

## **Construction Lien Act Review Consultation Meeting Summary Ontario Good Roads Association**

**November 9, 2015 (9:00 a.m. to 11:00 a.m.)**

Attendees: Scott Butler, Bruce Reynolds, Sharon Vogel, James Little

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

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

### **Overview of the Ontario Good Roads Association**

The Ontario Good Roads Association (“OGRA”) is an association with a long history that grew out of a social movement in the 1800s that brought cyclists and farmers together. Both groups wanted better roads and they advocated for infrastructure development.

The members of OGRA now include 433 of the 444 municipalities in Ontario. There are also 29 First Nations members. The Association has been evolving over the last 122 years. It is now concerned with municipal infrastructure more broadly, not just roads but issues of broad public concern. The OGRA has longstanding working relationships with the Ministry of Transportation (“MTO”) and Infrastructure Ontario (“IO”).

The OGRA’s mandate is to advocate for key investments to civil infrastructure, promote asset management and asset management practices, and re-image the fiscal relationship between other levels of government and local government. It is well known for the OGRA/ROMA conference, one of the largest gatherings between provincial and local orders of government.

In terms of governance, the OGRA Board (“Board”) is comprised of 15 representatives from various regions. Unlike most organizations where there is a separation between staff and elected councillors, majority representation on the Board alternates between staff and elected officials. Once a Board member’s term has ended and they become the Immediate Past President, they serve on the Senate and help with advocacy. This allows OGRA to maintain continuity and institutional memory.

### **Prompt Payment**

The prompt payment issue came to the forefront with the *Prompt Payment Act, 2013* (“Bill 69”). The reaction of the Board was negative and there was a lot of concern expressed.

When OGRA analyzed the Bill, it realized that other municipal associations had discussed the same issues. There was a willingness to acknowledge that projects had become more complicated. It was noted that there has been an influx of public capital

into civic investments after the 2008 stimulus. While this was welcome, it highlighted longstanding issues that may have been simmering.

The other thing that happened since the last time the Act was reviewed is that Ontario is now using private-public partnerships (“P3”) and Alternative Financing and Procurement (“AFP”) structures. There are more parties involved and greater legal complications and fiscal arrangements. OGRA explained that a limited number of its members would be affected by such projects. 340 municipalities would not have an operating budget needed to make P3s viable.

OGRA explained that the reaction of contractors to having been excluded as potential bidders because they initiated lawsuits against owners is a new issue for OGRA. Until it was flagged, the municipalities thought it was common sense to do this. There is a realization now that it could be problematic.

The Information Package informed the Board as to why others want to see changes. Having been informed by the process that defined Bill 69’s rise and demise, the Board has some comments to share. They have taken Bill 69 as the baseline for any assumed changes to the Act.

## **Issues of Concern to OGRA:**

### **1. Proof of Financing**

OGRA stated that municipalities will continue to function well into the future and financial information is posted publicly. It appeared that this requirement, as initially proposed in Bill 69, could add duplication and inefficiency into the construction process.

According to OGRA, there is not an issue of solvency, but rather it has to do with the timing of funding from senior levels of government. A municipality will tender, the contractor will submit a bid and it will be open for acceptance for a certain period. Sometimes the municipality will advise the bidder that there needs to be a further extension because funding from the province is not yet available and contractors must hold their price. The Review has heard from some stakeholders that contractors in some instances end up holding their price for over a year and during that year labour and other costs increase. OGRA explained that municipalities are given guidance by other orders of government that funds will flow on a certain date and they are advised if there has been a change. Timelines may get moved and municipalities could have no control over this. OGRA suggested that if there was a way to devise a legislative framework that would lock the senior orders of government to sticking to timelines, municipalities would support it.

### **2. Holdbacks**

OGRA explained that there is recognition that holdbacks are a fairly standard process for municipalities. The Board saw it as the insurance policy for financial stewardship. It is a way of ensuring that any deficiencies had been remedied. They do not use it to be punitive, but to be good stewards.

The Review has been hearing from some stakeholders about slow payments, including by municipalities. Data has been presented by stakeholders to support the assertion that payment cycles are being elongated from what they used to be. The argument from certain stakeholders is that in a time when it is easy to transfer funds, late payment should not occur. Other stakeholders have expressed to the Review that it takes time for the payment certifier to assess the work and there are specific individuals who need to review the information.

OGRA noted that large projects bring scrutiny and some municipal councils become risk averse, which may slow down a project. Further, some smaller municipalities have fewer resources and often share services with other municipalities. OGRA stated that there is frustration among finance, procurement, and legal departments, and those providing frontline infrastructure services or public works.

The Review has heard that the global movement around prompt payment is aimed at trying to abbreviate an elongating payment cycle. The Review has heard that from a policy perspective, the stranded capital issues are not good for the industry.

OGRA explained that in smaller and remote communities, there is a similar concern. When capital is tied up in the holdback, it limits the number of contractors who bid and it drives up the cost of projects. There is a concern that some holdbacks and provisions limit and exclude local contractors from bidding on contracts because they have capital tied up in other contracts.

Some stakeholders have suggested increasing the holdback to 15 percent. No one has suggested that it decrease yet. OGRA noted that the holdback should be project specific. It could be an issue of scale. A one size fits all approach will not work. OGRA suggested that the Review should come up with a way of recognizing what a legitimate holdback should be for certain projects.

### **3. Timelines**

According to OGRA, municipalities would prefer to see timelines that account for the time required to review and properly certify work. When considering the provisions in Bill 69, OGRA found them to be aggressive and stated that they would undermine the ability to perform necessary due diligence and ensure that the construction is done properly. OGRA wants to see payments tied to milestones and the ability to negotiate payment terms.

OGRA has not landed on what a reasonable period of time would be. OGRA would agree that municipalities should strive for 30 days. Payments should occur only after satisfactory review and certification of the work. Aiming for a 30 day turnaround is a laudable goal and no reasonable municipality would object, but in considering timelines, there should be an acknowledgement that projects have become more complicated (e.g. engineering, legal, financial issues).

### **4. Estimates**

OGRA explained that municipalities are apprehensive about paying for services and materials based on estimates. There is a sense that it puts the whole idea of financial due diligence into question. Compounded with short payment timelines, this raises the risk of running into difficulties.

Municipal stakeholders have noted that they are obligated to be prudent managers of taxpayer dollars. OGRA explained that pre-paying for a promise fails the smell test. It would be easy to issue payment for work that has not been completed. The standard business practice is that payment should only be made once work is done and certified.

## **5. Work stoppages**

According to OGRA, Bill 69 allowed contractors and subcontractors to suspend or terminate the contract if they were not paid. There was a sense at OGRA that this could lead to significant delays in the timeline for completion. There may be cost overruns for mobilization and re-mobilization of labour. It poses a risk that public projects can become more costly and less timely.

## **6. Onus**

There was a sense that Bill 69 would result in inverting the relationship by putting the onus on the project owner for demonstrating why payment should not be made. Municipalities want to pay after it has been demonstrated that work has been done satisfactorily.

## **Adjudication**

The Review team has been suggesting to stakeholders that prompt payment can be divided into two types of issue: the ordinary course bundle of issues where payment is elongated and the “gridlock” issue where the project encounters a significant dispute and there is gridlock.

The Review explained Adjudication in the United Kingdom (“UK”) context as well as a number of other common law jurisdictions.

Bill 69 was aimed at the ordinary course bundle of prompt payment issues. In terms of the “gridlock” scenario, many stakeholders have been very positive with respect to adjudication as a means to address it.

OGRA will consider this issue. It is unlikely that they would oppose it.