Ontario Association of Architects

November 7, 2016

The Honourable Yasir Naqvi, Attorney General
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON
M7A 2S9

Re: Striking the Balance: Expert Review of Ontario's *Construction Lien Act*
Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure

Dear Minister Naqvi,

The Ontario Association of Architects (OAA) appreciates the various opportunities which have been afforded us to comment on the proposed changes to the *Construction Lien Act* (CLA) of Ontario, and in particular our last meeting with you on October 24, 2016.

As the minister responsible for the *Architects Act,* the efforts you and your staff have made in ensuring that the profession's views about the proposed changes to the CLA are heard, are most welcomed.

As discussed at our last meeting, we would like to reinforce some of our concerns and to elaborate on those for which some questions were raised or for which clarity is required.

Sincerely,

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

Attachment: OAA Comments on Striking the Balance

cc: Bruce Reynolds, Borden Ladner Gervais LLP

OAA Comments on Striking the Balance

OAA members encounter on a regular basis a lack of clarity and consistency in legal opinions obtained by clients during the construction period, in requests for proposals, and in contract terms and conditions regarding the application of the CLA and release of holdback. Many times this is expressed in terms and conditions which were created for and are appropriate to construction contracts, but are inappropriate for consultant contracts. For example, a denial of the right to a determination of substantial performance resulting in a retention of holdback until the end of the warranty period. This can result in the consultant's holdbacks being retained for more than twice as long as the construction contract holdback.

Many inconsistencies come about because of documents originally written for construction contracts which have not been properly edited for consultant contracts. For example, a requirement for consultants to carry insurance for heavy equipment used on site. We see some of this inconsistent usage in the BLG report and we don't want to see these issues arise inadvertently in a new Construction Lien Act.

1. **The OAA believes that greater clarity is required than is found in the current CLA**, stating that the CLA applies in its entirety to consultants unless noted otherwise. The reference in Part III The Lien Section 14 of the current CLA states:

   "*14. (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1).*

   Note: Subsection (1) applies to services and materials supplied by architects, holders of certificates of practice under the Architects Act and their employees under contracts made on or after November 28, 1997, and under subcontracts made under such contracts. See: 1997, c. 23, s. 4 (2)."

   The reference is explicitly (and has been interpreted by some to be exclusively) to Subsection 1. This has resulted in conflicting legal interpretations. The first problematic interpretation is that consultants in general, and architects in particular are not entitled to a determination of substantial performance. Other interpretations relate to whether architectural fees are subject to holdback or not.

2. **The OAA supports Recommendations 28 and 29** relating to phased or annual release of holdback and the segmentation of holdback.

3. **The OAA does not support Recommendation 30 as written.** While we support the designation of design and construction phases for the purposes of phased release of holdback, we believe early release of holdback for consultant contracts should be mandatory. The intended effect of Recommendations 28 and 29 will not be achieved in practice where early release of holdback for consultants requires the consent of the client.

OAA Comments on Striking the Balance

In the paragraph immediately preceding Recommendations 28, 29, and 30 the BLG report states:

"Further, in our view, there is no policy impediment to allowing for the segmentation of holdback where a contract has payment certifier and separate accounts are maintained for each improvement."

It is unusual for there to be an impartial payment certifier for a consultant contract. In the absence of a payment certifier, unless a provision is mandatory or is optional at the sole discretion of the payee, the payer is able to block the payee's access to the relief intended by the proposed provisions of the CLA.

The Construction Lien Act has been designed to provide protection for all parties in the "pyramid" and should continue to do so. A large proportion of architectural, engineering, planning and landscape architectural practices are small businesses with limited access to the financial resources available to public entity or corporate clients which in design-build and AFP projects includes many general contractors. Requiring the consent or cooperation of the client through the use of the permissive "may" creates a disparity in power stacked in favour of the client. Where allowed to, they often insist on the acceptance of unfair terms and conditions. As noted in the BLG report:

"…in reality there is little freedom of contract in the marketplace, as owners unilaterally impose their chosen payment conditions …"

If the provision is not mandatory, the provision might as well not exist.

Our understanding based on statements by Bruce Reynolds is that the main issue that BLG had with the mandatory early release of holdback for design consultants related to the difficulty as to how it would apply to sequentially tendered projects where construction starts on the foundation before design of the superstructure is completed.

The OAA did not have the opportunity to respond to this concern when the report was being written. We propose that the trigger for holdback release be substantial performance of the design component of the work. For a project which is intended to proceed to construction, the consultant contract should be deemed for the purposes of the CLA to be two contracts: one for the design phase services and the second one for the construction phase services. Such wording was accepted in principle by previous Attorney Generals, but was not enacted due to changes in government priorities.

Substantial performance should be understood as:

> "(a) when the improvement (the construction document package) to be made under that Contract or a substantial part thereof is ready for use or is being used for the purposes intended; and

(b) when the improvement to be made under that Contract is capable of completion or, where there is a known defect, correction, at a cost of not more than, …"

The same performance criteria would apply to both deemed parts of the contract. This is no different than the current process in a construction contract where there is no payment certifier.

The OAA recommends that it be mandatory that consultant contracts be deemed to be two contracts, so that the early release of holdback for consultant contracts becomes mandatory.

