

April 10, 2018

The Honourable Brian Mason,
Minister of Transportation, Government House Leader
319 Legislature Building 10800 - 97 Avenue
Edmonton, AB T5K 2B6

Transmitted via email: transportation.minister@gov.ab.ca

Dear Minister:

On behalf of the Board of Directors of the Alberta Roadbuilders and Heavy Construction Association, I write today to offer our support to the Department in resolving the Carillion Canada situation. We value the partnership we have with Alberta Transportation and are committed to providing excellent highway maintenance services ensuring a safe and efficient transportation system for all Albertans.

We thank the Department for engaging with our Highway Maintenance Committee to understand the logistics to be considered in planning for a rapid transfer of responsibilities - causing the least amount of disruption in service to the public. In the opinion of our Committee, the likelihood of a sale of Carillion and its continuance as a going concern is very slim. The prudent thing to do is to plan for the scenario where the Receiver moves to liquidate assets. Decisions are urgently needed to implement a contingency plan of action in the next seven to ten days that provides certainty for employees, companies and the public. Notices for summer layoffs have been issued by Carillion and key personnel in the affected areas are already looking for other employment opportunities.

We want to assure you that the industry can react to this situation rapidly and responsibly as your trusted partner. Our contractors can organize quickly to plan for and marshal resources of people, materials and equipment so long as they have policy certainty to justify the financial risk of investing new capital. As always, our industry is prepared to compete for the additional work to ensure the taxpayer continues to get best value possible.

The Department asked the ARHCA to list the conditions precedent to initiating a competitive process to transition the Carillion Contract Maintenance Areas (CMA.) The timing of the Carillion failure is complicating the Government's plan for tendering new contracts for those CMAs that are up for renewal. And as an industry, we are concerned that the move to performance-based specifications (PBS) and a realignment of CMA boundaries is already introducing a profoundly new model of risk pricing into the tendering system. The duty each current provider has first and foremost is to their current employees and stakeholders to make best efforts to protect their jobs by being successful in winning the tender in the CMAs they currently serve.

Had Carillion only operated in a few territories then we could probably manage through simultaneous processes of the scheduled retendering and a contingency plan for the Carillion territories. However, with 12 CMAs representing 43% of the network, the Carillion situation will require substantial capital

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investment on behalf of the existing industry to properly serve those 12 CMAs. We believe that a clear plan to reduce uncertainty and improve the PBS process will result in straightforward continuity of highway maintenance and the optimal best value for the Department and taxpayers. The sooner the plan is adopted the sooner we can commit resources. Our estimate is that mobilization of any new resources will take 30 to 60 days once new contracts are signed.

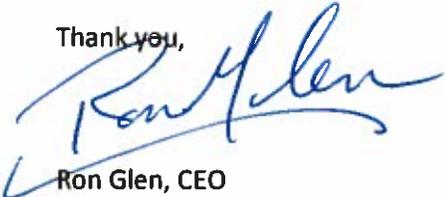
Practically, this means focusing on the Carillion CMAs first. To resolve the issue at hand and put the focus on the 12 Carillion CMAs, Government should first extend those contracts set to expire in 2019 for two years. Secondly, Government needs to commit to procuring new suppliers for the Carillion CMAs for a minimum term of two years to justify investment in new equipment, retaining or recruiting staff and arranging for facilities. The Department will need to make best efforts to allow access to Carillion's facilities, supplies, labour and equipment. To facilitate a competitive and rapid response procurement, companies would need access to inspect and assess the condition of the systems in place, to understand the unique needs of each CMA and then bid accordingly. Government would be asked to facilitate project labour agreements to allow workers under different contract arrangements to work together. Government is asked to make efforts to work with the bonding company and the receiver to defer liquidation. There is a North American backlog in plows and other equipment and we are concerned equipment could go south to the US very quickly given the dismal exchange on Canadian dollar.

Minister, the ARHCA recognizes that this means deferring the transformation from unit-based to performance-based specifications until the next set of CMAs come up. We believe that the uncertainty of this change, layered with the changes in the boundaries contain significant risk of short term higher costs and confusion over the interpretation of those performance criteria. Having more time to thoroughly develop performance-based specs will lead to better implementation, lower risk and lower cost. As the Department has indicated that they expect that PBS will lead to better outcomes over time, the ARHCA wants to be your partner in making this transition as successful as possible.

