

REPORT TO ONTARIO ROAD BUILDERS' ASSOCIATION

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TAB I

REPORT TO ONTARIO ROAD BUILDERS' ASSOCIATION

(I) Description of BLG's Mandate

On December 6, 2011, BLG was given a mandate by the Ontario Road Builders' Association ("ORBA") to review the Corporate Financial Assurance Audit Service Team ("CFAAST") Final Report entitled "Ministry of Transportation Infractions and Claims Processes Special Review" dated August 29, 2011 (the "CFAAST Report"), to conduct research, and to develop recommendations in response to the issues addressed by the CFAAST Final Report.

TAB II

(II) BLG’s Methodology and the Structure of the Report

In order to fulfill its mandate, BLG conducted legal research with respect to the statutory and policy framework within which the Ministry of Transportation of Ontario (“MTO”) functions, and with respect to relevant common law principles in various jurisdictions, including Ontario. BLG also conducted research on the practices of the ministries and/or departments of transportation responsible for road building in various jurisdictions including:

- All Canadian Provinces and Territories¹
- All U.S. States
- The United Kingdom
- Singapore
- New Zealand
- Australia

In respect of case studies or examples to be drawn from the Ontario experience in regards to dispute resolution, given that information related to specific disputes between MTO and contractors is, for the most part, not publicly available, it is not possible to conduct an analysis of the fact patterns of Ontario claims involving MTO, other than those referenced in reported cases.

This report will be structured as follows:

1. Executive Summary
2. Review of MTO’s current processes
3. ORBA’s concerns as expressed to CFAAST
4. Summary of the CFAAST Report
5. Legal Context of Issues
6. Comparative Analysis of other Jurisdictions
7. Gap Analysis
8. Conclusions
9. Recommendations

¹ Road construction falls under the mandate of the provincial and territorial legislatures pursuant to the division of powers set out in the *Constitution Act, 1867*, s. 91 and s. 92, therefore federal procurement policies do not form part of this report.

Given the integrated nature of MTO's current system, there are areas of overlap in the various processes described in the following sections. Each of the processes are described under the subheadings listed above, where relevant; however, some cross-referencing is necessary because of the integrated nature of the system as a whole.

TAB III

(III) Executive Summary

(a) The CFAAST Report and the BLG Retainer

In August 2011, the Corporate Financial Assurance Audit Service Team issued its Final Report titled “Ministry of Transportation Infractions and Claims Processes Special Review.” The CFAAST review was conducted to ensure that MTO’s infractions and claims processes are “fair, equitable and transparent,” so as to avoid conflicts of interest, and provide an appropriate level of accountability.²

In December 2011, ORBA retained Borden Ladner Gervais LLP (BLG) to review the CFAAST Report, conduct relevant research, and provide ORBA with BLG’s recommendations in respect of the issues raised by the CFAAST Report.

(b) BLG’s Methodology

BLG’s research included a comparative review of the policies and applicable legislation in relation to all other Canadian jurisdictions, and all 50 states, as well as direct communication with the departments of transportation of each of these jurisdictions. BLG’s comparative analysis also encompassed the relevant policies of Australia, New Zealand, Singapore and the UK. In addition, BLG conducted “first principles” research in respect of the relevant processes and issues, based on Canadian case law.

Once the referenced jurisdictions and legal principles were canvassed, relevant “best practices” were identified. BLG then conducted a “gap” analysis aimed at isolating the specific areas in respect of which MTO’s relevant processes deviated, if at all, from best practices, as derived from our first principles research and the predominant approaches of comparable departments of transportation.

Having identified the specific areas of deviation from “best practices,” BLG then developed a set of recommendations aimed at identifying the changes necessary to bring such areas of deviation into conformity with best practices.

(c) The MTO Contractor Management System

While CFAAST’s main focus was primarily on the infraction and claims mechanisms of MTO, it is evident from its report that CFAAST appreciated the fact that MTO has developed a complex, inter-related set of processes comprised of:

- (a) contractor “qualification,” sometimes referred to by MTO as pre-qualification;
- (b) tendering in respect of individual projects;

² According to the CFAAST Report, the principles of fairness, equity, and transparency are derived from MTO’s own internal documents. In our view, the principle of accountability must be added to this list of governing principles, as a “best practice,” and in recognition of the fact that its significance is implicit in the principle of transparency.

- (c) contractor monitoring through the use of a contractor performance rating system and a financial rating system;
- (d) an infraction process, which is a method used to sanction contractors for breaches of contract;
- (e) dispute resolution, using a process articulated in the General Conditions of MTO Contracts;
- (f) contract management at the individual project level, through the use of tools such as the claims review process and the liquidated damages provisions articulated in the General Conditions of MTO Contracts; and
- (g) a process for contractor exclusion or debarment (to use an analogous US term).

Together, these processes act as a contractor management system (the “Contractor Management System”). CFAAST also commented to the effect that the strong integration of the Contractor Management System, with its closely related processes, gives rise in some circumstances to the unintended amplification of intended punishments or sanctions. In particular, CFAAST referred to infractions, reductions in maximum workload rating, loss of supplemental bid capacity, and liquidated damages. CFAAST noted that when these sanctions are applied in tandem, “the degree of the consequences may exceed the severity of the initial incident that led to the infraction.”³ CFAAST therefore recommended that MTO review the alignment of various consequences to assist in ensuring that potential effects on contractors are considered.

MTO’s Contractor Management System is, in fact, integrated to a level that is much more complete, and much more complex, than any other similar system encountered during BLG’s research.

(d) The Standard of Conduct Applicable to MTO

In respect of the governmental values of fairness, equity, transparency, and accountability, it is important to recognize that the MTO does not have the freedom of operation of a private owner.

While it is true that pursuant to the *Public Transportation and Highway Improvement Act*, the Minister of Transportation has a broad mandate to “construct, extend, alter, maintain and operate such works as he or she considers necessary or expedient for the purposes of the Ministry,”⁴ and the Minister “may enter into agreements to construct or maintain roads,”⁵ MTO is nevertheless bound by the policies contained in the Procurement Directive of the Province of Ontario.

³ CFAAST Report, p. 17.

⁴ *Public Transportation and Highway Improvement Act*, R.S. O. 1990, c. P. 50, s.26.

⁵ *Public Transportation and Highway Improvement Act*, R.S. O. 1990, c. P. 50, s.26.

In this regard, the Management Board of Cabinet has broad powers in respect of policy making in regards to the operation of the public service, and, in April 2011, Management Board issued a Procurement Directive (replacing the previous, 2009, version).⁶

The purpose of the Procurement Directive is to ensure that goods and services, including construction, are acquired through a process that is fair, open, transparent, geographically neutral and accessible to qualified vendors. These principles, articulated in the Procurement Directive, are consistent with the values of fairness, equity, and transparency which are recognized by CFAAST as having been endorsed by MTO.⁷

According to the Procurement Directive, the policy of maintaining open competition is most prominent among the core values of government procurement, along with fairness, equity, and transparency. The Procurement Directive specifies the responsibilities of ministries in the procurement of goods and services such that costs will be minimized and there will be consistency in procurement practices by ministries. An open, competitive bidding system helps to ensure accountability in decision-making and assists in ensuring that conflicts of interest and allegations of “cronyism” are avoided because procurement is carried out in an unbiased manner, not influenced by personal preferences, prejudices, or interpretations.

(e) The Uniqueness of MTO’s Contractor Management System

As a general proposition, BLG’s research indicates that, when MTO’s Contractor Management System is compared to the processes of other North American departments of transportation, it is unique in many respects, including:

- (a) unique in the fact that it is founded upon a “qualification” process that involves both a financial rating and performance rating process in respect of the entire MTO-Contractor relationship and not a pre-qualification process at the level of specific projects;
- (b) unique in that it utilizes an infraction process that can reduce a contractor’s bid capacity;
- (c) unique in respect of the remarkable degree of its complexity, as represented perhaps most obviously by its integration of multiple processes;
- (d) unique in its rejection of surety bonds as performance security; and
- (e) unique in providing MTO with the absolute discretion to formally debar, or “exclude,” a contractor from bidding MTO work for up to three years because the contractor engaged in legal proceedings against the Province.

⁶ By way of context, the Ontario Public Service Guide to Public Service Ethics and Conduct, which is referenced in the CFAAST Report, defines Directives as “fundamental policies for administrative, financial and human resources management practices, which set out government principles, mandatory requirements and responsibilities.”(Guide to Public Service Ethics and Conduct, p. 15).

⁷ The extent to which “qualification” and pre-qualification processes are allowed under the Procurement Directive is unclear.

Since MTO is required by the Procurement Directive to administer an open, competitive bidding process in relation to roadwork, and to do so in a fair, equitable, transparent, and accountable manner, the Contractor Management System must be considered first within this broader context. From such a policy perspective, the question arises as to whether or not the sheer complexity of the MTO Contractor Management System combined with the effect of the level of control exercised by MTO is an impediment to the operation of an open, competitive bidding process, consistent with the Procurement Directive.

(f) BLG’s Conclusions Regarding Fairness, Equity Transparency, and Accountability

Taken together, the MTO processes constitute a complex set of interwoven procedures, which is administered in a manner that is opaque to contractors, and can produce unfair results, particularly where multiple forms of punitive sanctions, including liquidated damages, are applied. The lack of transparency attributable, in part, to the inherent complexity of the Contractor Management System is exacerbated by the fact that the primary mechanism at the heart of the Contractor Management System may be fairly characterized as a “black box,” significantly lacking in transparency and, thus, accountability.

Specifically, the “Qualification Committee” that governs decisions in respect of Qualification issues, Infractions, and the Exclusion Process, is a body that is significantly lacking in transparency and fairness regarding its membership, impartiality, and procedures.

One of the main concerns with respect to the role of the Qualifications Committee is that, while its decisions have the potential to impose significant financial hardship on a contractor, a given Committee may well be comprised, at least in part, of personnel that have previously been involved in the very issue(s) that the Committee is called on to deal with by way of what amounts to an appeal from the finding of an Infraction or from a decision related to the exercise of the Exclusion Provision. ORBA also notes that, with respect to the claim process “most often the same individuals are involved at each stage in the process or are otherwise informed by the original decision making level.” Such a situation cuts clearly against the value of fairness and presents the potential for the perception of conflict of interest and bias to be raised.

At the same time, and while a decision by the Qualification Committee to debar a contractor is, in our view, subject to judicial review (and to a limited right of internal appeal), and although a contractor dissatisfied with its treatment regarding a claim may initiate litigation, the “chill” cast by the Exclusion Provision (or the “Blacklist” as it is colloquially known) represents a powerful, if unspoken threat to the business of any contractor that considers seeking recourse to the oversight of the court. This powerful disincentive contributes significantly to the risk of unfairness inherent in the Contractor Management System.

The Exclusion Provision, as presently constituted, also contributes to the situation in respect of which contractor claims may languish, or possibly be rejected without regard to their merit, until they are settled in the intimidating shadow of the unspoken “Blacklist” threat. ORBA, in its submission to CFAAST states that, in the claims process, “there are many examples of contractors waiting months or even years for a response.” In our view, the existing MTO claim process represents a fundamentally flawed process, where the contractor has no template to use

for claim submission, little idea where its claim stands at any point in time, no idea of how other contractors have fared, and no realistic opportunity to have an independent third party, whether through mandatory arbitration or the court, exercise appropriate even-handed due diligence and final decision-making. Finally, the contractor receives a decision with no accompanying explanation or reasons.

The infraction process also operates within the “black box,” as there are no detailed guidelines with respect to the information to be provided to a contractor regarding the specifics of the allegations made in order to ensure that the contractor is able to fully understand the case it has to meet. Further, there is no mechanism within the infraction procedures to ensure that a contractor has an adequate opportunity to respond to the allegations made against it, such as a means of ensuring that the contractor is able to obtain relevant documents and information from relevant persons, including contract administrators and MTO staff. In addition, the current hearing time of 20 minutes is, depending on the seriousness or complexity of the infraction, insufficient time for a contractor to adequately present its case. Finally, the infraction procedures do not clearly set out the criteria for decision making in determining a sanction to be levied against a contractor.

In respect of liquidated damages, the MTO liquidated damages provision has been applied by MTO prior to a determination as to fault in respect of delays and is applied in tandem with other sanctions, including infractions, reductions in maximum work load rating, and loss of supplemental bid capacity, resulting in a potentially disproportionate effect on a contractor.

The subject of surety bonding is also one that arises directly within the context of considering whether the Contractor Management System conforms with the requirement that it be open and competitive. Specifically, surety bonds contribute to the values of openness and competitiveness. MTO rejects surety bonding on the basis that it saves money by not paying surety bond premiums and on the basis that the involvement of a surety in a claim situation can limit MTO’s control. MTO cites savings of “tens of millions of dollars”⁸ in support of its decision not to use surety bonds. However, it is not clear whether MTO includes a financial contingency for insolvency risk in this “savings” calculation. In this regard, one of the key advantages of surety bonds is that they act as a mechanism by which the risk of contractor insolvency is transferred from the government, and from the balance sheets of subcontractors and suppliers, to the surety. MTO’s view of its own process as acting as a “self-bonding” mechanism ignores the fact that the current system provides no protection for MTO or for subcontractors or suppliers in the event of contractor insolvency.

⁸ CFAAST Report, p. 24. In the NCHRP Report, referenced below, NCHRP reports that “[w]ith an annual construction program of roughly CDN \$1.4 billion and average Ontario performance/payment bond costs of 5% of contract costs (Tunistra 2008), the estimated savings to the province is roughly \$70 million per year in bond costs.” (NCHRP Report p. 48). The reference to “Tunistra 2008” is referenced as “Tony Tunistra, “Ontario Ministry of Transportation Prequalification Program,” Unpublished Working Paper, St. Catherines, Ontario, April 10, 2008.” In response to a request for access to this document under the *Freedom of Information and Protection of Privacy Act*, MTO advised that no records exist at MTO and the document is not an MTO document but rather is “a summary of an interview with Tony Tunistra that was conducted by the National Cooperative Highway Research Program regarding the Ministry’s prequalification system.” MTO advised that it did not have a copy of the summary.

In any event, it is our view that ORBA should support CFAAST's recommendation to further analyze surety bonds.

(g) BLG's Recommendations

Assuming that the Contractor Management System does not fundamentally contravene MTO's basic policy obligation to administer an open competitive procurement environment, there are specific changes, which should only be implemented as a package, and would significantly improve fairness, equity, transparency, and accountability within the structure of the existing Contractor Management System.

Accordingly, and proceeding on the assumption that the Contractor Management System does not in itself contravene MTO's mandate to administer an open, competitive process, our recommendations are as follows:

(i) Qualification Process

We recommend that the Qualification Procedures be revised to include:

- i. A clear written mandate for the Qualification Committee;
- ii. Clear written requirements in respect of the composition of the Qualification Committee including:
 - a. A requirement that members not have had prior involvement in the subject dispute, claim or infraction, such that the same individuals do not review the same matter at multiple levels; and
 - b. The addition of two independent members who are not MTO employees.
- iii. A clear written description of the role of the Secretary of the Qualification Committee including the investigative role of this individual and a bar to the involvement of the Secretary in decision making.
- iv. Written criteria related to the procedures of the Qualification Committee including attendance policies and quorum policies, as recommended by CFAAST.
- v. Conflict of interest guidelines for the Qualification Committee.
- vi. Required training of Qualification Committee members and Contract Administrators, as recommended by CFAAST.
- vii. The opportunity for contractors to assess the performance of Contract Administrators, as recommended by CFAAST.
- viii. Modifications as necessary to ensure consistency between and perhaps a consolidation of, or at least appropriate cross-references between the following:
 - a. the Infraction Procedures;

- b. the Exclusion Provision Procedures; and
- c. the Performance Rating Guide.

(ii) Infraction Process

We recommend that:

- i. The Infraction Process be revised to provide for a determination by the Qualification Committee augmented by at least two independent members, as noted above, and that individuals involved in the investigation of the infraction play no role in the hearing.
- ii. The Infraction Process be revised to provide for fair procedural mechanisms which include:
 - a. Improved specificity of the criteria used to assess an infraction, as recommended by CFAAST;
 - b. Proper notice of the specifics of the allegations made against the contractor;
 - c. An adequate opportunity to respond;
 - d. Adequate access to documents;
 - e. Adequate opportunity to make a presentation and response;
 - f. Written reasons issued by the Qualification Committee in respect of its decisions with respect to its infraction decisions signed by the Qualification Committee members issuing the decision and addressing the issues raised and the findings and conclusions of the Qualification Committee including the basis of such findings and conclusions; and
 - g. A procedure to ensure alignment of consequences (as recommended by CFAAST) including the introduction of a provision that operates where there is both an Infraction and a dispute arising out of or closely relating to the same issue and suspends the operation of the Infraction Procedure until the Dispute Resolution process is completed.
- iii. A website be created, as described below (under the Dispute Resolution heading) that includes information regarding infractions levied against contractors (CFAAST reports that infractions “impact at least 20% of contractors”).⁹

⁹ CFAAST Report, p. 13.

(iii) Liquidated Damages

We recommend that liquidated damages not be levied by MTO against contractors until after the claims review process is complete and that a provision to this effect be inserted in the General Conditions of MTO Contracts.

(iv) Dispute Resolution

We recommend that:

- i. the three step claims review process be abbreviated to a two step negotiation process and that the time frames be shortened to 100 days in total;
- ii. claim submission templates be developed, as per the CFAAST recommendations;
- iii. early adjudication of disputes by an adjudicator on an interim binding basis be imposed;
- iv. **mandatory** arbitration be included in the General Conditions as a final and binding dispute resolution mechanism; and
- v. a website be created to reflect, on a no-names basis, all claims outstanding, their dates of submission, the dates that they completed the various levels of dispute resolution, the extent to which claims determinations are overturned at a higher level (under the current system, CFAAST reports that 40-50% of the cases that reach Head Office are overturned)¹⁰ the dates that they were settled, and the dates that they were submitted to arbitration, with the total claims submitted and resolved per annum, and that such website contain similar statistical information regarding the infraction process.

(v) Surety Bonds

We recommend that a study be performed to fully consider the cost-benefit profile of surety bonds.

(vi) Exclusion Provision

We recommend that the Exclusion Provision be revised to provide explicitly that:

- i. contractual mandatory arbitration is not a “legal proceeding” in respect of which the Exclusion Provision will be applied; and
- ii. that a legal proceeding commenced in respect of a bona fide dispute (i.e. any dispute that is not frivolous, vexatious, or an abuse of process), and properly pursued, is not a “legal proceeding” in respect of which the Exclusion Provision will be applied.

¹⁰ CFAAST Report, p. 21.

We also recommend that Section 9.4 of the Qualification Procedures be revised to make it clear that it is “subject to section 9.3.”

Our recommendations with respect to the Exclusion Provision assumes that the other recommendations set out above are adopted, particularly those with respect to dispute resolution and those designed to avoid the disproportionate effect of the cumulative impact of multiple forms of sanctions applied in respect of the same incident(s).

TAB IV

(IV) Review of Ministry of Transportation of Ontario (“MTO”) Current Processes

In order to provide a baseline against which to consider the CFAAST Report, it is appropriate to have in mind the configuration of the processes that CFAAST audited and the extent of integration between them. These processes are described under the following headings:

- (a) The Qualification Process;
- (b) The Infraction Process;
- (c) The General Conditions of MTO Contracts; and
- (d) The Exclusion Provision

As noted above, these processes are integrated. As will be discussed in Section IV – Summary of CFAAST Report, CFAAST references in particular the cumulative impact of infractions, reductions in maximum workload rating, loss of supplementary bid capacity, and liquidated damages. CFAAST notes that when these sanctions are applied in tandem “the degree of the consequences may exceed the severity of the initial incident that led to the infraction.”¹¹ The inter-relationships between the various MTO processes is described in further detail below, in the course of describing each of the processes and its potential effects on contractors.

(a) The Qualification Process

The starting point of our analysis of MTO processes is the Qualification Procedures as defined below, because these procedures set out the rules which govern the determination of whether or not a contractor will be permitted to bid on an MTO contract. It is worth noting that although these procedures are titled “Qualification Procedures,” as defined below, they are also sometimes referred to as a “pre-qualification” process.¹²

(i) Purpose of Qualification Procedures

The Ministry of Transportation of Ontario Qualification Procedures for Contractors dated June 1, 2007 (the “Qualification Procedures”) is intended to provide an “administrative routine” to ensure that any contractor that intends to bid on a contract called for tender by MTO has the financial resources and adequate technical and managerial skills to satisfactorily perform the work within the specified time, should that contractor be awarded the contract.¹³

The Qualification Procedures constitute a prequalification regime which is program-wide, as opposed to project-specific.¹⁴ A project-specific prequalification process applies only to a given project and permits a contractor to submit its qualifications to bid on that project. A program-

¹¹ CFAAST Report, p. 17.

¹² The Qualification Procedures are referred to as a “pre-qualification” process in the Infraction Procedures and the Procedures for Processing the Contractor Pre-Qualification Exclusion.

¹³ Qualification Procedures, p. 2.

¹⁴ Daniel McMillan and Erich Luschei, “*Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps*,” *Construction Lawyer* (Spring 2007), p. 5.

wide prequalification process is a process that applies to all projects of a given type.¹⁵ In respect of the MTO prequalification process, the process applies generally to all MTO contracts for road construction valued at over one million dollars, as explained below.

(ii) Ambit of Qualification Procedures

The Qualification Procedures govern all contracts with a maximum estimated annual value of **over** \$1,000,000 and/or all contacts that require the contractor to have submitted what is known as an “Annual Declaration: MTO Minimum Quality Management System or ISO 9001 Quality Management Standard,” unless an exemption has been granted in writing by the Director, Contract Management and Operations Branch.

In respect of projects that have an estimated value of **under** \$1,000,000 or have been exempted by the Director, Contract Management and Operation Branch, a Rated Contractor (i.e. a contractor that has applied for and been granted a Basic Financial Rating or Maximum Workload Rating in accordance with the Qualification Procedures) can “pre-qualify” either using its Available Financial Rating or “supply the Ministry with performance bond, Labour and Material Payment bond or other forms of security in accordance the [sic] Instructions to Bidders in the tender document.”¹⁶

The threshold of \$1,000,000 means that any MTO Contract of any degree of significance will be subject to the Qualification Procedures, and, in particular, the financial rating and performance rating systems.

Contractors wishing to bid on contracts governed by the Qualification Procedures must, on an annual basis, submit certain information set out in the Qualification Procedures and may then be granted a rating,¹⁷ as described below.

(iii) Administration of Qualification Procedures

The Qualification Procedures are governed by “the Qualification Committee appointed by the Deputy Minister.”¹⁸ Importantly, there is no further detail provided in the Qualification Procedures as to the composition of the Qualification Committee. Certain powers of the Qualification Committee are described in the Qualification Procedures, notably with respect to the exercise of the Exclusion Provision, as explained below; however, there is also no description of the mandate of the Qualification Committee.

A contractor that wishes to bid on contracts governed by the Qualification Procedures is required to submit certain information to the “Head, Qualification Control, Contract Management Office,” MTO. The mandate and authority of this individual in respect of the rating system is not described in the Qualification Procedures. Also, the extent of the involvement of the Qualification Committee in the rating system is not clear, based on a review of the Qualification Procedures described below.

¹⁵ NCHRP Synthesis 390 Performance-Based Construction Contractor Pre-qualification Report, p. 6.

¹⁶ Qualification Procedures, s. 3, p. 2.

¹⁷ Qualification Procedures, p. 3, s. 4.

¹⁸ Qualification Procedures, s. 2, p. 2.

(iv) Sanctions Applied Under Qualification Procedures

MTO may, at any time, carry out investigations in respect of the financial data or Annual Declaration submitted by contractors.¹⁹ Any contractor or contractor's employee or agent who "makes or causes to be made any fraudulent, false, deceptive or misleading statement" under the Qualification Procedures or on any documents relating to a tender or to a contract with the Ministry or a contract in which the Ministry has some direct or indirect financial interest may be prohibited from bidding on contracts for a period of time determined by the Ministry or may have its Basic Financial Rating adjusted."²⁰

According to Section 8 of the Qualification Procedures, any "sanction" (which is not defined) issued by the Qualification Committee related to the procedures will be considered in calculating the contractor's Basic Financial Rating and/or Maximum Workload Rating in any and all classifications of work for a period of time determined by the Qualification Committee.²¹

(v) Rating System

The rating system is at the heart of the Qualification Procedures given that it is a Contractor's rating that determines the extent to which a contractor will be permitted to bid on MTO projects. It is a complicated system and the description of it found in the Qualification Procedures is, in our view, convoluted and lacks clear definitions of key terms, as described below. There are two kinds of ratings described in the Qualification Procedures: (a) a financial rating; and (b) a performance rating. Each of these types of ratings will be described in turn.

(A) Financial Rating

According to the Qualification Procedures, contractors may be rated in respect of certain classifications of work namely:

- general road contracts;
- structure contracts;
- electrical contracts;
- structural coating contracts; and
- general maintenance contracts.²²

The Qualification Procedures provide that contractors "shall be given a Basic Financial Rating for each classification of work in which they have proven experience in accordance with section 10 [sic] Experience."²³

¹⁹ Qualification Procedures, p. 4, s. 6.

²⁰ Qualification Procedures, p. 4, s. 7.

²¹ Qualification Procedures, p. 5, s. 8.

²² Qualification Procedures, pp. 11-12, Section 10.

A Basic Financial Rating is defined in the glossary section of the Qualification Procedures as “the Basic Financial Rating with no reduction or restriction for penalties or experience.” Penalties and experience are not defined terms in the Qualification Procedures. However, as noted above, “Sanctions” is the title of Section 8 of the Qualification Procedures. Pursuant to Section 8, any “sanction” (which is not defined) will be “considered in calculating the Contractor’s Financial Basic Rating [sic] ...”

Furthermore, Section 11 entitled “Experience” provides that a Rated Contractor²⁴ or a new applicant must demonstrate its ability to do satisfactory work in the related classification before it will be given “the full rating” (which is not defined). Although it is unclear, it would appear that the term “Rated Contractor” here refers to a contractor who is seeking to pursue work in a new classification; otherwise a contractor’s “record” would not be relevant.

According to Section 11, MTO reviews the contractor’s experience with municipalities, other road authorities and owners and after consideration of this experience, MTO “may reduce” the Basic Financial Rating of the contractor as follows:

1. a contractor with a demonstrated record of successfully completed related work as contractor for a road authority may receive a maximum reduction of the Basic Financial Rating for experience of up to: 50%;
2. a contractor with a demonstrated record of successfully completed related work as a subcontractor for a road authority may receive a maximum reduction of the Basic Financial Rating for experience of up to: 70%
3. a contractor that has not demonstrated its ability to perform satisfactory work in a classification of work may receive a maximum reduction of the Basic Financial Rating for experience of up to: 100%²⁵

Thus, the above “reductions” in a contractor’s Basic Financial Rating do not relate to a contractor’s finances, but rather relate to a contractor’s experience as a contractor or subcontractor with “municipalities, other road authorities and owners” with “related work,” as determined by MTO, based on undisclosed criteria. Given the language of Section 11, it would appear that the appropriate reduction is determined on a primarily discretionary basis. Pursuant to the Qualification Procedures, the contractor or MTO may request a review at any time of the contractor’s experience and MTO “will review the contractor’s experience and may adjust the contractor’s experience accordingly.”²⁶ The Qualification Procedures do not state who is responsible for this review.

²³ Section 11 is the Section of the Qualification Procedures that is entitled “Experience.” Section 10 does not describe experience, but rather sets out the classifications of work described above.

²⁴ A “Rated Contractor” is defined in the glossary as “a contractor that has applied for and been granted a Basic Financial Rating or Maximum Workload Rating in accordance with the Ministry’s Qualification Procedures for Contractors.”

²⁵ Qualification Procedures, Section 11.

²⁶ Qualification Procedures, s. 11, p. 12.

Section 12 of the Qualification Procedures is entitled “Available Financial Rating.” This Section states that in determining the Available Financial Rating,²⁷ “all work on which the contractor agreed to undertake or has been recorded as low bidder, whether called by the Ministry, other government organizations, municipalities or private developers/owners, must be included.”²⁸

Pursuant to Section 12 of the Qualification Procedures, a contractor shall not be awarded any Qualified Contract²⁹ or Designated Contract³⁰ for which it does not have the required Available Financial Rating.

