Construction Lien Act Review Consultation Meeting Summary
Ontario General Contractors Association

October 26, 2015 (11:00 a.m. to 1:00 p.m.)

Attendees:

Clive Thurston, David Frame, Paul Raboud, Christopher Moran, Charles Caza, Yonni Fushman, 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.

General Remarks

The Ontario General Contractors Association ("OGCA") explained that it is very supportive of the Review. With respect to prompt payment, the OGCA noted that general contractors are very concerned about this issue in that cash flow is important as contractors need to make payroll and have funds for other expenses. The OGCA explained that a lot of the debate around prompt payment framed as zero-sum but there are opportunities for improvement to the payment process and dispute resolution that can benefit everyone.

1. Suggested Revisions to the Act

Separate Trust Accounts

The OGCA explained that there are many examples of projects where contractors have not been able to collect holdback funds. A trust account structure would help to address this, particularly where projects are self-financed.

The OGCA supports separate, jointly administered trust accounts at the owner/general contractor level for logistical reasons: it would be easier to administer. The OGCA suggested that owner would set it up and both parties would sign signature cards.

The Review has heard that the trust account proposal has been raised in response to concerns about potential conflicts with the *Bankruptcy and Insolvency Act*. Some stakeholders have proposed project trust accounts to solve this problem. The OGCA agrees that it should be clear it is a trust account. The OGCA commented that this type of account is used in the British Columbia market and it is not an administrative burden. The only change would be in relation to the public-private partnership (P3) market in Ontario.

The OGCA suggested that it would be beneficial to have greater clarity in relation to P3s. Further, they stated that it is a possible to have separate trust accounts in a P3

scenario. The OGCA suggested that the Review consider clarifying the applicability of the Act to P3s and multi-site projects.

2. Mandatory Financial Disclosure

The OGCA suggested that the Act be amended to provide for mandatory disclosure of financial information. The Review has heard that some owner stakeholders are opposed to such disclosure. The OGCA suggested that it would help everyone in the construction pyramid to have such disclosure and that it would allow the general contractor to give subcontractors comfort that they will get paid.

The OGCA suggested that government and the broader public sector should be included in this requirement. By way of example, the OGCA explained that sometimes tenders are issued by public sector owners before the funding is in place and the delayed award puts the onus on the general contractor to extend its price with no increase. In this example, the general contractor must then pressure the subcontractors to hold their prices. The OGCA stated that if the general contractor does not extend the price by a certain date or changes its price, it does not get the contract whereas sub-trades are not bound by this requirement and can adjust their prices.

Financial disclosure provisions are included in the CCDC documents but the OGCA noted that they are generally removed. The OGCA suggested that any potential mandatory disclosure requirement should apply before the award of the contract and the information should be included in the tender documents.

The OGCA explained that the provincial government is usually a good client but there are problems with municipalities, schools and hospitals. By way of example, OGCA stated that Infrastructure Ontario would not put a project on the market without having sufficient financing.

This situation comes up in OGCA's internal complaint process. OGCA suggested that it could seek further feedback from its members on this issue since it affects everyone, including trades, and could increase material costs.

The OGCA explained that a general contractor needs to review financing term sheets, size of the facility, and conditions precedent to determine how the conditions will be satisfied and whether there is sufficient equity.

The OGCA has not heard of any statutory obligations in other jurisdictions but disclosure happens in practice in some instances. Owners provide officer's certificates confirming financing. This is the best alternative in the absence of a statutory obligation to provide the information.

3. Prompt Payment

The OGCA explained that it is not keen on the idea of fixed payment terms being mandated as the industry is too diverse for a one-size fits all solution. The Review has heard from some stakeholders that a one-size fits all approach is difficult. The OGCA noted that parties should be free to negotiate the terms that best suit the project. The

OGCA suggested that the legislation be focused on consequences of breaching payment terms instead of fixing payment terms.

According to the OGCA, the suspension of payment on projects denies all participants the opportunity to exercise business judgment. There are times when suspension is the right move but it may also be the wrong move.

The Review has heard from proponents of prompt payment that business judgment will adapt to take into account the statutory regulatory framework of prompt payment. The OGCA suggested that this is an optimistic perspective. The OGCA explained that the prompt payment provisions of Bill 69 would be a nuclear approach and would have unintended consequences.

The Review noted that the prompt payment issue may be viewed from two perspectives:

1. Prompt payment in the ordinary course where there is a concern on the part of PPO that the payment cycle is becoming more elongated; and

2. The "gridlock" issue where the project is no longer in the ordinary course such that payment stops because something has happened (e.g. soil conditions issue, design errors, insolvency) to disrupt the project.

In relation to the first issue, some stakeholders have suggested that the Act can be used to improve payment the ordinary course scenario (e.g., mandatory certification of completion of subcontracts). The "gridlock" issue is attracting a lot of attention from the stakeholder community because it is an issue that can result in excessive costs and protracted litigation. The Review has heard that adjudication could be implemented to ameliorate the "gridlock" issue.

