architect. The duty of diligence applies equally to any other persons performing the role of payment certifier. PPO understands and agrees that to perform the role of payment certifier diligently requires that there be a reasonable period of time to inspect the construction work. However, a reasonable period of time does not mean an unlimited period of time. It is patently unreasonable to suggest that it should normally take longer to inspect construction work than was required to perform that work. Every other North American jurisdiction that has prompt payment legislation also regulates the practice of engineering and architecture. Those jurisdictions have not experienced any conflict between the time periods stipulated under prompt payment legislation and the duty of diligence that applies to payment certifiers. Consequently, PPO does not see any inherent conflict between prompt payment legislation and the statutes that regulate professional engineers and architects.

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

PPO addressed the causes of payment delays in our submission where we drew, in particular, on the results of the survey conducted by Ipsos Reid on behalf of PPO. The survey found, that based on their experience, trade contractors assigned a 'high risk' to the following factors as causes of payment delay:

Contractors' Perception of High Risk Causes of Late Payment based on Experience
(1-10 Scale where 1 = Not Important at All and 10 = Extremely Important)
'High Risk' = 8-10 on Scale
Trade Contractor Survey, Tables 16, 17 and 18

	Public Sector Projects	Private, Non-Residential Projects	Residential Projects
Insolvency of the Owner or Builder	n/a	48.1%	46.5%
Insolvency of General Contractor	41.7%	23.6%	45.2%
Owner or Builder's Unexplained Delays	n/a	n/a	46.6%
Public Sector Owners' Financing Problems	37.9%	n/a	n/a
Private Sector Owner' Financing Problems	n/a	51.6%	n/a
General Contractors' Unexplained Delays	55.7%	55.8%	48.0%
Disputes over Alleged Deficiencies	49.4%	44.3%	42.3%
Payment Certifier Delays	48.7%	44.3%	41.3%
Bureaucratic Delays in Approving Payment	57.5%	n/a	n/a
Delays caused by Banks and Other Lenders	31.7%	37.9%	39.0%
Delays in Closing Project	n/a	n/a	45.7%

A number of conclusions can be drawn from this table. First, there are multiple causes of payment delay and these vary across sectors. Second, it would be an error to reduce the late payment problem to 'delays caused by disputes over alleged deficiencies'. While these disputes are clearly important in causing payment 'freeze-ups', in each sector, there are other factors that are even more significant. For example, in the public sector, 'bureaucratic delays' are the most important factor. And third, in all three sectors, 'general contractors' unexplained delays' are the most significant source of late payment risk.

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

PPO offers no comment on this issue.

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

The suggestion that a voluntary code will succeed where CCDC and CCA standard contracts have so demonstrably failed is both unrealistic and self-serving. As so many other jurisdictions have also concluded, only a legislated regime will solve the problem of systemic payment delays.

16. Consider introducing an adjudication mechanism for construction disputes in Ontario.

PPO strongly favours introducing an adjudication mechanism for construction disputes. We are pleased to see that a number of other stakeholders have also expressed a desire to see this concept implemented. In fact, it might reasonably be said that if there is one thing most affected stakeholders agree upon, it is that the current system of legal enforcement is deeply flawed. All participants in construction need a remedy for disputes that is impartial, technically competent, speedy, efficient and cost-effective. We note that other jurisdictions appear to have had considerable success with such adjudication procedures.

A question has been raised concerning how adjudication could work where there is an ability to preserve a lien. PPO sees no obstacles to integrating an adjudication system with a system for the securing of payment obligations using liens, although there would be technical issues which would need to be addressed. For example, an adjudicator would require statutory jurisdiction to order the discharge of any lien which may have been preserved or perfected in the interval between the matter being referred for adjudication and his or her determination that payment must be made. In the event a claim for payment is dismissed upon adjudication, the claimant should retain the right to secure and pursue payment via lien, as a necessary corollary to its right to have the adjudicator's decision reviewed at the end of the project. (An interesting ancillary issue that arises here concerns what legal or evidentiary significance should be given to such an adjudicator's ruling in any proceedings brought at that later time.) There are undoubtedly other similar issues of a technical nature which would need to be addressed, but again, PPO sees no fundamental incompatibility between the lien system (which deals essentially with the securing a claimant's right to payment) and an adjudication system (which deals with the expeditious, interim resolution of such payment claims.)

Questions have also been raised about the potential "institutional bias" of adjudicators and the qualification process for adjudicators generally. PPO does not know what the concern about institutional bias is, and cannot speculate. PPO assumes that adjudicators will, at the outset, be sourced from among the cadre of legal and other professionals who have demonstrated expertise and experience in the resolution of construction disputes, including those who have achieved third-party certification by organizations such as the Chartered Institute of Arbitrators, ADR Institute of Canada and others. Over time, PPO expects that a specialized system for the training and endorsement of adjudicators will arise, either independently or as adjuncts to the existing organizations already providing such services to the industry.

A final question has been raised concerning when an adjudication decision would have to be appealed. In line with approaches used in other jurisdictions, PPO strongly advocates that an adjudicator's decision be

binding and enforceable upon issuance, with no right of appeal therefrom, or other review thereof in any judicial process, until the earlier of the completion of the claimant's work or the completion of the project. PPO recognizes the possible need for exceptions to this prohibition in very limited cases, for example, fraud, absence of jurisdiction and similar, but suggests that this list of exceptions be necessarily limited, in keeping with the overall objective that adjudication provide for the prompt, and binding, determination of disputes.