We believe that implementing two major systems changes simultaneously introduces such a high level of risk that the costing of the risk transfer of the untested PBS will be dramatically out of line with the recently tabled Budget, and that the response to the Carillion situation could be hampered. Together, Department and Industry can respond to one or the other exceptionally well but trying to do both simultaneously is risky. We understand that this is not the preferred political direction of the Government. This is the reason for my direct appeal to you, to provide our best advice, and offer our support to a change in the staging of implementing the PBS policy while we stabilize the situation presented by the Carillion failure.

We would be pleased to meet with you to answer any questions and provide any information we can to assist you in responding to this urgent situation.

Thank you,



Ron Glen, CEO
ARHCA

cc Mr. Barry Day, Deputy Minister, Alberta Transportation (Barry.Day@gov.ab.ca)
Mr. Paul Bretscher, Chief of Staff to the Minister (Paul.Bretscher@gov.ab.ca)
Mr. Quentin Huillery, Chair of the Board of Directors, ARHCA

June 12, 2018

The Honourable Brian Mason,
Minister of Transportation, Government House Leader
319 Legislature Building, 10800 - 97 Avenue
Edmonton, AB T5K 2B6

Transmitted via email: transportation.minister@gov.ab.ca

Dear Minister Mason:

Thank you for meeting with our delegation from the ARHCA on May 24, 2018 to discuss our concerns with the failure of Carillion Canada and the impacts to our industry and the 12 Contract Maintenance Areas (CMA) in Carillion's three contracts.

Alberta's highway maintenance industry has been providing reliable, dependable services benefiting taxpayers and the traveling public for over 22 years. Over that time some businesses have exited the industry and new businesses have emerged to compete for work. Government successfully retendered Contract Maintenance Areas in bundles and in stages that assured a competitive environment. Our Association believes that the Carillion situation is the exception and not the norm for our industry.

As suspected for many years, and now proven out, Carillion's business model (practiced around the world by Carillion PLC and all of its subsidiaries) was unsustainable and has led to business failure. Owners of infrastructure benefited greatly over this time from services provided at less than cost, while the losers are Carillion's shareholders and creditors. We note Carillion's business model led to failure and not the valued employees of Carillion who are dedicated to the provision of services that keep our roads safe for the travelling public.

In 2017, the Department indicated that to ensure a competitive environment and reduce the Department's risk, the maximum number of CMAs to be held by any one entity would be reduced. Carillion PLC's financial crisis worsened in October of 2017 when they posted a six-month loss of 1.2 Billion British Pounds and announced intention to sell segments of its businesses in Canada and the UK in an attempt to raise cash. By January 15, 2018 Carillion PLC was exhausted of cash and went into liquidation.

On January 25, 2018 Carillion was granted protection by the Ontario Superior Court from creditors under the Companies Creditors Arrangement Act with EY Inc. appointed Monitor. The ARHCA has been in contact with Department of Transportation officials regularly since that day, offering our aid to provide a predictable, cost effective, transparent and seamless transfer of highway maintenance operations to a new management group. The ARHCA offered to collaborate on an industry solution that

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would ensure work could be coordinated and highways maintained during Carillion's corporate troubles without negative impact to the other areas of Alberta. In February, Carillion Canada sold off some good assets to Bouchier Group, EllisDon Corporation, and Fairfax Financial Holdings Limited. The remaining assets of Carillion (Highway Maintenance Contracts) were generating an unattractive negative cash flow and no buyer was found.

On April 10, I wrote to you with our best advice as to how to transition to a new service provider in a transparent, fair, and open process in time to assure stability and mobilization for the winter 2018 season. We believe the only way to ensure the taxpayer is getting best value is through a competitive tender process. We were very surprised and deeply concerned when rumors through the industry were confirmed that the Government of Alberta was considering an exclusive offer from a BC company, and may be willing to alter the Carillion contracts to make them profitable to enable this deal. We do not have any objection to a firm from BC or another jurisdiction entering the Alberta marketplace so long as they compete for the business on an even playing field.

