

Construction Lien Act Review Consultation Meeting Summary Ontario Road Builders Association

November 19, 2015 (9:00 a.m. to 11:00 a.m.)

Attendees: Ashley De Souza, Geoff Wilkinson, Nadia Todorova, Stewart Valentine, Allan West, Bruce Reynolds, Sharon Vogel

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.

1. General Overview of Ontario Road Builders Association

The Ontario Road Builders Association ("ORBA") is a member of the Construction and Alliance Design of Ontario ("CDAO"). The CDAO has decided to let members present their views to the Review separately.

ORBA represents a wide variety of contractors, ranging in size from small to very large contractors. They deal as general contractors and also subcontractors. Some members are international players.

ORBA has national members that work across Canada, so they deal with different types of legislation. This Review is helpful in terms of having different provinces do their own research on what needs to be done in their jurisdiction. ORBA suggested that Ontario will be seen as a leader.

There are different views that have come up through the internal consultation process because of the different types of members. The ORBA represents unionized and non-unionized labour contractors. It needs to be neutral in terms of its position on the labour force.

Process of Developing the Submission

ORBA formed a working group and provided members with the ability to join this group. There were about 20 members, including a mix of small and large contractors.

The working group reviewed the Information Package and they completed the online questionnaire. They sent their feedback and it was incorporated into the paper. It was sent to them for review and suggested changes were made.

2. Preservation, Perfection and Expiry of Liens

One issue for ORBA where there was a uniform opinion was that the timelines for preserving and perfecting liens is too short. The amount of time allotted for preservation and perfection is insufficient.

The Review has heard different things from different stakeholders. Some want to keep the status quo and some want to increase the time for both preservation and perfection.

ORBA suggests 90 to 135 days because it adds another 45 days.

ORBA explained that 'pay when paid' provisions may work for or against a contractor. ORBA is often looking at the 45 days from a credit manager's point of view. When dealing with public owners, it is often not a problem. When there are private projects, the timeline is not enough. The standard terms are net 30 days. ORBA suggested that parties need to make an internal decision to exercise lien rights on day 35. On day 40, you need to make a final determination and then give the lawyers time to issue the lien (generally a minimum of 3 days).

Most customers want to pay but cannot do so because they have not been paid. A small percentage must seriously consider whether to lien. ORBA is concerned about maintaining business relationships as once you lien the project, the funds stop and the customer still cannot pay if they have not been paid. Most customers will get paid within 60 days. The 90 days is preferred because it falls in line with labour and material bonds.

The general contractor wants 'pay when paid' but the subcontractor and material supplier would not want such clauses.

In certain examples, ORBA suggested that it can take up to 75 days to get paid from a public owner. The supplier may then lien because they are waiting a long time for payment.

3. Prompt Payment

There are two buckets of payment issues the Review has heard about: "gridlock", where payment is stopped because of a dispute, and the ordinary course which relates to the elongation of payment.

Some owner stakeholders have said that elongation results from a number of factors, including insufficient progress payment applications, inadequate backup, errors, inadequate documentation, internal processes and procedures.

ORBA explained that contractors who work with the Ministry of Transportation ("MTO") generate progress payments based on quantities of work that has been accomplished. An owner's representative may not agree with the progress payment request. This is a reality and it takes time. In this scenario, it is impossible to determine whether to lien at day 35.

The *Prompt Payment Act, 2013* ("Bill 69") was directed at addressing the ordinary course of payment elongation bucket. On the owner's side, the Review is hearing from some stakeholders that contractors submit deficient progress draw requests and front end load.

The Review has heard that the proponents of prompt payment wish to see the elongation of payment issue resolved and it is their view that bureaucracy has created

the elongation. In contrast, some owner stakeholders have said that the legislated solution is an extreme interference with the freedom of contract.

ORBA's position is that it should be left to the parties to contract who are best positioned to do so.

4. Adjudication

In the "gridlock" scenario, payment may stop because of a major design error, late design, fundamental defect, or a materials testing issue.

The Review discussed the concept of Adjudication and how it had worked in the United Kingdom.

Internally, ORBA has had a debate about whether it should be binding or non-binding arbitration. Adjudication would be something in between as it is an interim binding decision. ORBA will consider the issue of adjudication and provide feedback to the Review.

ORBA explained that the new dispute resolution process with MTO starts on January 1, 2016, so there is no experience with it yet. It would be interesting to hear from MTO how they perceive that process working moving forward. MTO is working on reducing the backlog of existing claims.

ORBA explained that there is a relationship aspect to consider. ORBA noted that having a referee intervene in the process will help. If the referee decides on the issue, it may be persuasive in court.

5. Bidder Exclusion Provision

ORBA's recommendation is that the province needs to regulate the use of the provision that has been used by some public sector owners.

ORBA explained that if a private owner is not happy with the work, they may exclude the contractor. In the public sector, the contractor is helping to fund a municipality through taxes so any exclusion provisions should be reviewed.

6. Annual and Phased Release of Holdback

ORBA is in favour of an annual release of the holdback on long contracts. It would prefer this approach rather than phased release upon the achievement of a milestone. For large jobs over three to four years, it should be annual because it is a large amount of money. This would be reasonable and logical.

ORBA explained that if you have annual release, you do not have the same pressure to adopt a process of mandatory certification of a subcontract. For the public-private partnership ("P3") model, there should be annual release.

7. Miscellaneous Issues

ORBA will consider mandatory interest on late payments. The interest would follow the contractual relationships and flow down. On a large P3 project, the lenders would be very familiar with how interest works. The idea is that it creates an incentive to process payments faster.

ORBA's submission suggests that there should be an option for access to the financing information of owners. Some have said it should be required, and not an option. If it is in the statute, you do not have to worry about the effect on the contractual relationship of asking for the information. ORBA does not have a position on this issue.

ORBA is in favour of labour and material payment bonds for all public projects.