Equity and Fairness in the Practice of Architecture

OAA Annual Meeting

Motion for Adoption by the Membership

May 24, 2017

John MacDonald, OAA, MRAIC

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John MacDonald OAA, MRAIC

To the Members of the Ontario Association of Architects, and to its Valued Interns

Thank you for your consideration in this matter.

I am a practicing architect in the Grand River Watershed, with a firm of 8 to 10 staff, including myself. The practice was founded in 1995, and works largely for the adaptive re-use, expansion, and construction of facilities for a broad variety of private and public sector clients. We are two Licensed Architects, presently one Intern Architect, four graduates in architectural programs, and an assistant to the practice. The firm regularly employs Interns and architectural students, and appreciates their contribution to our work and the firm.

In my thirty year trajectory from architectural student to graduate associate to licensed architect and finally practicing architect, I have been assisted by teachers, mentors, by the practicing professionals who have been my employers, by those who have worked alongside me, and by my staff. I have the greatest respect for them. Throughout this journey these firms and individuals have provided training, knowledge, insight, and have supported me in the growth of professional judgment that is the essence of what we offer the public and our communities. They continue to do so today, and hopefully will do so tomorrow, as ours is a life-long journey.

My journey, most happily, has involved neither exploitation nor a request that I provide services without compensation for the hours in which they were given. My contribution to the resulting work has been graciously recognized, including through adequate remuneration. In my own practice, and for many other practitioners, we strive to uphold principles of fairness and equity in our employment practices. We try to reach beyond a carefully contrived minimum duty within or below the law, to a more equitable place for all of us.

I do not believe that all who work in our profession have been so lucky, and I believe there are and will continue to be pockets of activity and behaviour that must be improved. I have submitted a motion to the 2017 Annual General Meeting of the OAA for consideration by the membership, in the hope that we can make a strong statement to our Council and to the public that as a self-governing profession we are capable of higher standards, and do not fear to be measured by them.

There is no time like the present. A motion addressing the exemptions in the employment standards act was put to the membership over 20 years ago, and was defeated. If we do not move forward now, then when?

If we rely upon other legislation than our own to compel compliance with present standards, let alone higher, then are we indeed worthy of the trust placed in us by those with whom we work?

I ask for your active engagement to ensure that this motion is discussed in an open and transparent manner throughout our profession,

and for your support in ensuring that it is adopted at the Annual General Meeting. Thank you.

Introduction

"All of us, if we are reasonably comfortable, healthy and safe, owe immense debt to the past.

There is no way, of course, to repay the past.

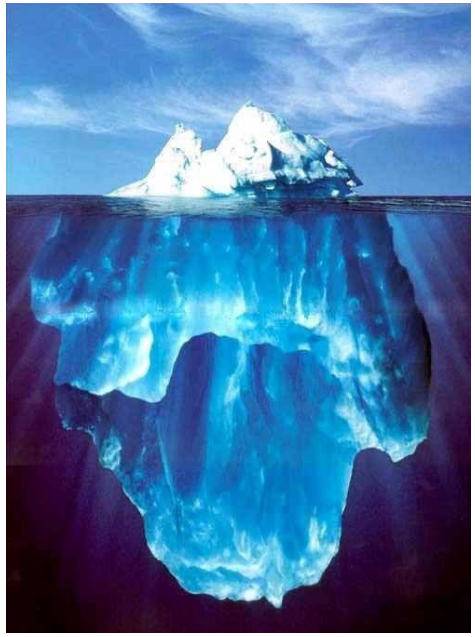
We can only pay those debts by making gifts to the future."

Jane Jacobs —
Canadian Cities and Sovereignty-Association

John MacDonald OAA, MRAIC

What are the Issues?

