

CONSTRUCTION LAW LETTER

Volume 29 • Number 6

July/August 2013

IN THIS ISSUE:

New Standard Form Contracts for Ontario Architects

Andrea W. K. Lee 1

Authorization Required to Enter into Certain Public Contracts in Quebec

Nicolas Croteau and Julie Fortier.....4

Beyond Expectations: Damages in Home Renovation Cases

Bortolussi v. Busselton Construction Ltd. 6

Builder Liable to Subsequent Owners for Dangerous Defects

Vargo v. Hughes 8



GUEST ARTICLE



Andrea W. K. Lee, B. Arch., LL.B.
Partner
Glaholt LLP

NEW STANDARD FORM CONTRACTS FOR ONTARIO ARCHITECTS

In any construction project, it is important to set out in writing the role and responsibilities of parties, not merely relying on oral agreements. While parties are often optimistic about their relationship at the beginning of the project, issues may arise at a later date. However, they may be avoided if expectations are set out formally on paper.

Since 2005, the Ontario Association of Architects (OAA) has published a standard form contract—*Document 600*—to assist architects and their clients. In March 2013, the OAA released two new versions of the contract: *OAA 600-2013* and *OAA 601-2013*. The principal difference between the two forms is that the *OAA 600-2013* contains a standard checklist of basic and additional services at GC2.1 and GC3.1, whereas the *OAA 601-2013* allows architects to append their own scope of services at GC13.

Some of the key changes from the earlier versions of *Document 600* are summarized below.

Architect's Responsibilities

Generally, an architect owes a duty to the client to exercise reasonable care, skill, and diligence expected of an ordinarily competent professional. However, architects can contract into a higher standard of care if they hold themselves out to be specialists or have extraordinary skills and experience.

Continued on Page 2

CONSTRUCTION LAW LETTER

The **Construction Law Letter** is published six times a year by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ont., L3T 7W8, and is available by subscription only.

Design and compilation © LexisNexis Canada Inc. 1984-2012. Unless otherwise stated, copyright in individual articles rests with the contributors.

ISBN 0-433-40930-4 **ISSN 433409304**

ISBN 0-433-44380-4 (Print & PDF)

ISBN 0-433-44664-1 (PDF)

Subscription rates: \$240
\$335 (Print & PDF)

EDITORS

Editor:

**Paul Sandori, Dipl. Ing. Arch.,
R.I.B.A., O.A.A., F.R.A.I.C.**

Reyav and Associates Limited

Tel.: (416) 498-1303, ex. 208 Fax: (416) 491-0578

Consulting Editor:

**Harvey J. Kirsh,
B.A., LL.B., LL.M., C. Arb., C.S.**

Kirsh Professional Corporation

Contributing Editor:

Howard Krupat

Heenan Blaikie LLP, Toronto

Tel.: (416) 643-6969

LexisNexis Editor:

Boris Roginsky

LexisNexis Canada Inc.

Tel.: (905) 479-2665 ext. 308

Fax: (905) 479-2826

E-mail: constructionlaw@lexisnexis.ca

EDITORIAL BOARD

The Right Hon. Madam Justice **Beverley M. McLachlin**, Chief Justice of Canada • The Hon. Justice **R. Roy McMurtry**, former Chief Justice of Ontario • The Hon. Justice **Gordon Killeen**, formerly of Ontario Superior Court of Justice • **Michael A. Atkinson**, President, Canadian Construction Association • **David I. Bristow QC**, Team Resolution, Toronto • **John R. Singleton QC**, Singleton Urquhart, Vancouver • **W. Donald Goodfellow QC**, Calgary • **William M. Pigott**, Miller Thomson LLP, Toronto • **Master David H. Sandler**, Ontario Superior Court of Justice • The Hon. Justice **Michael F. Harrington**, Court of Appeal of the Supreme Court of Newfoundland and Labrador

Note: Readers should not rely solely on the interpretation of a court decision summarised in this publication, but should consult their own solicitors as to the interpretation of the written reasons rendered by the court. The publishers and editors disclaim any liability which may arise as a result of a reader relying upon contents of this publication. The opinions expressed in the articles are those of the authors, and not necessarily those of the publisher and editors of the *Construction Law Letter*.

Interestingly, GC1.1 of the new OAA contracts adds to the “Architect’s Responsibilities” that the architect shall “exercise such professional skill and care as would be provided by architects practising in the same area in the same or similar locality under similar circumstances.”