In our meeting you raised three very good questions that relate to your responsibilities as Minister to ensure provision of services continue for public safety on highways.

Your first question was in relation to ensuring that emergent work was done during the restructuring. ARHCA members are already providing services to the Department in the Carillion CMAs through the issuance of direct work orders in an amount exceeding \$1.1 million. These providers have also been asked to submit quotes for additional work to the end of the summer season. The ARHCA is following through on our commitment to work with the Department and contribute to solutions.

Your second question was in relation to the status of the Carillion contracts and your rights to retender the contracts. The Alberta Transportation Highway Maintenance contracts contain a demerit/default system for non-performance of contracted services. As outlined in the preceding answer, the Department has procured services from suppliers unrelated to Carillion to perform work contracted to Carillion. This is clear evidence of non-performance and default. Furthermore, the fact that Alberta Transportation has requested quotes for work orders through the summer indicates that there is no faith in Carillion to perform those contracted services for the duration of its existence under creditor protection expiring in October of 2018. From our perspective, the only thing keeping the Carillion contracts alive is the Government of Alberta's practice of providing funding to Carillion.

Your third question concerned a perceived risk that Carillion's equipment would be liquidated and transported out of Alberta. We believe this risk to be very minimal. Our information is that the majority of the leased equipment would be returned to the leasing company Wells Fargo which has first priority security interest on equipment they own. It would be in their interest to assign those leases to a successor and maximize cash flow rather than repossess and dispose of through sale. The sooner the Carillion CMAs are retendered the sooner the leasing companies would have certainty for their equipment.

You also raised a concern that an open market tendered price might be higher than rates and new terms negotiated with the interested party from BC. All parties recognize that the rates Carillion bid were unrealistic, contributed to this predictable situation, and by necessity, need to rise to reflect the cost of providing services, paying employees and suppliers for materials and equipment. The only way to ensure the price the Department pays for services is fair, is to tender those CMAs in a competitive, open, and transparent process. We believe a process where one proponent dictates the terms of commercially attractive prices is neither fair or defensible as reflecting a market price.

Mr. Minister, we encourage you to have confidence in the competitive Alberta marketplace and put the Carillion CMAs to tender immediately. This path provides the most certainty and transparency and therefore the most defensible decision to the public.

Again, on behalf of our Association we thank you for being open to hearing our concerns and proposed solutions. The Roadbuilders are always ready to demonstrate our willingness and capacity to work with you for the benefit of Alberta's traveling public.

Yours Truly,

A handwritten signature in blue ink, appearing to read "Ron Glen", with a large flourish underneath.

Ron Glen, CEO
ARHCA

cc Mr. Barry Day, Deputy Minister, Alberta Transportation (Barry.Day@gov.ab.ca)
Mr. Paul Bretscher, Chief of Staff to the Minister (Paul.Bretscher@gov.ab.ca)
Mr. Quentin Huillery, Chair of the Board of Directors, ARHCA

June 27, 2018

Mr. Barry Day,
Deputy Minister, Alberta Transportation
2nd Floor Twin Atria Building
4999 - 98 Avenue
Edmonton, AB T6B 2X3

Dear Mr. Day:

A handwritten signature in blue ink that reads 'Barry'.

Thank you for inviting our delegation in to discuss the matters enumerated in your letter of June 19, 2018.

Our discussions were wide ranging, and we want to ensure that we have frank and open communication and there are no points of uncertainty regarding our respective positions on two matters:

1. Readiness of industry to change the model of delivering highway maintenance in the Province of Alberta from the current model where AT staff order work, monitor performance and control spending that has successfully provided cost effective service to the taxpayer since 1996, while simultaneously changing the highway maintenance specifications and geographic boundaries of CMAs creating the necessity to re-asses and quantify Alberta Transportation's highway infrastructure and to acquire new land or facilities from landowners not party to the Government's policy agenda.
2. The ability of the industry to respond to the Carillion situation, and our consistent position that the Department has an obligation to put the competitive economic forces of our industry to work and create solutions that protect the taxpayer and the safety of the public.

Performance Based Specification (PBS) roll-out.