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

PPO does not believe that amendments to the *Construction Lien Act* should include similar provisions to False Claims legislation that is found in the United States. The issues addressed by False Claims legislation in the United States are already addressed by existing statutes in Canada:

- Secs. 35 and 86 of the current *Construction Lien Act* provide statutory protection and potential compensation for liability for an exaggerated claim for lien or where a lien is claimed without foundation.
- The *Competition Act* (R.S.C. , 1985, c. C-34) already includes criminal and quasi-criminal sanctions in respect of bid-rigging and collusive bids.
- Sec. 362 the Canadian *Criminal Code* provides ample sanctions for false statements or false declarations.

PPO sees no need to introduce 'False Claims' provisions to deal with payment processes. Owners or their agents already have ample time under standard agreements to inspect work and satisfy themselves that the work described in an invoice has been performed. Prompt payment legislation simply statutizes the timeframes already set out in standard agreements. If owners or their agents believed there was a need for additional protection against 'False Claims', we would see provisions of this sort incorporated into standard agreements.

PPO sees no benefit to Ontario in criminalizing what are essentially civil disputes over whether work has been performed. Our understanding of 'False Claims' legislation in the United States is that it involves the Attorneys General, at the Federal and State levels, enforcing such legislation through criminal and quasi-criminal prosecution. Do we have any reason to believe that the Attorney General of Ontario wishes to add oversight of 'False Claims' legislation to his existing mandate?

In our view, the proposal to import 'False Claims' legislation into Ontario is at best redundant and, at worst, counter-productive.

18. Consider modifications to the statutory settlement meeting provisions.

PPO's original submission did advocate the removal of the settlement meeting provisions in the current Construction Lien Act and replacing those with a province wide reference process as is underway and available in Ottawa and Toronto whereby the claims are effectively case managed.

19. Consider issues related to case management references.

PPO addressed case management in our initial submission to the Review

20. Consider implementing changes to documentary disclosure requirements.

PPO addressed financial disclosure in our initial submission to the Review.

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

PPO believes that the *Construction Lien Act* and the *Registry Act* are already sufficiently harmonized. We are not aware of any problems that require a legislated change to align the two statutes.

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

With respect to machinery and equipment, trade contractors can take their security either under the *Construction Lien Act* or the under a conditional sales agreement pursuant to the *Personal Property Security Act*. We do not see a problem that requires a legislative amendment to the *Construction Lien Act*.

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

The content of certificates of substantial performance (CSPs) is set out in sec. 32(2) of the current Act. There are additional rights to information (sec. 39) which should be integrated with the information requirements in sec. 32(2). Specifically, a CSP should also provide:

- the names of the parties to the prime contract(s) (if construction management) and the names of the parties between the "contractor(s)" and its/their subcontractors;
- the state of accounts between the owner and the contractor and between the contractor and its subcontractors including the revised prime contract price as at the last certified payment; and
- particulars of any labour and material payment bond by any contractor or subcontractor provided for that particular improvement,

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

Sections 4 and 5 of the current *Act*, effectively precludes any negotiated waivers or carve-outs from the obligations and protections of the *Act*. The only exception to the application of the current *Act* is found in section 2 which exempts contracts under the *Ministry of Transportation and Communications Creditors Payment Act*. Additionally, of course, Crown properties are not lienable. PPO opposes any options for negotiated waivers. Given the imbalance of bargaining power that is pervasive in the construction industry, an option to negotiate waivers would have the effect of diluting or removing protections where they are often most needed. An option to negotiate waivers could undermine the fundamental purposes of the *Act*. PPO also opposes any carve-outs from the *Ac*t for particular types of projects or contracts. PPO recognizes that some types of non-traditional projects, e.g., P3s, may fit awkwardly with the current Act.

For this reason, PPO proposed that there be a separate section dealing with these types of projects in a new 'Construction Act'.

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

The industry currently relies on the Daily Commercial news for publication of certificates of substantial completion, etc. This practice works. We see no reason to alter it.

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

PPO sees no conflict between prompt payment and the *Ontario Energy Board Act*. Utilities undertaking projects that have been reviewed and approved by the OEB are obliged to execute those projects prudently. We do not see how this imposes any additional duty on a utility which would not otherwise apply to any of hundreds of other public sector entities that have an ethical duty of prudence to the public. Nor do we see how the OEB's requirement for prudent execution imposes an additional duty on the management of the company that its board of directors (on behalf of the shareholders) should not have already have imposed on management. We realize that the OEB may refuse payment for cost overruns that it regards as imprudent or unauthorized. While that imposes a risk on utilities, we fail to see how it conflicts with prompt payment, unless the utility's intention is to use the OEB's disallowance as an excuse to 'stiff' the trade contractor that performed the work. PPO sees no validity in the argument of some utility companies that prompt payment legislation should accommodate their current approval processes which appear to require 60 days to review an invoice an issue a payment. For much of the work that is undertaken for utility companies, the utility companies have (or should have) on-site engineers acting on their behalf. One would have thought that the duty (and practice) of inspecting work-in-progress on an ongoing basis would expedite the review process rather than delay it.

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

PPO agrees with this proposal.

■