Section 12 of the Qualification Procedures also provides that a contractor shall determine its Available Financial Rating “prior to the time the contractor’s bid is opened for which the rating is required.” The Qualification Procedures state that it is the contractor’s responsibility to ensure that “it has sufficient Available Financial Rating prior to Tender Closing.”

Section 13 of the Qualification Procedures provides that contractors are to submit information using the MTO Registry, Appraisal, and Qualification System (“RAQS”) which is used to register contractors “interested in providing services to MTO” and allows the Contractor Registration Form, Tender Registration Form, and performance information to be submitted and viewed electronically.

Part B of the Qualification Procedures sets out the documents and information to be submitted by a contractor in order to maintain a continuous Basic Financial Rating. MTO will consider factors such as a contractor’s net current assets, depreciated value of machinery and equipment, and net book value of all other fixed assets and land.³¹ Part B describes the procedure applied in assigning a Basic Financial Rating to a contractor, which involves applying a multiplication factor to the net current assets of the contractor (defined in Section 18 as the “difference between the current assets and current liabilities”). The multiplication factor is either 4 or 5 depending on the work classification.

A Rated Contractor can increase its “Basic Financial Rating by up to 50% by depositing a certified cheque or irrevocable letter of credit with the Ministry.”³²

²⁷ The phrase “Available Financial Rating” is defined as follows in the glossary:

A contractor’s Available Financial Rating at any given time will be its Adjusted Financial Rating [defined in the glossary as the Basic Financial Rating less any reduction or restriction because of sanctions or experience] (or Basic Financial Rating if no adjustments have been made):

Less: the total value of all work on hand at that [sic] time of submission as calculated on the Tender Registration Form (TRF), i.e. work on which he has been recorded as low bidder and work that has been awarded to the contractor.

Plus: the total of all progress payment certificates submitted on that work.

²⁸ Qualification Procedures, Section 12.

²⁹ A Qualified Contract is defined in the glossary as a contract which is tendered in accordance with the Qualification Procedures.

³⁰ A Designated Contract is defined in the glossary as a contract where the Ministry accepts performance bonds, payment bonds or other forms of security in lieu of pre-qualification.

³¹ Qualification Procedures, Section 17.4, p. 18.

³² Qualification Procedures, Section 17.4, p. 18.

(B) Performance Rating

Part D of the Qualification Procedures addresses contractor performance ratings. Every contractor that completes MTO work will have its performance evaluated and will receive a Contractor Performance Index rating annually, based on a 3 year weighted average calculated as per the formula set out in Part D of the Qualification Procedures.³³

The Contractor Performance Index is based on a scale of 0 to 100. Contractors with a Contractor Performance Index of less than 70 will be “evaluated” by the Qualification Committee on an annual basis and any “sanctions” imposed by the Qualification Committee will be imposed as per Section 29 (which is entitled “Available Maximum Workload Rating,” as described below). The Qualification Committee’s decision to apply a sanction for substandard performance will start on or around April 1 each year for a period of 12 months.

According to Section 26 of the Qualification Procedures, Ministry Qualified Contracts and Designated Contracts will carry two qualification ratings: (1) a Necessary Available Financial Rating; and (2) a Necessary Available Maximum Workload Rating. Contractors who “receive notification of substandard performance must satisfy both ratings in accordance with the Qualification Procedures to qualify to bid on a Ministry Qualified Contract or Designated Contracts.”³⁴

According to the Qualification Procedures, Section 27, Approved Contract Performance Ratings (which is not a defined term, despite the capitalization) are averaged annually based on the calendar year and a weighted average of the annual averaged Contract Performance Ratings for the preceding three calendar years will be calculated on December 31 of each year.³⁵ The resulting calculation is known as the Contractor Performance Index and is calculated in accordance with a weighted formula.

The Contractor Maximum Workload Rating is defined in Section 28 as the highest annual total dollar value of work awarded to a contractor in one of the five fiscal years preceding the current fiscal year.³⁶

The Available Maximum Workload Rating of a contractor is calculated based on the contractor’s Maximum Workload Rating less “the total value of all Ministry work awarded or low bidder [sic] during the fiscal year in which the MWR [Maximum Workload Rating] was imposed.”³⁷

Pursuant to Section 29 of the Qualification Procedures, a contractor shall determine its Available Financial Rating and Available Maximum Workload Rating at the time the contractor’s bid is recorded on the contract for which the rating is required and it is the Contractor’s responsibility to ensure that it has the required Available Financial Rating and Available Maximum Workload rating at that time.

³³ Qualification Procedures, Section 27

³⁴ Qualification Procedures, Section 26.

³⁵ Qualification Procedures, Section 27.

³⁶ Qualification Procedures, Section 28.

³⁷ Qualification Procedures, Section 29.

Section 30 entitled “Integrated Infraction/Contractor Performance Rating System” states that the Contractor Performance Index is divided into three zones as follows:

(a) Green Zone 70 to 100

If a contractor’s Contractor Performance Index is rated in the green zone the Qualification Procedures will not “impose” a contractor’s Maximum Workload Rating. Any infraction imposed as per Section 8, Sanction will be applied to the Contractor’s Basic Financial Rating.³⁸

(b) Yellow Zone 55 to 70

The Qualification Procedures may impose a contractor’s Maximum Workload Rating calculated per Section 27 [sic] “plus further reduce the contractor’s Maximum Workload Rating by up to 20%.”³⁹ Sanctions assessed as a result of poor performance will not be applied to the Contractor’s Basic Financial Rating.

(c) Red Zone 35 to 55

In this zone, a contractor’s bidding capacity will be the Contractor’s Maximum Workload Rating which shall be reduced by a factor calculated “linearly between 20% and 100% depending on its position in the zone (20% at 55 and 100% at 35).”⁴⁰

It is worth noting that the Qualification Procedures do not reference the existence of the MTO guide entitled “Contractor Performance Rating: a Contract Administrator’s Guide to Rating” dated April 2007 (the “Performance Rating Guide”). The Performance Rating Guide describes the performance rating process in an effort to ensure that “the ratings conducted on Ministry contracts must be as objective as possible and consistent across the Province.”⁴¹

The rating system is described in detail in the Performance Rating Guide for rating contractor performance on individual contracts which is generally founded on the concept of rating contractors on a 0 to 4 scale for each individual item, where 0 is poor and 4 is excellent.⁴² MTO’s Contract Administrators complete and sign the Contractor Performance Rating, the Project Manager reviews and signs the completed Contract Performance Rating, and it is then forwarded to the Contract Control Officer.⁴³ The Contractor Performance Rating Form is then sent to the contractor, who has an option to appeal the original rating within 21 days of receipt, to the Regional Manager of Contracts.⁴⁴ The Regional Manager of Contracts provides a review and responds to the contractor in writing within 21 calendar days of receiving the appeal, giving reasons for the decision. Should the contractor not accept the decision of the Regional Manager

³⁸ Qualification Procedures, Section 30.

³⁹ Qualification Procedures, Section 30.

⁴⁰ Qualification Procedures, Section 30.

⁴¹ Contractor Performance Rating: a Contract Administrator’s Guide to Rating, dated April 2007, Section 1, p. 2.

⁴² The Rating Guide, Section 1.1, p. 3.

⁴³ The Rating Guide, Section 1.4, p. 4.

⁴⁴ The Rating Guide, Section 1.5, p. 5.

of Contracts, the contractor has the option to appeal the decision to the Qualification Committee which will consider an appeal for one or more of the following reasons:

- The Ministry has not followed the prescribed process for the performance rating; or
- There is new or additional information.⁴⁵

This appeal must be made in writing to the Secretary, Qualification Committee within 21 calendar days of the date of the letter from the Regional Manager of Contracts. The Qualification Committee will investigate the appeal and decide the outcome.

(C) Tender Registration System

Part C of the Qualification Procedures sets out the procedures relevant to tender registration for individual contracts. MTO identifies contracts for bids which are restricted to Rated Contractors, based on Financial Rating and/or Maximum Workload Rating. The ratings required are described in the advertisement for the tender. Contractors who want to bid on a Qualified Contract or a Designated Contract⁴⁶ must submit a Tender Registration Form which is reviewed by MTO to verify that the Contractors has “the Available Financial Rating and or Maximum Workload Rating equal to or in excess of the advertised ratings.”⁴⁷

MTO then approves Contractors found to have the necessary Available Financial Rating and/or Maximum Workload Rating to be considered for the Contract and Tender Registration Approval Forms are issued to these Contractors.

(vi) The Exclusion Provision

Section 9 of the Qualification Procedures addresses the “Contractor Pre-qualification Exclusion” (the “Exclusion Provision”).⁴⁸ The Qualification Committee is assigned the responsibility for implementing, applying and enforcing the Exclusion Provision. The purpose of the Exclusion Provision is contained in Section 9.2 of the Qualification Procedures which sets out the following justifications, particularly in respect of the inclusion of legal proceedings as a consideration in exercising the Exclusion Provision:

- (a) it is prudent for the Ministry to consider avoiding doing further business with a contractor who is engaged in a legal proceeding given that open and co-operative dealings are necessary for successful achievement of other projects;

⁴⁵ The Rating Guide, Section 1.6, p. 6.

⁴⁶ “Designated Contract: Designated Contract means a contract [in respect of which] the ministry accepts Performance Bonds, Payment Bonds or other forms of security in lieu of pre-qualification”; and “Qualified Contract: A contract which is tendered in accordance with the Ministry Qualification Procedures for Contractors.” Qualification Procedures, p. 35.

⁴⁷ Qualification Procedures, Section 21.

⁴⁸ The change in terminology in respect of this exclusion from “qualification” to “pre-qualification” is not explained in the procedures.

- (b) it is prudent for the Ministry to consider avoiding doing further business with contractors who choose to engage in a legal proceeding rather than use the prescribed dispute resolution process set out in the contract because of the additional costs to the Ministry in defending itself;
- (c) it is prudent for the Ministry to avoid the additional costs associated with extraordinary time required of the contract administrator and Ministry staff and the management of projects with contractors who have been or are engaged in a legal proceeding; and
- (d) there is a negative impact on the equity, fairness and consistency of the business relationship between the Ministry and the contracting industry if Ministry resources are required to deal with litigation and there are extraordinary demands on contract management.

Section 9.2 also refers to Infractions and Notices of Default and states that it is prudent for the Ministry to avoid awarding contracts to those contractors and related persons whose past performance demonstrates a significant increase in the level of management effort demanded by the Ministry and its representatives as demonstrated by, among other things, the issuance of infractions or notices of default. Throughout the balance of this document, when the phrase “Exclusion Provision” is used it is used to describe the exercise of Section 9.2 in the context of the exercise of the provision merely because a party has been or is engaged in litigation and not because of infractions or notices of default, unless expressly stated to the contrary.

Pursuant to Section 9.3 of the Qualifications Procedures “no tender registration form shall be issued to a contractor to whom the provisions of Section 9 of the Qualifications Procedures for contractors apply,” unless the Qualification Committee makes an exception.

In respect of a contractor that has been or is engaged in a legal proceeding with the Ministry, according to Section 9.3, the Qualification Committee will assess the nature of the legal proceeding, along with a review of all the factors described in Section 9. In particular Section 9.3 lists the following considerations:

9.3 Considerations:

No Tender Registration Form shall be issued to a contractor to whom the provisions of Section 9 of the Qualification Procedures for Contractors apply, unless the Qualification Committee has considered and is favourably satisfied, on a review of all the considerations below and the Purpose of the Policy stated above, that the Tender Registration Form should be issued.

In the event that the contractor has been or is engaged in a legal proceeding with the Ministry, the Qualification Committee will assess the nature of the legal proceeding along with a review of all the considerations described in this Section, which are without limitation, the Purpose of the Policy, the considerations listed below and other aspects of the business relationship between the Ministry and the contractor, as the Qualification Committee considers appropriate, and the Qualification Committee may, in its absolute discretion, determine if the contractor will or will not qualify to be issued a

Tender Registration Form for any Ministry Qualified Contract or any Ministry Designated Contract.

Consideration must be given to, but not be limited to:

A. Legal Proceedings

Legal proceedings that the contractor is engaged in or has commenced in the three years prior to the date that the Qualification Committee considers the matter.

The Qualification Committee shall exclude the following legal proceedings from the application of the clause and from consideration:

1. any legal proceeding restricted to the enforcement of lien remedies provided for pursuant to the Construction Lien Act.
2. any action by a motorist or its passengers involving a default of the requirements to maintain and keep in repair the King's Highway pursuant to section 33 of the Public Transportation and Highway Improvement Act.
3. any legal proceeding naming Her Majesty the Queen in right of Ontario and commenced against a ministry, other than the Ministry of Transportation, or a Crown agency controlled by the Crown.

B. Notices of Pending Legal Proceedings

Notices of a legal proceeding for which a notice pursuant to the Proceedings Against the Crown Act is required and has been given in the three years prior to the date that the Qualification Committee considers the matter.

The same exclusions in respect of legal proceedings shall also apply to this consideration.

C. Unpaid Court Awarded Costs

Unpaid Court costs awarded to Her Majesty the Queen in right of Ontario or the Ministry irrespective of when the non-payment occurred.

D. Infractions

Infractions issued against the contractor in the three years prior to the date that the Qualification Committee considers the matter.

E. Notices of Default issued by the Ministry

Notices of Default issued by the Ministry in the three years prior to the date that the Qualification Committee considers the matter.

F. Notices of Default issued by the contractor

Notices of Default that the contractor has issued against the Ministry in the three years prior to the date that the Qualification Committee considers the matter.

G. Days Contractor has suspended or ceased to work on a project

The number of days that the contractor has suspended or ceased to work on a project in the three years prior to the date that the Qualification Committee considers the matter.

H. Inability to work co-operatively

Contractor's demonstrated inability to work in a co-operative manner with the representatives of the Ministry and the consultants to the Ministry or inability to maintain open and co-operative communications preferable for the successful performance of other previous contracts.

In reviewing the Contractor's past performance, the Qualification Committee shall not re-evaluate any past performance forms completed by the Ministry or any Contractor Performance Rating previously given to the Contractor by the Ministry.

I. Increased resources

An account of any increased staff, consultant and legal costs incurred in the administration of any previous contract.⁴⁹

Furthermore Section 9.4 states as follows:

9.4 Contractor Pre-Qualification Exclusion

Notwithstanding the provisions of Part "D" – Contractor Performance Rating, the Ministry may, in its absolute discretion, refuse to qualify or issue a Tender Registration Form for any Ministry Qualified Contract or any Ministry Designated Contract and thereby refuse to receive a tender or bid from any Contractor:

- a. i. where that Contractor has been or is engaged in a legal proceeding; or,
- ii. where that Contractor is a Person Related to another:
 - 1. person that has been or is engaged in a legal proceeding;
 - 2. person, corporation, partnership, limited partnership, trust, joint venture or other business association, or any combination thereof, that has been or is engaged in a legal proceeding; or,
 - 3. person, corporation, partnership, limited partnership, trust, joint venture or other business association, or any combination thereof, who directly or indirectly and in whole or in part:
 - i. controls or is controlled by; or,

⁴⁹ Qualification Procedures, pp. 6-8, s. 9.3.

- ii. has any beneficial or other interest in or in whom any beneficial or other interest is owned by, the entities referred to in section 9.4.a.ii.2 that have been or are engaged in a legal proceeding, or any of them,

by way of an action or an application pursuant to the Courts of Justice Act and its Regulations, including the Rules of Civil Procedure, and any other statute, or any of them, against Her Majesty the Queen in right of Ontario, the Ministry, their respective servants, agents, successors and assigns, or

any of them, in relation to any cause, matter or thing whatsoever and howsoever arising; or,

- b. who receives an unfavourable assessment by the Ministry in respect of the Contractor's past performance on any other contract for work or services with the Ministry, which assessment may consider, in addition to any other method of assessing the performance of the Contractor and irrespective of the Contractor's performance rating described in Part "D" – Contractor Performance Rating, such matters as:

- i. the timeliness of the completion of the work and services,
- ii. the issuance of any Notice of Default,
- iii. the manner of the resolution of any disputes and whether such disputes were resolved in accordance with the prescribed provisions of the Contract; or,
- iv. the Contractor's overall management of the previous work or services and its effect on the level of effort demanded of the Ministry and its representatives.

In exercising the absolute discretion described above, the Qualification Committee will be responsible for making a decision as to whether or not to refuse to qualify or issue a Tender Registration Form to a Contractor to whom this provision applies and the Qualification Committee may direct that the Ministry not issue the Contractor a Tender Registration Form for any Ministry Qualified Contracts or any Ministry Designated Contracts within a period of three years from the date that the Qualification Committee considers the matter ("exclusion period"). At any time during the exclusion period, the Qualification Committee may, in its absolute discretion or upon a request from the Contractor, reconsider the exclusion period, and in exercising its absolute discretion, modify the exclusion period.⁵⁰

It is important to note that Section 9.4 refers generally to circumstances "where that Contractor has been or is engaged in a legal proceeding." It does not distinguish between circumstances where a contractor has commenced legal proceedings as opposed to having to defend legal proceedings or has been added as a third party to legal proceedings.

⁵⁰ Qualification Procedures, pp. 8-10, s. 9.4.

Interestingly, Section 9.3 excludes legal proceedings commenced pursuant to the *Construction Lien Act*, but does not explain why such proceedings are excluded.

In addition, there are a set of procedures entitled “Procedures for Processing the Contractor Pre-Qualification Exclusion” dated September 2007 (the “Exclusion Provision Procedures”). The Exclusion Provision Procedures are not referenced in the Qualification Procedures, but the purpose of the Exclusion Provision Procedures is to provide “administrative direction for the Qualification Committee to manage Section 9 – Contractor Pre-Qualification Exclusion of the Qualification Procedures for Contractors.”⁵¹ According to the Exclusion Provision Procedures, the Secretary for the Qualification Committee will notify the Committee of any and all situations that may “involve” a contractor pre-qualification exclusion to be addressed at the next scheduled Qualification Committee meeting.⁵² The Secretary of the Qualification Committee provides an “initial assessment” detailing the situation. The Secretary of the Qualification Committee therefore plays a key role in this process given that it is the Secretary that provides the notification and the initial assessment to the Qualification Committee. Then the Qualification Committee, “on the basis of the considerations set out in the Contractor Pre-Qualification Exclusion,”⁵³ decides either to allow a Tender Registration Form(s) to be approved for the contractor or to notify the contractor that the Qualification Committee will “assess the circumstances of the situation in accordance with the Contractor Pre-Qualification Exclusion.”⁵⁴ The notice must indicate the grounds upon which the contractor is subject to the Exclusion Provision and will include a copy of the initial assessment prepared by the Secretary of the Qualification Committee. This notice is delivered prior to an investigation being conducted.

The Secretary of the Qualification Committee then “will take the initiative to ascertain the facts of the situation and will provide a report for the Qualification Committee of the circumstances involved in the contractor and the Contractor Pre-Qualification Exclusion,” i.e. the Secretary conducts an investigation, and reports on the results of the investigation.⁵⁵ The Secretary then provides this report to the contractor and requests that the contractor provide comments on the report in writing within a specified time period (minimum of 15 calendar days). The report, and any comments or explanation from the contractor, are presented to the Qualification Committee along with copies of any legal proceedings. The Qualification Committee then considers the report and any responses to the report by the contractor together with Section 9 of the Qualification Procedures and decides whether or not a Tender Registration Form can be approved for the contractor (the “preliminary decision”). The preliminary decision of the Qualification Committee, together with an explanation of its reasons is then sent to the contractor, which may comment on the preliminary decision by sending a written response to the Chair of the Qualification Committee and a copy to the Secretary within the period specified (a minimum of 15 calendar days). The contractor may request the opportunity to make an oral presentation to the Qualification Committee which will be scheduled. Two representatives of the contractor are permitted to attend such a presentation following which the Qualification Committee will either issue a final decision to confirm the preliminary decision, or issue a new preliminary decision.

⁵¹ Exclusion Provision Procedures, p. 2.

⁵² The Exclusion Provision Procedures state that the Qualification Committee typically meets monthly.

⁵³ Exclusion Provision Procedures, p. 2.

⁵⁴ Exclusion Provision Procedures, p. 2.

⁵⁵ Exclusion Provision Procedures, p. 3.

A contractor that objects to the final decision of the Qualification Committee may, within 15 calendar days of the decision, advise in writing that it desires to have the final decision reviewed by the “Assistant Deputy Minister’s Review Committee.” The Assistant Deputy Minister’s Review Committee will be composed of the Chair of the Qualification Committee, one other Assistant Deputy Minister of the Ministry of Transportation, and an Assistant Deputy Minister from another ministry, as determined by the Chair of the Qualification Committee. The Assistant Deputy Minister’s Review Committee reviews the written submissions of the contractor, along with information considered by the Qualification Committee, to determine if the final decision of the Qualification Committee should be reversed or not. The Assistant Deputy Minister’s Review Committee then notifies the contractor in writing within 15 calendar days of its meeting (with a copy to the Secretary of the Qualification Committee) of its decision to reverse or not reverse the decision of the Qualification Committee.

(b) The Infraction Process

The Qualification Committee’s “Procedures for Processing the Contractor’s Infraction Report” dated June 2005 (the “Infraction Procedures”) provide an administrative routine for the handling of infractions.

Infraction Reports are used to record breaches of contract by contractors including:

- Failure to abide by the tendering requirements;
- Tender declarations that are incomplete, inaccurate, or are not adhered to;
- Failure to adhere to the general conditions of contract;
- Failure to adhere to the specifications, special provisions, or any contract specific clause; and
- Failure to complete the project in a timely manner.

According to the Infraction Procedures, an Infraction Report will “normally only be issued for a serious incident (or multiple occurrences of similar incidents).”⁵⁶ The Infraction Procedures state that an Infraction Report should not be issued for “minor deviations from the contract” which are more appropriately recorded in the Contractor performance report (which presumably refers to the Contractor performance rating referenced in Part D of the Qualification Procedures).

The intent of the Infraction Procedures is to provide the Contractor with a series of progressive warnings and the opportunity to correct a deficiency, prior to the issuance of an Infraction Report, unless the situation is sufficiently serious to warrant the issuing of an Infraction Report without prior warning. If a warning is provided, the Contractor will be given a reasonable time to make changes and, if those changes are not forthcoming, a formal “Warning of Infraction Report” is issued to the Contractor.⁵⁷ The Contractor may, and is encouraged to request a formal

⁵⁶ Infraction Procedures, p. 2.

⁵⁷ Infraction Procedures, p. 2.

meeting to discuss the Warning of Infraction Report which will be attended by MTO's on-site representative and a senior regional MTO representative.

The Infraction Procedures set out a timeline for completing, issuing, and responding to an Infraction Report. According to the Infraction Procedures, an Infraction Report should be issued in a "timely" fashion and preferably within 15 calendar days of the incident.⁵⁸ A copy of the form to be filled out is attached as Appendix II to the Infraction Procedures and "[a]ll supporting information must be attached."⁵⁹ According to the Infraction Procedures, it is "particularly important to state how the contract was violated, and the actions taken by the Ministry and the contractor."⁶⁰ The Infraction Report is to be issued to the Contractor senior representative on site in a formal meeting. The Contractor has the option to respond within 21 calendar days of this site meeting.

The Secretary of the Qualification Committee is responsible for investigating the incidents that led to the issuance of the Infraction Report and the preparation of a statement of facts which summarizes the infraction and identifies those facts that are agreed by both parties and those that are in dispute and may also include facts that the contract management office considers relevant but were not included in the Region's or the contractor's submissions. A copy of the statement of facts is provided to the contractor and the Region with an invitation to review and comment on it within a specified time, normally 15 calendar days.⁶¹ The role of the Secretary in the decision making process related to infractions is not described in the Infraction Procedures. However, as with the Exclusion Provision Procedures, based on the above description of the Infraction Procedures, it is clear that the Secretary of the Qualification Committee plays a key role in the investigation of infractions.

The Qualification Committee is described in the Infraction Procedures as an internal Ministry committee with the authority to impose administrative sanctions on Contractors resulting from the issuance of a Contractor's Infraction Report. The membership of the Committee is described as being comprised of "head office executives and managers" and being chaired by an Assistant Deputy Minister who is also responsible for appointing a secretary and legal counsel as "advisor" to the Committee.⁶² There is no further detail provided as to the role of legal counsel.

The Qualification Committee will consider the statement of facts (described above) and the responses to the statement of facts and then decide the outcome. The Qualification Committee may take no action on a Contractor's Infraction Report or may impose penalties, ranging from a warning letter, to financial rating reduction, to a suspension of bidding privileges. According to the Infraction Procedures:

- Penalties are determined by **the nature of the transgression, the impact of the transgression, and the Contractor's previous record** [emphasis added]. The

⁵⁸ Infraction Procedures, p. 3.

⁵⁹ Infraction Report, p. 3.

⁶⁰ Infraction Procedures, p. 3.

⁶¹ Infraction Procedures, p. 4.

⁶² Infraction Procedures, p. 4.

duration of any penalty is at the discretion of the Committee, although the duration of the financial rating reduction will normally be one year.⁶³

- The preliminary decision of the Committee, together with an explanation of the Committee's findings, is sent to the Contractor and the Region who may comment on the preliminary decision by sending a written response to the Chair of the Qualification Committee and a copy to the Secretary within the period of time specified (which is not normally less than 15 calendar days).
- If the preliminary decision of the Committee is to impose a financial rating reduction, the Contractor may make an oral presentation to the Committee not to exceed **20 minutes**. The Contractor's delegation is limited to two representatives of the company making such submissions.⁶⁴ [Emphasis added]
- The Committee will then consider the content of such presentation and any written comments on the preliminary decision and issue the final decision or confirm the preliminary decision or revise the preliminary decision.⁶⁵

(c) The General Conditions of MTO Contracts

The General Conditions of MTO contracts have undergone several rounds of revisions over the past 20 years. These modifications to the General Conditions have taken into account industry concerns in respect of, *inter alia*, dispute resolution.

(i) The Dispute Resolution Process

Since 1990, the following rounds of revisions to the MTO General Conditions have affected dispute resolution:

- a) General Conditions of Contract dated August 1990;
- b) General Conditions of Contract dated September 1999;
- c) General Conditions of Contract dated April 2003;
- d) General Conditions of Contract dated April 2004;
- e) General Conditions of Contract dated April 2005;
- f) Amendment to MTO General Conditions of Contract, June 2006 by way of special provision no. 100855, amendment to General Conditions of Contract dated April 2005;
- g) General Conditions of Contract dated November 2006; and

⁶³ Infraction Procedures, p. 4.

⁶⁴ Infraction Procedures, p. 5.

⁶⁵ Infraction Procedures, p. 5.

h) General Conditions of Contract dated April 2010.

The chart enclosed in the envelope that follows describes the evolution of the MTO General Conditions in respect of Dispute Resolution. Over the past 20 years the MTO claims review process has become increasingly complex. In 1990, the MTO General Conditions provided for a one-stage claims review followed by arbitration, upon agreement of the parties. The use of a referee or independent advisor was included in the MTO General Conditions from 2003-2005, but was removed in 2006. The MTO General Conditions of 2010 involve a three-stage claims review process, mandatory mediation, and arbitration (if MTO agrees to arbitration).

In particular, the current claim review process commences with a detailed notice of claim delivered to the Regional Manager of Contracts within 90 days of the date of the Request for Clarification for Change Order.⁶⁶ A three-stage claim review process as follows:

- The contractor and the owner attempt to resolve the claim as detailed in the “request for clarification.”⁶⁷
- If not resolved, the claim is then reviewed by the Regional Contracts Office. The Regional Manager is to make best efforts to resolve the claim at the earliest opportunity and is to give a written decision to the Contractor within 60 days after receiving a complete notice of claim.⁶⁸
- The claim, if still unresolved, then proceeds to review by Head Office. The Head Office Staff are to make best efforts to resolve the claim at the earliest opportunity and are to give a written decision to the Contractor within 60 days after receiving the request to elevate the claim to the head office level of claim review.⁶⁹

If the parties fail to resolve the claim following the claim review process, the parties shall “use formal non binding mediation.”⁷⁰ Following mediation, if the matter does not settle, then the parties are to explore alternative dispute resolution methods “that are acceptable to the Owner.”⁷¹ Arbitration is the example given of an alternative dispute resolution mechanism which can be utilized, although “the Owner reserves the final right to determine the alternative dispute resolution to be used and the terms by which the alternative dispute resolution is to be governed.”⁷² Therefore and importantly, the ultimate mandatory step is non-binding mediation.

