Ontario Association of Architects

November 2, 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,

The Ontario Association of Architects (OAA) appreciates the opportunity to comment on the contents of the information package that we received as part of the review of the *Construction Lien Act* (CLA).

The OAA has been earnestly involved in advocating for reform of the CLA since 2003. Throughout 2004-2005, the OAA effectively reached agreement with the Government over our proposed amendment. Most notably, the OAA was repeatedly given indication of the Government's intention to include the OAA's CLA amendment in an omnibus bill throughout 2005-2006, though this was eventually parked by the Government until 'after the election' before eventually appearing to have been set aside.

The OAA's amendment was again considered during the Government's engagement with the Council of Ontario Construction Associations but was not included as one of the CLA reforms integrated into the *Open for Business Act*, being identified for further "input from interested parties" by the Ministry of the Attorney General.

More than ten years later, the OAA respectfully stresses that it is long overdue for the Government to make good on its commitment to include the architect's amendment.

The key issues which we will raise below are essential to ensuring the legislation is fair and reasonable and mitigate any undue financial hardship on the architectural practices of Ontario.

**1. Dividing the Architect's Contract into Two Phases**

Whereas the architect is one of the first of the client's (Owner's) consultants, the architect's services can extend over an extensive time period from the early planning stage to the completion of the architect's services at the end of the warranty period for the actual construction phase. In the majority of instances, the largest portion of the architect's services (approximately 70% to 75%) is complete prior to the start of construction which may then extend from six months to three years or more, depending on the size of the project.

The existing CLA does not contain any provisions for early release of holdback monies or a release at substantial performance for the architect. Such provisions are presently in place for contractors, sub-contractors and suppliers.

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As mentioned above, this issue has been raised by the OAA over the course of many years and a proposal to address the problem has been advanced numerous times to government.

The OAA previously proposed the following amendment to the CLA which would address the issue of Owners being able to hold 10% of the architect's fees for an unreasonable time frame.

1) Section 33 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, is further amended by adding thereto the following section:

   33a.(1) 'Where an architect under the Architects Act agrees to supply services both before and after commencement of an improvement pursuant to a contract or a subcontract, the contract or subcontract shall, for the purposes of this Act, be deemed to be divided into the following two separate contracts or subcontracts:

   i) the first contract or subcontract shall consist of the supply of services up to and including the commencement of the improvement; and

   ii) the second contract or subcontract shall consist of the supply of services thereafter;

While this remains the OAA's amendment put forward for consideration, it's important to note that our amendment or recommendations could be revised further, particularly in light of developments resulting from the larger review currently underway.

The 2005 amendment was written as a non-intrusive "surgical" amendment that could be easily integrated into an omnibus bill, and our legal counsel at the time indicated that if the CLA were being opened up to larger revisions, they would likely have written their amendment differently.

It is also important to note that the wording that was recommended at the time addresses the unreasonable time frame issue for stipulated price contracts, but does not work for other forms of construction contracts which have become even more prevalent over recent years *(see item 3 below)*.

**2. Release of the Statutory Holdback on the Architect's Fees at Substantial Performance of the Architect's Services**

There are varying opinions by legal counsel as to the applicability of substantial performance as it relates to an architect's services and, if applicable, to the timing. Therefore we advocate that it should be clarified that substantial performance does currently apply to architectural services, or that if it does not, it should be included as detailed below.

The definition of substantial performance as it applies to the architect's services should be similar in concept to that which currently applies to the contractor in the CLA. It being the financial formula plus the completion of the services to a point where the services can be utilized by the Owner for the purpose which the architect was retained.

The concept of substantial performance should be independently applied at each of the following:

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- Design phase, for which the architect is retained for partial services only. For instance, from client contact through to construction documents (including permit approval).
- Contract administration phase including general review, for which architects have been retained to provide services after the commencement of the Work.

It is important to note that for many types of contracts, architects are often engaged for both distinct phases of the project, typically referred to as full basic services.

