

## **Construction Lien Act Review Consultation Meeting Summary Ontario Association of Architects**

**November 6, 2015 (9:00 a.m. to 11:00 a.m.)**

### **Attendees:**

Kristi Doyle, Toon Dreessen, Charles Greenberg, Brad Green, Adam Tracey, James Little, Bruce Reynolds, Sharon Vogel

Sheryl Cornish, Counsel at the Ministry of the Attorney General, attended the meeting to record a summary.

For the introduction provided by the Review, please see document titled BLG Consultation Introduction.

### **Overview of the OAA**

The Ontario Association of Architects (“OAA”) is established under the *Architects Act*. The principal objective under the legislation is to “regulate the practice of architecture in order that the public interest may be served and protected”. A key aspect of self-governance is the OAA Council, which is made up of 15 architects and 5 Lieutenant Governor in Council appointees. The OAA represents the public interest. It sets the standards of practice, performance, conduct, and entry into the profession, including the process of internship and licensure. It also supports the profession with tools and resources to ensure continued competence, such as practice tips and notices. The OAA also provides feedback to government and stakeholders on key issues affecting the profession.

There are currently 3,704 architects, 1,450 intern architects, 333 student architects, and 1,726 practices in Ontario. The majority of firms are small practices. The architectural profession offers a very diverse range of services and specialties to a wide variety of clients, including other architects (e.g. procurement, facility design, functional programming, and risk threat analysis). The majority of built form in Ontario requires architects.

Small practices can have their financial stability threatened by changes to the Act. The client hires the architect to design a building and expects that the architect will do the construction administration, including payment certification. There can be millions of dollars of work certified by a small firm.

### **The OAA’s History in Seeking Amendments to the Act**

The OAA has been pursuing an amendment to the Act since 2003. It did not originally have lien rights when the Act was first enacted.

A tentative agreement on an amendment was reached shortly after 2003, with a commitment from the government through 2005-2006 to introduce the amendment but it was not actioned. The amendment was revisited during the *Open for Business Act*,

2010 process but, again, it was not actioned. The OAA is hoping that it can obtain this non-controversial amendment as a result of this process.

### **Division of Contract or Sequential Contract / Holdback**

According to the OAA, the majority of the architect's work and fees (75 percent) is typically done before a shovel hits the ground. The work is done independently or as part of a larger contract. The architect is one of the few entities involved in the conceptual phase of a project, through substantial completion and beyond. There is a significant impact on architectural practices because the holdback is held unnecessarily, and for a longer period of time.

The architect may undertake a lot of services leading up to design. If there is still another year or two of planning design for a significant project, all of the pre-design work could be done three years before the drawings are ready to be used. Other stakeholders have presented notions of phased release generally, to provide for release of the holdback at certain milestones. They have also mentioned the approach in other jurisdictions that provides for yearly release, for example. There has been a lot of discussion of phased release of holdback more broadly. Architects are affected by this as well as other trades, such as excavators.

In terms of the annual release concept, there are many types of contracting structures. Architects could be working on a major project for years and would be subject to a holdback that would not be released for many years. In a project that started seven years ago, the holdback could have accumulated to \$2 million and there would more work to complete. It could take another two years to get the holdback. That money could represent 50 percent of the firm's annual cash flow. Architects are sometimes able to negotiate a progressive release of holdback, but some clients are unable or unwilling to negotiate. The OAA suggests that there should be clear rules about the holdback that everyone understands.

According to the OAA, a one year release is too much; six months would be a good timeframe. This avoids the negotiation aspect and the rules would be clear.

There are many different models and it is important to consider other models and anticipate what forms of delivery may happen in the future. There should be a very simple model where the release happens at a certain point (e.g. when certain parts of the work are substantially complete, since the drawings may not all be used at one time). There needs to be some mechanism or term to say when architectural services are substantially complete and define what it means so that we get a better understanding.