In respect of the role of the Contract Administrator, there has been an evolution over time in the MTO General Conditions of the description of the Contract Administrator’s role in the claims review process. The MTO’s General Contract from 1990 explicitly established the Contract Administrator’s impartiality:

⁶⁶ MTO General Conditions, GC 3.1.4.04. Details of the information required in the Notice are set out in GC 3.1.4.0.

⁶⁷ MTO General Conditions, GC 3.14.02.

⁶⁸ MTO General Conditions, GC 3.14.06.03.

⁶⁹ MTO General Conditions, GC 3.14.06(04).

⁷⁰ MTO General Conditions, GC 3.14.07.01.

⁷¹ MTO General Conditions, GC 3.14.07.03.

⁷² MTO General Conditions, GC 3.14.07.03.

The Contract Administrator will be, in the first instance, the interpreter of the Contract Documents and the judge of the performance thereunder by both parties to the Contract. Interpretations and decisions of the Contract Administrator shall be consistent with the intent of the Contract Documents **and in making these decisions the Contract Administrator will not show partiality to either party.**⁷³ [Emphasis added]

This provision remained unchanged in the General Conditions issued by MTO in 2003, 2004 and 2005. However, in November 2005, MTO issued an amendment to the General Conditions by Special Provision No. 100S57. This Special Provision eliminated GC 3.01.09 which described the role of the Contract Administrator as interpreter of the Contract Documents and the judge of the performance thereunder by both parties to the Contract. In the 2010 MTO General Conditions, the Contract Administrator's role as interpreter and judge was re-introduced, but without the requirement of impartiality:

The Contract Administrator shall be, in the first instance, the interpreter of the Contract Documents and the judge of the performance there under by both parties to the Contract. Interpretation and decisions of the Contract Administrator shall be consistent with the intent of the Contract Documents.⁷⁴

The impartiality of a Contract Administrator or Consultant in respect of interpretations and findings is a concept found in many standard form construction contracts. For example, GC2.2.9 of the CCDC2 Stipulated Price Contract 2008 provides as follows:

Interpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor.

The removal of the requirement of impartiality on the part of the Contract Administrator may result in a reduction in the level of fairness of the claims review process and the potential for an apprehension of bias on the part of the Contract Administrator.

(ii) The Liquidated Damages Provision

MTO's standard form General Conditions contain a liquidated damages provision that provides as follows:

It is agreed by the parties to the Contract that in case all the Work called for under the Contract is not finished or completed within the date of completion specified aforementioned or as extended according to subsection GC3.06, Extension of Contract Time or Interim Completion Dates, of MTO General Conditions of Contract, April 2010, a loss or damage will be sustained by the Owner. Since it is and will be impracticable and extremely difficult to ascertain and determine the actual loss or damage which the Owner will suffer in the event of and by reason of such delay, the parties hereto agree that the Contractor will pay to the Owner the sum of \$ as liquidated damages for each and every calendar day's delay in finishing the work beyond the date of completion prescribed. It is agreed that this amount is an estimate of the actual loss or

⁷³ MTO General Conditions, GC 3.01 .09.

⁷⁴ MTO General Conditions, GC 3.01 .09.

damage to the Owner which will accrue during the period in excess of the prescribed date of completion.⁷⁵

⁷⁵ MTO General Conditions, Special Provision No. 100F10, Liquidated Damages.

SUMMARY OF MTO GENERAL CONDITIONS OF CONTRACT RELATED TO DISPUTE RESOLUTION

Step in the Process	OPS General Condition of Contract 1990	OPS General Condition of Contract 1999	MTO General Condition of Contract 2003	MTO General Condition of Contract 2004	MTO General Condition of Contract 2005	Amendment by special provision no. 100855, June 2006 to MTO General Conditions	OPS General Conditions of Contract, November 2006	MTO General Condition of Contract 2010
Negotiation/ Claims Review	Claim to be submitted to the Contract Administrator, after giving the appropriate notice. (GC 3.14.01) Within 60 days of receipt of the claim, the Contract Administrator is to advise the contractor of the Contract Administrator's opinion with regard to the validity of the claim. (GC 3.14.01(5)) If the contractor disagrees with the opinion of the Contract Administrator, the parties would then enter into negotiations (the timeframe for which is not described). (GC 14.02)	Sets out details as to the nature of the information to be provided by a contractor in submitting a claim. The Contract Administrator's review of a claim is 90 days following amicable receipt, followed by negotiation.	Provides for an "issue resolution approach" which includes negotiations at the following three levels: (i) negotiation with the Site Contract Administrator (with a target negotiation period of 60 days); (ii) negotiation with the owner's Regional Construction Administration (with a target maximum negotiation period of a further 120 days) (iii) negotiation with the owner's Assistant Deputy Minister, Operations Division (with a target maximum negotiation period of a further 240 days) (GC 3.15.03) In respect of negotiations, each party is responsible for elevating an issue to the next level if that party is of the view that it is was not being addressed in a forthright manner at the current level. (GC 3.15.03(03))	Provides for "issue resolution" involving three levels of negotiations as follows: <ul style="list-style-type: none">negotiate with the Contract Administrators (60 days);negotiate with the owner's Regional Construction Administrators (120 days); andnegotiate with the owner's Assistant Deputy Minister (240 days). (GC 3.15.03)	There is an issue resolution approach which provides for three levels of negotiations as follows: <ul style="list-style-type: none">negotiate with the Contract Administrators (60 days);negotiate with the owner's Regional Construction Administrators (120 days); andnegotiate with the owner's Assistant Deputy Minister (240 days). (GC 3.15.03)	GC 3.15 headed "Issue Resolution" is replaced by GC 3.15 headed "Claims, Review and Resolution" and provides for a "claims review process," following an "attempt to resolve the claim" at site as opposed to a negotiation process with the following timeline: <ul style="list-style-type: none">Regional Claim Review (with a written decision to be delivered with n 60 days after receiving notice of claim)Head Office Claim Review (with a written decision to be delivered within 60 days after receiving the request to elevate the claim to the Head Office level of claim review). (GC 3.15.04)	GC 3.13 is entitled "Claims, Negotiation, Mediation" and GC 3.13.03 is entitled "Claims Procedure". The Contractor is to provide written "Notice of Intent to Claim" within 7 days "of the commencement of any part of the work that may be affected by the situation" and submit a detailed claim as soon as reasonably possible and in any event not later than 30 days after the completion of the work affected by the situation. <ul style="list-style-type: none">Within 30 days the Contract Administrator may request information and the Contractor is given 30 days to respond. The Contract Administrator will provide its "opinion" with respect to the validity of the claim within 90 days.3.13.04 requires that the parties "make all reasonable efforts to resolve their dispute by amicable negotiations."	A three stage claims review process is set out as follows: <ul style="list-style-type: none">The contractor and the owner shall attempt to resolve the claim as detailed in the "request for clarification" (GC 3.14.02)If not resolved, the claim is then reviewed by the Regional Contracts Office. The Regional Manager is to make best efforts to resolve the claim at the earliest opportunity and is to give a written decision to the Contractor within 60 days after receiving a complete notice of claim (according to GC 3.14.06.03).The claim, if unresolved, then proceeds to review by Head Office. The Head Office Staff are to make best efforts to resolve the claim at the earliest opportunity and are to give a written decision to the Contractor within 60 days after receiving the request to elevate the claim to the head office level of claim review. (GC 3.14.06(04))
Mediation		Parties may, upon mutual agreement, utilize the services of a mediator. Review by mediator to be completed within 90 days after Contract Administrator renders its opinion. (GC 3.14.05)				If the claim is not resolved following the Head Office Claim Review, the parties "will use formal non-binding mediation to attempt the parties to resolve the dispute [sic]." (GC 3.15.05)	3.13.05 requires that if the claim is not settled by negotiation within 30 days the parties may, on mutual agreement, "utilize the services of an independent third party mediator." The review by the mediator is to be completed within 90 days from the Contract Administrator's opinion described above. In a final attempt to assist the parties in resolving the issue prior to proceeding to arbitration the mediator shall provide, without prejudice, a non-binding recommendation for settlement." (GC 3.13.05)	If the parties fail to resolve the claim following the claim review process, the parties shall "use formal non-binding mediation" (GC 3.14.07.01).
Referee			Parties may enter into a referee agreement to utilize the services of a referee, upon mutual agreement. (GC 3.15.04)	The parties can, upon mutual agreement, enter into a referee agreement and use the services of a referee or, a party advisor (whose review may continue for a maximum duration of 15 days following the completion of negotiations at the ADM level). (GC 3.15.04)	The parties can use a referee upon mutual agreement. (GC 3.14.05)			
Independent Advisor			In the alternative, the parties may, upon mutual agreement, utilize the service of an "independent third party advisor." (GC 3.15.05)	In the alternative, a third party advisor can be utilized (whose review may continue for a maximum duration of 15 days following the completion of negotiations at the ADM level). (GC 3.15.05)	Alternatively, the parties may, upon mutual agreement, utilize the services of an independent third party whose review may continue for a maximum duration of 15 days following the completion of the negotiations at the ADM level. (GC 3.15.05)			
Arbitration	A dispute may be resolved through arbitration if the parties agree. (GC 3.15.01(01)(b))	Either party can invoke arbitration by giving written notice. The parties shall be bound by the decision of the arbitrator. The hearing is to commence within 90 days of the appointment of the arbitrator. (GC 3.15)	MTO reserves the right to deny the use of arbitration to resolve issues "where reasonable." (GC 3.15.06) Further, disputed issues, of an estimated value in excess of \$2 million shall not be resolved through arbitration, but shall be determined by an action brought in a court of competent jurisdiction. (GC 3.15.06(02))	Arbitration is provided for, but MTO reserves the right to deny the use of arbitration to resolve issues "where reasonable." (GC 3.15.06) Further, disputed issues, of estimated value in excess of \$2 million shall not be resolved through arbitration, but shall be determined by an action brought in a court of competent jurisdiction. (GC 3.15.06(02))	Arbitration is provided for, but the owner reserves the right to deny the use of arbitration to resolve issues "where reasonable." (GC 3.15.06) Further, disputed issues, of estimated value in excess of \$2 million shall not be resolved through arbitration, but shall be determined by an action brought in a court of competent jurisdiction. (GC 3.15.06(02))	Pursuant to GC 3.15.05(03), if the parties fail in their efforts to resolve the claim and the parties agree, prior to resorting to litigation, to explore alternative dispute resolution methods that are acceptable to MTO. An example of alternative dispute resolution may be considered includes arbitration, but "the owner reserves the final right to determine the alternative dispute resolution to be used and the terms by which the alternative dispute resolution is to be governed." (GC 3.15.05(03))	3.14.01 states that if a claim is not resolved by negotiation then either party may invoke the provisions of GC 3.14, Arbitration, by written notice to the other party. The parties shall be bound by the decisions of the arbitrator. Pursuant to GC 3.14.02 the parties are subject only to such right of appeal as exist where the arbitrator has exceeded his or her jurisdiction or has otherwise disqualified him or herself.	If the matter does not settle through mediation then the possibility of arbitration is addressed in GC 3.14.07.03. ⁷⁶

⁷⁶

GC 3.14.07.03: "If the parties fail in their efforts to resolve the Claim, then the parties agree that prior to resorting to litigation they shall explore alternative dispute resolution methods that are acceptable to the Owner. The Contractor shall provide written notice to the Assistant Deputy Minister, Provincial Highways Management, of the Contractor's desire to explore alternative dispute resolution methods within 30 Days of the decision of the Owner's Head Office level of claim review or within 30 Days of the completion of mediation where used. Subject to the rights reserved by the Owner, the parties agree to explore all avenues of alternative dispute resolution and shall attempt to negotiate the method and the terms for the alternative dispute resolution in an effort to settle the Claim before resorting to litigation. If the parties are unable to agree upon an alternative dispute resolution method and its terms within 60 Days of the request to explore alternative dispute resolution, then either party may resort to litigation. An example of the alternative dispute resolution that may be considered includes arbitration. Notwithstanding the foregoing, the Owner reserves the final right to determine the alternative dispute resolution to be used and the terms by which the alternative dispute resolution is to be governed."

(d) Surety Bonds

At present, MTO does not require contractors to obtain bid bonds, labour and material payment bonds, or performance bonds.

According to MTO, as referenced in the CFAAST Report, its qualification process “acts essentially as a ‘self bonding’ approach’.”⁷⁷ MTO noted in the CFAAST Report that it is in a unique position as an owner to annually contract a high volume of contracts generally involving a specific group of contractors. In the CFAAST Report, MTO states that it has determined that it is “appropriate to accept this risk.”⁷⁸

⁷⁷ CFAAST Report, p. 24.

⁷⁸ CFAAST Report, p. 24.

TAB V

(V) ORBA's Concerns as Expressed to CFAAST

On or about April 1, 2011, ORBA submitted to CFAAST a document titled "Submission to the Corporate Financial Assurance Audit Service Team (CFAAST) Ontario Internal Audit Division, Ministry of Finance regarding the independent review of the Ministry of Transportation's infractions and claims processes with respect to fairness, equity, transparency and conflict of interest" (the "ORBA Submission").

The ORBA Submission described ORBA's concerns about the claims process and the administration of infractions and liquidated damages by MTO in regards to compliance with the standards of fairness, equity, transparency, and lack of conflict of interest.

(a) The Claims Process

The ORBA critique of the MTO claims process focused on the need for an independent review and decision making mechanism. ORBA stated as follows:

The lack of an independent dispute resolution mechanism means fundamentally that the process cannot be seen to be fair in its design, and, in fact, cannot be fair in practice.

ORBA described independent review as the single most important element missing from the MTO claims process.

ORBA summarized its concerns about the claims process as follows:

- The three stages of the claims process do not offer fresh perspectives on the contractor's claim by different MTO officials because "most often the same individuals are involved at each stage in the process or are otherwise informed by the original decision making level." ORBA stated that "there are many examples of contractors waiting months or even years for a response." ORBA further stated that MTO has an unfair advantage in the claims negotiation process because MTO has no effective deadlines for delivering a response in the claims process. ORBA noted that the longer a contractor must wait for compensation that it may rightfully be owed, the more likely it will be that the contractor accepts a settlement that is less than a reasonable amount because of its need for working capital.
- The possible exercise of the Exclusion Provision effectively prevents contractors with legitimate complaints from using the legal system.

(b) Application of Infractions, Liquidated Damages and Reduced Contractor Performance Ratings

The OBRA Submission referred to the following tools available to MTO in the event of alleged contractor non-compliance with the contract and/or specifications by a contractor:

- (a) Infractions which are used as "penalties for major breaches of contract";

- (b) Liquidated damages for late completion of a contract; and
- (c) Reduced contractor performance ratings.

ORBA advised that it does not dispute MTO's right to use any of these tools; but has concerns about them being used properly and fairly. ORBA described the following concerns in respect of infractions, liquidated damages, and reduced contractor performance ratings:

- ORBA does not understand exactly how decisions about infractions are made; but does not believe that infractions are used by MTO in a consistent manner. Contractors have no way of knowing what penalty might ultimately be invoked by MTO or the severity of it, nor do they have a method of assessing whether the penalties assessed are consistent with those levied against another contractor in the same or a similar situation.
- There are cases of late completion by a contractor where both liquidated damages and infractions are imposed creating a concern about consistency and transparency.
- A Contractor's Performance Rating is assessed and may be downgraded at the end of each project based on MTO's assessment of the contractor's performance. Contractors have no opportunity to appeal to an independent body in the event of a downgrading. ORBA pointed out that the same issue that resulted in a downgrading of the contractor's Contractor Performance Rating may also be the subject of another internal decision that favours MTO's position (e.g. an infraction or assessment of liquidated damages).
- ORBA asserted that the current formula used by MTO to set and/or reduce a contractor's financial rating is "simplistic in nature" which can give rise to a disparity of impact on smaller as compared to larger companies in respect of the same type of event.
- MTO assesses liquidated damages at the end of the project, even in circumstances where a claim with respect to the cause of delay leading to the late completion is still in progress. ORBA stated that it "believes it is patently unfair for MTO to take liquidated damages while the cause of late completion remains an unresolved dispute." ORBA further stated that assessing liquidated damages while a dispute is unresolved also "provides unfair bargaining power to the Ministry vis-à-vis contractors' claims," because the claims negotiation process is tied to the eventual disposition of the liquidated damages issue. Further, ORBA stated that the threat of an infraction can also be used as leverage by MTO in claims negotiation.
- With respect to the infraction process, ORBA expressed a concern about the role of the Secretary of the Qualifications Committee who prepares a statement of facts which is reviewed by the Qualifications Committee in assessing an infraction. ORBA stated that "in many cases the Qualifications Committee does not review the contractor's response to the infraction report directly" but only

reviews the statement of facts which is prepared by the Secretary of the Qualification Committee.

ORBA also referenced the fact that discussions were, at the time, ongoing with MTO regarding the application of liquidated damages and/or infractions prior to resolution of any related claims. Further, ORBA referenced its request that MTO offer a formal proposal to introduce the option of binding, third party arbitration. ORBA advised that this is the most important proposal that it was seeking from MTO. ORBA noted that it had requested that MTO not implement any measures such as liquidated damages, infractions, and reductions in the Contractor Performance Rating during the arbitration process.

In its summary, ORBA advised that it had a clear and consistent record with MTO of requesting an independent and binding dispute resolution process at the earliest possible stage of the dispute. ORBA cited the example of Alberta, where a negotiated claims resolution is encouraged as a first step and the process moves very quickly to binding arbitration if issues cannot be resolved between the two parties on their own. ORBA attached as Appendix A to its submission excerpts of submissions from ORBA to MTO dating back to 2002 requesting an independent and binding dispute resolution mechanism.

TAB VI

(VI) Summary of the CFAAST Report

CFAAST was engaged by MTO to conduct a review of the infractions and claims processes of MTO “to ensure that they are fair, equitable transparent (i.e., help prevent conflicts of interest).”⁷⁹

CFAAST describes itself as an “Enterprise-Wide Audit Service Team that reports directly to the Corporate Audit Committee” which is chaired by the Deputy Minister of Government Services.”⁸⁰ CFAAST is independent of the line ministries, including MTO.

In the preparation of its report, CFAAST met with a number of stakeholders.⁸¹ The CFAAST Report describes a number of “opportunities” for MTO to consider that could enhance the fairness, equity and transparency of the overall process.

The CFAAST Report includes MTO’s response and action plan in respect of each of its recommendations. In terms of next steps, the CFAAST Report indicates that CFAAST will begin a follow up review engagement within six months and report back to the Corporate Audit Committee on the status of action plans to address the observations in the CFAAST Report. The follow up review engagement would therefore begin at the end of February 2012.

The CFAAST Report’s recommendations are broken down into the following categories:

- (a) Detailed Assessment of the Claims Process;
- (b) Detailed Assessment of the Infractions Process;
- (c) General Observations;
- (d) Other Opportunities for Improvement.

Each of these categories will be summarized below.

⁷⁹ CFAAST Report, p. 1.

⁸⁰ CFAAST Report, p. 1.

⁸¹ The CFAAST Report states that CFAAST met with:

- Key MTO personnel in the **claims** and **infraction** processes;
- Members of the MTO Qualification Committee;
- Ontario Road Builders’ Association (ORBA);
- Surety Association of Canada;
- A sample of contractors who have delivered services to the Ministry;
- Industry representatives and subject matter experts;
- Other Provincial Ministries of Transportation;
- A large Municipal Department of Transportation;
- US State Departments of Transportation; and
- OPS experts including Ontario Infrastructure and Lands Corporation and Supply Chain Management. (CFAAST Report, p. 4)

(a) Detailed Assessment of the Claims Process

(i) Timelines of Claims Process

CFAAST reviewed the “performance commitment” of MTO to review claims and provide contractors with a written decision within the following timelines:

- Field Level review and response provided within 75 days;
- Regional Level review and response provided within 60 days; and
- Head Office Level review and response provided within 60 days.

Contractors have 15 days to elevate a claim to the Regional Level and 30 days to prepare a request to Head Office for review. 15 day extensions at both the field and regional levels are permitted to allow MTO additional time to provide its decision. The CFAAST Report notes that the complete review process for claims should not exceed 270 days.

According to the CFAAST Report, “contractors interviewed generally agree that the target timelines are acceptable”.⁸²

The CFAAST Report states that claims are often not resolved within the target timeframes and states that based on a “random sample of resolved claims for 2010/11” settlement at the Regional Level takes an average of 116 days and at the Head Office Level it takes 176 days.

As a result, the CFAAST Report recommended that MTO identify opportunities to improve the efficiency of the claims review process.

MTO responded, indicating that it was conducting an internal review of the claims review process to identify opportunities to improve the efficiencies of the claims process with expected completion in February 2012 and that it was developing a claims tracking system to assist in meeting claim timelines, which was expected to be completed by December 2012. MTO further noted that it is improving communication with its contractors on the importance of supplying complete claims submissions. Since the date of publication of the CFAAST Report, i.e. August 29, 2011, ORBA has not received any update.

The CFAAST Report focuses on the timelines of the MTO claims process, and does not address the issue of whether or not a three-stage review process is necessary or efficient.

(ii) Communication of Status and Decisions

With respect to the communication of status and decisions by MTO to contractors in respect of claim status, claim denials, and infraction decisions, the CFAAST report states that:

- There is no central tracking process for claims and no central contact point for contractors to obtain current claim status at the regional and head office levels.

⁸² CFAAST Report, p. 7.

Further, the CFAAST Report notes that some contractors interviewed stated that it was often difficult to reach MTO staff who could provide them with current status.

- MTO’s decision letters in respect of claim denials and infractions do not provide detailed explanations or reasons for the decisions rendered. The CFAAST Report states that according to MTO, the “level of detail provided by MTO to contractors for claim denials and infraction decisions is based on the advice received from the MTO Legal Services Branch.” The basis of such legal advice is not set out in the CFAAST Report.

The CFAAST Report recommended that:

- MTO should consider implementing a central process to track claims and contactors to enable accurate and timely responses to contractor questions and status requests; and
- MTO should consider completing a review of the claim denial and infraction decision communication process to identify opportunities to “improve process consistency and transparency.”

In response, MTO indicated that it was:

- Implementing a tracking system that is expected to be completed by December 2012;
- Ensuring that responses to claims will include contact information for status inquiries; and
- Reviewing claim denial and infraction decision communication processes to identify opportunities to improve process consistency and transparency, with expected completion by September 2012.

(iii) Right to Mediation and Arbitration of Claims

The CFAAST Report states that ORBA Senior Management and some contractors “have a perception that MTO **may** turn down contractor requests for mediation or arbitration”⁸³ [emphasis added]. Presumably, this perception is based on the fact that the General Conditions of the MTO Contracts do not provide for mandatory arbitration. However, the CFAAST Report states that in subsequent meetings between MTO and ORBA:

MTO reconfirmed their commitment to accept **all** contractor requests for mediation and arbitration. In addition MTO has committed to updating the general terms and conditions of the contract to clarify this policy interpretation for contractors.⁸⁴ [Emphasis added]

⁸³ CFAAST Report, p. 11.

⁸⁴ CFAAST Report, p. 11.

The CFAAST Report recommended that MTO should revisit, clarify and effectively communicate policies around approval of requests for arbitration and mediation to ORBA members.

In response, MTO advised that it was:

- Ensuring continued participation in non binding mediation when requested by the contractor;
- Initiating communications with ORBA to develop provisions for contractors to request binding arbitration with expected implementation in 2012 contracts. MTO stated that it has assured ORBA that “future requests for arbitration will not be denied”;
- Revising contract language to ensure that there is an opportunity to proceed to arbitration and include a standard arbitration process within the contract (to be completed for 2012 contracts).

As of the date of writing, ORBA has not received revised contract language from MTO.

(iv) Claims Submission Templates

The CFAAST Report notes that, when claims are submitted Contract Administrators (“CAs”) provide a recommendation, but MTO does not provide to CAs defined criteria surrounding the level of detail or supporting documents required in respect of such recommendations. The CFAAST Report states that this lack of defined criteria raises a concern that information submitted to the Region and Head Office might be incomplete or inaccurate.

The CFAAST Report therefore recommended that MTO provide detailed guidelines to CAs on the required content and level of detail needed for CA claim recommendations.

In response, MTO advised that it would develop minimum requirements regarding documents/information for claims analysis and recommendations for CAs which would be developed by November 2011 and formally added to the Construction Administration and Inspection Task Manual in the spring of 2012.

As of the date of writing, ORBA has not received any guidelines prepared by MTO to be delivered to CAs.

(b) Detailed Assessment of the Infractions Process

(i) Detailed Criteria for Infraction Sanctions

The CFAAST Report references the three criteria used by MTO in determining the severity of an infraction sanction (which are set out above in the description of the Infraction Procedures) namely:

1. nature of the Infraction;

2. impact of the Infraction; and
3. contractor history of prior infractions.

The CFAAST Report states that “detailed decision making criteria” relating to sanctions resulting from an infraction would help to ensure that sanctions are consistently applied and that communication of these criteria to relevant parties would help to ensure that the decision making process is fair and transparent. The CFAAST Report further notes that some contractors interviewed expressed concerns about not understanding the reasons for decisions and related sanctions.

According to the CFAAST Report, there are roughly 50 contractors actively working as prime contractors on major MTO construction contracts and in 2009 there were 18 infractions levied to 10 contractors and in 2010 there were 15 infractions levied to 10 contractors. It is not explained how CFAAST gathered these statistics. The CFAAST Report concludes that, since infractions impact at least 20% of contractors, it is important to have a consistent framework for evaluation to help ensure “equitability.”⁸⁵

The CFAAST Report therefore recommended that MTO consider developing more detailed decision making criteria to help adjudicate sanctions for infractions and consider communicating these criteria to relevant parties in advance to help reduce perceived bias in the process.

In response, MTO advised that it was:

- Expanding current decision making criteria for determining sanctions for infractions (i.e. severity of breach, liability issues, repeated breaches, etc.);
- Developing a Qualification Committee document to guide decision making with expected implementation by March 2012; and
- Communicating factors considered for determining sanctions to contractors by May 2012.

As of the date of writing, ORBA has not received any additional information from MTO about the decision-making criteria to be employed by the Qualification Committee.

(ii) Enhancing QC Process, Fairness, and Transparency

With respect to the Infraction Process, the CFAAST Report states that “[t]he MTO, as well as other parties interviewed, believed the MTO was the only jurisdiction in North America that uses an infraction process.”

The CFAAST Report described the following opportunities to enhance the Qualification Committee process to promote “fairness, consistency, and transparency.”⁸⁶

⁸⁵ CFAAST Report, p. 13.

⁸⁶ CFAAST Report, p. 14.

- Use of a fairness monitor (similar to that used by the Ontario Infrastructure and Lands Corporation) to ensure that the process is impartial, consistently applied and has the appropriate level of diligence.
- Introduction of an attendance policy to ensure that members of the Qualification Committee are attending meetings and fulfilling their duties.
- Ensuring that a quorum of a majority of the voting members of the Qualification Committee attend meetings.
- Extending the time given to contractors for presentations (beyond the current 20 minute limit). The CFAAST Report suggests that presentation time could be weighed in proportion to the significance of the potential sanction or the complexity of the infraction.

In response, MTO advised that it was:

- Conducting a review and assessment of Qualification Committee procedures to identify opportunities to enhance fairness, consistency, and transparency.
- Reviewing the use of fairness monitors in the Qualification Committee process, with recommendations to be identified by March 2012.
- Developing a formal attendance policy for review by the Qualification Committee in November 2011.
- Reviewing contractor presentation time relating to infractions to be complete by November 2011.
- Increasing the Qualification Committee quorum from three voting members, including the Chair or Vice-Chair, to four voting members at least one of which must be the Chair or Vice-Chair, which MTO advised had been completed.

As of the date of writing, ORBA has not received any additional information with respect to any changes to the infraction process.

(iii) Alignment of Consequences

CFAAST Report notes that MTO has a “unique approach” to applying sanctions through a reduction of the contractor’s bid capacity instead of focusing purely on financial penalties and noted that MTO was the only jurisdiction interviewed that has an infraction process that reduces a contractor’s bid capacity.

The CFAAST Report further states that some of the potential sanctions and cost recovery mechanisms used by MTO include infractions, reductions in maximum workload rating, loss of

supplemental bid capacity, and liquidated damages which, when applied in tandem, “may exceed the severity of the initial incident that led to the infraction.”⁸⁷

With respect to liquidated damages, the CFAAST Report states that MTO’s current policy is to deduct liquidated damages from progress payments during the period when accountability for the delay is still under dispute. The CFAAST Report notes that ORBA and various contractors interviewed expressed concern with respect to the fairness of MTO’s policy of assessing and collecting liquidated damages and/or imposing infractions while a related claim is in dispute.⁸⁸

As a result, CFAAST recommended that MTO review “the alignment of various consequences to help ensure that potential impacts to contractors are considered” and review its policy of applying liquidated damages and/or sanctions for infractions while related claims are in dispute, and identify opportunities to enhance the perception of process fairness.

