Construction Lien Act Review Consultation Meeting Summary
Consulting Engineers of Ontario

December 15, 2015 (11:30 a.m. to 1:00 p.m.)

Attendees: Barry Steinberg, David Zurawel, Bruce Reynolds, Sharon Vogel, James Little

Sheryl Cornish, Counsel at the Ministry of the Attorney General, attended the meeting to record a summary.

For the introduction provided by the Review, please see document titled BLG Consultation Introduction.

1. General Overview of the Consulting Engineers of Ontario

The Consulting Engineers of Ontario ("CEO") represents 200 firms ranging from sole practitioners to multi-nationals with thousands of employees. These firms employ about 20,000 people, 6,000 of which are engineers. They also employ technicians, technologists, architects, and planners. They are multi-disciplined and see things through the eyes of different professionals.

Engineering firms may see a project at the very early stages (e.g soil testing). Members do design work, testing, feasibility studies, and construction management. They are sometimes involved years before, throughout, and at the end of a project.

CEO represents more than 30 engineering specializations and 260 sub-specializations. They look at projects from every angle. By virtue of the *Professional Engineers Act* ("PEA"), they have a responsibility for public safety and welfare.

They play a role in many aspects of construction. Engineers take their responsibility for public safety very seriously. They can save many lives through good design and doing things correctly. Many people do not know what engineers do because a lot of what they do is invisible. In design-build, they are the agent of the contractor. In design-bid-build, they are the agent of the owner.

2. The Need for Amendments to the Act

CEO explained that now that government has made its commitment to improve the construction sector, it has brought the Act to the forefront. They noted that we have an industry where people are paid with 90 cent dollars. It did not come to light until Bill 69 came to committee and stakeholders voiced concerns about what it takes to get paid.

According to CEO, we are at this point because Bill 69 failed to come out of committee. It is not just about being paid, but the system that governs being paid. The Bill contradicted the Act. This has brought us to where we are. We have the opportunity to get it right. We can create a statute that makes sense.

CEO continued to explain that the frustration has been that the industry tried, in 1990 and 2010, to get amendments to the Act, but because of the number of stakeholders involved, they were not able to achieve consensus. It is nature of how engineers do their business. Engineers and architects are both self-regulating and involved in certain aspects, but they come at the issue from different perspectives.

CEO's members are of the view that that everyone should be paid in a timely fashion for completed work. People who supply services and materials agree about payment, but some owner groups do not. CEO is also conflicted. They believe in getting paid promptly but they are also involved in certifying work and can see problems potentially arising.

CEO is the meat in the sandwich because there is a risk of over or under certifying. There is pressure from those who have to make payment and those seeking payment.

No payment clause should have an impact on public safety according to the CEO. If something is rushed, there is a chance that this could happen. Most stakeholders have said that they need to ensure proper checks and balances and value for money, and auditability.

CEO stated that there is a lack of consensus on what constituted appropriate improvement to the legislation, which has prevented Act from being updated. It has led it to being ineffective. The legislation has not kept pace with the industry. This precipitated the prompt payment movement, which pushed a number of actors to reject the Act and try to get a separate piece of legislation.

In reference to Bill 69, CEO did not agree with layering one piece of legislation on another piece of legislation. They told PPO that it is one contract. Having two statutes dealing with the same contract would create unintended consequences. At the heart of the debate is the construction contract. Any regime that seeks to regulate contracts has to be integrated and holistic.

CEO is glad to hear that there is a general level of acceptance about this need for integration. CEO felt the prompt payment organizations have been very single-minded and focused on prompt payment. There has been concern at CEO that there was not an appreciation or concern about the unintended consequences of Bill 69.

The Review noted that options are open in terms of modernizing the Act. CEO pointed out that the Act does not recognize the payment relationship outside of the traditional contractor and subcontractor relationship. A lot of the work of engineers is outside the construction pyramid. Some of it is in the pyramid and they function similar to contractors or subcontractors. As it is currently written, the Act does not make these distinctions. CEO wants something that makes sense and addresses the current environment that we are living in. It must be consistent, flexible, and enforceable and provide for timely payment for certified, completed work.

3. Application and Release of Holdback for Engineering Services

The Act is written for construction and contracting services, and then it is applied to engineers. There is a difference in that relationship. Professional engineering services need to be contemplated.