- unpaid "internships" in various industries, including our own, that extract work of economic value to firms and clients without compensation to those who perform it;
- unpaid overtime that produces deliverables sold for economic gain or in hope of it, without compensation to those who produce them;
- barriers that young professionals and employed youth face in general, and their particular vulnerability, as they seek to take their place in our profession and society and benefit from our mentorship;
- increased government enforcement and "crackdown" on employment practices that do not even conform to the minimum allowed by law, the ESA;
- findings within various service and professional industries that contraventions of the ESA may be a tolerated norm rather than the exception, unfortunately justifying such increased intrusion and enforcement within our self-regulating profession;
- reliance upon a complaints-based system that asks the vulnerable to do the running when it comes to upholding their rights and helping to police employment practices;
- the advent of timesheet software that does not allow an employee to log hours against a project once its allotted budget has been expended, essentially requiring that further work on the project be freely given and kept "off the books";
- unreasonable deadlines for deliverables accepted by management as "our lot in life" or in the knowledge that increased overtime without compensation has a healthy affect upon the firm's bottom line;
- loss of work / life balance, health, and well-being, mistakenly upheld as the requirement of the vocation, or as proof of passionate dedication and therefore worthiness for promotion and advancement within a firm and the profession;
- systemic issues that create inequities and barriers to opportunity and advancement for far too many: care-givers, parents, spouses, and those without means to live through periods of unpaid labour or internship demanded as the price of admission.



Each of these is an issue that relates to unfair and inequitable employment practices in our profession.

They call for our leadership, and concerted action.

John MacDonald OAA, MRAIC

Affirmation

Part 1 of the Motion

- that exemption of architectural professionals from legislated labour standards within the Employment Standards Act of Ontario is intended to protect the public such that
  - a licensed architect offering architectural services to the public,
  - who is therefore responsible for architectural designs and such services affecting the public interest,
  - produces such designs under his or her direct supervision, and to a professional standard of care,
  - unencumbered by exculpatory recourse to workplace legislation regarding conditions of work, or compensation, for the responsible professional;

It should be no more possible for practicing architects to use the ESA to walk away from a situation requiring the application of our professional services in the interest of the public than for any other practicing professional described by the ESA (in its list of professional exemptions).

As professionals directly supervising activities in our clients' and the public's interest we cannot be allowed to avoid professional standards of care because we had "exceeded our daily allotment of hours under the ESA". "I left the patient's chest open on the operating table because I'm entitled to lunch" is not the standard to which the practicing professional is held, and rightly so.

Where we have been exempted because we are self-governing, but we neglect to actually govern ourselves in these matters, we do ourselves an injustice. Our behaviour as **practitioners of architecture** is governed by the Architects' Act, not the ESA, and that is rightly so.

OAA Code of Ethics

Architects will act with integrity, honesty and professional competence.

Architects will have regard for the best interests of both their clients and the public.

Architects will honestly represent the extent of their expertise.

Architects will respect the rights of their colleagues and appropriately recognize their contributions.

Architects will demonstrate respect for the natural and cultural environments of the people and places that are influenced by their work.

Architects will provide mentorship and guidance in the interests of the profession.

John MacDonald OAA, MRAIC

Responsibility

Part 2 of the Motion

- that such legislation of labour standards and employment requirements, whether in strict law, in principle, or in spirit, are in the opinion of the membership and the OAA not intended to sanction the avoidance of the practicing professional's duties as an employer of any individuals who are not practicing and licensed professionals so responsible;
- that such duties of employment are owed as a duty in accordance with normal and common legislated standards of workplace conditions and employment, without recourse to professional exemptions, and that this duty exists for all licensed and practicing professionals;

While I believe that the responsible design professional who seals designs should not have recourse to exculpatory arguments that mitigate professional duty, I do not believe this applies to employees of the practicing professional's firm, including architects who are not holders of the Certificate of Practice or sealing designs. These employees are individuals working under the responsible professional's direct supervision, as required by the Architects' Act and Regulations. I do not believe they are the "duly qualified practitioner of architecture" to which exemptions apply.

I ask that our profession push that the ESA's exemption for professionals be narrowly defined. My understanding from conversation with the Ministry of Labour regarding its interpretation of the ESA, as set out in its Policy and Interpretation Manual, is that:

the definition of who is and is not subject to ESA exemptions in our profession is the result of a written submission to the Ministry of Labour ***by none other than the Ontario Association of Architects****.*

The appendix pages set out my reasoning regarding a definition of "duly qualified practitioner of architecture", and "student in training" that I believe the OAA could submit to the Ministry, to revise any such previous submission, which is equitable and fair.