In response, MTO stated as follows:

Unlike other jurisdictions, the Ministry has recently agreed to delay the set-off of liquidated damages until the Assistant Deputy Minister (Head Office level claims) has provided a response to a related delay claim. The policy is supported by ORBA as part of discussions on liquidated damages and has been implemented.⁸⁹

MTO further advised that it was conducting a review of the alignment of the contractor rating process, liquidated damages and infraction processes, with expected completion by May 2012.

(c) General Observations

(i) Conflict of Interest Declaration

The CFAAST Report states that there are currently no formal, documented MTO processes in place to periodically disclose potential conflicts of interest (namely employee guidance on what constitutes a conflict of interest, processes for annual acknowledgement of understanding and responsibilities, and annual Qualification Committee, Contract Administrator, Management and Staff sign offs).⁹⁰ The CFAAST Report therefore recommended that MTO consider implementing a formal process for key individuals involved in the claims and infractions processes, including CAs, to disclose and assess conflicts of interests in accordance with the requirements of the “Guide to Public Service Ethics and Conduct,” discussed below.

In response, MTO advised that it had initiated a review of Best Practices for conflict of interest declarations, with completion by January 2012 and that it had implemented a formal process for conflict of interest declarations for “key individuals” involved in the claims and infraction processes to be implemented by April 2012. The key individuals referenced are not defined.

⁸⁷ CFAAST Report, p. 17.

⁸⁸ CFAAST Report, p. 17.

⁸⁹ CFAAST Report, p. 17.

⁹⁰ CFAAST Report, p. 19.

(ii) Contract Administrator Performance Evaluations

The CFAAST Report notes that there is no MTO process in place to receive formal feedback from contractors relating to their satisfaction with the CA assigned to any project. The CFAAST Report states that contractors indicated that the quality of the CA assigned to their Projects has a direct correlation to project success and that some CAs are not currently performing their duties effectively.

CFAAST recommended that MTO consider requiring contractors to provide formal feedback regarding CA performance and consider this feedback in completing its overall CA performance evaluations.

In response, MTO advised that it was “[r]eviewing opportunities” for contractors to provide formal feedback to MTO regarding CA performance, which would be in place by September 2012.

(iii) Regional Training and Awareness to Promote Consistency

There are five regional offices of the MTO’s Provincial Highways Management Division which are responsible for administering MTO’s planning, design, construction, maintenance, and operations functions. The CFAAST Report notes that regional management and staff have not been provided with recent training in claims analysis and negotiation, which would help to promote consistency in review and decision making processes. CFAAST referenced the following potential indicators attributable to a lack of regular training:

- Claims resolution can range from 56 to 199 days from region to region, according to MTO documentation relating to 2010/2011 claims.
- Head Office overturns the region’s decisions in 40-50% of the cases that reach Head Office for review (either overturning the decision or offering a higher settlement amount).
- Contractors interviewed stated that there is a wide variation in the effectiveness of CAs and that poor CA performance can significantly impact project success.

The CFAAST Report references a practice from the state of Minnesota where quarterly meetings are held with the regions to discuss lessons learned relating to complex claims, outcomes of recent litigation, and emerging industry best practices which sessions help to ensure a consistent approach and application of the rules throughout the jurisdiction.

The CFAAST Report recommended that:

- MTO should consider completing an internal review to identify the root cause of the differences of claim resolution timelines between regions and the discrepancies between Head Office and regional decisions.

- The Ministry should consider undertaking efforts to increase consistency across the province through increased training/awareness, peer review of claims/infractions between regions, and related strategies.
- MTO should consider providing training in infraction and claims processes to CAs including protocols, criteria and write ups to help further improve CA consistency and performance.

In response, MTO advised that it had:

- Increased the frequency of meetings of the regional and Head Office claims staff to identify the root cause of the difference in claim resolution timelines between regions and to review recent claims decisions and would report on findings by February 2012.
- Included on the agenda at future general meetings of managers of operations, contract engineers, and claims staff the issue of claims, decisions, and consistency.
- Begun creating guidelines for increased consistency and processing claims (to be available in October 2011).
- Begun supplementing the Construction Administration and Inspection Task Manual (“CAITM”) with development of minimum requirement guidelines for claims analysis and recommendations for CAs to be developed by November 2011 and added to CAITM in the spring of 2012.
- Recently developed and provided a province wide claims training course to increase consistency to be delivered to MTO and CA staff in the winter of 2012.

ORBA has not received any additional details of the steps taken or to be taken by MTO.

(iv) **Bid Bonds and Performance Bonds**

The CFAAST Report notes that MTO has stated that it is the only jurisdiction using a **financial** pre-qualification process.

The CFAAST Report further notes that most jurisdictions use bonding for construction contracts and cites the example of the US Federal Government which is required by legislation to use bonds for construction projects over \$100,000. Further, the CFAAST Report notes that all states in the United States are required to use bonds for public works projects.⁹¹

The CFAAST Report refers to the following benefits of bonds:

⁹¹ CFAAST Report, p. 23.

- Allows the risk of default to be transferred from the contract owner to the surety given that, in the event of contractor default, the surety steps in to assess the root cause of default and take action as required;
- The surety will often lend the contractor money if the default was a result of issues with the timing of cash flow or re-tender the contract if the contractor becomes insolvent.
- The surety will complete a comprehensive analysis of contractors including analysis of private and public sector work underway, investments held, intangible risks (including succession planning and reliance on key executives), the company's profit trends over all its recent projects and the contractor's entire corporate structure.

CFAAST references the following potential drawbacks of bonds:

- Bonds have an associated cost. The CFAAST Report states that a 50% performance bond typically costs roughly 0.5% to 1% of the total contract price.
- Due to the unique role played by the surety, contract owners may lose some control over the outcomes of the procurement process, i.e. in the event of contractor performance default.

The CFAAST Report states that there are some alternatives to bonding that should be considered, namely self-insurance and letters of credit. The CFAAST Report therefore recommends that MTO undertake an independent cost/benefit analysis to help determine whether letters of credit or bid, performance, and/or labour and material payment bonds should be required.

In response, MTO noted that its qualification process “acts essentially as a ‘self-bonding’ approach.” MTO further noted that past reviews have shown that “tens of millions of dollars can be saved when bonding is not a contract requirement” and that experience from other jurisdictions indicates that having bonds in place can create situations where the Ministry may lose some decision-making capability.

MTO further asserted that “[r]ecent conversations between the Ministry and ORBA have indicated the industry is also very satisfied with the current qualification approach.”

However, MTO advised that it would undertake an independent cost/benefit analysis to help determine whether letters of credit or bid, performance, and/or labour and material payment bonds are appropriate for Ministry construction contracts, which review was to be completed in March 2012.

(v) The Exclusion Provision

The CFAAST Report notes that MTO has an exclusion provision within the terms of the Qualification Procedures which allows it to exclude vendors from bidding on future contracts under specific conditions including the following:

- Legal proceedings against the Ministry (excludes liens and 3rd party claims);
- Notices of pending legal proceedings;
- Unpaid court awarded costs;
- Infractions issued in the last three years;
- Inability to work cooperatively with the Ministry;
- Notice of default issued by the Ministry;
- Notices of default issued by the contractor;
- Suspension of work/failure to complete work;
- Increased resource requirements.⁹²

The CFAAST Report states that the Exclusion Provision “allows MTO to manage their relationship with contractors and can reduce the risk of litigation.” The CFAAST Report notes that the exercise of the Exclusion Provision can have a significant impact on a contractor because it removes the contractor’s ability to generate cash flow through MTO contracts, which is especially true for many small contractors that work almost exclusively for MTO. The CFAAST Report states that:

Contractors interviewed felt that the threat of the exclusion provision can potentially be used by MTO personnel to unfairly encourage them to cease engaging in litigation. Contractors also feel that they have no recourse if they have exhausted MTO’s internal processes for claims and infractions.⁹³

CFAAST therefore recommended that MTO consider re-evaluating the ongoing need for the litigation component of the Exclusion Provision within the Qualification Procedures.

In response, MTO stated that it has “never pursued the exclusion provisions” and that the provision includes various criteria in addition to litigation. MTO asserts that the “current process allows contractors to review and respond to the reasons for which exclusion is being considered; it also allows for an appeal of the decision.”⁹⁴

Interestingly, an American Report prepared by the National Cooperative Highway Research Program in 2009 which uses Ontario as one of its case studies, cites an example of a contractor who was in the “Green Zone” in its performance rating,⁹⁵ but was “excluded from bidding because of its ongoing lawsuit against MTO.”⁹⁶

MTO further advised that in order to ensure that its exclusion approach is appropriate, it was investigating vender exclusion processes used by other jurisdictions to provide a fairness

⁹² CFAAST Report, p. 26.

⁹³ CFAAST Report, p. 26.

⁹⁴ CFAAST Report, p. 26.

⁹⁵ The zones are described in Section 30 of the Qualification Procedures.

⁹⁶ NCHRP Report, p. 50.

assessment of current MTO processes which it advised would be presented to the Qualification Committee in February 2012.

(d) Other Opportunities for Improvement

CFAAST identified the following practices that may help address contractor concerns and reduce administrator red tape through the process:

- Early election to use ADR (i.e. after the first level of review as in British Columbia);
- Early MTO input (citing the example of the Florida Department of Transportation which has only one level of review); and
- Adjudication (citing the examples of the United Kingdom, Australia, New Zealand, and Singapore).

The CFAAST Report recommended that the Ministry should consider completing an internal process review to explore options to:

- Allow contractors the option to choose ADR earlier in the dispute resolution process;
- Involve relevant and experienced parties at the onset of a claim to provide their input and review, and help streamline the claims process;
- Utilize adjudication as a method of dispute resolution for construction contracts.

In response, MTO advised that it would:

- Collaborate with ORBA to review current processes and develop options for contractors to choose other forms of alternative dispute resolution and binding arbitration earlier in the dispute resolution process and that appropriate contract clauses would be incorporated into the 2012 contracts;
- Review and evaluate best practices for dispute resolution including adjudication and early input from experienced parties to determine their effectiveness in reducing delay disputes and litigation to be completed in March 2012 and appropriate trials to be implemented in 2012 contracts.
- Develop clauses for contracts that will clarify contractor's rights to pursue disputes through binding arbitration for inclusion in 2012 contracts.

To date, the General Conditions of MTO contracts have not been amended in respect of the dispute resolution provisions. Further, the results of MTO's review and evaluation of adjudication as a dispute resolution mechanism have not yet been shared with ORBA.

TAB VII

(VII) Legal Context of Issues

In this section of our report and in subsequent sections, we will address the processes under consideration in the following order:

- (a) qualification process;
- (b) tendering process;
- (c) infraction process;
- (d) liquidated damages;
- (e) dispute resolution process;
- (f) surety bonds; and.
- (g) exclusion provision.

This order was selected based on what we view as a logical sequencing of the relevant issues as opposed to a documents-based approach.

Analyzing these processes on a first principles basis provides a framework for assessing whether or not a particular process is functioning effectively, such that it meets its goals.

(a) Qualification Process

In conducting a first principles analysis of the qualification process, it is important to understand the legislative and policy framework within which MTO's Qualification Procedures exist.

Pursuant to the *Public Transportation and Highway Improvement Act*, R.S.O. 1990 c.P. 50, the Minister of Transportation has a general mandate pursuant to s. 26 to “construct, extend, alter, maintain and operate such works as he or she considers necessary or expedient for the purposes of the Ministry.” Pursuant to s. 26(2) the Minister “may enter into agreements to construct or maintain roads for and on behalf of a Minister of the Crown, or an agency of the Crown.” Section 116 states that the Minister may enter into agreements as follows:

116. (1) The Minister may enter into agreements for the purposes of this Act, including agreements,

- (a) related to the planning, design, construction, maintenance, management and operation of highways and bridges and related structures and works; ...⁹⁷

In Ontario, the Management Board of Cabinet, pursuant to the *Management Board of Cabinet Act*, R.S.O. 1990, c. M. 1, s. 3(1)(e), has certain powers and duties including the power “to establish, prescribe or regulate the efficient and effective operation of any part of the public

⁹⁷ *Public Transportation and Highway Improvement Act*, R.S.O. 1990 c.P. 50 (“*Public Transportation and Highway Improvement Act*”), Section 116(1).

service.” Pursuant to Section 3(3) of the *Management Board of Cabinet Act*, the “Board may issue such directives as it considers necessary in the performance of its duties.” Thus, the Management Board has broad powers in respect of its policy-making authority.

Ontario’s *Guide to Public Service Ethics and Conduct*, which is referenced in the CFAAST Report, defines Directives as “fundamental polices for administrative, financial and human resources management practices, which set out government principles, mandatory requirements and responsibilities.”⁹⁸

In April 2011, the Management Board of Cabinet issued a new procurement directive (the “Procurement Directive”) which replaced the procurement directive of July 2009.

The Procurement Directive states that it applies to the procurement of all goods and services, including *inter alia* construction, required to meet government needs except those related to advertising, public relations, media relations or creative services and the acquisition of real property. The Procurement Directive is mandatory and applies in its entirety to Ministries. The term “ministries” is defined as follows in the Procurement Directive:

“Ministries” means all **ministries**, Clusters, advisory, adjudicative and regulatory agencies and any other agency, as classified under the Agency Establishment and Accountability Directive, that is required by a Memorandum of Understanding to comply with the MBC Procurement Directive or its predecessors in its entirety.⁹⁹ [Emphasis added]

Ministries seeking any exemptions for the purposes of a non-competitive procurement or the use of a Vendor of Record Arrangement must obtain the necessary approvals set out in Section 5.7.1 of the Procurement Directive. The general rules (applicable to non-consulting services procurements) are set out in Section 5.5.3 of the Procurement Directive and require that “Ministries must use an **open** competitive procurement process for all non-consulting services procurement with a Procurement Value of \$100,000 or more”¹⁰⁰ [emphasis added].

The Procurement Directive of Management Board has evolved over time. The 2003 version of the Procurement Directive contemplated the use of a pre-qualification procedure. For example, section 4.9 of that Procurement Directive stated as follows:

Ministries must clearly identify all information, qualifications and evaluation requirements in all requests for qualifications, proposals and tenders. In addition to bid price/cost, ministries may take into account the quality, quantity, delivery, servicing, experience, financial capacity of the vendor and any other criteria **directly related to the contract** provided that the principle of reciprocal non-discrimination is respected. [Emphasis added]

This provision does not explicitly reference “pre-qualification” but section 4.6.1 of the 2003 Procurement Directive does provide a list of information to be disclosed by the tender calling authority to bidders, noting that “ministries and agencies covered by this directive must include the following as mandatory criteria in pre-qualification and tenders for construction.”

⁹⁸ *Guide to Public Service Ethics and Conduct*, p. 15.

⁹⁹ Procurement Directive, DEFINITIONS AND ACRONYMS.

¹⁰⁰ Procurement Directive, Section 5.5.3.

The 2005 Procurement Directive is similar to the 2003 Procurement Directive and contains the same language in section 4.9 as that found in the 2003 version.

In the 2007 version of the Procurement Directive, however, there are significant changes. There is reference to a definition of the term Request for Qualifications, but the term is not used through the balance of the document and the word “qualification” is not used in the 2007 Procurement Directive. The 2007 Procurement Directive is accompanied by a 2007 Operating Policy (in the 2003 version, there was an Operating Procedure). The 2007 Operating Policy contains a similar provision to that found in section 4.9 of the 2003 and 2005 Procurement Directives, but this no longer references “qualifications.”

The 2011 version of the Procurement Directive is very similar to the 2007 Procurement Directive and does not reference qualification systems.¹⁰¹

Therefore, the extent to which qualification or pre-qualification procedures are permitted under the Procurement Directive is unclear.

It is clear that MTO’s Qualification Procedures have the effect of reducing competition, because the system is not “open” in the sense that contractors must be pre-qualified on a program-wide basis before being able to bid for a specific project, and the availability of a bid bond is insufficient. However, the Qualification Procedures do not purport to establish a Vendor of Record system, and we have been unable to determine whether MTO obtained the necessary exemption under section 5.5.3 of the Procurement Directive in respect of the Qualification Procedures.

In this regard it is important to note that the purpose of the 2011 Procurement Directive is to ensure that goods and services which include construction goods and services, are acquired through a process that is fair, open, transparent, geographically neutral and accessible to qualified vendors.¹⁰²

These objectives are very similar to those referred to in the CFAAST Report, which describes as the objective of the report to assess whether MTO’s claims and infractions processes are “fair, equitable and transparent,” and to identify opportunities for improvement.¹⁰³ The executive summary of the CFAAST Report indicates that according to “internal” MTO documentation, MTO is “dedicated to providing a fair, equitable, and transparent environment for the tendering and delivery of highway construction, maintenance, and consultant services.”¹⁰⁴

As noted above, in its responses to the recommendations contained in the CFAAST Report, MTO confirms its commitment to these principles noting, *inter alia*, as follows:

¹⁰¹ We have not been able to obtain access to the 2009 version of the Procurement Directive.

¹⁰² Procurement Directive, Section 1.

¹⁰³ CFAAST Report, p. 4.

¹⁰⁴ CFAAST Report, p. 3.

- “The Ministry is committed to providing an open and transparent contracting environment.”¹⁰⁵
- MTO confirmed that it was conducting a review and assessment of its Qualification Procedures “to identify opportunities to enhance fairness, consistency, and transparency.”¹⁰⁶

The Procurement Directive also specifies the responsibilities of individuals and organizations at each stage of the procurement process. It is designed to contribute to a reduction in purchasing costs and to ensure consistency in the management of procurement related processes and decisions.¹⁰⁷

An earlier iteration of the Procurement Directive is referenced in a relatively recent decision of the Divisional Court as follows:

We do not hold that the Directive will raise public law issues in all provincial public tendering. However, the tendering issues in this case raise public law concerns justifying judicial review of the Decision.

There, in considering the effect of the Procurement Directive on the conduct of MTO, the Divisional Court concluded as follows:

The Directive does not have the force of law at the instance of third parties and does not constrain the government to the same degree as the statutory or regulatory scheme provided in many of the cases cited. However, **in our view, the Directive creates and informs the MTO's duty of fairness in the procurement context.** Whether *certiorari* lies for an administrative government decision and whether a decision is sufficiently public are determined by considering a number of factors such as the nature of the decision maker, the source of the power exercised, and the purpose or function of the decision-making body (See *Co-operative Housing Federation of Canada v. York (Regional Municipality)*, [2009] O.J. No. 696 (Div.Ct), at para. 63.) **In this case, the decision is made by the MTO, which is the only market for road construction pursuant to its statutory power for the purpose of building public roads that are vital to the public interest. For these reasons and those outlined above, the circumstances of this case attract a public law interest.**¹⁰⁸ [Emphasis added]

The objectives of the Procurement Directive are set out as follows in Section 4:

4. PRINCIPLES

The overall objective of this Directive is to ensure that Ministries and Other Included Entities acquire the goods and services required to meet government needs in the most economical and efficient manner, through procurement processes that conform to the following principles:

¹⁰⁵ CFAAST Report, p. 9.

¹⁰⁶ CFAAST Report, p. 15.

¹⁰⁷ Procurement Directive, Section 1.

¹⁰⁸ *Bot v. Cavanagh*, Divisional Court (“*Cavanagh*”), paras. 26 and 31.

Value for Money

Goods and services must be procured only after consideration of ministry business requirements, alternatives, timing, supply strategy, and procurement method.

Vendor Access, Transparency, and Fairness

Access for qualified vendors to compete for government business must be open and the procurement process must be conducted in a fair and transparent manner, providing equal treatment to vendors.

Conflicts of interest, both real and perceived, must be avoided during the procurement process and the ensuing Contract. Relationships that result in continuous reliance on a particular vendor for a particular kind of work must not be created.

Responsible Management

The procurement of goods and services must be responsibly and effectively managed through appropriate organizational structures, systems, policies, processes, and procedures.

Geographic Neutrality and Reciprocal Non-Discrimination

Ministries and Other Included Entities that are subject to Ontario's Trade Agreements must also ensure that access for vendors to compete for government business is geographically neutral with respect to other jurisdictions that practice reciprocal non-discrimination with Ontario.¹⁰⁹

Accordingly, these principles are relevant to an assessment of MTO's Qualification Procedures. Each of these principles will be analyzed below.

By way of analogy, the Broader Public Sector Procurement Directive ("BPS Procurement Directive") which is applicable to designated broader public service organizations (not Ministries of the Government of Ontario), is based on similar principles. The following five key principles articulated in the BPS Procurement Directive are designed to allow organizations to achieve value for money while following procurement processes that are fair and transparent to all stakeholders:

- Accountability;
- Transparency;
- Value for Money;
- Quality Service Delivery; and
- Process Standardization.

¹⁰⁹ Procurement Directive, Section 4.

In respect of procurement policy and procedure requirements, the BPS Procurement Directive requires segregation of duties and delegation of authority as “essential control mechanisms within the procurement process” to ensure integrity of the process by reducing exposure to inappropriate, unauthorized or unlawful expenditures. Organizations are required to segregate at least three of the five functional procurement roles, namely requisition, budgeting, commitment, receipt, and payment. Responsibilities for these roles must lie with different departments or, at a minimum, with different individuals.¹¹⁰ Furthermore, organizations must establish an approval authority schedule for procurement of goods and non consulting services. Procurement must be approved by an appropriate authority in accordance with the approval authority schedule. The BPS Procurement Directive also encourages open competitive procurement, stating that:

Open competitive procurement ensures the highest level of fairness, impartiality, and transparency; it maximizes suitability and the value for money of the obtained goods or services.¹¹¹

(i) Value for Money

As noted in the Procurement Directive under the heading “Value for Money,” goods and services should be procured only after consideration of MTO “business requirements, alternatives, timing, supply, strategy, and procurement method.” The effectiveness of a procurement process will be measured, in part, by the extent to which the process achieves the goal of obtaining services and goods for the best possible price.

In the case of any public procurement process, it is obviously in the taxpayer’s interest for government to obtain goods and services for the best possible price. This is one of the reasons why the Government of Ontario has embraced a competitive bidding process.

As explained by the Supreme Court of Canada in *MJB Enterprises v. Defence Construction*,¹¹² a competitive bidding process is intended to “replace negotiation with competition.” The implementation of a competitive bidding process requires that certain principles of tendering law be incorporated in the process, as discussed further below.

(ii) Vendor Access, Transparency, and Fairness

Pursuant to the Procurement Directive, access for qualified vendors to compete for government business must be open and the procurement process must be conducted in a fair and transparent manner, providing equal treatment to vendors. Thus the fundamental principles of tendering law are explicitly recognized in the Procurement Directive.

Further, the Procurement Directive states that conflicts of interest must be avoided. The Procurement Directive notes in particular that relationships that result in continuous reliance on a particular vendor for a particular kind of work must not be created. It is important that conflicts of interest be avoided so as to eliminate allegations of “cronyism.” It is therefore essential that a procurement process be impartial, such that the procurement of goods and services is conducted

¹¹⁰ Broader Public Sector Procurement Directive Implementation Guide, Section 10.3.

¹¹¹ Broader Public Sector Procurement Directive Implementation Guide, Section 10.3.2.1.

¹¹² [1999] 1 SCR 619 (“*MJB Enterprises*”).

in an unbiased manner. It should not be influenced by personal preferences, prejudices, or interpretations.

The CFAAST Report also recognizes the importance of avoiding conflicts of interest, and references the *Guide to Public Service Ethics and Conduct* in this regard. This Guide was introduced in January 2011, and is described by CFAAST as “build[ing] upon the legislative requirements with respect to ethical conduct set out in the Public Service of Ontario Act.”¹¹³ The Guide sets out key expectations in respect of the conduct of Ontario public service employees which includes the disclosure of actual or potential conflicts of interest. The Guide also sets out certain organizational values of public service employees including that of fairness which requires that employees “deal with others in an open, impartial and non-discriminatory manner” and “ensure that the processes [they] use and the decisions [they] make are fair and seen to be fair.”¹¹⁴

As noted above, CFAAST recommends that MTO implement a formal process for key individuals involved in the claims and infraction process, including Contract Administrators to disclose and assess conflicts of interest in accordance with *Guide to Public Service Ethics and Conduct*.

Daniel D. McMillian and Erich R. Luschei, in their article entitled “*Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps*” refer to the importance of ensuring uniformity, objectivity, and competition in a prequalification program, stating as follows:

As a prelude to discussing specific grounds on which prequalification programs may be challenged, it is important first to see the forest before looking at the trees. The process of prequalifying contractors for responsibility must be considered in light of the overall objectives of competitive bidding as developed in the context of the traditional model for awarding construction contracts on public projects. Under customary competitive bidding, contracts are awarded to the lowest responsible (and responsive) bidder. The following three principles underlie that traditional model: competition in bidding sufficient to ensure that the owner gets a fair price for the work; uniformity in the treatment of contractors to avoid favoritism; and the use of objective criteria and methods of evaluating contractor credentials. These bedrock standards need to be considered when developing, defending, or challenging a pre-qualification program or the denial of prequalification. Prequalification programs do not set aside these principles. Instead, they implement them.¹¹⁵

Thus, the principles of open access and fairness and transparency are well recognized as being a key element of a competitive bidding process, and they are well entrenched in tendering law in Canada, as described below.

¹¹³ CFAAST Report, p. 19.

¹¹⁴ *Guide to Public Service Ethics and Conduct*, p. 4.

¹¹⁵ Daniel D. McMillian and Erich R. Luschei, in their article entitled “*Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps*” *Construction Lawyer* (Spring 2007), p. 9.

(iii) Responsible Management

The Procurement Directive notes that the procurement of goods and services must be responsibly and effectively managed through appropriate organizational structures, systems, policies, processes, and procedures.

(iv) Geographic Neutrality and Reciprocal Nondiscrimination

The Procurement Directive notes that Ministries must ensure that access for vendors to compete for government business is geographically neutral with respect to other jurisdictions that practice reciprocal nondiscrimination with Ontario.

In particular, Ontario is a signatory to Canada's Agreement on Internal Trade, which is an intergovernmental trade agreement signed by Canadian First Ministers that came into force in 1995. Its purpose is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market. Chapter 5 of the Agreement on Internal Trade addresses procurement. The purpose of this chapter is to establish a framework to ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy, in the context of transparency and efficiency.¹¹⁶ Chapter 5 of the Agreement on Internal Trade contains a set of procedures for procurement that includes processes for making calls for tender, evaluation of tenders, and the award of contracts. Pursuant to Article 506 of the Agreement on Internal Trade, an entity may limit tenders to goods, services, or suppliers "qualified prior to the close of the call for tender," but the qualification process must be consistent with Article 504.¹¹⁷ Article 504 contains reciprocal non-discrimination provisions intended to avoid discrimination based on the location of a supplier's place of business in Canada, the place in Canada where the goods are produced or the services are provided, or other like criteria.¹¹⁸

¹¹⁶ Agreement on Internal Trade, Article 501.

¹¹⁷ Agreement on Internal Trade, Article 506(7).

¹¹⁸ Canada is also a party to various trade agreements, including the Agreement between the Government of Canada and the Government of the United States on Government Procurement. However, this Agreement explicitly states in Appendix 1 that it does not apply to highway construction in the Province of Ontario.

(v) Other Considerations Relevant to an Assessment of the Qualification Procedures

In addition to the legislative and policy framework described above, a consideration of the relevant common law principles is appropriate. Generally, the common law protects a party's right of freedom of contract. In *Manos Foods International Inc. v. Coca-Cola Ltd.*,¹¹⁹ a case involving two private parties, the Ontario Court of Appeal stated that “[t]here is no common law obligation to contract with another party. Parties are free to contract as they see fit. The freedom to contract includes both the ability to enter into contracts and to refrain from entering into contracts.” However, MTO is a governmental entity subject to the Procurement Directive, which obligates it to contract through an open, competitive process, such that from a policy perspective, persons appropriately situated have a presumptive entitlement to bid for MTO work. At the same time, MTO has created a pre-qualification system that subjects contractors to a sophisticated administrative process, and the public policy considerations contained in the Procurement Directive dictate that administrative law principles, including the principle of fairness, should apply to MTO's exercise of discretion under the Qualification Procedures.