With respect to industry's readiness to respond to an RFP for Performance Based Specifications (PBS), we are ready to respond. Our members have been proactive with the Department and continue to provide constructive feedback on any and all of the massive number of details that need to be itemized and vetted within the new PBS, so that when the Ministry tenders, the Province will receive a fair, clear and competitive result, that is defensible to the taxpayer. It is our Industry's position that the readiness of the Department to issue a thorough and complete RFP that leads to a successful, cost effective transition is still very far from reach. The Department has been working on this file for more than two years. Industry was told that RFPs would be let at the end of January, however, we are now approaching the end of June and there is a myriad of issues still in need of consideration, development, internal consultation with AT staff, feedback from stakeholders and final drafting before submitting to AT legal counsel for review.

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We wish to be part of the successful launch of the Government's policy change to move toward performance-based contracts as a new approach to asset management that protects the taxpayer's investment in infrastructure and supports a cost-effective outcome. Rushing to put out an incomplete RFP that massively shifts undefined risks and compressed timelines to mobilize for new CMA boundaries puts the taxpayer at the greatest exposure of paying more for additional risk factors that could be reduced with more time, and through clarity and partnership.

We respectfully advise the Department take the necessary time to engage with stakeholders to refine the product, reduce risk and get the PBS contracts right. On this matter it is our shared responsibility to deliver a high-quality product to the taxpayer. We believe the Department needs more time to properly consult and understand the implications of the specifications in the new contracts. Our industry can work with you to accomplish a logical and pragmatic deferment of the implementation of PBS.

The Carillion Default

With respect to Carillion, we have been absolutely consistent that the taxpayer and public safety are best protected and served through the competitive and transparent process we have created together. A partnership that has met every test we've faced, together, over the last 22 years. Carillion is not so unusual that it justifies the Government disengaging with Alberta's industry, turning away and enabling a single, prospective buyer with financial incentives and contractual revisions, that provide assignment and extension of contracts set to expire in 2019, and while including all these give-aways as sweeteners which will result in a "sole-sourced" contractual arrangement of more than \$150 million annually for services until 2022 and 2023. This is so completely at odds with the policy direction on procurement the Government relies upon.

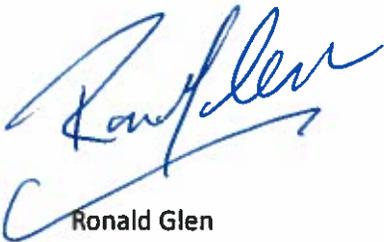
Our position on Carillion has never varied. Allow commercial entities to resolve the risks of the commercial failure of Carillion. We have no objection to any company buying the contracts as they exist and under the existing terms. We take great offense to the inherent unfairness of the entire process when, through a private process, the Government of Alberta enables a corporate buyer to negotiate its price and its own terms with Government for contracts valued at an estimated \$150 million annually.

We have offered to help and to anticipate the details needing firm leadership and decisions to protect the taxpayer and public safety and to provide the assurance that we are a trusted partner – backed up by over 35 years of openness and dependability. The successful competitor or competitors to succeed Carillion will take steps in partnership with the Department to maintain leased equipment and facilities and employ the existing AUPE employees. We have consistently offered to work with you on a process to bring competitive economic forces to support the success of the Department.

We believe there is still an opportunity to make a better choice than to sole-source 40% of the province to any one company. We note that the expressed direction of AT is to limit the number of CMAs any one contractor can obtain through the competitive process to approximately 20% as a response to the Carillion experience. To assign over \$500 million (total amount of work over the life of the Carillion CMAs) to a single contractor to be at odds with the restrictions AT intends to place on good performers, while again exposing the taxpayer to the risk of placing too much service with an entity having no prior experience in Alberta.

As always, we remain committed to work through challenges together.

Yours Truly,

A handwritten signature in blue ink, appearing to read "Ronald Glen", with a large, sweeping flourish underneath.