John MacDonald OAA, MRAIC

A clear message

Part 3 of the Motion

- that means and methods undertaken by practicing and licensed professionals to avoid compliance with workplace legislation and regulations, are unethical;
- that unpaid internships, unpaid overtime, overly onerous working conditions relating to hours of work or workplace conditions, or other means that allow a member or holder to pursue potential architectural services or to perform architectural services without adequate compensation to those who perform the work, brings the architectural profession into disrepute; and further
- that any member found to have engaged in such practices shall be guilty of Professional Misconduct.

While it's tempting to believe that no practicing professional would select "*the minimum allowed by law*" as an upper limit of behaviour, to be achieved only when left with no other option or in the face of likely punitive consequence, I do not believe a statement of principle will suffice.

A clear and likely potential for punitive consequence is needed,

in a form that does not place the onus on the vulnerable
to uphold the values of the profession.

John MacDonald OAA, MRAIC

Professional Misconduct

Our profession has a long list of behaviours that constitute professional misconduct, including:

- Authorizing, permitting, counselling, assisting, aiding abetting or acquiescing in any act that constitutes professional misconduct;
  - * which lies within our power to discuss, agree, and define
- Failing to maintain the standards of practice of the profession;
  - which standards are ours to discuss, agree, and define
- Undertaking to provide architectural services at a fee that is not fully disclosed, fair or reasonable
  - * a standard which should apply as equally to our staff as to ourselves
- Doing or failing to do anything while engaged in the practice of architecture that shows a deliberate or reckless disregard for the rights and safety of others
  - * "others" applies as equally to our staff as to the public
- Conduct or an act relevant to the practice of architecture that, having regard to all of the circumstances, would reasonably be regarded by members of the Association as disgraceful, dishonourable or unprofessional.
  - * with the adoption of this motion, we will make this regard known, with respect to employment practices.

"All of us, if we are reasonably comfortable, healthy and safe, owe immense debt to the past.

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Jane Jacobs —
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It's Time

The text of the Motion that has been put forward by myself and other sponsors, for adoption at the 2017 Annual General Meeting, is set out in the rust-coloured bullet points

- on Page 3
- on Page 4
- on Page 5

The formal motion, is set out in full, is under separate cover.

Motions adopted at the meeting are not binding upon Council.

They do, however, send a clear message regarding the will of the membership, and require that Council consider the issues and act appropriately in the matter.

I believe it's long past time that architects take action to distance our profession from behaviours that create and exacerbate inequities and unfairness in our endeavours.

Adoption of this motion, and subsequent action by OAA Council, will do much to address the issues outlined at the beginning of this presentation. It will do much to ensure the health and well-being of all who work in our profession, present and future, to whom we owe a duty of care.

I believe it is our responsibility to act on this matter, as a self-governing group of professionals. We should not turn to others, or wait patiently upon changes to other legislation, to act for us.

I ask for your support of this motion at the Annual General Meeting, whether in person or by placing your proxy with me, using the OAA Proxy Form supplied under separate cover.

Thank you.

Please

Attend the meeting and support the motion,

or

Complete, sign, scan and return the Proxy Form and support the motion by way of proxy vote.

Thank you for your Consideration.

John MacDonald OAA, MRAIC

My Perspective on the Employment Standards Act and Exemptions

Appendix

The following is a personal opinion, from one architect, not a lawyer.

Firms and individuals are requested to take legal counsel in all matters pertaining to Employment Law. No party may rely upon the following personal opinion for any use whatsoever.

Just sayin'

John MacDonald OAA, MRAIC

I believe the following to be untrue

- **that a licensed architect is exempt from the provisions of Parts VII to XI of the ESA (entitlement to minimum wage, overtime, and other employment standards)**

I believe the exemption applies:

- to a person, not all staff at a firm or company, and
- not to an architect, but to "a duly qualified practitioner of architecture"

because that is what the Act says.

We might wish it to say something else, but it does not.

As such, I believe that such a person must be a member AND a holder of a certificate of practice, not simply a licensed member entitled to call him or herself an Architect. An *architect* is not a *practitioner of architecture* without such a Certificate of Practice and the seal which he or she applies to designs as evidence of professional responsibility. Applying exemptions to workplace standards those who are not so responsible is in my opinion a misinterpretation of the intent.