(b) Tendering Process

As described above, MTO has a tender registration system which ensures that only those contractors that have the required Available Financial Rating and/or Maximum Workload rating will be permitted to bid on any advertised MTO project. Approved Contractors receive a Tender Registration Approval Form and can then submit bids. In the bidding process in respect of individual projects, MTO will be held to the same standards of fairness and equity as any tender-calling authority.

By way of context, in 1981, the Supreme Court of Canada in its seminal decision in *R. v. Ron Engineering & Construction (Eastern) Ltd.*,¹²⁰ introduced the “two-contract” conceptual analysis of the tendering process, consisting of:

- (1) “Contract A” which arises upon the submission by the contractor of its tender, and without more occurring, that contract is considered to be a unilateral contract formed by the submission of the tender qualifying as an “acceptance” of an “offer” constituted by the owner's call for tenders; and
- (2) “Contract B”, the resulting construction contract itself, which arises upon the acceptance of the tender (a stage that was not reached in *Ron Engineering*).

The terms of Contract A are established in the tender documents but, in addition, the Courts have recognized certain implied terms that have been found to form part of Contract A. The implied terms recognized by the Courts (which are subject to express terms to the contrary) include the following:

1. To provide proper and full disclosure to all bidders;

¹¹⁹ (1999), 180 D.L.R. (4th)309 (“*Manos*”)

¹²⁰ [1981] 1 S.C.R. 111, 13 B.L.R. 72, 35 N.R. 40, 119, D.L.R. (3d) 289 (“*Ron Engineering*”)

2. To consider only compliant bids;
3. To conduct a fair evaluation process of all bids pursuant to the disclosed selection criteria provided and any evaluation methodology specified;
4. To award to the lowest compliant bidder¹²¹; and
5. To award the contract (Contract B) as tendered.

In *Martel Building Ltd. v. Canada*¹²², the Supreme Court of Canada found that the duty of fairness was an implied contractual term of Contract A, and was necessary to promote and protect the integrity of the tender system, without which a bidder's fate could be predetermined by some undisclosed standard. Importantly, the contractual duty to treat a bidder fairly only arises if Contract A comes into existence.

The Supreme Court set out the following rationale for imposing an obligation to treat bidders fairly and equally in *Martel*:

[I]n light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other ... tenderers, would have submitted a bid unless it was understood by those involved that **all bidders would be treated fairly and equally**. This implication has a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed. **Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved.** Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.¹²³ [Emphasis added]

Thus, in order to maintain the integrity and business efficacy of the tendering process, bidders must be treated fairly and equally and the bidding process must be carried out in a transparent manner.

(c) **Infraction Process**

As noted in the summary of the Infraction Process above, the criteria to be applied by the Qualification Committee in reaching a decision as to an appropriate penalty for an infraction as articulated in the Infraction Procedures, are as follows:

1. The nature of the transgression;
2. The impact of the transgression; and
3. The contractor's previous record.

¹²¹ Subject to the terms of the owner's "privilege clause."

¹²² [2000] 2 S.C.R. 860, 2000 SCC 60 ("*Martel*").

¹²³ *Ibid*, at para. 88.

It is apparent that these criteria represent a recognition of the importance of fairness and proportionality in respect of the imposition of a penalty by the Qualification Committee.

Of course, it is open to the Qualification Committee to take no action in respect of an infraction, but should the Committee decide that the alleged transgression occurred and warrants the imposition of a penalty, then the penalties range from:

1. A warning letter;
2. To a financial rating reduction;
3. To a suspension of bidding privileges.

In the event of a financial rating reduction, the Infraction Procedures provide that “[a]ny impact on the contractor’s maximum Workload Limit will be by formula in accordance with the provisions of the document ‘Qualification Procedures for Contractors’” (i.e. the Qualification Procedures). The Qualification Procedures do not reference the Infraction Procedures, but the two sets of procedures are clearly integrated given that:

- (a) An infraction may affect a contractor’s:
 - (i) Basic Financial Rating; and
 - (ii) Maximum Workload Rating (described above in the discussion of Section 30 of the Qualification Procedures, which is entitled “Integrated Infraction/Contractor Performance Rating System”).¹²⁴
- (b) Pursuant to Section 8 of the Qualification Procedures, at the discretion of the Qualification Committee, a sanction, disqualification, suspension or revocation from bidding may be applied to any related Company(s) that falls under the definition of Common Ownership. A Company under sanction will not be allowed to obtain a Basic Financial Rating for any other related Company(s) that falls under the definition of Common Ownership or include another related Company(s) in its consolidated financial statement.
- (c) The Qualification Committee plays a central role in the Infraction Procedure and is also the body that determines any appeal of a Contractor performance rating, pursuant to the Contractor Performance Rating Guide, described above.
- (d) Under Section 9.3 of the Qualification Procedures, one of the considerations of the Qualification Committee in determining whether to exercise the Exclusion

¹²⁴ In addition, Section 8 of the Qualification Procedures entitled “Sanction” (neither this Section nor the glossary define “Sanction”) references the fact that any sanction issued by the Qualification Committee “related to these procedures” shall be considered in calculating the Contractor’s Financial Basic Rating and/or Maximum Workload Rating.

Provision is “[i]nfractions issued against the contractor in the three years prior to the date that the Qualification Committee considers the matter.”¹²⁵

Given such integration, it is important to ensure that the infraction process is carried out in a fair, equitable, and transparent manner and in a manner which avoids potential conflicts of interest or perceived bias. As will be addressed in the Gap Analysis section below, the Qualification Committee acts as a “black box,” including in relation to its role in the Infraction Process.

The infraction process, like a disciplinary process imposed by a governmental entity, is governed by the principles of administrative law.

What is known technically as a “statutory power of decision” is not required in order for a court to review a government decision for procedural fairness. The test is set out in the Supreme Court's decision in *Martineau v. Matsqui Institution*:

Certiorari is available as a general remedy of supervision of the machinery of government decision-making. The order may go to any public body with the power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision makers.¹²⁶

Purely ministerial policy decisions and legislative functions are not reviewable. The theory is that such decisions are general in nature and do not affect the rights of any one person directly.¹²⁷ However, this is arguably not the case with respect to a decision by the Qualification Committee to reduce a particular contractor's financial rating based on an infraction. Instead, it is made by a public body, and purports to decide a matter directly affecting a contractor's interests.

We have located only two Ontario cases involving judicial review of a decision of MTO's Qualification Committee: *R. v. Raney*,¹²⁸ and *Bot Construction Ltd. v. Ontario (Minister of Transportation)*.¹²⁹ As explained below, the *Raney* case indicates that judicial review of a Committee decision is not available, but, for the reasons explained below, the decision is no longer good law.

The *Raney* case states explicitly that judicial review is not available because the Committee does not exercise a quasi-judicial function.¹³⁰ This statement of the law is no longer correct. In particular, the 1974 *Raney* case predates the decision of the Supreme Court of Canada in the *Martineau* case, referenced above, which dramatically broadened the availability of judicial review, doing away with the requirement for a “judicial or quasi-judicial” function. The authors of *Judicial Review of Administrative Action* state that “it is necessary to read with great caution cases decided prior to *Nicholson* and *Martineau* which limit the scope of review pursuant to

¹²⁵ Qualification Procedures, Section 9.3.

¹²⁶ *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at 608 (“*Martineau*”). *Certiorari* is an administrative law remedy which allows a court to, among other things, quash a decision and send it back for review by the tribunal or board where there has been a breach of fairness.

¹²⁷ Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2009) at para. 1:2221.

¹²⁸ *R. v. Raney* (1974), 47 D.L.R. (3d) 533 (Ont. C.A.) (“*Raney*”).

¹²⁹ *Bot Construction Ltd. v. Ontario (Minister of Transportation)*, 1998 CarswellOnt 926 (WL) (Div. Ct.).

¹³⁰ *Raney, supra*, at paras. 4-5.

certiorari and prohibition.”¹³¹ Also worth noting is commentary from Sue Arrowsmith in her 1988 text *Government Procurement and Judicial Review* that “... firstly ... there should always be a hearing where a contractor is struck from a tender list, provided the list is not an ‘open’ one, or where his rating is reduced. The relevant factors are the existence of a legitimate expectation and the fact that, by virtue of the small number of contractors to whom this will apply, there will be no undue burden on resources. Thus, the contractor in *Re Raney and R.* should succeed today.”¹³²

That *Raney* is no longer the law was also recognized in the 1998 MTO decision referred to above. There, the Divisional Court stated that “since the decision of the Court of Appeal in *Raney v. R.* ... the concept of procedural fairness has been broadened in the administrative area.”¹³³ Thus, the court assumed, without deciding, that a duty of procedural fairness was owed.

The Divisional Court’s decision in the *Cavanagh* case, discussed below, also recognizes that MTO procurement decisions are subject to judicial review for procedural fairness. This conclusion was not addressed when the Court of Appeal overturned the Divisional Court’s decision on other grounds.

Traditionally, arguments against judicial review of procurement decisions have been based on the theory that judicial review would interfere with a private law-based relationship (the law of contract) between the contractor and the government, acting in its private capacity, with respect to a specific contractual relationship. Since the 1970s, however, there has been increased recognition that “public concerns such as equality of access to government markets, integrity in the conduct of government business and the promotion and maintenance of community values” are implicated by government procurement decisions.¹³⁴ Where a government procurement decision, controls, restricts or eliminates a contractor’s access to its sole or most significant market, these concerns are likely to be more acute, and to favour access to judicial review.

The reasoning applied by the Courts in the cases described above supports the argument that judicial review of a Qualification Committee’s decision in respect of an infraction is available. The Committee’s decision in respect of an infraction raises public law concerns, supporting the application of a duty of fairness.

Generally, as a matter of procedural fairness, a person is entitled to fair and adequate notice of the allegations made against them and a fair and adequate opportunity to respond, particularly when the issue under consideration by a tribunal is in the nature of a charge or allegation that has the potential to impair a commercially important right to bid on MTO contracts.

Applying general administrative law principles, the greater the potential impairment to the interests of a person are, the greater the need for procedural safeguards to ensure the ability of

¹³¹ Brown and Evans, *supra*, at para. 1:2210.

¹³² Sue Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) at 167.

¹³³ *Bot Construction Ltd. v. Ontario (Minister of Transportation)*, 1998 CarswellOnt 926 (WL) (Div. Ct.), at para. 1.

¹³⁴ McLachlin J. in dissent (but not on the issue of the availability of judicial review) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 1994 CarswellBC 115 (WL).

the person to have the right to make their case and to meet the case against them. These rights include, at each stage of the proceeding:

- i. The right to fair notice;
- ii. The right to a fair opportunity to respond; and
- iii. The right to a fair and unbiased hearing.

Each of these rights will be addressed below.

(i) The Right to Fair Notice

An individual has the right to fair notice in connection with both the preliminary determination and the final determination of the Qualification Committee. The right to fair notice includes the right to receive reasons of any preceding decision, such as a preliminary determination

(ii) The Right to a Fair Opportunity to Respond

It is important for a party to have a fair opportunity to respond to any infraction. Such a right includes:

- a) Disclosure of relevant documents reviewed in the decision making process; and
- b) Provision of adequate time to respond, both in terms of the preparation of a written response and oral submissions.

(iii) The Right to a Fair and Unbiased Hearing

A party responding to an infraction has the right to a fair and unbiased hearing. This right includes the right to understand the composition of the panel which will be making the decision in order that the party responding can determine whether or not there is any potential perception of bias.

In particular, in order to avoid any perception of potential bias, tribunals normally attempt to ensure that an investigator is independent of the parties and the entity making a decision about the dispute. For example, the Health Professions Appeal and Review Board (“HPARB”) attempts to ensure the independence of its Board Members. The HPARB is an independent adjudicative agency. On request, it:

- Reviews decisions made by the Complaints Committees of the self-regulating health professions Colleges in Ontario;
- Conducts reviews and hearing of orders of the Registration Committees of the Colleges; and

- Holds hearings concerning physicians' hospital privileges under the *Public Hospitals Act*.¹³⁵

The HPARB attempts to ensure that it engages independent parties, stating as follows:

(2) The Board may engage persons who are not public servants employed under Part III of the Public Service of Ontario Act, 2006 to carry out investigations under paragraph 3 of subsection 28 (5) of the Code. 2006, c. 35, Sched. C, s. 116 (3); 2007, c. 10, Sched. M, s. 4 (1).

(3) The Board may engage persons who are not public servants employed under Part III of the Public Service of Ontario Act, 2006 to provide expert or professional advice in connection with a registration hearing, complaint review or registration review. 2006, c. 35, Sched. C, s. 116 (3).

(4) A person engaged under subsection (3) shall be independent of the parties, and, in the case of a complaint review, of the Inquiries, Complaints and Reports Committee. 2007, c. 10, Sched. M, s. 4 (2)¹³⁶

By way of further example, the *Ontario Securities Act* provides that a member sitting on a hearing of the Ontario Securities Commission may not have participated in the investigation, stating as follows:

(4) No member who exercises a power or performs a duty of the Commission under Part VI, except section 17, in respect of a matter under investigation or examination shall sit on a hearing by the Commission that deals with the matter, except with the written consent of the parties to the proceeding.¹³⁷

By way of further example, each member of the Ontario Labour Relations Board must swear an oath that he or she will fulfill his or her role impartially.¹³⁸

In addition, and although it does not have direct application, *The Adjudicative Tribunals Accountability, Governance and Appointments Act* is a broad piece of Ontario legislation that governs tribunals and boards in Ontario. This Act requires that members of adjudicative tribunals shall be selected on the basis of, among other criteria, an aptitude for "impartial adjudication."¹³⁹

The Infraction Procedures do not clearly set out the composition of the Qualification Committee or the roles to be played by those who have participated in the investigation. Further, as noted by CFAAST, the Infraction Procedures do not include reference to a process for ensuring conflicts of interest are avoided, nor do they reference an attendance policy or quorum requirements for a Qualification Committee hearing.

¹³⁵ Health Professions Appeal and Review Board website: <http://hparb.on.ca/scripts/english/default.asp>.

¹³⁶ *Regulated Health Professions Act*, at s.24(2)-(4).

¹³⁷ *Ontario Securities Act*, at s. 3.5(4)

¹³⁸ *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s. 110(8).

¹³⁹ *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, SO 2009 at s.14(1).

(d) Liquidated Damages

Liquidated damages provisions are inserted in construction contracts in order to provide an owner with a mechanism for recovering its damages related to delays as a result of the acts or omissions of a contractor. However, liquidated damages provisions are enforceable only in accordance with the following principles:

- (1) A liquidated damages provision will not be enforced and will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Co., Ltd.*, [1915] A.C. 79 at 87 (H.L.).
- (2) A liquidated damages provision will not be enforced where the stipulation for liquidated damages is disproportionate and unreasonable when compared with the damages sustained: *H.F. Clarke Ltd. v. Thermidair Corp.* (1974), [1976] 1 S.C.R. 319, 17 C.P.R. (2d) 1, 3 N.R. 133, 54 D.L.R. (3d) 385 at 398, varied [1976] 1 S.C.R. 340n, 18 C.P.R. (2d) 32, 54 D.L.R. (3d) 399 (S.C.C.).
- (3) A liquidated damages provision will not be enforced where it is found to be unconscionable and will be found to be a penalty where there has been no genuine pre-estimate of damages by way of discussion or a meeting of the minds: *Meunier v. Cloutier* (1984), 46 O.R. (2d) 188 at 194-195, 1 C.P.R. (3d) 60, 9 D.L.R. (4th) 486 (H.C.).
- (4) A liquidated damages provision will not be enforced in favour of an owner against a contractor where the owner is, unable to bring itself within the terms of its own contract: *Warden Construction Co. v. Grimsby (Town)* (1983), 2 C.L.R. 69 at 85, 90 (Ont. C.A.).
- (5) Liquidated damages provisions in printed forms of contract must be construed strictly *contra proferentum*: *Warden Construction, supra*, at p. 86.
- (6) If the contractor has never started work under a contract, liquidated damages provisions for delay and completion are inapplicable as they apply only once work under the contract has begun: Goldsmith, *Canadian Building Contracts* (3d ed.) 1983, "Penalty Clauses" at pp. 122-125.
- (7) If the owner is partially responsible for preventing the contractor from completing by the scheduled completion date, i.e., where the owner has contributed to the contractor's delay in completion, then the owner will not be entitled to enforce a liquidated damages provision against the contractor. In such circumstances, whether the contractor has contributed to the delay is irrelevant: *N.B.C. Mechanical Inc. v. A.H. Lundberg Equipment Ltd.* (1999), [1999] B.C.J. No. 2993, 215 W.A.C. 84, 132 B.C.A.C. 84, 50 C.L.R. (2d) 1, 1999 CarswellBC 2918, 1999 BCCA 775 (B.C. C.A.); and see *Perini Pacific Ltd. v. Greater Vancouver Sewerage & Drainage District* (1966), 1966 CarswellBC 182, 57 D.L.R. (2d) 307 (B.C. C.A.), affirmed (1967), 60 D.L.R. (2d) 385, 1967 CarswellBC 187, [1967] S.C.R. 189 ; and see *Dodd v.*

Churton (1897), 66 L.J.Q.B. 477, [1897] 1 Q.B. 562 (Eng. C.A.), at pp. 479-480 [Q.B.].¹⁴⁰

Thus, the courts will carefully examine liquidated damages provisions, prior to enforcing them. In the circumstances, we were not able to locate any evidence that MTO actually performs an analysis of its pre-estimated damages or what damages MTO would, in fact, suffer in the event of a delayed highway opening.

Generally, liquidated damages provisions are used as an exclusive remedy for contractor delay, and not in tandem with other remedies imposed on a contractor.

As will be discussed in the Conclusion Section below, historically, the liquidated damages provisions in MTO Contracts have been applied at the same time as other sanctions resulting in potentially severe consequences for Contractors.

(e) Dispute Resolution Processes

An effective dispute resolution process includes the following characteristics:

i. Efficient and Expeditious Resolution of Disputes

Matters should be disposed of in a timely manner at the least possible expense so that they are not allowed to fester or evolve (devolve) into larger disputes.

ii. Procedural Fairness

The process should not favour one party over the other, and should allow for disputes to be addressed without negatively affecting the ongoing work or the relationship between the parties. Ideally, the mechanism should identify and discourage frivolous claims, and should not penalize a party for raising legitimate claims.

iii. Certainty and Finality of Result

An effective dispute resolution mechanism will achieve a certain and final result, whenever possible.

The current dispute resolution procedures of MTO involve negotiation, mediation, and the possibility of arbitration, each of which will be discussed below, followed by a discussion of alternative methods of resolving disputes.

(i) Stepped Negotiations

It is not unusual to include a procedure involving structured or stepped negotiations in a construction contract, such that the parties identify representatives from each organization who are responsible for meeting at first instance and attempting to resolve a dispute when it arises, failing which the dispute is elevated to a higher level of management for further negotiation prior

¹⁴⁰ Scott and Reynolds, “*Scott and Reynolds on Surety Bonds*” (Toronto: Carswell, 2009 – Rel. 1), p. 7-12-7.12.1

to turning a dispute over to other methods of dispute resolution involving a third party. Such procedures generally include requirements for full disclosure and prompt exchange of information.¹⁴¹

The main disadvantages of such a process, are that:

- if the information exchanged between the parties is insufficient, the likelihood of resolution is significantly diminished,¹⁴² and
- “it is slow and unless carried on parallel to an adjudicated process could, if unsuccessful, significantly delay the parties reaching any resolution at all.”¹⁴³

The advantages of such a process are that:

- negotiations can result in a swift resolution of a dispute if the parties “communicate well and engage in principled negotiation;”¹⁴⁴ and
- the negotiation may involve several levels of authority within the organizations with the result that “the dispute will be examined by people with different concerns, view point and agenda, and perhaps with a healthy distance and detachment from the dispute.”¹⁴⁵ However, this advantage of a stepped negotiation process only applies if the individuals attempting to resolve the claim do, in fact, have the requisite distance and detachment from the dispute.

(ii) Mediation

Mediation can be a useful tool for resolving disputes through the use of a neutral third party mediator. The literature describes the following advantages of mediation:

- Relatively low financial cost involved;
- Short length of the typical mediation;
- The potential for preserving the business relationship after the dispute;
- Maintaining privacy in connection with the dispute; and

¹⁴¹ P. Bruner and P. O’Connor, *Bruner and O’Conner on Construction Law*, (West Group Publishing, 2002) (“*Bruner and O’Conner*”).

¹⁴² *Bruner and O’Connor*

¹⁴³ W. Earle, *Drafting ADR and Arbitration Clauses for Commercial Contracts* (Toronto: Carswell, 2010) (“*Drafting ADR*”), p. 1-6.

¹⁴⁴ P. Bruner, “‘Rapid Resolution’ ADR – The Future is Now” American Bar Association Forum on the Construction Industry 2011 Mid-Winter Meeting, New York, (“*Rapid Resolution*”) p. 8.

¹⁴⁵ *Drafting ADR*, p. 1-6.

- The possibility to “create solutions that would not likely come out of rights-based litigation.”¹⁴⁶

However, mediation will not be successful where:

- It is just used as a tactic to delay resolution;
- There is a power imbalance that cannot be managed within the mediation;
- Legal questions or matters of policy or principle are involved that make it difficult to reach a negotiated resolution particularly where the mediator is not an evaluative mediator; or
- The fact finding process is not sufficiently advanced such that the parties are not adequately prepared.¹⁴⁷

(iii) Arbitration

The construction industry was one of the first industries in North America to accept arbitration as a contractually agreed method of dispute resolution. *Bruner and O’Conner on Construction Law* notes that:

It was the growing complexities of the construction process, judicial development of the concept of implied contractual obligations and the perceived value of expertise in fact finding and decision making that commended arbitration to the construction industry.¹⁴⁸

Bruner and O’Connor further note that the growth of the use of construction arbitration paralleled the growing acceptance of arbitration by the American judiciary which has “recognized the freedom of contracting parties to select their own method for resolution of disputes arising under their contract subject to basic concepts of fairness and good faith.”¹⁴⁹

Binding arbitration is well known to the construction industry in Ontario and has governing legislation in the form of Ontario’s *Arbitration Act 1991*.¹⁵⁰

The key to an effective contractual arbitration provision is that the process be mandatory, rather than voluntary or subject to an owner’s veto.

An arbitration process should resolve disputes in a timely and cost effective manner. It is recognized, however, that arbitration by its nature and given the procedural steps involved can sometimes be a lengthy process (although no more so than a trial). An effective arbitration process will include the following elements:

¹⁴⁶ *Drafting ADR*, p. 1-12.

¹⁴⁷ *Rapid Resolution*, p. 13.

¹⁴⁸ *Bruner and O’Conner*, p. 320.

¹⁴⁹ *Bruner and O’Conner*, p. 321.

¹⁵⁰ S.O. 1991, c. 17.

- i. A well drafted agreement that requires mandatory, binding arbitration, and clear rules for the conduct of the arbitration;
- ii. A selection process for arbitrators with the requisite construction law, construction industry, and case management knowledge and experience;¹⁵¹
- iii. The requirement for early disclosure of positions;
- iv. Limits on oral discoveries and document disclosure;
- v. Effective arbitrator control of pre-hearing motions and the hearing; and
- vi. A reasoned decision.¹⁵²

Even an arbitration process that incorporates the above elements can become a time consuming and expensive process, which has led various jurisdictions to explore alternatives, such as adjudication, dispute resolution boards, and referees, described below.

(iv) Adjudication

Adjudication is a term that first began to be used in the construction industry in the United Kingdom during the late 1970's.¹⁵³ The essential difference between adjudication and arbitration is that adjudication is an interim binding procedure subject to revision by either arbitration or litigation unless the parties agree that the decision of the adjudicator is to be binding.¹⁵⁴ Like arbitration, adjudication involves a process whereby the parties to a contract submit a dispute to an independent third party, whose decision is to be binding. Unlike arbitration, however, an adjudicator's decision usually binds the parties only until it is revised in subsequent arbitration or litigation.¹⁵⁵ Significantly, while adjudication is structured as an interim procedure, surveys from the UK have shown that it vastly reduces, if not eliminates appeals and further arbitration. In other words, the UK experience shows that the parties by and large, end up accepting the interim decision of the adjudicator.¹⁵⁶

Although adjudication in the UK is now statutory, it can also be provided for through contractual provisions. Duncan Glaholt in his Paper "*The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada*,"¹⁵⁷ makes a persuasive argument for the adoption of adjudication as a proven mechanism for the resolution of construction disputes, based on an analysis of the experience from the UK and other jurisdictions.

As noted, the UK adjudication process is statutory, having been enacted under the *Housing Grants, Construction and Regeneration Act, 1996*, which provided the following basic scheme to address the resolution of disputes in construction contracts:

¹⁵¹ *Rapid Resolution*, p. 15.

¹⁵² *Rapid Resolution*, p. 15.

¹⁵³ Hudson's Building and Engineering Contracts 12th Edition, Chapter 11, p. 1373.

¹⁵⁴ *Ibid*, p. 1376.

¹⁵⁵ *Ibid*, p. 1376.

¹⁵⁶ (2006), 53 C.L.R. (3d) 8 ("*Adjudication Option*")

¹⁵⁷ *Adjudication Option*.

- i. Enactment of minimum procedural requirements enabling parties to provide for reference of “disputes” to an “adjudicator” for summary determination according to a set timetable and within a very short period of time. (28 days in the UK), while work on the project continues;
- ii. A statutory default scheme if minimum procedural requirements are not met by the parties in their contracts;
- iii. Any parties to a written “construction contract” may seek adjudication by serving a “notice of adjudication” appointing an adjudicator, and serving a “referral notice” on both the other party and the adjudicator;
- iv. The adjudicator is nominated by a nominating body if agreement is not possible. The adjudicator is selected within a week and the dispute is “determined” within four weeks. The adjudicator hears one dispute at a time; the adjudicator has twenty-eight days from referral to make a “determination” which is binding and enforceable for the life of the project;
- v. Courts may be enlisted to assist in the implementation of any adjudicator’s determination; and
- vi. Adjudicators are selected from a roster and are required to conduct proceedings in accordance with Rules of Natural Justice, and must act impartially and inform the parties if he or she is taking into account information obtained from his or her own knowledge and experience, or from other sources and of the conclusions he or she might reach, taking those other sources into account.

The key benefits of adjudication, according to the U.K. experience, are:

- a) It provides for an expedited process that results in an interim binding decision by a third party;
- b) It is relatively inexpensive to engage;
- c) It has demonstrated an ability to keep money flowing on a project, pending completion of the project and the determination as to whether certain funds are due and owing, while preserving the parties’ rights to have the interim decision revised or reversed at the conclusion of the project;
- d) There is a high frequency of the acceptance of the recommendations of the adjudicators; and
- e) There is a proven and significant reduction in litigation.

The disadvantages of adjudication include the following:

- a) The tight timeframes of many adjudications systems (such as the 28-day timeline imposed in the U.K.) means that there may be insufficient time to properly prepare the case; and
- b) Procedural safeguards such as oral discovery and documentary disclosure are not available.

(v) Dispute Resolution Boards

A dispute resolution board is a board comprised of one to three technical experts (experienced in the area of construction at issue and possessing procedure expertise)¹⁵⁸ who are retained prior to the commencement of construction. Such boards usually consist of three members with the owner and the contractor each nominating one member and the two members then nominating the third member who becomes the chair. This selection process is intended to create an impartial board. The board familiarizes itself with the project, attends at the project site on a regular basis (monthly or quarterly), obtains reports from the project managers of the owner and the contractor, follows the development of the project, and provides advisory opinions with respect to disputes that may arise. These advisory opinions can be provided during the regularly scheduled meetings or following an ad hoc hearing. The objective of such boards is that disputes will be resolved as they arise, rather than waiting until the completion of the project when disputes can become more expensive and difficult to resolve.

The advantages of dispute resolution boards include the following:

- Dispute resolution boards allow for “real time” dispute resolution.¹⁵⁹
- Dispute resolution boards are considered to be relatively inexpensive as a practical approach is used.
- Dispute resolution boards allow for better relationships between the parties because problems are not allowed to “fester and contaminate other problems that may arise later.”¹⁶⁰

DRBs are used extensively in the United States. The state highway departments of over a dozen states use DRBs with California, Florida, Massachusetts, Washington, and Virginia being significant users of DRBs.¹⁶¹

Disadvantages of DRBs may include the following:

- Concerns arising over the impartiality of the Board;

¹⁵⁸ Bruner

¹⁵⁹ G. McEniry, “*It’s Time for More DRBs in Canada*” The Revay Report, vol. 29, No. 2, June 2010 (“McEniry”)

¹⁶⁰ K. Lawrence, “*Effectively Employing the Independent Decision Maker, Project Neutral and Dispute Resolution Board ADR Options*” ABA Forum on the Construction Industry 2011 Mid-Winter Meeting, New York (“Lawrence”).