While this addition may be construed as establishing an ordinary standard of care, it could be viewed, in certain cases, as raising the standard to a more stringent one. Based on the language, an architect providing services for a small residential project in a remote area could arguably be held to a different standard than an architect working on a complex institutional project in a large urban centre.

Client’s Responsibilities

Many clients may not be aware of their own responsibilities with respect to the project, which could lead to delay and additional costs down the road. The OAA contracts clarify certain responsibilities that have typically been sources of confusion.

For example, it is clear that the client must provide information such as surveys describing physical characteristics, legal limitations and utility locations for the project site, sub-surface investigation and reports, air and water pollution tests, and tests for hazardous substances or materials. The architect is entitled to rely on the accuracy and completeness of this information.

The contracts also set out the client’s responsibility to provide the architect with a written program of requirements including spatial and functional requirements and relationships, a budget, and an anticipated schedule.

Finally, while the architect may assist the client in submitting an application for building permit, the contracts clearly state that the client must sign applications for permits as the owner and pay for the building permit and all other permits and development costs.

Additional Services

Clients and architects often disagree midway through or at the end of a project as to what services constitute additional services for which extra fees must be paid.

The OAA contracts clarify that certain services commonly requested or required by clients are additional services such as value engineering or involvement in mediation or other dispute resolution processes between the client and contractor, while other services such as the coordination of consultants identified in the contract are part of the architect’s basic services.

Further, it is now clear that an architect’s additional services resulting from unforeseen situations cannot be included in the contract’s fixed or percentage fee and can be determined as to scope and compensation only if and when the events occur. An architect should include an hourly rates fee for use in the event that unforeseen additional services are required.

Payment

The new contracts set out that, where fees are based on a lump sum or percentage of the *construction cost*, payment for each phase of services shall be based on a certain apportionment of the total fees. Blanks are to be filled in by the architect as to the percentage of fees to be billed upon the completion of schematic design, design development, construction documents, bidding or negotiating, and construction phases. The OAA and the Royal Architectural Institute of Canada (RAIC) recommend that the below range of percentages be used:

Schematic design phase	12%–18%
Design development phase	12%–18%
Construction documents phase	35%–49%
Bidding or negotiating phase	2.5%–6.5%
Construction phase	25%–35%

In projects where more work is done in the earlier phases, such as those using *Building Information Modeling (BIM)*, percentages may be weighted more heavily for the schematic design, design development, and construction documents phases.

Release of Holdback

With respect to the holdback payments under the Ontario *Construction Lien Act*, architects are often required to wait until the end of the project or the contractor’s warranty period until holdback is released to them by clients.

To alleviate the financial burden placed on the architect, the new OAA contracts provide that if the architect is providing services both before and after the commencement of construction, then the contract shall be deemed to be divided into two contracts. The first contract will be for the provision of the services up to and including the start of construction, and the second contract will be for the provision of the services after the start of construction.

While this provision allows the architect to receive its holdback payment in two stages, this may also result in two deadlines for the purposes of the architect’s lien rights. Any liens related to the first contract for preconstruction services may expire 45 days following the commencement of the work pursuant to the *Construction Lien Act*.

Copyright and Use of Instruments of Service

There has been much confusion in the past as to what project documents clients can retain, and how they may use them. The new OAA contracts clarify in the definitions that *instruments of service* are the paper or non-editable electronic documents, which comprise the design, drawings, specifications, and reports prepared by the architect,

including plans, sketches, drawings, graphic representations and specifications, and other materials. These documents, however, do not include software systems, databases, computer programs, or computer-aided design documents such as editable CAD or BIM files unless otherwise agreed in writing.

GC7 further provides that copyright in an architect's instruments of service belongs to the architect and that these instruments of service shall remain the architect's property whether or not the project is executed and the architect has been paid. Alteration of the instruments of service by the client or anyone else is prohibited without a written licence from the architect.

While the client may retain copies of the instruments of service, the copies may be used only for the purposes intended and for a one-time use (on the same site, for the same project, and by that client only) and may not be offered for sale or transfer without the express written consent of the architect. A condition precedent to the use of the instruments of service for the project is that all of the architect's fees and reimbursable expenses must be paid in full.

Summary

While some disputes related to projects are unavoidable, the use of written contracts such as the *OAA 600-2013* and *OAA 601-2013* will greatly assist in ensuring that the expectations of both the architect and the client are discussed and properly reflected in the final agreement. These new standard form contracts, which can be applied in many types of projects, will help parties to understand their respective responsibilities and can lead to savings in time and money.