Formalizing two phases for substantial performance of the architect's services should negate the current situation where the statutory holdback is released after total completion of the architect's services (e.g. both phases of work), being the end of the twelve-month warranty review of the Work.

**3. Criteria to Determine Substantial Performance**

Under the OAA's proposed amendment to divide the contract into two phases, the triggering mechanism for the completion of the design portion would be the start of the construction stage ("the improvement").

In contrast, the current concept of substantial performance in the *Construction Lien Act* is that the triggering method for release of the holdback is the completion of a defined phase.

This generally works when the construction proceeds on the basis of design-bid-build and the contract is in fact signed prior to the start of construction, but problems can arise where the contract is not signed until well into the construction or sometimes never signed at all.

This issue can be resolved for a design-bid-build contract by redefining "commencement of the Work" to mean the date the construction contract is signed or the actual start of construction of the Work, whichever is earlier.

**4. "Pay-when-paid" Provisions**

Within the existing *Standard Contract between Architect and Consultant* (OAA 900, 2014), article A9 states:

> "The Architect shall pay the Consultant's fees and reimbursable expenses plus value added tax (VAT) subject to holdback required by the Construction Lien Act (CLA) promptly after the Architect is paid by the Client under the Prime Contract."

The Borden Lardner Gervais discussion document lists pay-when-paid as an issue to be considered.

The OAA is open to alternatives to pay-when-paid provided that prompt payment could be guaranteed, negating the need for such provisions. During preliminary meetings with MPP Steven Del Duca, and the subsequent hearings on Bill 69 before the Standing Committee on Regulations and Private Bills, the OAA has supported the principle of prompt payment.

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Given the preponderance of independent prompt payment legislation in other jurisdictions, the OAA proposes that prompt payment should similarly be dealt with through standalone legislation (as initially proposed) and not through amendments to the *Construction Lien Act.*

Unless the current intervention can fully address all concerns regarding prompt payment, it is critical to the financial stability of architectural practices that the current wording contained in OAA 900, 2014 not be negated by changes to legislation.

**Additional Items**

In addition to the above, the OAA supports the following:

1. *Separate interest-bearing trust accounts for statutory holdback*

   The legislation should require separate interest-bearing trust accounts for statutory holdback for each project including architect and consultant's holdbacks where there are substantial fees involved. Defining substantial fees would need to be further explored but could be cross-referenced with current provisions in Manitoba and BC legislation.

2. *Clarifying that all lien rights extend through to substantial performance of the relevant phase of the contract*

   All lien rights should extend through to substantial performance as this would be beneficial where architects are retained either for partial services, early termination of an architect's contract and/or in a design-bid-build contract.

3. *Adjusting the "When contract deemed completed" clause for inflation*

   In calculating when a project is deemed to have been completed, the CLA currently explains:

   > **When contract deemed completed**
   > (3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,
   >
   > (a) 1 per cent of the contract price; and
   >
   > (b) $1,000. R.S.O. 1990, c. C.30, s. 2 (3).

   Consideration should be given to update this $1,000 amount for inflation from the original date in 1984, as this amount has remained unchanged during its 30 years of existence and no longer remains a relevant figure.

4. *Clarifying the legislation as related to project creep*

Attention is drawn to subsection (2) of Section 2 of the *Construction Lien Act*, which reads as follows:

> (2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance. R.S.O. 1990, c. C.30, s. 2 (2).

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Project creep caused by changes to the contract to include additional work or services in the latter stage of the project can prove to be problematic when determining substantial performance. Although the legislation currently includes the quoted text which can help to avoid the delay of substantial performance, there are times when parties disagree as to whether the improvement could be completed expeditiously. Careful attention should be given towards clarifying this area of the existing legislation.

The OAA would like to again thank you for the opportunity to participate in this important review, and look forward to discussing our recommendations further.

Sincerely,

Toon Dreessen, Architect
OAA, MRAIC, AIA, LEED AP
President