December 30, 2015

Bruce Reynolds and Sharon Vogel
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King St West, 44th Floor
Toronto, ON M5H 3Y4

Dear Mr. Reynolds and Ms. Vogel,

Thank you for the opportunity to meet on December 17th to discuss ways the Construction Lien Act could be modernized.

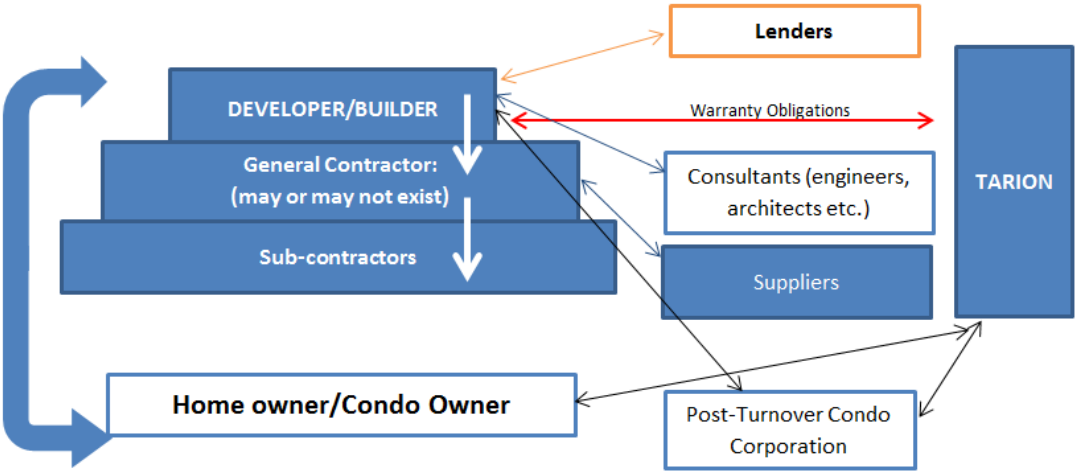
As we discussed in the meeting, the residential construction industry and the payment process is considerably different from the Institutional, Commercial, Industrial (ICI) and civil construction sectors. We committed in the meeting to provide you with more details on the key 'differentiators' our sector has compared to other construction sectors.

Below are seven unique attributes of residential construction that are clear differentiators compared to other sectors. OHBA and RESCON would welcome any additional opportunity for input or dialogue on ways to modernize the Act.

1. **TARION WARRANTY CORPORATION BUILDER REGISTRATION**: Unlike other contract methods where 'anyone' can legally act as a builder/owner in a project, the existence of Tarion, creates an initial 'check' in the system. Only a licensed Tarion builder which has registered a project can act as a builder on a new residential construction project. This process filters out companies that are unable to demonstrate that they have met a financial threshold to be able to fund the project and have the construction aptitude to carry out the building process. In addition Tarion requires a builder to post security based on the builder's history and the number of units it intends to build.
2. **NEW HOME PURCHASER AS END USER**: Unlike other contractors, where there is a single 'purchaser' of the construction product – like a government, municipality or school board – the new home purchaser is the end client for the home builder/developer. This creates a unique set of pressures on the builder to ensure that trades and sub-trades are paid in an expeditious manner or else a lien may delay closing the home for the purchaser. Any delay to a closing may trigger a set of Tarion fines under its "delayed closing" policies. This creates a significant added pressure in a subdivision for a builder to sort out payment issues before liens can be registered. This pressure does not always exist in a civil or ICI construction environment where liens (or notices of claims for lien) are applied to public buildings like hospitals.
3. **BUILDER ACTS AS GENERAL CONTRACTOR:** In many, although not all instances, the builder is the general contractor in the payment structure. This provides sub-trades with a more direct relationship with the primary construction 'owner'.

4. **WARRANTY OBLIGATIONS**: Ontario has a mandatory new home warranty program for new home builders. This locks the builder into a relationship with the new home buyer along with warranty obligations. In this structure, builders are accountable for the long term quality of their homes. Therefore the holdback provisions are particularly important to ensure that sub-trades are also accountable.
5. **SMALL BUSINESS DOMINATE:** The prevalence of small business in our industry makes the introduction of new payment certifiers or strict payment timelines difficult. Prompt payment provisions in particular would impose a significant administrative burden on small builders and contractors. In addition, the dollar values for a mandated monthly payment scheme may be incremental for small contracts relative to the administrative cost to verify the work was completed.
6. **SMALL POOL OF TRADES:** In many communities and regions outside the GTA, there may be only two framing contractors that may frame all new homes for the entire town that year. In a small ecosystem of trades, maintaining a good payment structure is critical to ensuring ongoing positive relationships in the construction community.
7. **LARGE AMOUNT OF ECONOMIC ACTIVITY CHARACTERIZED BY NUMEROUS FRAGMENTED TRADES:** Ontario builds on average over 60,000 units annually – including over 20,000 single-detached units and 40,000 multiple housing units. Our sector generates $33 billion in economic activity across Ontario. Residential construction accounted for $18.98 billion in building permit activity in 2014 compared with $11.7 billion for *all* non-residential construction work. (StatsCan CANSIM Table: 026-0003) While residential activity substantially exceeds every other construction activity, the monetary value of individual contracts is relatively small as they typically refer to specific units. For example in a single detached home one might have up to 45 contracts varying from a few hundred dollars to over $30,000. Therefore, imposing a rigid payment scheme with numerous new reporting requirements would destabilize a contracting structure that is limited in its administrative capacity to deal with additional red tape.

On the next page is a conceptual illustration that shows the construction contract, warranty and payment obligations in Ontario's residential construction sector.



Thank you again for your engagement on this very important matter.

Please contact Stephen Hamilton (shamilton@ohba.ca) for any additional follow-up or clarification.

Sincerely,

Richard Lyall
President, RESCON

Joe Vaccaro
Chief Executive Officer, OHBA

Copy: Derek R. Freeman and David W. Bernstein at FreemanLaw--Barristers