4. **The OAA strongly supports the limitation of the right of set off to the contract at-hand and not across any other contract between the same parties. The performance of and payment for each contract should stand on its own merits.**

   The OAA sees many Requests for Proposals containing unfair terms and conditions. Often these terms and conditions relate to an abusive use of the right to set off for perceived unproven damages arising from any cause (e.g. lack of performance by other parties) on a specific project, against the fees due to consultants on any other projects with the owner. The RFP wording attempts to extend the consultants' liabilities in contract beyond their liability 'at law'. It also attempts to avoid due process by allowing the owner to act as judge, jury and executioner. The same protection from the abusive use of the right of set off should be afforded to contractors under construction contracts.

5. **The OAA also strongly supports the exclusion of holdback monies from any right of set off.** The holdback was taken as 10% of the amount that was already certified to be due and payable to the contractor/payee for work already properly completed. If not set aside as holdback in trust for sub-contractors and suppliers until the lien period ends, the holdback amount would already have been released to the payee. Months may have passed during which there were multiple opportunities for the payer/certifier to withhold funds to cover the cost of any noted deficiencies. In a properly managed contract, there should be no need to claw back that which has already been certified as due and payable. Set off would also unfairly complicate the payment of value added taxes and income tax on monies earned but not yet received and would create situations in which the money earned is never received because it was subject to set off.

   When the holdback is to be released it should pass directly into the hands of the payees it was set apart to protect without any encumbrance by a right of off set.

6. The BLG report has some inconsistencies in its use of the terms Contractor, General Contractor, and Consultant. In Recommendation 48 BLG states:

   "We recommend that the prompt payment regime should apply at the level of the owner-general contractor, general contractor-subcontractor, and downwards, and

that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners…"

The use of "general contractor" in this instance seems to restrict prompt payment to the construction "pyramid" to the exclusion of the consultant "pyramid". In a discussion with Bruce Reynolds, he confirmed that the intent of the report was to include consultants in the prompt payment regime. **The OAA supports prompt payment for both "pyramids".** A similar issue arises in Recommendation 61. **Any new legislation will need to be clear and consistent in its terminology and in its application.**

7. The BLG report addresses Mandatory Surety Bonds (Recommendations 45, 46). **It is the OAA's position that existing professional liability insurances and regulatory procedures have in the past, and will continue to provide more than adequate protection to the public and to sub-consultants/suppliers**. In the BLG surety recommendations, the term contractor is used, implying that the provision should apply to consultants. In discussion with representatives of the Surety Association of Canada, they stated that they had no desire to extend bonding to consultants.

   Mandatory Surety Bonds should not be required on consultant contracts.

8. **The OAA supports finishing holdback in general (Recommendation 26) and supports the use of small claims court to simplify and reduce the costs and effort of pursuing a lien action.** We also suggest that consideration be given to extending the simplification and cost reduction through the elimination of holdback where the value of the contract is less than a threshold amount and the elimination of finishing holdback where the value of the work outstanding at substantial performance is less than a threshold amount. For example, the threshold could be five times the deemed completion amount. In the case of the proposed deemed completion amount of $5,000, the threshold would be $25,000.

   The holdback on $25,000 would be $2,500. On any amount less than $25,000 there would be no holdback. Even in small claims court, the cost in time to prepare and present an argument is likely to exceed the $2,500 holdback amount. In practice, very few are going to pursue relief in the courts for such a small amount. The cost to the system for the contractor to do the paperwork to apply for release of $2,500 of holdback, for the payment certifier to review and certify payment, for the contractor to publish a certificate of substantial performance, and for the payer to issue a cheque likely means that the entire value of the holdback is consumed across several parties in unproductive effort.

   If there were no holdback below the threshold ($25,000 or such other amount as determined) there would be little if any practical reduction in protection, and the reduction in paperwork would be of benefit. This would also serve to remove the holdback requirement for small residential projects (an issue discussed in the BLG report) where compliance with the CLA is low to begin with, thus avoiding putting many

homeowners in a double jeopardy position. This approach also avoids creating a special case just for residential projects.

We suggest that prompt payment would be of more benefit to the small contractor than the appearance of protection afforded by the holdback on small contract amounts.

9. The CCDC national consensus documents govern many construction projects across the country and strongly influence the contracts for many others. It is important in avoiding unnecessary confusion and conflict that any legislation be consistent with the requirements of the CCDC documents.

   For example, the time period of 7 calendar days in Recommendation 52 for a payer to deliver a notice of intention to withhold payment conflicts with the longstanding provision in the CCDC contract of 10 calendar days for the payment certifier to issue a certificate for payment. How can a payer decide by the 7th day to withhold some amount of payment when the certified amount won't be known for several more days?

   The BLG report states:

   > "…as it [a 28 day payment period] should provide a payment certifier with adequate time to review the invoice and supporting documents and conduct necessary due diligence."

   We agree that a 28 day period would be more than adequate, but in reality, clients will want payment certification completed before the 7 calendar day notification period expires, effectively requiring certification in 4 days or less.

   The OAA recommends retention of the industry standard 10 calendar day time limit or the adoption of a 7 working day time limit.