

Prompt Payment Ontario

360 Superior Blvd.
Mississauga, ON
L5T 2N7 Canada

Tel: 905-564-6622 | Fax: 905-564-5744

January 22, 2016

Via Email

Mr. R. Bruce Reynolds,
Bordner Ladner Gervais LLP
Scotia Plaza, 40 King St West
Toronto, ON M5H 3Y4

Dear Mr. Reynolds:

Re: Response Submissions of Prompt Payment Ontario

Thank you for affording us the opportunity to make a brief response submission following the publication of the submissions made to the *Construction Lien Act Review*. In this letter, we will comment on seven issues that were raised in other submissions and which we believe require comment.

1. Time Required to Certify Work for Progress or Milestone Payments

The Review received a number of submissions proposing that any statutory time period for obliging payment to be made commence after the work has been certified by a payment certifier or otherwise approved by the owner or its agent. The Review also received submissions from the Ontario Association of Architects and engineering associations arguing that in their role as payment certifiers members of the architectural and engineering profession have a statutory duty of due diligence which requires that they not be limited by a fixed period of time to perform their inspection and certification functions. Similarly, public sector submitters appear to be arguing that they also need an unrestricted period of time to inspect and formally accept work that is being undertaken on their behalf.

Prompt Payment Ontario finds these submissions to be unpersuasive. In the first place, formally allowing an unrestricted period of time to inspect and certify construction work effectively would create a legal sanction for payment delay. This would exacerbate the existing problem rather than contribute to its rectification.

Although payment certifiers are expected to be neutral in the exercise of their duties, they are employed and remunerated by the owner. If they are insufficiently compensated for their professional services by owners, or indeed, if they are actively or tacitly encouraged to do so, the certification and payment process will be drawn out or delayed.

How long a time be required to inspect work that was performed in one month? Surely, it is unreasonable to suggest that it could take longer to inspect and certify the work than was required to perform it.

- The Consensus Draft on Prompt Payment (see PPO Submission – Appendix A) provided for payment after 20 days from the submission of a monthly progress invoice. That is surely sufficient time to inspect and certify a month’s work.
- Bill 69 similarly provided for payment after 20 days from the submission of a monthly progress invoice.
- CCDC-2 provides that a ‘consultant’ will certify payment within 10 days of submission of an invoice and that an owner will make payment within 20 days of receiving the consultant’s certification report. As you know, the CCDC documents have had input from architects and engineers since their inception. If a 10 day window is acceptable in the CCDC documents then why would it not be acceptable in a legislative mandate?
- CCA-1, another industry standard document, provides that a sub-contractor will be paid within the later of 35 days after submitting the invoice or 15 days following certification under the prime contract.

While there are minor differences in the treatment of timeframes, the Consensus Draft, Bill 69, CCDC-2 and CCA-1 all recognize that ‘the clock starts ticking’ when the invoice is submitted, not after certification is provided. Prompt payment legislation in other jurisdictions starts the countdown for payment from the date of submission of the invoice. Architects, engineers and other payment certifiers, as well as owners acting on their own account, are all able to manage within these time frames. We see no reason why Ontario architects, engineers, *etc.* should require more time than is accorded to their counterparts in other jurisdictions. We also see no reason why vacation schedules in the public sector should be regarded as a valid reason for suspending the approval and payment process.

2. Nature of the Holdback under the *Construction Lien Act*

The Review received a number of submissions which propose to change the nature of the statutory holdback. In essence, these submissions argue that the holdback should function as a security deposit against deficiencies and that a revised *Act* should sanction this practice.

The sole purpose of holdback under the *Construction Lien Act* is to provide a pool for funds for the payment of unpaid suppliers and contractors. It is a retention of funds on work already performed and for the most part, already paid for. Nowhere does the *Construction Lien Act* confer on an owner or prime contractor a statutory right to withhold funds as a security against deficiencies. The appropriate and long-accepted contractual remedy is that, if there are deficiencies, the reasonable value of correcting those deficiencies be withheld from certification until they are corrected. *There neither is, nor should there be, any right to extend holdback beyond the time period allowed by the Act.* In the absence of a lien, holdback monies should be released immediately after the 45-day period.

3. The Submissions of OHBA and RESCON on the Residential Sector

Prompt Payment Ontario was both surprised and disappointed by the submissions of the OHBA and RESCON. In their supplementary submission, OHBA and RESCON provided the Review with a report on residential construction submitted to the Attorney General in 1995. That report acknowledged that “... breach of trust was endemic to the industry...” Little has changed since 1995. And yet, the OHBA and RESCON assert that there is no problem in the residential sector.

The Ipsos Reid survey commissioned by PPO found that almost half of all approved or certified payments required more than 30 days in the residential sector. This was a higher proportion even than in the public sector. Indeed, 40.4% of trade contractors perceived a ‘high risk’ of late payment in the residential sector. This was among the highest of all sectors. And yet, once again, the OHBA and RESCON assert that there is no problem in the residential sector.

The 1995 report recommended the introduction of standard contracts (similar to CCA and CCDC) into the residential sector. Twenty years later there has been no progress on the development of standard contracts owing to a lack of interest on the part of builders. And yet, again OHBA and RESCON assert that there is no problem in the residential sector.

The OHBA and RESCON evidently do not even see a need for expedited adjudication of disputes in the residential sector even though those disputes can draw out the payment time to unconscionable lengths.

The obdurate refusal on the part of OHBA and RESCON to acknowledge any problem and contribute to its solution underscores the implausibility of a voluntary industry-based solution to the problem of prompt payment and the need for a statutory framework.

