### PROTECTING YOURSELF: WHAT CAN YOU DO WHEN YOUR CLIENT DOESN'T FOLLOW YOUR ADVICE?

This bulletin discusses some of the options an architect might consider when a client doesn't follow your advice or makes changes to your design without your knowledge. Suggestions include:

- Limit your liability in your Client / Architect Agreement
- Qualify your Certificates
- Be prepared to say "I don't know enough about this..."
- Retain a specialist
- Put your concerns in writing
- Advise the Chief Building Official
- If all else fails...consider withdrawing your services

## INTRODUCTION

Late in 2006 Pro-Demnity sent you a bulletin dated November 2006 reporting on an Ontario Building Code Commission ruling respecting the use of an EIFS application on a Part 3 building.

One factor in the story was that an inferior EIFS application had been substituted by the Builder / Developer for the “stucco” cladding that had been shown in the documents that had been the basis for the issuance of a building permit.

The bulletin prompted a number of enquiries from architects asking how they could protect themselves when a client chooses to make a substitution over the architect’s objections or without informing the architect. We in turn referred the question to one of the lawyers regularly retained by Pro-Demnity.

Although the examples included in this Bulletin were occasioned by the substitution of an EIFS cladding for another, the principles would apply to any change from your design that you disagree with or cannot recommend

## YOU OWE A DUTY OF CARE TO WARN YOUR CLIENT…

You will owe a “duty of care” to your client to warn them of your concerns or your lack of satisfactory experience with the product or application. Failure to warn exposes you to liability when the “new” alternative product or system fails to perform satisfactorily.

It is not uncommon for a client, faced with a failure arising from its own insistence to state that “the architect should have been more forceful in its objections” or even “the architect should have forced me to not do what I did”.

## AND YOU OWE A DUTY OF CARE TO OTHERS…

You must remember that regardless of your arrangements and advice to your client, you will also be exposed to claims from third parties, for instance the purchasers of units in a condominium who may be bearing the costs of repairs or replacement of a defective cladding and claim that the negligence of the architect caused or contributed to the envelope failures.

You may have warned the client / developer of the potential problems but the purchasers of units will not have heard your warnings.

Courts in Canada have been gradually extending liability of consultants to third parties such as the eventual owners of condominium units. Defence of claims that your negligence caused them damages will certainly be helped if there is a clear record of your warnings.

## PROTECTING YOURSELF

So what can you do when your client insists upon making a change that you regard as unwise? The following are some suggestions. None of these can be considered “bullet proof” but perhaps they can help you establish that it was not your negligence that led to a failure when your advice was ignored.

**Contract Provisions:**

The place to start is your Client / Architect Agreement.

Insertion of certain contract provisions into a Client / Architect Agreement can be used to limit architect’s liability for specific circumstances. Liability may be limited by adding a clause that has the client agreeing the architect cannot be held responsible for changes where the architect is not informed by the client.

The following can be added as a new clause GC7.7 in a Document 600 (2005) or RAIC Document 6, 2006 Edition.

“The client agrees that the architect shall not be responsible in contract or in tort for any changes to the architect’s design, drawings or specifications taken without the architect’s knowledge and approval.”

Such a provision does not necessarily mean that the architect will be fully protected. Nevertheless, once informed that a change has taken place, the architect should promptly state his reservations / concerns in writing.

**Qualified Certificates**

Throughout the building process, architects are called upon to certify the construction for Progress Payments, at Substantial Performance and at Completion.

Too often the architect does not take advantage of these certificates to protect itself from liability associated with unacceptable changes from the architect's plans.

To minimize the risk of liability, where an architect is completing a certificate for Progress Payments or for Substantial Performance, the certification should be qualified with a statement which indicates the "work is in general accordance (or conformity) with the architect's plans and the Ontario Building Code, save and except for…" any systems or products not in accord with the architect's plans and specifications. These should be identified and expressly excluded from the certificate.

The architect issuing a "qualified certificate" may face enormous pressure from its client to not do so as the consequences can impact occupancy, project costs and availability of financing. However, be aware that architects have faced allegations of negligence when they have NOT qualified their certificates respecting construction that is non-compliant with the drawings and specifications.

An architect would be wise to advise its client in writing of its reservations and that it will have to qualify its certificates if a particular change is made as soon as the architect is first made aware of the change or contemplated change. If the change proceeds, the architect should qualify its certificates from that point on, rather than starting to do so at the end of the project.