There are clear definitions in terms of what is and is not included in the Act. Many clients apply the holdback to services offered before construction and engineers do not receive it until substantial performance. CEO does not think it was the intent of the Act to include in services other than design.

CEO recommends a more efficient, equitable, timely, and effective payment system. Services that are not construction-related should not be captured. Engineers should not be removed from the Act, but certain classes of services should be exempt.

If something is being built or renovated and there is design work or contract administration, then it works. Soil or contamination testing may have taken place much earlier, and it is not related to the construction. Also, for example, a feasibility study for a bridge may be done well in advance of the constructions. This should be outside the construction because it does not address the improvement. There is no distinction in the Act now and CEO believes that there should be a distinction.

CEO explained that there are non-construction services, design services and then construction services. Design and construction services are related to the improvement. With respect to services that are construction-related and where holdback is maintained, unless there is early release of holdback (before substantial completion or performance) lien rights should be maintained until 45 days after substantial completion.

It does not make sense from CEO's perspective to have lien rights if you do not get money after substantial performance. Your lien rights will be gone. Lien rights expire and then there are set-offs and the money is gone. The Act has a means to deal with deficiencies; holdback money is not one of them. It is not for deficiencies.

The Review has heard from owner stakeholders, particularly municipalities and broader public sector owners that they view the holdback, once publication has taken place and there are no liens, as a legitimate means to get the contractor to finish the work. If the contractor does not finish the work, it is a set-off to pay another contractor to come in and finish the work. It has also been characterized as freedom of contract because one of the ideas is that making the payment of the holdback mandatory on the 46th day would be a change to the Act. It would be additional regulation and certain stakeholders say it would be an interference with the freedom of contract.

CEO explained that if a project is at the point that you have had the architect sign and publish substantial performance that it is 97 percent complete, there were questions as to how much work could possibly be left to justify an owner in holding significant amounts of money for deficiencies. There has been concern with the apparent disproportionality in this equation.

Some stakeholders have said that the 10% holdback is the profit margin on the job. This was the original justification for the holdback when the Act was created. Few stakeholders have suggested that the holdback should be higher; some contractors

have said they want more security. They have also said that the holdback is a higher amount in other jurisdictions.

The Review noted that some have suggested phased or annual release to allow the holdback to be paid on long projects. It is done in other jurisdictions and certain large Ontario projects.

Eligible Financial Instruments

A significant concern for CEO is in relation to eligible financial instruments being used for the holdback. Some members have raised concern with the use of cash for the holdback. CEO explained that it is onerous for engineers to carry cash to be held as the holdback. It affects the ability to pursue other jobs or complete the job they have. Some have said that because the Act is silent, it is cash.

On multi-year projects where there is a holdback and they decide it is going to the end of the project, there is a lot of money tied up. Some owners like to use the same consultants. They could use letters of credit. Other instruments are almost as good as cash. There should be a definition of what these requirements are. This is a huge issue for CEO members.

4. Prompt Payment

PPO has put forward three objectives for prompt payment: prohibit any holdback other than what is required under the Act apply, new mandatory payment terms with an aggressive schedule, and establish new requirements for financial disclosure.

This is a concern for CEO. Good public policy does not pick winners and losers. It is strong and balanced. It is CEO's position that there is an unreasonable onus being placed on engineers. A 20-day payment period is very aggressive when you are looking at complex projects with multiple layers of signoff that involves multiple consultants. There is a disproportional onus for CEO members. Having invoices deemed paid within 10 days of receipt, and then a further 10 days to raise objections, opens engineers to massive amounts of risk.

The reason engineers do this is because they are making engineering decisions. These decisions are regulated. There is a risk in saying that it must be done in a certain process. In a short timeframe, you may not find everything. It is completely unprofessional

Engineers are compelled to act in accordance with the PEA. If you have a statute that says an engineer has to act in a certain way and a certain time frame to do it, there are concerns with conflict in regulating an engineer's behavior. The time frame will be in the contract. The engineer makes the best effort to conform to the contract. If there are public safety concerns, the engineer will not move forward until the concern is addressed. This is a duty of care issue and the engineer should say that they are regulated by the PEA and it will be done when it is done. If you move forward pursuant to the PEA and you are in breach of the Act, then this is an intolerable situation.

Engineers do not withdraw from these situations. They should not give an opinion if they are not given sufficient time to do so.