4. The Right to Suspend Work

The Review has received submissions which effectively argue that there are no circumstances when a trade contractor should be allowed to suspend work for non-payment. In other words, a trade contractor should always, and under all circumstances, be obliged to continue working on a project – *i.e.*, continue incurring costs for payroll, equipment and materials on behalf of the owner. Prompt Payment Ontario submits that this position is extreme and unreasonable. It would oblige a trade contractor to fulfill all terms of a construction contract even when the owner or prime contractor is in breach of that contract. This position is all the more galling when one notes that a public sector submitter to the Review opposed prompt payment obligations on the grounds that these requirements could interfere with vacation schedules.

Prompt Payment Ontario recognizes that suspension of work is a serious step, which in practice likely will be taken infrequently and which, in any event, should be taken only following notice of intention to do so. The right to suspend, however, is the necessary “teeth” to any workable prompt payment regime. We believe that there can be no more effective remedy for drawing the attention of all interested parties to an urgent payment issue and driving the process to an expeditious resolution.

5. The Application of Liens in the Condo Sector

In its submission to the Review, Prompt Payment Ontario proposed that in new residential construction projects, trade contractors should have the ability to file a general lien rather than lot-by-lot liens (in low rise construction) or unit-by-unit liens (in condo construction). We repeat this recommendation.

ACMO and CCI raise a different issue in their submissions. They focus on the application of liens to major repair construction projects on existing condo buildings, *e.g.*, a new roof, replacing the heating and cooling system, new elevators, *etc.* These repairs apply to ‘common elements’ rather than to individual units. It was submitted by ACMO and CCI that the current practice of liening individual units interferes with an existing owner’s ability to legitimately sell his or her condo unit. ACMO and CCI’s preferred solution is to exempt condos from the *Construction Lien Act*. This is clearly an unacceptable solution as it would reduce payment security without putting in place any alternative. The alternative proposed by ACMO and CCI is that liens for ‘common elements’ work apply only against the condo corporation and not against individual units. Prompt Payment Ontario finds this alternative solution to be flawed because there is no capacity to act on the lien rights, *i.e.*, it is not feasible for a lien holder to force the sale of the common elements so as

to satisfy the outstanding claim. Prompt Payment Ontario reminds the Review that condo corporations always have the option of posting security under s. 44 of the *Construction Lien Act*, and this remedy would appear to continue to work well in practice.

6. Incorporating ‘Deemed Work’ into an Invoice does not conflict with Protection of Taxpayer Interests

Public sector submitters to the Review have claimed that by providing for deemed work to be included in an invoice, prompt payment legislation would undermine the duty of public sector managers to protect taxpayer interests. Prompt Payment Ontario is very surprised to see this, as the argument reflects an incorrect representation of a long-established practice with which we assumed such owners would be well familiar.

An invoice that is to be submitted on the last day of the month may be prepared a few days before the end of the month. The invoice will include a reasonable estimate of the work that the trade contractor expects to complete by the end of the month. This is to allow the general contractor, who typically must bill for all work up to the end of the month, to receive and process all trade contractor billings in time. Approval of the invoice, however, is still dependent on that work actually having been done and verified by the payment certifier through the payment certification which takes place after the end of the month.

No one expects any owner – public or private – to pay for work which was not done. If the work was not performed, it cannot be certified or approved. There is no public interest which is jeopardized by allowing trade contractors to include in a progress invoice a reasonable estimate of the work they expect to complete by the actual date of the invoice. This is long established practice and has never been raised as an issue in the past.

7. Public Sector and Private Sector

The tenor of some public sector submissions appears to imply that the public sector should have greater rights vis à vis construction contractors (both general contractors and trade contractors) for no other reason than that it is the public sector and it has a fiduciary duty to taxpayers. We find this implicit reasoning troubling. All owners have a right to diligently inspect construction work being undertaken on their behalf before authorizing either a progress payment or a final payment. Public sector owners should have neither fewer rights nor greater rights to undertake their due diligence. This principle is all the more important to establish in the context of P3 projects which can blur the distinction between public and private sector owners. There is no valid reason for a government department to have a longer period of time to authorize and make payment than would be accorded to other large organizations, such as a bank or a multi-national corporation. When time periods for authorization and payment of monthly progress invoices are established by statute, owners – both public and private – and their third party consultants will be expected to staff their operations and design their approval processes so as to conform to the requirements of the legislation. This has happened in every other jurisdiction that has enacted prompt payment legislation. There is no reason to believe that Ontario should be any different.

Public sector submitters appear to believe that by reciting the mantra ‘protection of the taxpayers’ they gain licence to draw out certification and payment periods for as long as they wish. ‘Protection of the taxpayers’ thereby becomes a rationale for under-staffing or for delays caused by vacation schedules. It was even suggested by one public sector submitter that, if these delays impose a cost on trade contractors, the contractors should respond by raising their bid prices. How do higher construction costs protect taxpayers? Why is indifference to the costs imposed on trade contractors (who are also taxpayers) good public policy? Prompt Payment Ontario believes that every owner – public and private – should have reasonable time to

satisfy themselves that the work described in a monthly progress invoice has been performed according to specification. We also believe that every owner – public and private – should have reasonable time to process payment for an approved invoice. We already have norms for what constitutes ‘reasonable’. Those norms are reflected in the consensus documents of Canadian Construction Documents Committee which incorporated the advice and input of both public and private sector owners, including some who submitted to the Review.

•

Thank you for the opportunity to make these additional submissions.

Yours truly,



J. Blair
Executive Director

On behalf of Prompt Payment Ontario.