**Be prepared to say "I don't know enough about this…"**

It would be appropriate for a professional to recommend that the client obtain advice from another professional with appropriate experience. Stating that you don't know enough about a particular system or product to provide an informed recommendation is preferable to remaining silent and "going along" without stating your reservations or the limitations of your expertise in assessing the products, their service life, maintenance consequences etc.

**Retain a Specialist (or advise your client to retain a specialist)…**

There is no expectation that every architect has all of the expertise required to address every issue that arises on a design and construction project. It is understood that the success of any project relies upon a range of expertise. Architects and their clients routinely engage other skilled professionals to complement their own knowledge including the various engineering disciplines, and specialists of all kinds. Building enclosures are increasingly complex and subject to various failures. Once the failure occurs, the "Building Envelope Specialists" will be very much involved in determining what went wrong, often leading to the inference that your expertise wasn't up to the job. Instead of waiting to have this expertise arrayed against you, consider retaining it yourself before you complete your design and details.

The use of "Building Envelope Specialists" is a mandatory requirement in some jurisdictions and increasingly, insurers are making it a condition of single project or excess insurance. Should problems occur, you will have the benefit of being able to refer to your reliance upon the advice of the specialist.

Please note the specific exclusion from coverage in the Pro-Demnity policy regarding ingress of precipitation without provision for drainage in an above grade wall. Other insurers may include a similar exclusion in their policies, in some instances with the possibility of modifying the exclusion when certain conditions are met, including retention of a "Building Envelope Specialist".

**Put it in Writing**

No matter what other measures you choose to take, PUT YOUR RESERVATIONS IN WRITING in a letter to your client. If you are unfamiliar with a product or system that is proposed to your client

or that your client is proposing to use on the project, say so IN WRITING in a letter to your client.

**You are obliged to inform the Chief Building Official**

Under the Building Code Act, no one may construct a building except in accordance with the documents upon which the permit was issued, and you have an obligation under the Act to inform the C.B.O. of the municipality of any material change to the project from the permit documents.

This obligation can also be a useful tool. Your insistence upon notifying the C.B.O. of changes that others are making or have been made without your knowledge may serve as a catalyst for reconsideration by your client. If the C.B.O. concludes the changes violate the building code, he has the authority to stop the work. If the C.B.O. determines that the changes do not violate the code, you can take some comfort.

The following excerpts from the Ontario Building Code Act, Section 8, “Building Permits” provide useful leverage to an architect as well as imposing an obligation.

*Notice of change*
(12) No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying, filing details with and obtaining the authorization of the chief building official

*Prohibition*
(13) No person shall construct or demolish a building or cause a building to be constructed or demolished except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes to them authorized by the chief building official.

**Withdrawal of Services**

The architect may choose to withdraw services. In choosing this option, the architect should write a “Confirmatory Letter” to the client stating the reasons for the withdrawal and that the architect will not be held responsible for the consequences of any changes which deviate from the architect’s plans.

Withdrawal of services is a very difficult choice for most architects to make and should not be taken except after consultation with your own lawyer. Your actions must reflect the terms within the contract. There will be other potential consequences that you should consider before taking such action. Nevertheless, the ability and willingness to say “NO” may be a powerful lever in discussions with your client when your professional advice is being rejected. Many architects who have had to live with a claim arising from the consequences of their advice being ignored would say “NO” if given a second chance to do so.

## CONFIRMATORY LETTERS

It has been recommended that architects should write a “Confirmatory Letter” respecting changes from their design and construction documents that are taken without their knowledge or against their recommendation or advice. These changes may occur during construction and can represent a material change from the architect’s design, drawings and specifications and the documents upon which the building permit was issued.

One circumstance requiring such a letter is a change made without the architect’s knowledge. Other variants would apply where the architect has reviewed a proposed change and needs to record its reservations about the change should the client insist upon making it or where the architect is withdrawing services.

The circumstances in each instance will determine the appropriate content and wording. Any letter will need to reflect the actual terms of any Client / Architect Agreement or, in its absence, other undertakings that the architect may have agreed to.

Because of the wide range of circumstances that might apply and the potential consequences,

such letters MUST be written or reviewed by your own lawyer.

Material changes that occur during construction, after the building permit has been issued MUST be brought to the Chief Building Official’s attention in accordance with requirements of the Building Code Act.

Pro-Demnity Insurance Company cannot provide legal advice. Be sure to review the specific circumstances and any measures that you consider taking or communications with your client with your own lawyer.

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