Ontario Association of Architects

December 31, 2015

R. Bruce Reynolds
Borden Ladner Gervais
Scotia Plaza, 40 King St. W
Toronto, ON M5H 3Y4

VIA email to cla-review@blg.com

Dear Mr. Reynolds,

Further to your email of December 8, 2015, the following are the further comments from the OAA with respect to the subjects identified in your correspondence.

1. Examples of the financial consequences for an architectural practice when the holdback is held to completion of the construction of the project are attached as Appendix A showing a typical time frame for services plus various monetary examples.

2. The OAA supports the notion of phased release of the holdback monies as triggered by either the deemed completion or substantial performance of a subcontractor. Presently the OAA has no opinion as to whether the triggering mechanism is substantial performance or deemed completion as we feel that this issue is best decided by contractors and subcontractors.

However, the OAA is of the opinion that regardless of which triggering mechanism is incorporated in the *Construction Lien Act* (CLA), it should be mandatory and not left to the discretion of the 'payer' (owner) as this may not improve the cash flow under a contract.

Furthermore, consideration should be given to the threshold where mandatory release applies in order to eliminate additional procedures which apply to small amounts of monies where the financial impact is minimal.

3. The OAA does not believe that the notion of mandatory certification of subcontracts is the most appropriate mechanism to satisfactorily address our concerns with holdback monies being held through the duration of the construction and warranty periods. As stated in our previous submission, we propose that the architect's contract be deemed to be divided into two separate phases consisting of design and then construction. The triggering mechanism of release of holdback for the two phases should be substantial performance as now included in the current CLA - the financial formula including where the services (work) can be utilized for the purposes intended. In other words, a sufficient percent of the design has been

…/2

completed so that construction can commence or is already underway in the case of design-build, construction management, or fast-track projects. In the case of the construction phase, substantial performance of the architect's services should coincide with substantial performance of the contractor's work.

4. The OAA supports the proposition that holdback requirements should not apply to any claim that would fall within the jurisdiction of a small claims court.

5. The OAA supports the current time frame of 10 calendar days for the consultant to issue a certificate for payment as prescribed in the CCDC 2 document. CCDC 2 further states that the period when payment is due is a maximum of 20 calendar days after the receipt of the certificate. However, the OAA recognizes that certain owners may not be administratively efficient or may unnecessarily delay payment. As such it is important that a maximum time for payment be prescribed. We recommend a maximum of 60 days from receipt of an invoice or 50 days from receipt of the certificate for payment where there is a payment certifier as in CCDC 2. Setting a maximum period for payment under the CLA should not preclude having any contractual relationship regarding payment of interest on overdue accounts with an earlier specified time frame. The proposal requirement for interest bearing trust accounts for the holdback monies should provide incentive to promptly pay the monies owing at least for the holdback monies.

6. While the OAA is supportive in principle of a system of mandatory adjudication, we cannot comment further without seeing the details of a proposed system.

We thank you once again for the opportunity to meet with you and to provide additional comments. We are available for further consultation should you require further clarification with respect to the content of this letter.

Sincerely,

Kristi Doyle
Executive Director