Ontario Association of Architects

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John Stephenson, President
Ontario Association of Architects
Deputation to the Standing Committee on the Legislative Assembly
Bill 142, the Construction Lien Amendment Act, 2017

Mr. Chair and Members of the Standing Committee –

My name is John Stephenson, and I am the President of the Ontario Association of Architects.

The OAA is the Regulator and professional association for architects in Ontario.

Established by the *Architects Act* and dating back to 1889, it is the legislated mandate of the OAA to regulate the practice of architecture to ensure that the public interest is served and protected.

I would like to start by thanking Government for undertaking this important initiative to modernize the *Construction Lien Act*.

The OAA has collaborated extensively with Government over the *Construction Lien Amendment Act* including three submissions and numerous meetings and discussions with Mr. Reynolds and Ms. Vogel as well as government officials and staff and we have appreciated the positive reception of our input and comments to date.

I would also like to acknowledge that based on recent communications from Minister Naqvi, it appears that our concerns regarding performance bonds will be addressed through the addition of a clarifying statement to “Exclude architects, engineers, and consulting professionals from the requirement”. The OAA applauds Government for this important amendment.

With that said, I sit before you today to communicate a few remaining concerns and recommendations from the architectural profession.

Most importantly, there remains a lack of clarity regarding substantial performance as it applies to architectural services.

Also, while attempts have been made to clarify the transition period, the OAA remains concerned about a lack of clarity as to the effective date of the new *Act* and how it applies to existing contracts.

I'll expand on these points now.

Substantial Performance

Regarding Substantial Performance, the OAA believes that the concept of substantial performance applies, and should apply, to architectural services.

During ongoing conversations that we have had with Mr. Reynolds and Ms. Vogel, we were pleased to hear they agree with this interpretation.

However, not all lawyers share Mr. Reynolds and Ms. Vogel's opinion. Some construction lawyers do not believe substantial performance applies to architectural services.

The reason for this is the definition of improvement in section 1.1 of the *Construction Lien Act*.

This definition does not explicitly reference design services instead focusing on largely physical improvements such as repairs, construction, and demolition.

While Mr. Reynolds and Ms. Vogel felt the definition of improvement did not require modification as it already encompassed design services, the OAA recommends that a clarifying statement be appended to the definition of improvement to resolve this issue.

This statement should make it explicitly clear that design services are an improvement so as to end any debate within the legal community as to whether substantial performance applies to an architect's contract.

If the Government does not wish to modify the definition, our concern could also be resolved by adding this clarifying statement in section 2.(1) which deals with the determination of substantial performance.

In either case, the clarifying statement could follow the form of a similar statement currently included as 14.(3) dealing with liens.

Transition Period

Regarding the Transition Period, the OAA does acknowledge that the Minister has provided some clarifications. However, outstanding concerns remain regarding:

1. The effective date of the new *Act*, and
2. How the new *Act* applies to existing multi-year/multi-project contracts.

Architects and other members of the design and construction community should have a clear understanding of how their lien rights or prompt payment responsibilities—and the administration of these requirements for which architects are often responsible—are to be applied in instances such as with multi-year, multi-project master services contracts and vendor of record contracts.

It is our understanding that Government intends for these types of contracts to continue to be governed by “the previous regime”. In other words, pre-existing contracts will not be governed by the requirements of the new legislation.

These master contracts would therefore continue to dictate the terms and conditions of subsequent work for five or more years beyond when this legislation comes into force, despite the fact that these new projects—not pre-existing work—may commence long after the *Construction Act* is passed.

This could continue to disenfranchise architects and others from the important changes and protections Government has put in place for years to come.

The OAA recommends that all provisions of the proposed legislation apply to any individual project contract that is dated after the effective date of the legislation regardless of whether there was a pre-existing master services or vendor of record contract.

Thank you very much for the opportunity to speak to you today and I look forward to addressing your questions.