The OAA explained that the break point is traditionally the point between completion of the design and contract administration. This is when the design is ready to use for construction and architects are finished the majority of their work. At that point, it is substantially complete. This is referred to as design-bid-build. (Design-build is fast tracked). Substantial performance is when the project is at the point where construction can begin. There could be a situation where one aspect of the work is ready. There may

need to be a series of staggered definitions of what this could mean to allow for flexibility to account for differences in how practices operate.

There should be a definition for substantial performance that works for different types of projects. There could be a definition for the architect's fees similar to what is used for contractors (i.e. has the architect completed the work for which they were retained for the first phase? Does it meet a financial formula?). This addresses the issue of when drawings are done for the first phase and there is substantial performance so money can be released.

### **Release of the Holdback and Negotiation Challenges**

Some stakeholders have submitted that the holdback is not released because it is being held for deficiencies. The OAA explained that if the building is finished and occupied, there cannot be architectural deficiencies. Managing this issue without having a confrontational relationship with the client is important, because many architectural service businesses are based on references.

The OAA stated that the definition of substantial completion should be clear and linked to a particular phase or element of the project. This assumes multiple substantial completions of each project, which the Act does not currently allow. If you have multiple substantial completions of various phases, the concept of substantial completion loses its meaning. Other stakeholders have emphasized the importance of freedom of contract. In multiple substantial completions, the parties would be at liberty to agree on phased release in their contracts. It could be negotiated upfront.

There are challenges with certain client groups that impose onerous contractual terms that are unfair. The OAA suggests that there should not be a contractual discussion that is left to the market to implement. The legislation is clear and everyone understands it. If it is deferred to a third party, they may enforce something that is unfair or inconsistently applied.

The relationship between architect and private client declines because of payment or contractual issues. In a client relationship where services are procured through the government, the architect's track record on a past project is disregarded and there is a vendor performance management process where they are scored at the end of the process. There is a mechanism of appeal, but the architect is being scored and, if they are fighting for the release of the holdback at the end of the project, it makes them hesitant to have that discussion. The question arose as to how you deal with it in a fair and transparent way that excludes the contractual relationship and allows the architect and client to decide when the release will happen.

According to the OAA, if the Act were amended to allow for the phased release of the holdback and architects received 75 percent of the holdback before construction starts, the holdback would be lower at the end of the project. The entire holdback could be released when all of the work needed to get to that point has been completed. This would prevent a situation where the architect prepares the documents for tender and the client tenders the work and then puts the project on hold. The architect would then

have to wait longer to get the holdback. The design fee should be released when the project is ready for completion.

The OAA discussed that the contract between the architect and the client is a separate prime contract than that between the prime contractor and the owner for the construction. There are some very significant differences in the nature of these two contracts. The architect is exposed to risks or eventualities that do not arise in the relationship between the owner and contractor.

Some have suggested that the certificate of subcontract completion under section 33 of the Act be mandatory. There could be a separate contract for services and a certificate for the completion of design services under section 33. The complicating issue is that with a contractor and subcontractor, there is a payment certifier who weighs when the work is complete. Architects are professionals and would have to work with the owner to jointly certify substantial completion. As far as the profession is concerned, it should be the professional that says they have reached that point. They cannot submit an invoice for services that have not been rendered, as this would be professional misconduct. The best approach advocated by the OAA is for substantial completion to be clear in the Act.

Another example the OAA provided is if an architect is retained to provide expert witness testimony and spends time doing research and preparation and is involved in the trial. Four months later the trial is complete and the judge takes time to render a verdict. The architectural services are finished. The rest of the trial has nothing to do with the architect. If there were a holdback applied and the decision was not to release it until the decision was rendered, it could take years, especially if there were an appeal. This is not fair to the architect who provided professional services in a case that was completed years before the decision was rendered.

The OAA suggested that if the definition of substantial completion is tied to services rendered for each phase or task, there must be a way to agree on what it is. It is not fair to say one substantial completion fits all. There should be specific examples of what substantial completion is for certain construction models. This should make it clear for everyone involved in the project.

Architects are differently situated, from a policy perspective, from general contractors and other entities in the construction contract period. The grouping under the architect is much smaller in number and there are not the same layers of holdback obligations.

