



CCA INDUSTRY SUMMIT

September 29, 2015

Sheraton Gateway
Toronto





By James Raiswell, Senior Writer, Stiff Sentences Inc.

CCA Holds National Summit to Address Questions of Payment Delays

"We all want to get paid on time"

No-one across our industry disputes the notion that cash flow is critical to operations. Money comes in from owners or prime contractors and flows out to buy materials, rent equipment and pay employees. When cash flows in a timely fashion, contractors can fund operations fully and run their businesses effectively. They can hire people more easily, invest in machinery and pay their suppliers on time.

The trouble is, cash no longer flows freely in the construction industry. It used to be that contractors could count on being paid for their draws within 15 days of invoicing. That changed to 30 days, then 45 days. Sixty days now seems to be the accepted norm.

Lengthy delays hit contractors hard. Trade contractors in particular feel the squeeze. Their revenues depend on unscheduled—and often, late—payments from prime contractors, yet their costs arrive on fixed terms. Payments to employees, to Canada Revenue Agency and to their provincial workers' compensations scheme are recurring and cannot be delayed. In an effort to account for such risk, they price projects higher than usual and draw more heavily on contracts earlier on in a project so that money remains to cover lean periods during the later stages of a job.

Clearly, something has to be done.

CCA Summit Focuses on Payment Issues

The Canadian Construction Association (CCA) held its annual industry summit on September 29 with the exclusive aim of exploring the various issues that surround cash flow and payment concerns in our industry. This was a first for the national association. Normally the summit agenda covers a range of industry issues. Yet, as chairman Anibal Valente indicated in his opening remarks, payment problems have become so deeply rooted—and have such far-reaching consequences—that the time has come for a focused discussion on the subject.

The 125 summit participants were split into groups that cut across traditional industry lines. General contractors shared tables with subtrades, suppliers, designers, lawyers and representatives from the CCA's board of directors and its partner associations. The idea was to bring each stakeholder's perspective to the conversation in order to develop as complete a record as possible. The members of the CCA board would then be asked to use that data to inform further decision making.



Discussion 1: Canada's Cash Flow and Payment Challenges

The session began with a discussion of the various cash flow and payment challenges that exist for prime contractors, subcontractors and suppliers. Participants were also asked to identify common needs and expectations. Everyone agreed that timely payment is a problem in the industry, and they cited a variety of reasons for this trend. Some argued that the root of the problem is mechanistic. By themselves, concepts such as holdbacks, change orders, bureaucracy and constrained schedules create only tiny ripples in the payment process, but together they combine to form huge waves that topple boats.

Others saw cultural factors as the source of delays. Consultants at times act overzealously in the interests of owners. They scrutinize even the finest details of payment draws and reject anything that may appear to be remotely out of hand. Also, a “me-first” mentality is emerging in the industry. Whereas previously, owners, general contractors, subtrades and suppliers shared common goals and enjoyed strong interpersonal relationships (which in turn led to the timely settling of accounts), relationships today are far less cordial. They are conducted at arm’s length through technology and detailed contracts when only a handshake used to suffice. Trust has eroded among the various players in the construction game. With it, respect and care for one’s peers has disappeared. Such change manifests itself in delayed payment, among other unscrupulous practices.

Discussion 2: The American Experience

A discussion on current strategies and experiences followed. The participants heard a presentation from Chris Wright, a lawyer with the Seattle-based firm Watt, Tieder, Hoffar Fitzgerald, LLP. Wright spoke to the American experience with prompt payment legislation, a solution that many in the CCA summit viewed as a tonic for curing the Canadian industry’s payment woes. Wright cautioned that legislation has worked—to a degree. While the law helped to bring the late-payment practices of a number of firms under control, it also left open a few loopholes that led to long-running court actions. Wright explained that while mechanisms exist in the legislation to solve disputes via binding arbitration, if that process fails, claimants can wait up to two years to have their prompt payment cases heard in court.

The participants were then asked to consider the American experience and whether elements of that solution could be exported into Canada. Although opinions in the room were divided over whether an American-style legislated solution should be adopted in Canada, a few consensuses did emerge. The group believed that a legislative approach should at least be considered. Many also felt that the federal government here in Canada should take the lead on introducing prompt payment legislation, and then trickle down its solution to the provinces and territories. (Just as the United States federal government did, after which 49 of the 50 states followed suit.)

Participants agreed that Canada is a far different social and cultural animal than the United States. Our prompt payment model, therefore, should also be different. In addition to legislation, the Canadian solution might consider stronger language in industry standard contracts, such as those created by the Canadian Construction Documents Committee (CCDC). It should also perhaps draw on the experiences of



other countries, such as the United Kingdom and Australia, which have implemented prompt payment laws. Other elements of a uniquely Canadian solution might include a system of adjudication to help resolve disputes quickly, a right to suspend or terminate work in cases of unjustly delayed payment, and greater transparency throughout the payment process.

Prompt Payment in the Provinces

Most people in Canada's construction industry already know that Ontario came within a hair's breadth of enacting prompt payment legislation in the spring of 2014, only to have the bill set aside and eventually die on the order paper when the province elected a new government. The issue is back on the table with the current government's review of the Construction Lien Act, and progress is expected in 2016.

Ontario's delay appears to have paved the way for Quebec to take the lead on prompt payment. The participants at the CCA summit heard from Pierre Hamel of the Association de la construction du Québec that a report on prompt payment is already in the hands of the provincial government and that draft legislation may be released following delivery of the Charbonneau Commission's report.

A quick straw poll around the room revealed that progress on prompt payment in other provinces varies. Some, such as Alberta and Nova Scotia, are actively pursuing legislation. Many of the remaining provinces have opted to wait and see how solutions develop in other provinces or at the federal level.

Discussion 3: A Way Forward for CCA?

The day ended with a discussion on advice for the CCA board. Participants were asked to speak to the role CCA should play in prompt payment discussions, to identify the gaps that CCA could fill, and to offer advice to the national association. Some themes emerged.

Most agreed that CCA has a leadership role to play on this important issue, although the precise nature of that role was unclear. Consensus emerged on CCA's acting as a clearinghouse for data and information on provincial prompt payment efforts, and helping to re-draft CCDC and CCA contract documents to include timely payment solutions.

Yet when the discussion turned to the national association leading a call for federal prompt payment legislation, opinions divided. Some favoured the idea of CCA working to educate federal politicians and decision makers on the need for prompt payment legislation. Others disagreed. They worried that CCA's national efforts might derail the hard-won progress being made in provinces such as Ontario and Quebec. The timing of CCA's work would be critical.

Whatever work CCA chooses to perform, the participants agreed that it would be critical for the national association to involve all parties in the industry.