Ronald Glen

CEO, ARHCA

cc. Mr. Tom Loo, ADM Delivery Services, Alberta Transportation (email)
Mr. Quentin Huillery, Chair, Board of Directors, ARHCA (email)



Jim Schmidt
Partner
Direct Line: 780.917.4264
e-mail: schmidjtj@bennettjones.com
Our File No.: 85997-1

July 13, 2018

Delivered by Email and Courier (premier@gov.ab.ca)

Premier Rachel Notley
Office of the Premier
307 Legislature Building
10800 – 97 Avenue
Edmonton, AB T5K 2B6

Dear Madam Premier:

Re: Alberta Roadbuilders and Heavy Construction Association

I have been retained by the Alberta Roadbuilders and Heavy Construction Association (the “**ARHCA**”) to ensure that its members’ rights are appropriately protected as the Government of Alberta (the “**Province**”) addresses issues arising from the insolvency of the Carillion group (“**Carillion**”).

History of the ARHCA

The ARHCA is the largest heavy construction association in Canada. It represents contractors who work on the construction, maintenance and rehabilitation of highways, municipal roads, bridges, sewers and water projects, as well as the suppliers and consulting engineers who work with these contractors.

The ARHCA supports long-term, stable investment in Alberta’s transportation infrastructure at the best possible value to the taxpayer. The ARHCA knows that a strong transportation system is essential to Canada’s future and to the future of Canadian workers: the provision of cost-effective methods of moving goods and services to local and world markets, and giving Canadians a safe way to travel, are indisputably critical public policy objectives.

In that context, the ARHCA has had an excellent relationship with the Province. It indeed conducts itself as a trusted partner of the Province in the building and maintaining of safe roads in Alberta, providing work for more than 65,000 Albertans.

Significantly, the ARHCA has advocated for improvements in the quality, safety and capacity of transportation infrastructure and for the overarching principle of value to the taxpayer by way of a competitive market. None of these propositions has ever been contradicted by the Province.

Disposition of the Carillion Contracts

As you know, Carillion is a party to a series of highway maintenance contracts with the Ministry of Transportation, worth an estimated \$110,000,000 each year.

Unfortunately, despite millions of dollars being provided to Carillion by the Province in recent months, Carillion is now insolvent and subject to creditor protection under the *Companies' Creditors Arrangement Act* (the "CCAA").

However, confronted by Carillion's failure, the Province has apparently decided, rather than engaging in an open, competitive, and transparent tendering process for Carillion's contracts - in which competent service providers from Alberta and other provinces or states would be able to participate - to assign all, or substantially all, of Carillion's contracts to a British Columbia company, Emcon.

We further understand the contracts being proposed for assignment to Emcon are to be amended to, in part, increase prices, in order to make them more favourable and lucrative to Emcon (the "Re-Negotiated Contracts").

While the ARHCA is sensitive to the difficult situation the Province faces, it has profound concerns as to how this matter is being addressed, especially given the existence of numerous qualified and competent contractors in Alberta (and neighbouring provinces and states).

We have grouped these concerns as follows.

1. Issuance of Re-Negotiated Contracts Violates the Province's Trade Agreement Obligations

The Province is either a party to, or otherwise obligated to comply with, a number of prevailing trade agreements including, without limitation, the *New West Partnership Trade Agreement*, the *North American Free Trade Agreement*, the *Canadian Free Trade Agreement* and the *WTO Agreement on Government Procurement* (collectively, the "Trade Agreements").

Awarding the Re-Negotiated Contracts to Emcon without first completing a public tender is inconsistent with the spirit, intent and the Province's legal obligations under the Trade Agreements; it is also inconsistent with the Province's own guidelines, including the *Guidelines to the Procurement Obligations of Domestic and International Trade Agreements*, dated November 2013 (the "Procurement Guidelines").

The manifest intent of the Trade Agreements is to reduce barriers to trade in order to increase competitiveness, economic growth and stability amongst the signatories. To that end, each agreement



includes procurement obligations based on the principles of non-discrimination, openness and transparency, and reflects a commitment to the effective management of public resources.

The Trade Agreements prohibit the Province from procuring construction or other contracts or services through sole-source arrangements or limited tendering except in very limited exceptions (which, in our view, would have no application here).

With that in mind, the awarding of the Re-Negotiated Contracts to Emcon without an open and transparent tendering process offends the Province's obligations under the Trade Agreements and the Procurement Guidelines by:

- a. failing to ensure that all qualified, eligible suppliers are given the opportunity to bid on highway maintenance contracts;
- b. discriminating between suppliers, by failing to ensure that the Ministry of Transportation, as a procuring entity, affords eligible suppliers treatment that is no less favourable than the treatment it affords to Emcon;
- c. discouraging competition; and
- d. failing to honour the objective of sound management of public resources.