### **Key Principles Raised by Stakeholders**

Prompt Payment Ontario (“PPO”) suggests that there should be a statutory requirement that every contract require payment on a fixed cycle. The Act would be expanded to include requirements to provide that the contractor submit an application on a certain date, certification would occur within 10 days, and payment would be received within certain time after certification. Other groups are opposed to this idea because they say it is too great an incursion on freedom of contract.

The public policy objective in respect of holdback was to provide a buffer to protect suppliers of services and materials against insolvency. Today, cash flow is predominant

on people's minds and there is an interest in getting cash more quickly. There is tension between cash flow and insolvency protection.

This set of tensions is at play in issues of concern to architects. The contract for architectural services is different from those involving general contractors, subcontractors and sub subcontractors. The Act is predicated on a one-size fits all approach and others have said that the Review should recommend a more nuanced approach.

Another tension is between simplicity and complexity. If the Act is too complex, it is difficult for businesses to administer. The Review has been asked to strike a reasonable balance which takes into account differences that are not recognized by the existing approach, but does not create layers of complexity that no one understands.

The OAA commented that residential sector speaks to the simplicity/complexity challenge. Architects will deliver permit drawings for a house and the owner will tender to some contractors. The scope of the work is just to get permit drawings. The threshold point should be the dollar figure of the construction value or fee. Under a modest threshold, the holdback is much simpler. One challenge is that the homeowner does not know what an architect does and they need to educate the client. They do not want to also education them about the Act. If there is a threshold at which these projects do not apply, it gets easier. If it is too complicated, people will not do it or will try to find a way around it.

Many architects are involved with permits and general review but are not involved in payment. It is likely that a lot of small contractors do not lien. The lien concept for contractors and homeowners is not what it is meant to be. It is often cash based with no holdback and no lien.

#### *Smaller Value Projects Exemption*

It has been suggested by stakeholders that the Act not apply to projects under \$25,000 or to home renovations. The OAA noted that home renovations expose architects to more risk than anything else. The OAA suggested that a good sized project is \$2 million; \$15 million is really large. If there were a scale of \$5 million and below, the holdback could be released every six months and anything over this amount every 12 months. For anything below \$25,000 the OAA proposed that there would be no holdback and no lien. The OAA explained that the process can become convoluted however, and needs to be kept simple for small projects. Smaller architects do not want to lien and the last thing some want is a lien action for \$25,000.

The OAA is going to follow up on this issue and the \$25,000 threshold idea.

#### **Other Recommendations for Consideration**

The OAA is open to 'pay when paid' clauses. If you remove 'pay when paid' without addressing the cause, it perpetuates undue financial hardships.

### *Trust Accounts*

Though it is less of an interest for architects, the OAA supports separate trust accounts.

### *Lien Rights*

The OAA proposes that there should be clarification that lien rights extend through substantial performance.

### *Finishing Holdback*

The OAA explained that the finishing holdback should depend on the scale of the project. When do you decide when it is complete? The amount in the Act is out of date (\$1,000). The amount for substantial performance is a percentage, so it is okay.

The Act should address the situation where a contract is changed to create additional phases in the later stages of the project. If the scope of services is extended, the time and dollar value is also extended. Procurement departments do not want to create separate contracts so they just provide a change order. The architects want to avoid a situation where the foundation person does the last bit of work so that they can get on site at the end to fit within the 45 days.

## **Adjudication**

Adjudication has become a prominent issue in the Review. The prompt payment issue gave rise to the Review. The Review explained the two aspects of prompt payment and the idea of Adjudication and how it works in the United Kingdom. Most of the stakeholders that the Review team has met with are strongly in favour of adjudication. The OAA stated that it would be in favour of adjudication.

The OAA will consider the issue of the timeframe to review and certify the work in order for owners to release payment. They will raise this issue with their membership and provide comments to the Review.

The OAA wants to continue its dialogue and involvement in the Review. This is a key issue for the membership and an opportunity to lead and protect the public interest.