ONTARIO ROAD BUILDERS' ASSOCIATION

ORBA Supplementary Submission to Borden Ladner Gervais LLP

RE: Expert Review of Ontario's *Construction Lien Act*

December 16, 2015

The Ontario Road Builders' Association (ORBA) is providing supplementary information to Borden Ladner Gervais (BLG) in response to ORBA's presentation of its submission to BLG which took place on November 19, 2015. ORBA was asked to comment on a number of additional topics which came up during its submission's presentation.

The following are some of the comments that ORBA members have made on the additional issues.

Adjudication

Many public owners in Ontario still have legal exclusion provisions clauses, which is why ORBA members find it important to support prompt adjudication system, subject to some specific concerns. First, the adjudication process would have to be carefully married up with the lien process. In the United Kingdom there is only the presence of adjudication, no liens. Layering one on top of another could create more problems than it solves. Second, many public owners, including municipalities, still have legal exclusion provision bylaws on the books and are not shy about threatening to use them. Therefore, since adjudications contemplate all relevant parties participating, the process will only work if all bidding exclusion bylaws and similar rules are revoked. ORBA strongly believes that contractors should have unfettered access to courts without fear of being penalized.

Proof of financing

ORBA members primarily perform work with public sector owners where proof of financing is not generally an issue.

Mandatory interest

Generally, ORBA members note that the requirement of a project owner to pay mandatory interest would encourage timely processing of contractor payments. ORBA members also believe that the idea behind mandatory interest is to break concerns around prompt payment into its component parts and try to avoid swatting a fly with a sledgehammer. There are essentially two valid concerns about prompt payment and each has a very different remedy.

The first and most dramatic concern expressed is that trade contractors down the pyramid simply do not have the cash to meet payroll because of long payment delays and are thus being driven out of business. There is not a lot that can be done about that legislatively, but ORBA members note that there are very few established businesses in the industry that go under each year due to this issue. Additionally, ORBA members note that adjudication, if implemented properly, should help break the logjam to the extent that those cash crunches are due to claims that might take longer to resolve than small contractors have the financial wherewithal to wait for.

The second concern is not that companies are going out of business because of payment delays, but rather that someone at the top of the chain (i.e., owner, general contractor or prime sub) is shifting the financing cost down the chain by stretching payments (essentially borrowing money from their subs for no interest), which is unfairly adding cost to small business and

constraining their ability to grow. Interest is the ideal remedy for that behaviour, since it shifts the cost back to the proper party.

ORBA appreciates the opportunity to be involved in the Review and to provide feedback. Please do not hesitate to contact us if there are any additional questions.