¹⁶¹ McEniry

- DRBs may make recommendations that do not fall within the ambit of the contract;
- DRBs may not be effectively utilized by project participants if the contract is not drafted in such a way as to permit the expeditious and efficient review by the DRB.¹⁶²
- The advisory opinion of a DRB is not usually binding, such that an intransigent party can ignore it.

(vi) Referees and Project Neutrals

In some construction contracts, there is provision for a “referee” who is usually a technical expert who resides over a full hearing in the nature of an informal arbitration. The referee will review the evidence presented and will make a written, non-binding decision.

In addition, some construction contracts include reference to a “standing project neutral.” One or more individuals will be identified in the contract or appointed later and are “on call” to assist the parties in agreeing on dispute resolution procedures, facilitating negotiations, mediating disputes, and/or recommending proposals for settlement. The key element of this individual’s role is the “early neutral evaluation” of the facts and law on the dispute.”¹⁶³

The evolution of the MTO General Conditions, and the use of the dispute resolution mechanisms described above (except adjudication) is set out in the chart entitled “Summary of MTO General Conditions of Contract Related to Dispute Resolutions.”

(f) Surety Bonds

Surety bonds are employed by most jurisdictions in North America on major highway construction projects. The purpose of surety bonds is to provide an owner with protection in the event of contractor insolvency.

The NCHRP Synthesis 390 Performance-Based Construction Contractor Pre-qualification Report characterizes surety bonds as a form of financial pre-qualification.¹⁶⁴ According to MTO, as referenced in the CFAAST Report, its qualification process “acts essentially as a ‘self bonding’ approach.”¹⁶⁵ MTO noted in the CFAAST Report that it is in a unique position as an owner to annually contract a high volume of contracts generally involving a specific group of contractors. MTO, in the CFAAST Report, states that it has determined that it is “appropriate to accept this risk.”¹⁶⁶

¹⁶² McEniry
¹⁶³ *Rapid Resolution*, p. 11.
¹⁶⁴ NCHRP Report, p. 1.
¹⁶⁵ CFAAST Report, p. 24.
¹⁶⁶ CFAAST Report, p. 24.

(i) CFAAST

As noted in the CFAAST Report, MTO does not require bid bonds, performance bonds, or labour and material payment bonds.

MTO is therefore completely dependant on its pre-qualification system to protect itself from contractor default.

According to the CFAAST Report, MTO has advised that it is the only jurisdiction using a financial pre-qualification process.¹⁶⁷

As noted in the CFAAST Report, bonds are used throughout North America, in all Provinces and states with the exception of Ontario. Our research has confirmed this result.

MTO maintains that bonds are not necessary for the following reasons:

- The Ministry's Qualification Process acts essentially as a "self bonding" approach;
- Past reviews have shown that "tens of millions of dollars can be saved when bonding is not a contract requirement";¹⁶⁸ and
- Experience from other jurisdictions indicates that application of a bond can create situations where the Ministry may lose some decision making capability (although no specific jurisdictions are cited in this regard).

(ii) Surety Association of Canada

In response to the position taken by MTO, the Surety Association of Canada ("SAC") has noted that:

- The adoption of a surety bond system would result in savings in other areas which would further defray costs;
- The surety underwriting process involves a review of financial capacity of contractors including:
 - An analysis of all work underway that may affect the contractor's capacity to take on additional projects;
 - The investments held by contractors;
 - Intangible risks such as succession planning and reliance on key executives;

¹⁶⁷ CFAAST Report, p. 23.

¹⁶⁸ CFAAST Report, p. 24.

- A contractor's profit trends over all their recent projects;
- The contractor's corporate structure;
- In the case of a dispute between MTO and a contractor, the surety can play a role in examining the alleged default and potentially assisting in resolving the issue.

(iii) Commentary

Of the advantages of surety bonding, the key advantage is that surety bonds act as a mechanism by which the risk of contractor default is transferred from the owner to the surety. As noted in the CFAAST Report, the jurisdictional research conducted by CFAAST revealed that most jurisdictions found bonds to be highly effective. In the jurisdictional research conducted in the U.S. and Canada, bonds were viewed as a key element of the qualification system.

Viewed from a first principles perspective, the benefits of surety bonding are as follows:

- Surety bonds are issued for projects in two forms:
 - Performance Bonds, which benefit the owner; and
 - Labour and Material Payment Bonds, which benefit the subcontractors and suppliers.
- Surety Bonds are underwritten by major financial institutions regulated by the Office of the Superintendent of Financial Institutions.
- The underwriting process constitutes a disciplined pre-qualification of a contractor's financial capacity, construction capabilities, and character. The surety's underwriting process allows due diligence to be performed in respect of the contractor's entire enterprise, including related businesses and individuals.
- Performance Bonds guarantee the completion of defaulted contracts, and, fundamentally, protect the owner from the financial consequences of the insolvency of a contractor.
- Labour and Material Payment Bonds (which are issued in tandem with Performance Bonds) guarantee that subcontractors and suppliers with direct contracts with the contractor will be paid, protecting them from the consequences of contractor insolvency.
- Surety Bonds, in the form of Bid Bonds, also protect the owner from the financial consequences of a low bidder refusing a contract, whether due to a bidding error or due to contractor insolvency.
- Sureties are expert in mediating disputed defaults, and arranging for the completion of defaulted projects, sometimes by providing financial support to a cash strapped contractor.

Based on the forgoing, it is evident that MTO's pre-qualification process substitutes owner pre-qualification for surety pre-qualification, but provides no financial protection for the government, subcontractors or suppliers in relation to the risk of contractor insolvency.

In respect of the costs of surety bonding, while there is undoubtedly a cost savings which results from the removal of the requirement to pay the premiums necessary to obtain surety bonds, it is not known what evidence MTO relied on in support of its calculation that "tens of millions of dollars can be saved." Another potential drawback of surety bonding cited by MTO is the potential loss of MTO's decision-making power that may result if surety bonds are utilized; however, this rationale apparently overlooks the fact that bond wordings can be customized to minimize the loss of control. In addition, this issue also requires further investigation as the reference in the CFAAST Report to MTO's position does not cite any specific evidence or examples in support of this contention.

(g) Exclusion Provision

The Exclusion Provision is set out in section 9 of the Qualification Procedures. Section 9.3 of the Qualification Procedures provides that no tender registration form shall be issued to a contractor to whom the provisions of section 9 of the Qualification Procedures applies, unless the Qualification Committee makes an exception. Section 9.3 sets out the considerations to be reviewed by the Qualification Committee which include the following:

- Legal proceedings and notices of pending legal proceedings;
- Unpaid court awarded costs;
- Infractions;
- Notice of Default issued by MTO;
- Days contractor has suspended or ceased work on a project;
- Inability to work cooperatively; and
- Increased resources.

In respect of the first consideration listed above, it is noteworthy that the Qualification Procedures do not distinguish between legal proceedings that arise as a consequence of a bona fide dispute and legal proceedings that are frivolous or vexatious. Nor is there a distinction drawn between initiating a proceeding and having to defend one, or being brought into a proceeding by third party claim. The Qualification Procedures also do not reference legal proceedings in the nature of an arbitration pursuant to the General Conditions of a contract.

The exercise of the Exclusion Provision in connection with Infractions, Notice of Default issued by MTO, days contractor has suspended or ceased work on a project, inability to work cooperatively, and increased resources, relates to performance issues and is, in our view, defensible as a method of ensuring that only capable contractors are eligible to bid on MTO contracts.

However, the legality of the exercise of the provision as a result of the mere existence of legal proceedings that the contractor is engaged in or has commenced is, in our view, questionable. There is a good argument that the exercise of the Exclusion Provision as a result of legal proceedings that a contractor is engaged in or has commenced is implicitly punitive and, more importantly, if exercised, would violate the right of access to the courts which is a constitutionally protected right, as well as a right protected under the common law, such that it would be over-turned upon judicial review.

The distinction between the award of a single contract, on the one hand, and a threshold decision affecting access to the government contract marketplace, on the other, is described in *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*.¹⁶⁹ This case involved a government committee tasked with implementing a “Business Incentive Policy” that gave preferential access to public tenders to businesses that were designated as a “Northern Business.” The committee at issue was set up pursuant to a directive from the Executive Council of the Northwest Territories. The applicant’s designation as a Northern Business was revoked and it applied for judicial review of the decision. After extensive analysis, the Court of Appeal for the Northwest Territories concluded that *certiorari* is available with respect to the decision of any public body where a duty of fairness is owed, regardless of the source of the body’s power. The Court of Appeal then referred to the threshold nature of the decision at issue, as distinct from an individual decision to award a contract, to support its conclusion that a duty of fairness was owed in the circumstances:

This is not a simple procurement decision which deals with the acceptance or rejection of a specific tender or a bid. ... The decision of the Advisory Committee to reject an application or to revoke a designation affects, not the individual contract, but the ability of the business to compete with others in contracting with the Government generally and with organizations funded by the Government. ... It affects its ability to effectively carry on business in the Northwest Territories. It is this aspect that brings in the public duty and fairness component referred to in the authorities cited above.¹⁷⁰

The following principles can be derived in respect of the common law right of access to the courts:

- A party must have access to and the full use of the processes of the court in a manner applicable to all.¹⁷¹
- Parties should not be prevented from pursuing meritorious claims, defending themselves against prosecution, or having counsel take steps on their behalf.¹⁷²

¹⁶⁹ *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)* (1994), 113 D.L.R. (4th) 639, 1994 CarswellNWT 18 (WL) (N.W.T. C.A.) (“*Volker Stevin*”). The Court of Appeal of the Northwest Territories is composed of a Chief Justice and justices of appeal who are appointed by the Governor-in-Council from justices of the Courts of Appeal of Alberta and Saskatchewan and the judges and ex officio judges of the Supreme Court of the Northwest Territories.

¹⁷⁰ *Volker Stevin*, *supra*, at 12 of WL version.

¹⁷¹ *Rasekhi-Nejad v. General Accident Assurance Co. of Canada* (2004), 11 C.C.L.I. (4th) 220 (Ont. S.C.J. (Master)), at para. 30.

¹⁷² *Re Stanny* (2009), 73 C.P.C. (6th) 356 (Alta Q.B.) (“*Re Stanny*”).

- Parties must be able to access the courts in circumstances in which they ought to be able to do so.¹⁷³

The constitutional right of access to the courts was referenced by the Quebec Court of Appeal in its decision *Compagnie de construction et de développement cris ltée v. Société de développement de la Baie-James*.¹⁷⁴ In this case, the Quebec Court of Appeal examined a policy for the award of service contracts by the Baie-James Development Society (the “Society”) which provided, *inter alia*, that bidders that were the object of legal proceedings or which had instituted proceedings against the Society would not be eligible to submit bids for service contracts. The Court of Appeal found that this clause placed the contractor in the invidious position of choosing between:

- a) the fundamental right to have recourse to the courts in order to have its rights sanctioned, and
- b) attempting to obtain the desired contract.

Further, as a result of the wording of the clause, if the Society sued the contractor, the contractor would be prevented from attempting to obtain a contract, whether or not that suit was valid. Therefore, the Court of Appeal upheld the trial judge’s decision to invalidate the provision of the Society’s policy as being against the principle of the rule of law and contrary to public order. The Court noted that the rule of law is explicitly recognized in the preamble of the *Canadian Charter of Rights and Freedoms* which states, “whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.” The Court stated as follows:

The modern conception of the rule of law requires, as a first condition, the existence of legal order based on rules of law which regulates relationships between individuals. The second condition is that all are bound to this legal order. The third condition is the right to judicial recourse to enforce this right.

...

Here the restriction of the right of the contractor to bring an action against the provider of work contravenes the principle of the rule of law, which would lose any real value in our society if we permit individuals to withdraw from being bound to the legal order and deprive others of their legitimate right to access the courts.¹⁷⁵

The Quebec Court of Appeal relied on the Supreme Court of Canada decision of *BCGEU v. British Columbia (A.G.)*¹⁷⁶ where the court stated as follows:

It would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.

¹⁷³ *Re Stanny*, at para. 28.

¹⁷⁴ [2001] R.J.Q. 1726 (C.A.) (“*Baie-James*”).

¹⁷⁵ *Baie-James*, at paras. 24-25 [Unofficial translation].

¹⁷⁶ [1988] 2 SCR 214, at paras. (“*BCGEU*”).

...
There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.¹⁷⁷

There are certain lower court decisions in British Columbia and Alberta that have upheld policies which permit an owner to reject tenders from an entity which is engaged in a lawsuit with it if that policy was adopted for valid commercial or business purposes, most of which caselaw arises out of an ongoing dispute between a particular contractor and the City of Nanaimo.¹⁷⁸

For example, in *Sound Contracting Ltd. v. Nanaimo (City)*¹⁷⁹ (“*Sound Contracting No. 2*”),¹⁸⁰ the British Columbia Supreme Court upheld the validity of a resolution by Nanaimo City Council adopting a policy to exclude all bids “from any company or agency where there is a current or pending legal action either by or against the City relating to work of a similar nature.”¹⁸¹ It does not appear that the trial judge considered whether impeding the right to access the courts could render otherwise permissible discrimination impermissible. Nor was the exclusion discretionary. The court, in fact, found that the resolution was directed specifically against Sound, the only contractor excluded by it in practice.¹⁸² On the facts of the case, City staff considered there to be “solid business reasons”¹⁸³ to exclude bids by Sound and the Court upheld the policy given that it had been implemented for valid commercial or business purposes and the resolution of the City Council was *intra vires* and given that there was no evidence that the contractor had suffered any damages.¹⁸⁴ In *Sound Contracting No. 2*, the City of Nanaimo argued that it was entitled to adopt the impugned policy and resolution and that, in doing so, it acted in good faith and for valid municipal and business purposes. In examining the validity of the position taken by the city, the trial judge reviewed the Supreme Court of Canada’s decision in *Shell Products Ltd. v. Vancouver (City)*.¹⁸⁵

¹⁷⁷ *BCGEU*, at paras. 229-230

¹⁷⁸ See *Sound Contracting Ltd. v. Nanaimo (City)*, [2000] B.C.J. No. 2668; *Hancon Holdings Ltd. v. Nanaimo (City)*, [2001] B.C.J. No. 2589; and *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)*, [1997] A.J. No. 759.

¹⁷⁹ [2000] B.C.J. No. 2668 (S.C.) (“*Sound Contracting No. 2*”).

¹⁸⁰ There was an earlier decision related to a separate tendering dispute between Sound and the City of Nanaimo, *Sound Contracting Ltd. v. Nanaimo (City)* [2000] B.C.S. No. 992 (“*Sound Contract No. 1*”). This case is not directly relevant as it addressed the challenge of a specific tender award by the City of Nanaimo and the facts of this case did not involve any policies promulgated by the City of Nanaimo, but it was the first of three reported decisions addressing disputes between the City of Nanaimo, Sound, and related companies, the latter two of which are relevant.

¹⁸¹ This case addressed a policy promulgated by the City of Nanaimo, as opposed to a single tendering decision as in *Sound Contracting No. 1*.

¹⁸² At the time, Sound had *three* active law suits against the City and there were no other legal actions to which the City Council resolution could have applied.

¹⁸³ *Sound Contracting No. 2*, at para. 28.

¹⁸⁴ The Court noted that neither of the two bids submitted by Sound to the City of Nanaimo while the policy was in force were the lowest bids.

¹⁸⁵ (1994), 88 B.C.L.R. (2d) 145 (“*Shell Canada*”). The facts of *Shell Canada* related to City of Vancouver council resolutions that it would not do business with *Shell Canada* “until Royal Dutch/Shell completely withdraws from South Africa.” *Shell Canada* sought an order quashing the resolutions arguing that they were discriminatory, that they were *ultra vires* the municipality under the *Constitution Act, 1987*, that they were vague and uncertain, and

*Hancon Holdings Ltd. v. Nanaimo (City)*¹⁸⁶ was another British Columbia Supreme Court decision, this time involving a company related to Sound and again involving the City of Nanaimo's purchasing policy and tendering documents. Hancon Holdings unsuccessfully brought a petition seeking an order setting aside a City Council resolution amending the City's purchasing policy and tender documents to provide the City with "absolute discretion" to reject a tender submitted by a tenderer that had been engaged directly or indirectly in a legal action against the City in relation to any other contract for works or services or any matter arising from the City's exercise of its powers, duties or functions within five years of the date of a call for tender. Hancon Holdings submitted that the City's conduct was a bad faith reaction to the City's concern regarding the loss of an arbitration to Sound.¹⁸⁷ Importantly, there was no legislation which required "local governments, such as the City of Nanaimo, to have a purchasing policy or requiring it to engage in public tendering process before entering into contracts."¹⁸⁸

On the facts of the case, the court considered itself satisfied on the basis of affidavit evidence from the City Manager that "the sole purpose of the adoption of the purchasing policy and tender documents was for valid business reasons and included in that business rationale was the high costs to the taxpayers involved in defending against legal actions particularly brought by the petitioner."¹⁸⁹ The Court further found that, on the material filed, there was no evidence of bad faith in relation to the previous arbitration award. Hancon had also argued that the policy was discriminatory and contrary to the *Charter of Rights and Freedoms*, in response to which the Court noted that the City of Nanaimo was entitled to discriminate in municipal business decisions, relying on *Shell Canada Products Ltd. v. Vancouver (City)*.¹⁹⁰

In *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)*,¹⁹¹ the Alberta Court of Queen's Bench upheld a policy passed by a municipality pursuant to which the municipality would not consider tenders from any contractor that had initiated litigation against the municipality for five years after termination of the litigation. The municipality acknowledged that the idea for the creation of the policy arose shortly after Cox Bros. sued the municipality.

that they infringed s.2 of the *Canadian Charter of Rights and Freedoms*. The B.C. Supreme Court quashed the resolution as being *ultra vires* the municipality. The Court of Appeal reversed the judgment. The majority of the Supreme Court of Canada agreed with the trial judge's conclusion that the City of Vancouver was seeking to use its powers to do business to "affect matters in another part of the world,"¹⁸⁵ a purpose which was found to be directed at matters outside the territorial limits of the City, without any identifiable benefit to its inhabitants. Under the Vancouver Charter, this purpose was not expressly or impliedly authorized. Furthermore, and although not necessary to decide the appeal, the majority of the Supreme Court of Canada also found that the resolutions constituted unauthorized discrimination. Justice Sopinka, writing for the majority, stated "[d]iscrimination for commercial or business reasons is a power that is incidental to the powers to carry on business or acquire property. These activities could not be carried on without this power. Different considerations apply to discrimination for non-commercial, non-business reasons that are not grounded in promoting the health, safety or welfare of the inhabitants of the City. It cannot be said that considerations relating to the political policy of a foreign state are so essential to the exercise of enumerated powers as to be implied" (*Shell Canada*, para. 106). Based on a review of the Vancouver Charter, the majority concluded that discrimination of the kind involved in the case was not authorized by the Vancouver Charter. The issue of access to the courts was not present in the *Shell Canada* case.

¹⁸⁶ [2001] B.C.J. No. 2589 (S.C.) ("*Hancon*")

¹⁸⁷ See above regarding discussion of *Sound Contracting No. 1*.

¹⁸⁸ *Ibid*, at para. 7.

¹⁸⁹ *Hancon*, at para. 10.

¹⁹⁰ (1994), 88 B.C.L.R. (2d) 145 (S.C.C.).

¹⁹¹ [1997] A.J. No. 759 (Q.B.).

However, an employee and an elected official of the municipality each swore that the policy was not directed at Cox Bros. The Chief Administrative Officer of the municipality swore to the variety of business reasons why the municipality might not want “to voluntarily enter into relationships with parties who are adverse in interest to the municipality.”¹⁹² The court considered that it was bound by *Shell Canada* to find that discrimination for business reasons was authorized as being for a municipal purpose, and that the court was not permitted to consider whether or not the municipality’s decision was reasonable. The issue of access to the courts was not considered.

However, in our view, the *Sound Contracting*, *Hancon*, and *Cox Bros.* cases are distinguishable from the circumstances related to the potential exercise of the Exclusion Provision for the following reasons:

- there was no equivalent to the Procurement Directive in any of these cases;
- it does not appear that the issue of freedom of access to the course was raised in any of these cases;
- each of these cases involved municipal decision-making and focussed on whether the decision was *intra vires* the municipality;
- each of these cases concerned litigation, as opposed to contractual arbitration, and evidence of valid commercial reasons for the policies was introduced;
- none of these cases are Ontario cases; and
- two of the three relevant cases involved an ongoing battle between Sound and the City of Nanaimo which cases must be reviewed based on their specific facts.

In any event, determination as to the validity of the enforcement of such a policy will depend on the wording of the policy, the facts related to the exercise of the policy, and the authority of the entity promulgating the policy.

At the same time, access to the courts has been considered in Ontario examined in the context of the imposition of various fees which may serve as a barrier to access to the courts. For example, in *Polewsky v. Home Hardware Stores et al.*¹⁹³ the Ontario Divisional Court addressed a motion for a declaration that the tariff fees of the Small Claims Court in connection with setting a matter down for trial were unconstitutional. The Divisional Court determined that there was a constitutional defect which arose from the fact that there was no provision in the *Rules of the Small Claims Court* for the waiver or reduction of fees in cases where the litigant had a meritorious case and, but for the waiver or reduction of fees, would not be able to proceed. The Ontario Divisional Court found this to be a breach of the rule of law and the constitutional values that underlie the common law.

¹⁹² *Ibid*, at para. 17

¹⁹³ (2003), 66 O.R. (3d) 600.

Thus, Ontario Courts have recognized the importance of maintaining a party's right to seek legal recourse in the event of a dispute.

Fundamentally, as in all situations that speak to constitutional rights, this one involves competing values. Here, the value of allowing government maximum control over its contractual relations contends with the value of protecting the right of access to the courts as the mechanism for protecting the rule of law. Viewed from this perspective, as did the Quebec Court of Appeal in the *Baie-James* case, the *Sound* cases are either irrelevant, like *Sound Contracting No. 1* which dealt with a specific bid and not a general policy; or fail to consider the access to the courts issue at all, like *Sound Contracting No. 2*, *Hancon*, and *Cox Bros*. In our view, the reasoning in *Baie-James*, *Volker Stevin*, and *Polewsky* is compelling. Therefore, in its present form, the Exclusion Provision is subject to legitimate criticism as unfairly precluding contractors from effectively pursuing legitimate claims, and, in the event that MTO were to attempt to enforce the Exclusion Provision against a contractor solely on the basis that a legal proceeding had been commenced in respect of a bona fide dispute, such enforcement would, in our view, be unlikely to be upheld as it would represent a denial of access to the court.

The exercise of an exclusion provision, suspension provision, or debarment provision for performance-related causes may well be justified on the basis that if a contractor has demonstrated that it is not capable of performing the work, they should not be entitled to bid on future work. In other words, as long as the system that permits a contractor to be excluded, suspended or debarred is a fair system, it will likely be enforced. As noted above by Arrowsmith in *Government and Procurement Judicial Review*, fairness in this context will require that there be a hearing where a contractor is struck from a tender list or where a contractor's rating is reduced.

However, the legality of the exercise of an exclusion provision as a result of the mere existence of legal proceedings that a contractor is engaged in or has commenced without regard to the bona fides of the dispute at issue is questionable.

Moreover, in circumstances where there is no requirement to submit a dispute to a contractually mandated, binding dispute resolution mechanism, such as arbitration, the operation of an exclusion clause may effectively deprive an organization of the ability to pursue its legitimate legal rights and is subject to challenge based on both administrative and constitutional law principles.

TAB VIII

(VIII) Comparative Analysis of other Jurisdictions

The following is a brief summary of the trends observed in our research in respect of Canada, the United States, and certain other jurisdictions (the United Kingdom, Australia, New Zealand, and Singapore).

(a) Qualification Process

Our research reveals that most of the jurisdictions reviewed have some form of pre-qualification procedure. For example, in the United States 41 states have a pre-qualification procedure of some kind. Those States that have no pre-qualification procedure require that a contactor has sufficient surety bonding capacity and/or that the contractor be licensed. For example, California, Idaho, Louisiana, and Mississippi each have a body responsible for licensing of contractors. Louisiana has both a licensing system and an independent pre-qualification process in respect of financial information. In Rhode Island and New York there is no pre-qualification process, but the low bidder is required to “post qualify”. The post qualification system used in these states is said to be implemented to save time. In both Rhode Island and New York, bid bonds are required as a financial form of pre-qualification.

According to the CFAAST Report, MTO understands that it is the only jurisdiction using a financial pre-qualification process.¹⁹⁴ However, our research in the United States indicates that 37 States require some form of financial evaluation of contractors.

In terms of performance indicators, 39 States require information on past performance on other projects. In its report on Performance Based Contractor Pre-qualification, the U.S. Transportation Resource Board grouped pre-qualification factors into the following four categories used as criteria:

- i. Financial Criteria
 - a. Type of business
 - b. Financial Statement
- ii. Managerial criteria
 - a. Key personnel experience
 - b. Major violations
 - c. Business connections
 - d. Project failures
- iii. Performance Criteria
 - a. Work classifications

¹⁹⁴ CFAAST Report, p. 23

- b. Construction experience
 - c. Major project experience
 - d. Available equipment
- iv. Bonding, Sureties, and Insurance¹⁹⁵

In respect of the third category listed above, being performance criteria, these criteria include factors that relate to past project performance of the applicant and the ability of the applicant to perform on any upcoming projects.

In addition, with respect to project-specific record keeping, at least 33 states keep information in respect of the past performance of contractors.

In terms of the principles applied in the procurement practices of the jurisdictions reviewed, the underlying principles informing the procurement policies of various jurisdictions appeared similar to those set out in the Procurement Directive and the principles of fairness, equity, and transparency are concepts used in most jurisdictions. In some jurisdictions, the underlying principles are even broader than those articulated in the Procurement Directive. For example, the City of New York's procurement rules describe the following as the purposes of its rules:

The underlying purposes of these Rules are to simplify, clarify and modernize the law governing procurement by the City of New York; to permit the continued development of procurement policies and practices; to make as consistent as possible the uniform application of these policies throughout New York City agencies; to provide for increased public confidence in New York City's public procurement procedures; to ensure the fair and equitable treatment of all persons who deal with the procurement system of the City of New York; to provide for increased efficiency, economy, and flexibility in City procurement activities and to maximize to the fullest extent the purchasing power of the City; to foster effective broad-based competition from all segments of the vendor community; including small businesses, minority and women-owned and operated enterprises; to safeguard the integrity of the procurement system and protect against corruption, waste, fraud, and abuse; to ensure appropriate public access to contracting information, and to foster equal employment opportunities in the policies and practices of contractors and subcontractors wishing to do business with the City.¹⁹⁶

The pre-qualification procedures employed by most Canadian Provinces and Territories generally are not as sophisticated as those employed in Ontario and the United States. In each of the Provinces and Territories, contractors must meet specified criteria in order to submit a tender on a project by project basis and generally, including the requirement to provide a bid bond, but the relevant provincial ministries and departments responsible for the construction of roads and highways do not maintain lists of prequalified contractors.

¹⁹⁵ Performance Based Contractor Pre-qualification, p. 18.

¹⁹⁶ <http://www.nyc.gov/html/mocs/ppb/downloads/pdf/April2010rulesmodifiedMar2011pdf.pdf>

(b) Infraction Process

Our review of various jurisdictions indicates that MTO's infraction process is unique. In general, the jurisdictions reviewed fall into one of the categories:

- i. Jurisdictions where there is no evaluation, grading, or assessment of the projects a contractor has worked on. In these jurisdictions, projects are awarded on a case-by-case basis without regard to a contractor's past record of performance for the department of transportation.
- ii. Jurisdictions where projects are evaluated, assessed, or graded on a project-by-project basis but such evaluations, assessments or grades are not used to assess contractors in respect of future projects.
- iii. Jurisdictions where projects are evaluated, assessed, or graded and these evaluations, assessments, or grades are used in future decision making in the pre-qualification process.