While we are well aware of the legal distinction between an assignment of an existing contract and the awarding of a new contract, we consider the distinction largely falls away when, as is the case here, an assignment includes substantive variations to the contract being assigned.

Significantly, it would appear that the Ministry is proposing to enter into new contractual commitments with Emcon that differ materially from the Carillion contracts (in a way that substantially favours Emcon) while at the same time attempting to portray these new commitments as something they are not: simple, permitted assignments of contractual obligations. Accordingly, we consider that the Province is *not* permitted to assign the Re-Negotiated Contracts to Emcon without first engaging in a public tender that is consistent with the Trade Agreements and the Guidelines.

2. Issuing the Re-Negotiated Contracts to Emcon Contradicts the Province's Previous Commitments

The Ministry began signalling to the industry several years ago that it was uncomfortable with the large market-share of highway maintenance contracts held by Carillion. Indeed, we understand from the ARHCA that the Ministry previously assured industry that the maximum number of contract maintenance areas that could be held by any one contractor would be reduced for future contracts.

The decision to award all the Re-Negotiated Contracts to Emcon, without a public tender, wholly undermines that assurance.



Further, the Province made public comments earlier this year to the clear effect that it was committed to giving Alberta companies a greater opportunity to become parties to contracts awarded by it (within the context of the Province's obligations under the Trade Agreements). The ARHCA would have expected this commitment to be have been honoured, particularly in light of the inter-provincial controversies that have recently dominated public discourse in Alberta.

3. Breach of the Province's Legal Obligations

As you will appreciate, the awarding of highway maintenance contracts involves the critical, core function of the Ministry of Transportation: providing safe, reliable roadways for members of the public. Accordingly, the public, as well as the private contractors and the ARHCA, have an interest in ensuring that the process being used to award the Re-Negotiated Contracts complies with the Province's legal obligations.

We are actively considering the extent to which the apparent decision by the Province to award the Re-Negotiated Contracts to Emcon would constitute a breach of the Province's legal obligations. You will know that the Province must not only comply with its obligations under the Trade Agreements and the Guidelines, but must also ensure that it complies with the duty of fairness owed by it to bidders on the highway maintenance contracts ultimately awarded to Carillion. A decision to amend the Re-Negotiated Contracts to include more favourable terms to Emcon would be a material change from what was stipulated in the tender call and would raise an important question as to whether the Province breached the duty of fairness it owed to unsuccessful bidders.

Given the above, if the Province (through the Minister of Transportation) intends to exercise its discretion by consenting to the assignment of the Re-Negotiated Contracts to Emcon, it will undoubtedly open itself up to scrutiny by the courts.

To ensure that the ARHCA and its members are afforded the opportunity to further consider and assert their full range of legal rights and remedies, the ARHCA respectfully requests that the Province confirm its intention with respect to the awarding of the Re-Negotiated Contracts as soon as possible and, in any event, prior to any judicial order being obtained in Carillion's CCAA proceedings.

Summary

You should be aware the ARHCA considers the disposition of the Re-Negotiated Contracts to be a matter of grave concern. It is determined to explore, understand and assert all legal rights its members may have in this context.

At the same time, Carillion's insolvency provides, or should provide, the Province with an opportunity to redistribute its highway maintenance contracts to multiple, capable new partners, to ensure that the public is receiving the very best value for the services provided, as intended by the Trade Agreements and as reflected by the Province's recent public statements.



July 13, 2018

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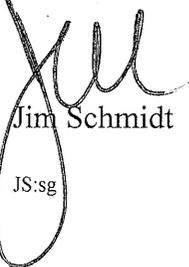
In our client's respectful view, if Emcon is not interested in assuming Carillion's contracts in their current form, taxpayers will be better served by the Province refusing to re-negotiate the contracts with Emcon and instead engaging in an open and transparent public tender.

Our client accordingly urgently requests a meeting to address the issues identified above.

We look forward to hearing from you.

Yours truly,

BENNETT JONES LLP



Jim Schmidt

JS:sg