The OGCA explained its view that Bill 69 dealt with the issue through a sledge hammer and it did not deal with dispute-related delay in payment. The OGCA did an analysis of their records and found that most payment is reasonable. The problem the OGCA encountered was with payments that drag on because of massive amounts of delay, which affects people in the construction pyramid at all levels. The OGCA would support looking at adjudication as a way to resolve the "gridlock" issue in Ontario.

The OGCA noted that the issue is determining the consequences when payment is not made. They suggested using a form of punitive interest when money is held beyond the contractual payment terms as a means of aligning interests.

In the United Kingdom ("UK"), 'pay when paid' clauses were eliminated and they brought in adjudication. The parties to construction contracts in the UK still have suspension rights. They did not force the general contractor to capitalize themselves so that they can make the payments. This structure would not require a recapitalization or restructuring of the industry.

The Review has heard from some subcontractor stakeholders that they only have 45 days before their lien rights expire and that this is not enough time. They have to

register a claim in circumstances where the payment terms have been imposed on them. The OGCA explained that it discussed this issue with some key subcontractors when Bill 69 was being considered to determine if there are problems, and it did not identify any. The feedback received by the OGCA was that subcontractors were afraid to use the Act because they would not get future work. Some had told the OGCA that retaining a lawyer to register a lien would be too expensive.

The OGCA suggested that prompt payment may be more of practical problem rather than one that requires a restructuring of the current framework. Part of the problem with delays is judicial resourcing according to the OGCA. Further, when you look outside of Toronto, the delays that the OGCA has noted are even longer. Therefore, the OGCA suggested that the Review consider the judicial framework and resources that we currently have in place in Ontario.

4. Changing the Holdback Amount

The OGCA would prefer that the holdback remain at 10 percent.

The OGCA explained that if the holdback is reduced too much there is not sufficient security on the project. The OGCA gave certain examples of situations where the 10 percent holdback would not be enough. The OGCA preferred the status quo.

The OGCA submitted that owners often do not meet their own deadlines. Some owners include contractual clauses to exclude penalties for late payment. Some owner stakeholders have told the Review that it is an administrative burden. The OGCA explained that this is more of a public issue than a private issue. Municipalities have 90 day payment terms. There are many factors that the OGCA suggest cause the process with municipalities to be protracted and ultimately result in 60 to 90 day payments.

The OGCA suggested that government owners should not be excluded from a prompt payment scheme. If they are, the OGCA submitted that the whole project should be excluded. According to the OGCA, there should be more teeth in any amended legislation to make owners more responsible.

The OGCA is supportive of the mandatory release of the holdback provided that the payer has not provided prior notice to the payee of a *bona fide* dispute. It is also supportive of the early release of the holdback. The ‘may’ in the Act could be changed to ‘shall’.

With respect to payment of interest, the reasonable cure period could be the cure for non-payment. This could be a the statutory period where mandatory interest must be paid.

5. Mandatory Adjudication

The OGCA is supportive of mandatory adjudication but suggests that the following issues be considered:

- The effect of the Act and how it would coordinate with prompt payment. If you are the loser of adjudication, you would have right to lien to resolve the dispute after the fact.

- There is a concern that there will not be a sufficient pool of trained adjudicators to manage the new system. There may be ways to mitigate this by training people. It could be rolled out in phases.

In response, the Review explained the practice of adjudication in the UK. Specifically, how engineers, architects, and lawyers work as adjudicators. The Review has heard as a suggestion that the way to start an adjudication system would be to choose a core group of senior engineers, architects, lawyers and quantity surveyors who would not have to qualify. You could then create a training and licensure system.

The OGCA also raised concerns about cost. In the UK, the Review explained that the average cost depends on the situation.

The OGCA asked whether the Review team has considered the notion of conditional payment where there is insolvency upstream with the owner. The Review explained that the Latham Report in the UK recommended that 'pay when paid' provisions be rendered void, with this exception. Some states in the United States have taken a similar approach.

There may be a quality issue on the site that is not yet a payment issue, but could be. Different jurisdictions have taken a different approach with respect to adjudication of these issues. In some, adjudication is restricted to a monthly draw issue. In others, any dispute may be adjudicated.

6. Bidder Exclusion Clauses

The OGCA explained that bidder exclusion clauses prohibit a contractor from bidding if they access certain dispute mechanisms against the owner. The Review has heard that if a general contractor is forced to assert rights, as long as it is not an abusive proceeding, they have the right to have access the courts. By way of example, the OGCA noted that the City of Toronto has a contractor rating system.

The OGCA explained that in municipalities it is automatic. There is a distinction between bidder exclusion provisions and a rating system that has elements of appealability.