The above approaches may involve the use of differing practices. For example, in respect of the latter approach, the evaluations used in some jurisdictions are more formal in nature and a numerical or letter score is assigned to a contractor which may involve the use of a cut-off score for future projects, and others are more informal. In some States, bidders may be disqualified from bidding or suspended due to poor past performance. In most cases where there is the potential for disqualification from bidding, contractors are provided with the opportunity for a hearing.

Other than Ontario, no Canadian jurisdiction has an infraction process in place that affects a contractor's bidding capacity (as noted in the CFAAST Report). However, the Quebec Civil Code permits the Province to refuse tenders submitted by a contractor for two years after that contractor has been given an unsatisfactory performance report. Similarly, contractors in Manitoba may be ineligible to bid on projects for two years following an incident of non-performance. In Newfoundland and Labrador, a contractor who receives a poor contractor evaluation at the end of a project can be prohibited from bidding on projects for a year.

In other jurisdictions, and in other ministries, a fairness monitor has been used as a tool to ensure fairness in procurement activities. The example cited by CFAAST is the Ontario Infrastructure and Land Corporation's use of a fairness monitor to ensure that procurement is carried out in accordance with its internal policies and guidelines.

(c) Liquidated Damages

The vast majority of the U.S. and Canadian jurisdictions reviewed use liquidated damages provisions in their contracts. In addition, many jurisdictions use bonus provisions as a means of creating an incentive for the timely completion of work.

(d) Dispute Resolution

The dispute resolution provisions used in various jurisdictions vary significantly.

Of the jurisdictions reviewed, Ontario's dispute resolution process is among the lengthier and more complicated of the dispute resolution provisions. Florida, for example, uses only one stage of review. In respect of the timing of the dispute resolution process, the majority of the States attempted to resolve claims within 100 – 200 days. Furthermore, the dispute resolution mechanisms reviewed in the United States are all designed to ensure finality at the conclusion of the process.

(i) Adjudication

The United Kingdom, certain states in Australia, New Zealand, and Singapore all use some form of adjudication, as follows.

(A) United Kingdom

As described above, in the United Kingdom, adjudication was introduced by the enactment of the *Housing Grants, Construction and Regeneration Act 1996* (“*HGCRA 1996*”) which became operative on May 1, 1998 in England, Wales, and Scotland and on June 1, 1998 in Northern Ireland. After *HGCRA 1996* came into effect, any construction contract incorporated the new right to adjudication in the contract, or it was incorporated by default.

As described by John L. Riches and Christopher Doncaster in *Construction Adjudication*,¹⁹⁷

The initial uptake of adjudication was slow. This is not surprising as the legislation only operated on contracts formed after 1 May 1998. A party wishing to exercise its right to adjudication had to both get into contract and get into dispute after 1 May 1998. As many construction practitioners know, it is probably easier in the construction industry to find oneself in dispute than in contract.

However the sea change, if one was needed, came from the courts. The question of enforceability of an adjudicator's decision was put beyond doubt in the case of *Macob Civil Engineering v. Morrison*, [1999] BLR 93. This case established beyond doubt that adjudicators' decisions would be enforced, thus removing one of the major skepticisms in the system of new adjudication.¹⁹⁸

On November 12, 2009, the U.K. Parliament passed the *Local Democracy, Economic Development and Construction Act 2009*, (the “*Construction Act 2009*”) Part 8 of which amended the *HGCRA 1996*. The *Construction Act 2009* received royal assent on November 12, 2009. On June 24, 2011, Section 138 came into force (partially), but the remainder of the Act is not yet in force. The *Construction Act 2009* is intended to assist in reducing unfair payment practices in the construction industry and encourage parties to resolve disputes by adjudication. For example, the *Construction Act 2009*:

- Removes the requirement that only contracts made in writing can be adjudicated;

¹⁹⁷ John L. Luschei and Christopher Doncaster, *Construction Adjudication*, (U.K: Blackwell Publishing, 2004)

¹⁹⁸ Glaholt, D.W. “*The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada*” (2006) 53 C.L.R. (3d) 8 at p. 18.

- Attempts to prevent the use of contract provisions which require the referring party to bear all the other parties' costs in an adjudication; and
- Makes various changes to the payment terms between contractors and subcontractors.¹⁹⁹

John Wright, a leading practitioner in the U.K., is quoted as follows with respect to the success of adjudication in the U.K.:

Adjudication has proved effective in helping construction parties to resolve their disputes swiftly and cost-effectively, which has allowed projects to be completed without wasted cost and time in litigation. The *HGCRA 1996* has been effective in providing a statutory right for parties to refer a dispute to adjudication but changes were necessary to the original legislation to improve the process and increase access to adjudication. Many of the changes in the new *Act* are to be welcomed, although questions still remain about some aspects.²⁰⁰

(B) Australia

In Australia, the Royal Commission into the Building and Construction Industry recommended in its final report that the commonwealth government enact a *Building and Construction Industry Security of Payment Act*.²⁰¹ Instead, each State and Territory enacted its own legislation.

New South Wales enacted the *Building and Construction Industry Payment Act 1999* (the “*BCIP Act*”). The *BCIP Act* provides for adjudication, but only in respect of payment claim disputes.²⁰² The jurisdiction of an adjudicator is narrower in New South Wales than in the UK or New Zealand. Also, adjudicators also have shorter timelines for decision-making. In particular, after a claimant has brought an application for adjudication the respondent has 5 business days to deliver a response²⁰³ and the adjudicator must then provide a decision within 10 business days of accepting the application (though the claimant and respondent may agree to extend this time period).²⁰⁴ Under the *BCIP Act*, the adjudicator’s decision may be enforced by filing an adjudication certificate in court.²⁰⁵

Research conducted from 2003-2004 had concluded that claimants had a high probability of success in the adjudication process and that 57% of claimants were awarded the full amount of their claim (only 8% of cases failed to recover any amount) according to an article written by Michael C. Brand and Thomas Uher.²⁰⁶ However, Brand and Uher in their 2005 article which analyzed these results acknowledged that, although claimants were regularly awarded

¹⁹⁹ “*Construction Act 2009: The Future for Adjudication?*” *The Resolver* (February 2010).

²⁰⁰ “*Construction Act 2009: The Future for Adjudication?*” *The Resolver* (February 2010), p. 1.

²⁰¹ The Hon. T. R. H. Cole QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations* (Canberra, 2003), p. 115. The draft Bill was set out in Appendix 1 to the Security of Payment Chapter contained in Volume 8.

²⁰² *Building and Construction Industry Security of Payment Act 1999*, s.17.

²⁰³ *Building and Construction Industry Security of Payment Act 1999*, s. 20 (1).

²⁰⁴ *Building and Construction Industry Security of Payment Act 1999*, s. 21.

²⁰⁵ *Building and Construction Industry Security of Payment Act 1999*, s. 25 (1).

²⁰⁶ Thomas Uher and Michael Charles Brand, “Analysis of adjudication determinations made under security of payment legislation in New South Wales” 2005 23 *International Journal of Project Management* 474, 479.

judgements by adjudicators, only about 50% of these claimants actually recovered the amounts awarded. Brand and Uher found “no procedural reason for such a high proportion of non-payments of adjudicated amounts” and attributed the non-payment to the lack of knowledge of the *BCIP Act* rather than shortcomings in the drafting of the Act.

In a follow up article published in 2010 regarding the *BCIP Act* of New South Wales, Brand and Uher concluded that the culture of making late payments remained entrenched in the construction industry²⁰⁷ and that contractors and subcontractors were not taking full advantage of the *BCIP Act*.

In their 2010 article, Brand and Uher reported that the level of knowledge amongst contractors and subcontractors had not improved, and had possibly declined. The surveyed contractors and subcontractors continued to experience a high rate of late payments. Roughly half of those surveyed found that their action under the *BCIP Act* had negatively impacted their working relationships. Though a large percentage of contractors and subcontractors were satisfied that the *BCIP Act* created a fair and balanced payment standard, 40% remained undecided on the issue. Brand and Uher did not make recommendations as to how to improve the *BCIP Act*.

The other states of Australia have used New South Wales’ *BCIP Act* as a model, but commentators have noted conceptual differences between the Acts adopted on the West Coast (including New South Wales and Western Australia) and the East Coast (the other states) of Australia, stating as follows with respect to the differences in the adjudication schemes adopted:

Whilst both models allow for a statutory adjudication scheme to determine, in the interim, disputed payment claims, they differ with respect to adjudicator appointment, submissions which may be considered by an adjudicator, and the approach which an adjudicator is to adopt in order to arrive at his or her determination. In all of these respects the East Coast Acts are more restrictive, disallowing mutual agreement of an adjudicator, consideration of reasons for withholding payment which have not been duly submitted in accordance with the statutory payment scheme, and discouraging an evaluative approach to adjudicators’ determinations.²⁰⁸

(C) New Zealand

In New Zealand, adjudication was introduced through the New Zealand *Construction Contracts Act 2002* (the “*Construction Contracts Act*”).²⁰⁹ New Zealand uses the U.K. model, but with some modifications:

- The *Construction Contracts Act* applies to residential construction contracts, but in a modified form,²¹⁰

²⁰⁷ Michael Charles Brand and Thomas Uher, “Follow up empirical study of the performance of New South Wales construction industry security of payment legislation” 2010 2 *International Journal of Law in the Built Environment* 7.

²⁰⁸ Jeremy Coggins, Robert Fenwick Elliott and Matthew Bell, “Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia” (2010) 10(3) *Australasian Journal of Construction Economics and Building* 14, at 15 (citations omitted).

²⁰⁹ *New Zealand Construction Contracts Act 2002*.

- The *Construction Contracts Act* applies only to non-monetary disputes;²¹¹
- A claimant may, in the notice of adjudication, seek a “charging order” in respect of a construction site;²¹²
- The adjudicator has 20 days to make a determination;²¹³
- The *Construction Contracts Act* states that the adjudicator must be independent as well as impartial;²¹⁴
- The adjudicator will undertake an inquisitorial process as opposed to a judicial process and may initiate inquiry and take into account “any other matters the adjudicator reasonably considers to be relevant;”²¹⁵
- An adjudicator’s determination that an amount of money is payable by one party to a contract to another is enforceable, but:

... an adjudicator’s determination of the rights and obligations of the parties under the contract, whether made in the course of arriving at a determination as to whether money is payable or the sole object of the adjudication, is not enforceable, although any court before whom the rights and obligations in question are subsequently litigated: “must have regard to the adjudicator’s determination.”²¹⁶

In comparing the legislation of New Zealand with that of New South Wales, Uher and Brand conclude as follows:

It emerges that due to its more robust scope the NSW Act is better equipped to address payment claim disputes more speedily and possibly more economically than its NZ counterpart. For example, timelines defined in the NSW Act for the nomination of an adjudicator, the submission of a payment schedule, and the making of an adjudication determination, are substantially shorter than in the NZ Act.

While the NZ Act, through rapid adjudication, provides scope for resolving a broader range of disputes than the NSW Act, access to the NZ Act is limited to contractors and subcontractors only; unlike the NSW Act, suppliers of goods and services are not captured by the NZ Act. While the reason for excluding suppliers of goods and services from NZ Act is unclear, it is doubtful that they would need any less protection under the NZ Act than contractors or subcontractors. The broader scope of the NZ Act is reflected in correspondingly broader jurisdiction afforded to adjudicators complemented by a wider range of adjudicators’ powers including the power to approve a charging order in respect

²¹⁰ New Zealand *Construction Contracts Act 2002*, Section 10.

²¹¹ New Zealand *Construction Contracts Act 2002*, Section 9.

²¹² Tomás Kennedy-Grant, “A.D.R. – Antipodean Dispute Resolution,” A paper presented to a meeting of the Society of Construction law in London, October 12, 2004, p. 19.

²¹³ New Zealand *Construction Contracts Act 2002*, Section 46(2).

²¹⁴ New Zealand *Construction Contracts Act 2002*, Section 41.

²¹⁵ New Zealand *Construction Contracts Act 2002*, Section 45.

²¹⁶ Tomás Kennedy-Grant, p. 20.

of a construction site owned by the respondent, and the determination of the owner's liability where the owner is not the respondent and the approval of a charging order over the owner's site. These appear to be powerful means that a claimant may use to enforce payment of the adjudicated amount of a payment claim.²¹⁷

(D) Singapore

In Singapore, the *Building and Construction Industry Security of Payment Act 2004* was introduced in an effort to ensure prompt payment on construction projects. It is similar to the legislation adopted in New South Wales described as follows:

Any party who has carried out construction work or supplied related goods or services¹ in the building and construction industry under a contract made in writing will have a statutory right to receive progress payment. The Act applies to both private and public sector projects. It can be used even where the contract has no provision for progress payment. The Act does not allow "pay when paid" clauses to be enforced where these are included in the contract.

To benefit from the Act, a claimant (payee) must serve payment claims according to the provisions in the contract and the Act. A respondent (payer) who withholds any payment must give reasons in a payment response to the claimant. **If the claimant disagrees with the response amount or fails to receive payment stated in the payment response, he may apply for adjudication through an Authorised Nominating Body (ANB).**

Adjudication is a simple process to resolve disputes in a quick and relatively low-cost manner. An independent adjudicator appointed by the Authorised Nominating Body decides on the amount to be paid for a claim made under the Act.²¹⁸ [Emphasis added]

With respect to timelines, a claimant submits an adjudication application to the Authorised Nominating Body within 7 days of the payment due date or the last day of the dispute settlement period and the respondent has 7 days to respond. The adjudicator is to make a decision within 14 days after commencement of the adjudication (unless a longer time is requested by the adjudicator and agreed to by the parties).²¹⁹

There is an adjudication review procedure if an aggrieved respondent (if the amount disputed is greater than \$100,000). Under this procedure, another adjudicator is appointed to review the matter with similar timelines imposed as for the initial adjudication.²²⁰

A claimant may take a dispute to litigation or arbitration, but this does not affect the adjudication and the adjudicator's determination remains binding and the adjudicated amount is to be paid

²¹⁷ Thomas Uher and Michal Brand (2007): A Comparative analysis of the operation of 'compulsory rapid adjudication' in New South Wales and New Zealand, *Construction Management and Economics*, 25:7, 765-775, at 772.

²¹⁸ Singapore Building and Construction Authority, *Building and Construction Industry Security of Payment Act 2004*, Information Kit, 2005 edition, p. iv.

²¹⁹ Singapore Building and Construction Authority, *Building and Construction Industry Security of Payment Act 2004*, Information Kit, 2005 edition, pp. 11-15.

²²⁰ Singapore Building and Construction Authority, *Building and Construction Industry Security of Payment Act 2004*, Information Kit, 2005 edition, pp. 17-18.

unless the dispute is re-adjudicated by the review adjudicator) or finally determined by court proceedings, arbitration, or agreement by parties.²²¹

In a 2008 article describing the effect of Singapore's *Building and Construction Industry Security of Payment Act, 2004*, Paul Teo stated that the legislation had a positive impact in terms of expediting payments on construction projects in Singapore.²²²

Therefore, adjudication has been successful in expediting the resolution of disputes in an economical manner in the UK, Australia, New Zealand, and Singapore.

(ii) Dispute Resolution Boards

As noted above, there are a dozen states which use Dispute Resolution Boards as a step in the dispute resolution process on highway construction projects. In general, in the U.S. in 2010, the DRB Foundation reported over 2,150 projects valued at over \$150,000,000,000 have used DRBs.²²³

DRBs have been used to resolve disputes on the Massachusetts Central Artery and Tunnel project (the "Big Dig"), the Los Angeles subway and the new terminal at the John F. Kennedy International Airport in New York.²²⁴

These high-profile projects have yielded a number of lessons for the future use of DRBs. The Big Dig project set up DRBs as a last resort before litigation. As a last resort, the DRB was successful, as many claims were resolved without the need to resort to arbitration or litigation.²²⁵

Kathleen Hardon, in commenting on the use of the DRB model on the Big Dig Project, stated that, because DRB members are aware of the basic facts of the project, they are able to make quick and accurate recommendations before the parties become embittered and their relationship deteriorates following a long dispute process.²²⁶ However, on larger projects such as the Big Dig, a backlog of cases can quickly develop and grow throughout the project, such that the timely use of the DRB mechanism is impeded.²²⁷ Other commentators have recommended limiting DRBs to less complex, low-dollar value disputes arising over the course of a project. DRBs are not well suited for complex, contract interpretation claims that may involve a large

²²¹ Singapore Building and Construction Authority, *Building and Construction Industry Security of Payment Act 2004*, Information Kit, 2005 edition, p. 18.

²²² Paul J.P. Teo, "Adjudication: Singapore Perspective" 2008 134 J. Prof Issues Engl. Educ. Pract. 224.

²²³ Lawrence.

²²⁴ Daniel D. McMillan and Robert A. Rubin, "Dispute Review Boards: Key issues, Recent Case Law, and Standard Agreements" 2005 2 The Construction Lawyer. Available online at: www.jonesday.com.

²²⁵ Kurt L. Dettman, Martin J. Harty and Joel Lewin, "Resolving Megaproject Claims: Lessons From Boston's "Big Dig"" 2010 30 The Construction Lawyer.

²²⁶ Kathleen M. J. Hardon, "Case Study as to Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project" 2009 Journal of Legal Affairs and Dispute Resolution in Engineering 18.

²²⁷ Kurt L. Dettman, Martin J. Harty and Joel Lewin, "Resolving Megaproject Claims: Lessons From Boston's "Big Dig"" 2010 30 The Construction Lawyer.

quantity of evidence and long hearings. Moreover, for larger claims, it is less likely that the parties will accept a non-binding recommendation.²²⁸

The DRB trend has not caught on in Canada, as yet, with the DRB Foundation reporting that from 1998-2010 only nine Canadian projects employed DRBs, seven of which included TTC projects (however, there may be other Canadian projects that have used DRBs that are not in the DRB Foundation database).²²⁹

(iii) Referees and Project Neutrals

Other jurisdictions in Canada use alternative dispute resolution mechanisms. For example, in British Columbia, a dispute can be referred to a referee if the decision of the Ministry Manager does not resolve the dispute.²³⁰ On agreement of the parties, a referee is selected and the referee will render a non-binding opinion and recommendations. In B.C., a referee is often a former employee of the Ministry of Transportation and Infrastructure.

A template Referee Services Agreement prepared by the B.C. Ministry of Transportation and Infrastructure (the “Template Agreement”) sets out the duties and obligations of the three parties being the referee, the Ministry, and the Contractor. The referee is appointed to address only the referred dispute and to do so promptly. The referee must disclose to both parties any facts or circumstances that may give rise to a reasonable apprehension of bias. The referee must not communicate with one party, unless a representative from the other party is present and all communication and information must be kept confidential. Though the referee is paid by the Ministry, the Template Agreement states that the referee is an independent contractor and not a servant, employee or agent of the Ministry. The Template Agreement also provides that both the Ministry and the contractor are obliged to cooperate with each other and with the referee.

The Template Agreement sets out a timeline for the resolution of the dispute. Within 7 days of the referral of the dispute to the referee, the referee must coordinate a meeting of the parties. At this meeting, the parties may determine the procedures and timelines for the remainder of the process. The Template Agreement sets out a timeline, although parties may choose to alter it. The Template Agreement proposes that within 14 days of the referral of the dispute, the referring party should submit a statement of claim and additional information, as necessary. The responding party is then given 14 days to respond and the referee is given 14 days to provide a written decision.

After the decision is delivered either party may deliver a Protest of Decision to the other party and the referee within 30 days. In the absence of a protest, within 14 days, the decision becomes final and binding on both parties. The Ministry has 45 days to Reply to the Written Protest and the contractor then has 30 days to issue a formal Notice of Claim or request a Referee Review. Any decision that is the subject of a protest is referred to arbitration.

²²⁸ Kurt L. Dettman, Martin J. Harty and Joel Lewin, “Resolving Megaproject Claims: Lessons From Boston’s “Big Dig”” 2010 30 The Construction Lawyer.

²²⁹ McEniry

²³⁰ BC Major Works Conditions, GC 58.11 and 59.05 (the other alternatives are an appeal to the Deputy Minister or arbitration).

In Newfoundland and Labrador, the Heavy Civil Association (“HCA”) of Newfoundland and Labrador and the Department of Transportation and Works created a mandatory alternative dispute resolution mechanism available to contractors who are HCA members. HCA members refer their disputes to a four-person dispute resolution committee which hears the dispute in accordance with the dispute resolution committee guidelines and renders a non-binding decision. Litigation can then be commenced.

(e) Surety Bonds

All of the North American jurisdictions reviewed used surety bonds, except for Ontario.

Some Canadian jurisdictions such as Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories, permit a contractor to provide contract security in alternate forms such as certified cheque, bank draft, or letter of credit.

(f) Exclusion Provision

As noted in the CFAAST Report, we have not located any jurisdiction that has an exclusion provision set out in a formal qualification procedure similar to that provided in the MTO Qualification Procedures.

Sixteen States in the United States do have a publicly available suspension or debarment list. In these States, if contractors are suspended or debarred their names will be published on the website of the Department of Transportation.

The U.S. Transportation and Research Board prepared a report entitled “NCHRP Synthesis 390 Performance-Based Construction Contractor Pre-qualification.” This report carefully examines the MTO Qualification Procedures and describes the following barrier to use of the MTO pre-qualification system, focusing on the Exclusion Provision, as follows:

The major barrier to implementing this type of system in the United States will be the issue of disqualifying contractors for bringing legal action against the agency. U.S. contractors, as verified by the contractor interviews, would argue that not all the lawsuits are the fault of the contractor and that standard construction contracts are crafted with the idea that the courts are the final recourse when the means provided by dispute resolution clauses fail to bring a satisfactory result.²³¹

(g) Summary of U.S. Jurisdictional Research Results

The processes employed in the United States are summarized in the chart enclosed in the envelope that follows this page.

²³¹ NCHRP Synthesis 390 Performance-Based Construction Contractor Pre-qualification, 2009, p. 51.

SUMMARY OF U.S. JURISDICTIONAL RESEARCH RESULTS

State	Pre-qualification requirements		Discipline Process	Non-Conformance Record Keeping		Liquidated Damages		Exclusion Provisions
	Financial	Past Performance		Records Kept?	Publicly available suspension list	LDs	Bonus - Project Specific	
Alabama	✓	✓				✓	✓	
Alaska	✓	✓				✓	✓	
Arizona	✓	✓	✓	✓		✓	✓	
Arkansas	✓	✓	✓			✓	✓	
California				✓	✓	✓	✓	
Colorado	✓	✓		✓		✓	✓	
Connecticut	✓	✓	✓	✓		✓	✓	
Delaware			✓			✓	✓	
Florida	✓	✓	✓	✓		✓	✓	
Georgia	✓	✓	✓	✓	✓	✓	✓	
Hawaii				✓	✓	✓		
Idaho						✓	✓	
Illinois	✓	✓	✓	✓	✓	✓	✓	
Indiana	✓	✓	✓	✓		✓		
Iowa	✓	✓	✓	✓		✓	✓	
Kansas	✓	✓	✓	✓		✓	✓	
Kentucky	✓	✓	✓	✓		✓	✓	
Louisiana	✓		✓			✓	✓	
Maine	✓	✓	✓	✓		✓	✓	
Maryland			✓	✓	✓	✓	✓	
Massachusetts		✓	✓	✓	✓	✓	✓	
Michigan	✓	✓	✓	✓		✓	✓	
Minnesota					✓	✓	✓	
Mississippi						✓	✓	
Missouri	✓	✓	✓	✓	✓	✓	✓	
Montana	For specialty work only	For specialty work only		✓	✓	✓	✓	
Nebraska	✓	✓	✓	✓	✓	✓	✓	
Nevada	✓	✓	✓	✓	✓	✓	✓	
New Hampshire	✓	✓		✓		✓	✓	
New Jersey	✓	✓	✓	✓	✓	✓	✓	
New Mexico		✓				✓	✓	
New York			✓	✓	✓	✓	✓	
North Carolina	✓	✓	✓	✓		✓	✓	
North Dakota	✓	✓			✓	✓	✓	
Ohio	✓	✓	✓	✓		✓	✓	
Oklahoma	✓	✓	✓	✓	✓	✓	✓	
Oregon	✓	✓	✓	✓	✓	✓	✓	
Pennsylvania	✓	✓	✓	✓		✓	✓	
Rhode Island						✓	✓	
South Carolina	✓	✓	✓	✓		✓	✓	
South Dakota	✓	✓		✓		✓	✓	
Tennessee	Optional	✓	✓	✓	✓	✓	✓	
Texas	✓	✓			✓	✓	✓	
Utah	✓	✓	✓	✓		✓	✓	
Vermont	✓	✓		✓		✓	✓	
Virginia	✓	✓	✓	✓	✓	✓	✓	
Washington	✓	✓	✓	✓	✓	✓	✓	
West Virginia	✓	✓				✓	✓	
Wisconsin	✓	✓	✓	✓	✓	✓	✓	
Wyoming	✓	✓	✓	✓	✓	✓	✓	

Legend:
 ✓ – Yes
 Blank – No

TAB IX

(IX) Gap Analysis

The following analysis will review the differences, or “gaps,” if any, between MTO’s current processes and:

- i. the first principles gleaned from a review of the legal context of the relevant issues described in Section VII above; and
- ii. the processes employed in other jurisdictions.

(a) Qualification Process

In general terms, a pre-qualification system can serve as an effective means of ensuring that capable contractors are retained to construct a road or highway. Furthermore, and although MTO’s approach in this regard is unique, the concept of evaluating contractor performance on a program-wide basis, as opposed to a project-by-project basis, is not contrary to either the first principles or the practices reviewed. Pre-qualification processes are employed in other jurisdictions. Such systems inherently provide a method for the ongoing recognition of contractors who perform good work and serve as a disincentive for contractors who are not competent or capable.

However, issues do emerge in respect of a qualification process if there is a lack of fairness in the evaluation system. Gaps identified in the MTO Qualification Procedures include the following:

- the Qualification Procedures contain inadequate information about the mandate of the Qualification Committee, its composition, its attendance policies, its quorum policies, its procedures, and the conflict of interest guidelines governing the Qualification Committee.
- there is no mechanism in the Qualification Procedures for contractors to evaluate Contract Administrators who play a key role, as noted in the CFAAST Report, in “managing the relationship with contractors.”

In its report, CFAAST, under the heading “Enhancing QC Process, Fairness and Transparency,” referenced opportunities to enhance the Qualification Committee process, including use of a Fairness Monitor, introduction of an attendance policy, and ensuring that a quorum of the majority of the voting members of the Qualification Committee attend meetings.

CFAAST recommends the use of a fairness monitor (similar to that used by the Ontario Infrastructure and Lands Corporation) to ensure that the process is impartial, consistently applied and has the appropriate level of diligence. Fairness monitors are used on public private partnership projects (“P3 Projects”) to:

- assess whether the project and evaluation team have demonstrated fairness in applying the procedures for the procurement process;

- to ensure that the transaction process is completed adhering to principles of fairness, openness, transparency, and integrity; and
- to assess whether the procedure in its design and in its execution was one that reasonable and well informed people would consider to be fair.

The introduction of a fairness monitor into the MTO Contractor Management System would provide an independent third party monitor for the process, but it is not clear how such a monitor would participate in the process given that in the context of a P3 Project the role of a fairness monitor is limited as outlined above. In other words, in order for a fairness monitor to be utilized, the role of fairness monitor would have to be significantly redefined.

In response to CFAAST's recommendations, MTO advised that it was conducting a review and assessment of Qualification Committee procedures to identify opportunities to enhance fairness, consistency, and transparency. No particulars were provided. Given the key role played by the Qualification Committee, the absence of a clear mandate and procedural regime for this Committee represents a significant gap in the process. Although MTO committed to review the use of a fairness monitor, it has not provided any information in this regard as of the date of writing. MTO also committed to developing a formal attendance policy and increasing the Qualification Committee quorum. In our view, the proposed steps to be taken by MTO, including the potential use of a fairness monitor, would not adequately address the problems inherent in the functioning of the Qualification Committee. Even with MTO's proposed changes the Qualification Committee would remain a "black box," fundamentally opaque to contractors.

As well, the interrelationship between the Qualification Procedures, the infraction process, and the utilization of the Exclusion Provision raises significant issues in relation to the MTO processes.

(b) Infraction Process

The Infraction Process, as it is presently constituted, fails to conform to best practices as follows:

- The Qualification Committee is defined in the Infraction Procedures as "an internal ministry committee with the authority to impose administrative sanctions on contractors resulting from the issuing of a contractor's infraction report. The membership of the committee comprises head office executives and managers. The committee is chaired by an Assistant Deputy Minister, who is also responsible for appointing a Secretary and a legal counsel as advisor to the committee." However, the detailed make up of the committee is not described in the Infraction Procedures, nor is it indicated whether or not the members of the Qualification Committee who consider the Statement of Facts and responses to the Statement of Facts and decide the outcome have had any other involvement in the project or the investigation of the infraction under consideration, including any prior decisions made in respect of potentially related claims.
- The Secretary of the Qualification Committee is responsible for the investigation of the incident(s) that led to the issuance of the Infraction Report, and the

preparation of the Statement of Facts that summarizes the infraction and identifies those facts that are agreed to by both parties and those that are in dispute. This summary may also include facts that the contract management office considers relevant, but were not included in the Region's or the Contractor's submissions. Infraction Reports are considered by the Qualification Committee, but there is a gap in the Infraction Procedures, in that the role of the Secretary of the Qualification Committee, who bears responsibility for the investigation of the incident(s), is not clearly described in the Infraction Procedures, particularly with respect to that individual's potential role in decision making.

- The Infraction Procedures do not require that the specifics of the allegations against the contractor be described in full such that there is limited assurance that a contractor will be able to completely understand the allegation(s) it has to meet.
- The Infraction Procedures do not provide criteria to ensure that the contractor has an adequate opportunity to respond to the allegation(s) made against it, particularly in circumstances where the contractor is not:
 - Given complete information regarding the evidence of relevant individuals involved in the project, including Contract Administrators.
 - Given access to the relevant documents.
 - Given adequate time to present its case at an oral hearing. A contractor is permitted only 20 minutes to make an oral presentation to the Qualification Committee, if the preliminary decision of the committee is to impose a financial rating reduction.
- The Infraction Procedures reference only the following three criteria for determining the severity of an infraction sanction:
 - The nature of the infraction;
 - Impact of the infraction; and
 - Contractor history of prior infractions.²³²
- The Infraction Procedures do not provide the contractor with any right of review or appeal. In contrast, in respect of the Consultant Performance and Section System, Consultant Appraisal Reviews, and Consultant Infraction Reports Procedures Guide issued by the MTO Qualifications Committee on or about October 2007 in respect of Contract Administrators, there is a process articulated in that Guide pursuant to which a Contract Administrator can submit a request for a review of its appraisal, based on substantial and reasonable grounds. There are

²³² As noted by CFAAST, “[d]etailed decision making criteria relating to sanctions resulting from an infraction would help to ensure that sanctions were consistently applied.”

two levels of review, the first level of review being at the regional manager level of review and the second level of review being a review by the Qualifications Committee.

In response to the CFAAST Report, MTO advised that it was:

- Expanding current decision making criteria for determining sanctions for infractions;
- Developing a Qualification Committee document to guide decision making with expected implementation by March 2012; and
- Communicating factors considered for determining sanctions to contractors by May 2012.

As at the date of writing, ORBA has not received any information from MTO about any of the above initiatives. As noted above, there are a significant number of issues related to the mandate, composition, and procedures of the Qualification Committee, particularly in respect of the infraction process. Further, there are opportunities for allegations of an appearance of bias to be raised considering a potential lack of independent decision making, and a lack of detailed decision making criteria exacerbate this problem.

(c) Liquidated Damages

The use of a liquidated damages provision is acceptable on a first principles basis, if it is found to constitute a genuine pre-estimate of damages.

With respect to other jurisdictions, as noted above, liquidated damages provisions are commonly used and accepted.

In response to CFAAST's express concern about the use of multiple sanctions and cost recovery mechanisms including infractions, reductions and maximum workload rating, loss of supplemental bid capacity, and liquidated damages which, when applied in tandem, "may exceed the severity of the initial incident that led to the infraction."²³³ MTO responded that:

Unlike other jurisdictions, the Ministry has recently agreed to delay the setoff of liquidated damages until the Assistant Deputy Minister (Head Office level claims) has provided a response to a related delay claim. The policy is supported by ORBA as part of discussions on liquidated damages and has been implemented.²³⁴

However, to our knowledge, no changes have been introduced to the MTO General Conditions, as of the date of writing.

²³³ CFAAST Report, p. 17.

²³⁴ MTO Report, p. 21.

(d) Dispute Resolution

MTO's current dispute resolution processes contain the following gaps which are notable when contrasted with the first principles analysis and the practices of other jurisdictions:

- i. A lack of expeditiousness, procedural fairness, certainty, and finality; and
- ii. No mechanism for early adjudication of disputes by an adjudicator, or review by a referee, or a dispute resolution board.

Perhaps most importantly, in the absence of mandatory arbitration, the present formulation of the Exclusion Provision gives rise to a major gap in the dispute resolution process utilized by MTO. While the Exclusion Provision is acceptable inasmuch as it pertains to inadequate prior performance by a contractor, from a dispute resolution perspective it is unacceptable in respect of its *carte blanche* approach to legal proceedings. This is because the Exclusion Provision serves, from a practical perspective, as an effective bar to the commencement of legal proceedings by a contractor with the result that the risk exists that there may be *no* finality achieved in respect of the resolution of disputes, or that contractors with legitimate claims will settle for significantly less than they are entitled to due to the intimidating effect of the Exclusion Provision. The Divisional Court in *Cavanagh* noted that MTO's Qualification Procedures allow it to exclude any contractors from bidding where the contractor is involved in a legal proceeding raising the possibility that a contractor "may be sanctioned throughout the duration of a lengthy action for damages."²³⁵ The fact that MTO has purportedly never pursued the enforcement of the Exclusion Provision is, of course, understandable given its questionable enforceability, and accordingly, the fact that its "chilling" effect on the pursuit of claims is of greater value to MTO than any effort to attempt to enforce it.

(e) Surety Bonds

MTO's assertion that its financial review is equivalent to that of a surety underwriter's, such that it is, in essence, "self bonding" is somewhat over-stated, inasmuch as a surety's financial review would be broader in its ambit. More importantly MTO's approach provides no financial protection from contractor insolvency, either for the Province or for subcontractors or suppliers.²³⁶ At the same time, MTO's assertion that it is saving "tens of millions of dollars" by not using surety bonds may be based on an incomplete evaluation as it is not clear that it includes a monetary contingency for insolvency risk. Finally, within the context of a default, it is the case that the surety will be entitled to have a say regarding project completion, so that MTO would not have total control where the surety is paying, although such a concern can be significantly moderated by a bespoke set of bond wordings.

As noted above, every other jurisdiction in North America utilises surety bonds. The fact that MTO does not, in itself constitute a noteworthy best practices gap.

²³⁵ *Cavanagh, supra*, at para. 25.

²³⁶ By way of recent example, in the insolvency proceedings related to Triwest Construction and Concrete USL, ten MTO projects are listed in the materials filed with the court (in action number CV-12-19646-00CL, *Bank of Nova Scotia v. Triwest Construction (GP) Inc. et al.* – Order dated March 16, 2012). These projects are not bonded and therefore MTO and the subcontractors cannot look to any bonds to recover their losses.

Having said this, the issue of the introduction of surety bonds on MTO contracts is a complex one which merits further in depth consideration of the advantages and disadvantages from both the perspective of MTO and contractors. At present, there is insufficient evidence available as to the economic and efficiency benefits of the adoption of surety bonds in order to make a definitive recommendation.

(f) Exclusion Provision

The exercise of an exclusion provision based on the mere existence of legal proceedings, as noted above, is by its very nature potentially punitive in nature, is unfair, and may effectively deny access to the Courts. The existing provision fails to distinguish between, on the one hand, bona fide disputes that cannot be resolved except by recourse to the courts or arbitration, and which have been properly pursued, and, on the other hand, frivolous or vexatious legal proceedings, or legal proceedings abusively pursued.

TAB X

(X) Conclusions

(a) Appropriate Governmental Standard of Conduct

In assessing current MTO processes, the necessary starting point is a determination of the appropriate governmental standard of conduct in the circumstances.

As noted above, in general, the courts will uphold the principle of freedom of contract, which includes the principle of freedom not to contract.²³⁷ However, there are certain constraints that apply to a government entity which do not apply to a private entity.

A governmental entity is circumscribed in its actions by the legislative framework within which it operates, as well as by applicable government policy. In the circumstances, MTO is granted a broad mandate to construct highways and roads and to enter into agreements for that purpose pursuant to the *Public Transportation and Highway Improvement Act*. However, in the exercise of this mandate, MTO is constrained by applicable policies and directives, including but not limited to the Procurement Directive. In particular, MTO is obliged to administer an open, competitive bidding system. The Divisional Court in *Cavanagh* noted that this Directive “creates and informs the MTO’s duty of fairness in the procurement context.”

Whether or not a contractor has available to it administrative law remedies in respect of MTO decisions will be determined with regard to the specific process and the facts at issue. In this regard, the fact that MTO is “the only market for road construction pursuant to its statutory power for the purpose of building public roads that are vital to the public interest”²³⁸ will be a factor taken into consideration.

In addition, constitutional law principles represent a potential constraint on the exercise of MTO’s duties and powers. For example, the rule of law that protects access to the courts is a principle that is relevant to consideration of the Exclusion Provision, as discussed above.

Again, while the common law principles of tendering law are also applicable to MTO tendering decisions, it is clear that MTO does not enjoy the freedom of a private party.

In summary, therefore, the following principles are relevant to the identification of the appropriate standard of conduct to be applied to MTO processes:

- i. The legislative framework within which MTO operates;
- ii. The policies and directives applicable to MTO procurement practices;
- iii. The administrative law principles applicable to MTO, in appropriate circumstances, including the duty of fairness;
- iv. The tendering law principles applicable to MTO tendering decisions;

²³⁷ *Manos, supra.*

²³⁸ *Cavanagh*, at para. 31.

- v. The constitutional law principles applied to government activities, on an appropriate basis; and
- vi. The foundational principles of equity, transparency, and accountability.

Given the applicable standard of conduct, and the significant interests at stake, and keeping in mind that MTO has created a fundamentally unique environment of inter-related processes such that the degree of complexity encountered by a contractor may be fairly characterized as remarkable among its counterparts, the need for appropriate levels of fairness, equity, transparency, and accountability is particularly acute in the circumstances. The following conclusions are to be viewed within this overall context.

(b) Conclusions with respect to MTO Processes

(i) Qualification Process

It is not debatable that a qualification process must be administered in a fair, open, and transparent manner. A fair process will encourage the continued participation in the roadbuilding industry of capable and qualified roadbuilders. From a policy perspective, the existence of a large pool of qualified and capable Ontario roadbuilders to perform work for MTO is an asset to the taxpayers of Ontario. There is no inherent flaw in a system that pre-qualifies contractors at a program-wide, as opposed to project-specific, level, as long as accountability is built into the system and the arbitrary exercise of discretion is constrained such that the system is administered in an open competitive environment.

There are certain gaps in the current MTO Qualification Procedures, as follows:

- The Qualification Procedures do not describe a clear mandate for the Qualification Committee. Rather, certain responsibilities are delegated to the Qualification Committee through the Qualification Procedures as well as through other ancillary procedures including the Infraction Procedure and the Exclusion Provision Procedure.
- The Qualification Procedures do not describe the composition of the Qualification Committee. The membership of the Committee is not clearly defined and the roles and responsibilities of its members are not clearly articulated. For example, the Secretary of the Qualification Committee is responsible for key aspects of the investigation of the exercise of the Exclusion Provision and Infractions, but the decision-making role of this individual with respect to the Exclusion Provision and Infractions is not described. Furthermore, the membership of the Qualification Committee is entirely made up of MTO staff. There are no independent, non-MTO members of the Qualification Committee. The only reference found in respect of the involvement of non-MTO staff is in the description of the role of the Assistant Deputy Minister's Review Committee described in the Exclusion Provision Procedures which references the involvement of an Assistant Deputy Minister from another ministry in the

Committee which reviews an objection made to the exercise of the Exclusion Provision.

- The Qualification Procedures contain inadequate information about the Qualification Committee's attendance policies, the Qualification Committee's quorum policies, and the Qualification Procedures lack conflict of interest guidelines governing the Qualification Committee to ensure impartiality; and
- There is no mechanism in the Qualification Procedures for contractors to evaluate Contract Administrators who play a key role, as noted in the CFAAST Report, in "managing the relationship with contractors."

(ii) Infraction Process

The infraction process, as it is presently constituted, also contains gaps.

There are no detailed guidelines with respect to the information to be provided to a contractor regarding the specifics of the allegations against a contractor in order to ensure that the contractor is able to fully understand the case it has to meet.

There is no mechanism within the Infraction Procedures to ensure that a contractor has an adequate opportunity to respond to the allegations made against it, such as a means of insuring that the contractor obtains relevant documents and all information from relevant persons, including contract administrators and MTO staff.

In terms of an oral hearing, a contractor is permitted only 20 minutes for a hearing which, depending on the seriousness or complexity of the infraction, may not be sufficient time for the contractor to adequately present its case.

The Infraction Procedures do not clearly set out the criteria for decision making in the determination of a sanction to be levied against a contractor.

(iii) Liquidated Damages

In its recommendations under the heading "Alignment of Consequences," CFAAST notes that potential sanctions and cost recovery mechanisms applied by MTO include:

- infractions,
- reductions in maximum workload rating,
- loss of supplemental bid capacity, and
- liquidated damages.

The CFAAST Report notes that “[w]hen the sanctions are applied in tandem, **the degree of the consequences may exceed the severity of the initial incident that lead to the infraction.**”²³⁹[Emphasis added]

Therefore, CFAAST recognized the unfairness that may result if multiple sanctions, including liquidated damages, are applied to a contractor. In this regard, the CFAAST Report notes that MTO deducts liquidated damages from progress payments while accountability for the delay is still under dispute. CFAAST also references the concern expressed by contractors that they are penalized multiple times for the same incident.

In response, MTO advised that it had “recently agreed to delay the set off of liquidated damages until the Assistant Deputy Minister (Head Office level claims) has provided a response to a related delay claim.”²⁴⁰ As of the date of writing, there have been no changes to the MTO standard contract terms with respect to liquidated damages or to the Qualification Procedures with respect to the imposition of multiple forms of sanctions in respect of the same incident.

MTO also advised that it was conducting a review of the alignment of the contractor rating process, liquidated damages and infraction processes with expected completion by May 2012, but as at the date of writing, no information had been received from MTO with respect to this “review”.

Liquidated damages clauses are commonly employed in construction contracts as a means of ensuring that a contract is completed in a timely manner. Canadian courts will enforce liquidated damages provisions, as long as they are found to be a genuine pre-estimate of damages, and not a penalty, as noted in the first principles review above.

As articulated in the CFAAST Report, the problems with the liquidated damages provision in the MTO construction contracts are:

- it has been applied prior to a determination as to fault in respect of delays, and
- the liquidated damages provision is applied in tandem with other sanctions, including infractions, reductions in maximum workload rating, and loss of supplemental bid capacity, resulting in a potentially disproportionate effect on the contractor.

With respect to the former concern, it is the language of the construction contract that will govern the assessment of when liquidated damages can be levied against a contractor, in a contract between two private sector entities. However, where one of the parties is a government entity such as MTO which has set up a stepped review structure for the review of claims, it can be argued that administrative principles of fairness should dictate in respect of the timing of the levying of liquidated damages.

²³⁹ CFAAST Report, p. 17.

²⁴⁰ In the CFAAST Report under the heading “What is Working Well,” CFAAST cites as an example of MTO taking initiative to improve processes, MTO’s communication of its proposed approach to liquidated damages and change orders at the ORBA Annual Convention.

Further, with respect to the latter concern about the cumulative impact of liquidated damages along with the other sanctions available to MTO, administrative law principles may impose fairness constraints on the process.

Moreover, the imposition of liquidated damages at the same time that other sanctions are employed, raises the concern that the liquidated damages provision and other sanctions have been transformed into a penalty as opposed to a genuine pre-estimate of damages such that the liquidated damages provision is not enforceable based on the common law principles enunciated above.

Finally, in our view, it is not clear that the liquidated damages provision in the MTO contracts is a genuine pre-estimate of MTO's damages as it is not clear what damages MTO would suffer from the late opening of a non-toll highway construction project.

(iv) Dispute Resolution

At present, the Dispute Resolution Process contained in the General Conditions of MTO contracts is a cumbersome and, to a significant degree, ineffective process, lacking in both timeliness and finality. For example, the claims review process includes target timeframes which total 240 days. In examining the evolution of the MTO General Conditions from 1990 to the present, it is apparent that the process has become unnecessarily complicated and long. In 1990, the MTO General Conditions provided for a short period of negotiations to take place over a 60 day timeframe. This evolved into a 3 level negotiation process articulated in the 2003 MTO General Conditions. In 2006, the approach shifted to a 2 level, 120 day "claims review process." The present process involves a 3 level 240 day "claims review process."

Mandatory mediation is provided for in the current iteration of the General Conditions of MTO contracts. For the reasons set out above, mediation can be a useful tool to resolve disputes provided that there has been adequate exchange of information and it is not just used as a tactic to delay resolution. Mediation involves a relatively low cost and time commitment and involves the possible use of solutions that may not result from a rights based litigation or arbitration.

Arbitration is referenced as an option in the current MTO General Conditions, but it is not mandatory as MTO "reserves the final right to determine the alternative dispute resolution to be used and the terms by which the alternate dispute resolution is to be governed." In our view, the imposition of mandatory arbitration is critical to achieving finality in the dispute resolution process and should be re-introduced into the MTO General Conditions.

Finally, although the General Conditions provide that parties agree that, prior to resorting to litigation they will explore alternative dispute resolution methods that are acceptable to the MTO, no specific dispute resolution methods, other than arbitration are referenced. Earlier iterations of the General Conditions of MTO contracts included reference to other options, such as referees and independent advisors, but the current version does not.

The lack of opportunity for the involvement of an independent adjudicator, referee, or dispute resolution board constitutes a significant gap in the MTO process. The introduction of a neutral third party evaluator would likely assist in improving the cost and time expended by both MTO and contractors on dispute resolution.

In addition, MTO “reserves the final right to determine the alternate dispute resolution to be used and the terms by which the alternative dispute resolution is to be governed.” Therefore, there is no efficient, expeditious, certain, or final dispute resolution mechanism provided for in the MTO General Conditions of Contract.

(v) Surety Bonds

With respect to surety bonds, MTO does not utilize surety bonds stating that its pre-qualification system acts as a substitute for surety bonds. MTO further states that it accepts the risk of contractor defaults as a result. It appears that a thorough cost-benefit analysis may not have been conducted in respect of the use of surety bonds vs. financial pre-qualification. The introduction of surety bonds may result in increasing the pool of potential contractors available to perform work on MTO contracts.

We therefore support the CFAAST recommendation that this issue requires an investigation, including a cost benefit analysis to determine whether surety bonds and other instruments, such as letters of credit, should be required for construction contracts to be conducted by a third party.

(vi) Exclusion Provision

As noted above, the potential operation of the Exclusion Provision has a “chilling” effect on contractors who wish to pursue legitimate claims. The exercise of an exclusion provision based on the mere existence of legal proceedings, as noted above, is by its very nature potentially punitive in nature, as it effectively denies access to the Courts.

Section 9.3 of the Qualification Procedure does reference a number of considerations which will be assessed by the Qualification Committee prior to invoking the Exclusion Provision including the nature of the legal proceeding and other aspects of the business relationship between MTO and the contractor. Furthermore, lien proceedings are excluded from the ambit of the Exclusion Provision. In addition to the existence of legal proceedings there are other grounds on which the Exclusion Provision can be invoked, including infractions, notices of default, an inability to work cooperatively (which includes an inability to maintain open and cooperative communications), and increased resources (which includes increased staff, consultant, and legal costs incurred in the administration of any previous contract). Such considerations may be found to constitute valid commercial or business purposes in support of the invocation of the Exclusion Provision.

However, the current composition, mandate, and procedures of the Qualification Committee (as described above) undermines contractor confidence in the assertion that these principles would be applied in an unbiased and equitable manner. Furthermore, the “appeal” is to a panel consisting of a majority of members who are MTO officials, which does little to dispel a concern in respect of fairness, transparency, and accountability.

As well, the existing Exclusion Provision fails to distinguish between, on the one hand, bona fide disputes that cannot be resolved except by recourse to the courts or arbitration, and which have been properly pursued, and, on the other hand, frivolous or vexatious legal proceedings, or legal proceedings abusively pursued.

In its present form, the Exclusion Provision is subject to attack as unfairly and punitively precluding contractors from effectively pursuing legitimate claims, and, in the event that MTO were to attempt to enforce the Exclusion Provision against a contractor solely on the basis that a legal proceeding had been commenced in respect of a bona fide dispute, such enforcement would, in our view, be unlikely to be upheld as it would represent a denial of access to the court.

According to the CFAAST Report, MTO has noted that it has never utilized the Exclusion Provision;²⁴¹ however, given the questionable enforceability of the Exclusion Provision its real value is in its “chilling” effect, as an implicit threat facing any contractor pursuing a claim.

In recent discussions in respect of liquidated damages and the introduction of binding arbitration, MTO has advised ORBA that binding arbitration would be subject to the application of the Exclusion Provision. From a public policy perspective, it is clearly unfair and inappropriate to inhibit a party from pursuing a legitimate claim through contractual arbitration because of a fear that the Exclusion Provision will be exercised. If a party pursues a claim that is not legitimate, or conducts itself abusively within the arbitration proceedings, there are cost consequences which will follow within the arbitration.

In our view, there is an imbalance in the relationship between MTO and contractors who work for MTO as a result of the current formulation of the Exclusion Provision, an imbalance that is inconsistent with the principles of fairness, equity, transparency, and accountability.

(vii) Integrated Contractor Management System

The inter-relationships between the various MTO processes are complex. MTO, in an interview with NCHRP “stressed that the success of the [MTO] system lies in the interrelationships of all the components with one another.”²⁴² In this sense, the MTO inter-related processes can be described as a “Contractor Management System.” The NCHRP Report characterizes the MTO Contractor Management System as a system with “teeth” and references the ability of the system to reward good performance and punish poor performance.²⁴³ The NCHRP Report concludes that “the fact that this system has been in use for some years testifies to its efficacy.”²⁴⁴ However, a truer test of the efficacy of the MTO Contractor Management System is the extent to which it meets the stated goals of fairness, equity, and transparency. At present, the “teeth” in the MTO Contractor Management System are most clearly represented by:

- The power and discretion exercised by the Qualification Committee which operates in a manner that is vulnerable to bias and opaque to contractors; and
- The potential exercise of the Exclusion Provision, coupled with the lack of mandatory, binding arbitration.

²⁴¹ an American Report prepared by the National Cooperative Highway Research Program in 2009 which uses Ontario as one of its case studies, cites an example of a contractor who was in the “Green Zone” in its performance rating, (the zones are described in Section 30 of the Qualification Procedures) but was “excluded from bidding because of its ongoing lawsuit against MTO. (NCHRP Report, p. 50)

²⁴² NCHRP Report, p. 48.

²⁴³ NCHRP Report, p. 50.

²⁴⁴ NCHRP Report, p. 51.

The strength of the MTO Contractor Management System from MTO's perspective is the level of integration between its various processes. However, from the contractor's perspective, this level of integration leads to the potential for procedural unfairness, a lack of equity, and a lack of transparency, and certain checks and balances are required, as described in the recommendations which follow. As noted above, the existence of a Contractor Management System is acceptable as long as the system does not fundamentally contravene the basic policy obligation to administer an open competitive procurement environment. With respect to the lack of transparency in the current Contractor Management System, such lack of transparency is exacerbated by the fact that the primary mechanism at the heart of the MTO Contractor Management System, namely the Qualification Committee, may be analogized to a "black box" significantly lacking in transparency and, thus, accountability.

TAB XI

(XI) Recommendations

The following are our recommendations in respect of MTO's processes:²⁴⁵

(i) Qualification Process

We recommend that the Qualification Procedures be revised to include:

- i. A clear written mandate for the Qualification Committee;
- ii. Clear written requirements in respect of the composition of the Qualification Committee including:
 - a. A requirement that members not have had prior involvement in the subject dispute, claim or infraction, such that the same individuals do not review the same matter at multiple levels; and
 - b. The addition of two independent members who are not MTO employees.
- iii. A clear written description of the role of the Secretary of the Qualification Committee including the investigative role of this individual and a bar to the involvement of the Secretary in decision making.
- iv. Written criteria related to the procedures of the Qualification Committee including attendance policies and quorum policies, as recommended by CFAAST.
- v. Conflict of interest guidelines for the Qualification Committee.
- vi. Required training of Qualification Committee members and Contract Administrators, as recommended by CFAAST.
- vii. The opportunity for contractors to assess the performance of Contract Administrators, as recommended by CFAAST.
- viii. Modifications as necessary to ensure consistency between and perhaps a consolidation of, or at least appropriate cross-references between the following:
 - a. the Infraction Procedures;
 - b. the Exclusion Provision Procedures; and
 - c. the Performance Rating Guide.

²⁴⁵ The recommendations below accord in certain respects with those of CFAAST, as noted below.

(ii) Infraction Process

We recommend that:

- iv. The Infraction Process be revised to provide for a determination by the Qualification Committee augmented by at least two independent members, as noted above, and that individuals involved in the investigation of the infraction play no role in the hearing.
- v. The Infraction Process be revised to provide for fair procedural mechanisms which include:
 - a. Improved specificity of the criteria used to assess an infraction, as recommended by CFAAST;
 - b. Proper notice of the specifics of the allegations made against the contractor;
 - c. An adequate opportunity to respond;
 - d. Adequate access to documents;
 - e. Adequate opportunity to make a presentation and response;
 - f. Written reasons issued by the Qualification Committee in respect of its decisions with respect to its infraction decisions signed by the Qualification Committee members issuing the decision and addressing the issues raised and the findings and conclusions of the Qualification Committee including the basis of such findings and conclusions; and
 - g. A procedure to ensure alignment of consequences (as recommended by CFAAST) including the introduction of a provision that operates where there is both an Infraction and a dispute arising out of or closely relating to the same issue and suspends the operation of the Infraction Procedure until the Dispute Resolution process is completed.
- vi. A website be created, as described below (under the Dispute Resolution heading) that includes information regarding infractions levied against contractors (CFAAST reports that infractions “impact at least 20% of contractors”).²⁴⁶

(b) Liquidated Damages

We recommend that liquidated damages not be levied by MTO against contractors until after the claims review process is complete and that a provision to this effect be inserted in the General Conditions of MTO Contracts.

²⁴⁶ CFAAST Report, p. 13.

(c) Dispute Resolution

We recommend that:

- i. the three step claims review process be abbreviated to a two step negotiation process and that the time frames be shortened to 100 days in total;
- ii. claim submission templates be developed, as per the CFAAST recommendations;
- iii. early adjudication of disputes by an adjudicator on an interim binding basis be imposed;
- iv. **mandatory** arbitration be included in the General Conditions as a final and binding dispute resolution mechanism; and
- v. a website be created to reflect, on a no-names basis, all claims outstanding, their dates of submission, the dates that they completed the various levels of dispute resolution, the extent to which claims determinations are overturned at a higher level (under the current system, CFAAST reports that 40-50% of the cases that reach Head Office are overturned)²⁴⁷ the dates that they were settled, and the dates that they were submitted to arbitration, with the total claims submitted and resolved per annum, and that such website contain similar statistical information regarding the infraction process.

(d) Surety Bonds

We recommend that a study be performed to fully consider the cost-benefit profile of surety bonds.

(e) Exclusion Provision

We recommend that the Exclusion Provision be revised to provide explicitly that:

- i. contractual mandatory arbitration is not a “legal proceeding” in respect of which the Exclusion Provision will be applied; and
- ii. that a legal proceeding commenced in respect of a bona fide dispute (i.e. any dispute that is not frivolous, vexatious, or an abuse of process), and properly pursued, is not a “legal proceeding” in respect of which the Exclusion Provision will be applied.

We also recommend that Section 9.4 of the Qualification Procedures be revised to make it clear that it is “subject to section 9.3.”

Our recommendation with respect to the Exclusion Provision assumes that the other recommendations set out above are adopted, particularly those with respect to dispute resolution

²⁴⁷ CFAAST Report, p. 21.

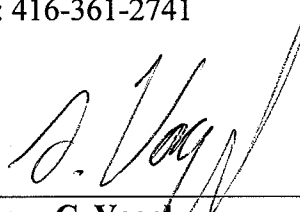
and those designed to avoid the disproportionate effect of the cumulative impact of multiple forms of sanctions applied in respect of the same incident(s).

All of which is respectfully submitted for your consideration.

Dated: April 11, 2012



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