I do not know whether the difference between an architect and a practitioner of architecture is generally understood at the Ministry of Labour, but I believe it is understood by our membership and the OAA. This should be clarified.

Given that the Ministry appears to have accepted the interpretation of "a duly qualified practitioner of architecture" as meaning simply "architect" from the OAA itself, I suggest that the OAA is equally capable, without change to the ESA statute or its own regulations, of revising this interpretation to cover *only Architects who are holders of Certificates of Practice with seal*.

From the ESA

"2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,

(a) as a duly qualified practitioner of,

(i) architecture,

(ii) law,

(iii) professional engineering,

(iv) public accounting,

(v) surveying, or

(vi) veterinary science;"

John MacDonald OAA, MRAIC

I believe the following to be untrue

- **that a graduate in architecture registered with the OAA as an Intern is exempt from the provisions of Parts VII to XI of the ESA**

In my opinion, the exemption applies to "students in training",

because that is what the Act says.

I do not believe we should penalize graduates in architecture wishing to become licensed architects by revoking their rights under the ESA upon their becoming Interns, by then redefining them as students. They are not students.

Further, the ESA defines a "person in training" that I believe flows directly to "student in training" in the above. There are six tests in the act for meeting the definition of "person receiving training". All must be met for the exemption to apply:

"Person receiving training
(2) For the purposes of clause (c) of the definition of "employee" in subsection (1), an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person's employees, unless all of the following conditions are met:

1. The training is similar to that which is given in a vocational school.
2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training. 2000, c. 41, s. 1 (2).

I do not believe the OAA definition of *Intern* meets the ESA definition of "*students in training*" nor do Interns meet all of the 6 necessary components to qualify as a "person receiving training". Once again, it is within the OAA's purview to clarify this interpretation to the Ministry.

From the ESA

"Exemptions from Parts VII to XI of Act
...
2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,
...
(e) as a student in training for an occupation mentioned in clause (a), (b), (c) or (d);"

John MacDonald OAA, MRAIC

I believe the following to be myths

The ESA and employment law are fairly clear that the following practices, which I believe too common, do not necessarily conform to the Act and employment law, unless narrow tests are achieved:

- that employers can avoid staff having employment rights, or a relationship of employment, by placing someone "*on contract*" and having them submit monthly invoices;
- that placing someone on *monthly or annual salary* rather than hourly wage means they are no longer entitled to additional compensation for overtime;
- that firms and their prospective employees, volunteers, unpaid interns, or whomever, can, by common agreement, contract out of the rights and obligations of an employment relationship as set out in workplace legislation; or
- that giving someone a title like "project architect" or "project manager" means they are automatically *management* and therefore not entitled to pay for overtime under the legislation.

I have heard anecdotally that in one or some cases, a firm has argued to the ESA that an *Intern*, or an *unpaid volunteer*, or an *unpaid intern* or some such thing, meets the six part test of a "student in training" because they "do no work of meaningful benefit to the firm".

While we might have differing views on the value of the architectural education (whether Bachelor or Master degree) this seems rather harsh. I further believe the following are also myths:

- that staff, while in the course of receiving training that is a norm in all industries, do not provide benefit to the firm; or that they should be grateful simply to receive the wisdom of the master as their recompense. Indeed any firm in any industry not assisting its people in continuous training and improvement, including the master, is likely to be left behind.
- *that firms cannot pay for work performed because the fees are too low*. I believe it's likely the other way round. Where employers had to think twice about offering work for free, because they would not be the ones actually doing this free work, it would benefit the profession and the public greatly.

Recent Trends

Savvy clients, including public entities like colleges and universities, understand they may put our whole profession to work for limited, ludicrous fee, staging limited competitions in which they ask first stage RFQ proponents to identify cost for next stage:

A couple of floor plans, some elevations, a few renderings. Hey, how hard could that be for a potential $50 million commission? $15 grand? $20?

In reality it's a large investment for each firm, to create the design and document it, with only the selected firm recouping the costs if the commission is awarded.

Where the true cost of the effort and overtime put into these proposals and designs by staff is actually **paid** to those performing the work, this situation would not arise. Firms would need to nominate to the prospective client the true cost of asking for multiple designs upfront, or bear the true cost itself as a massive loss, robbed from our actual paying commissions and clients.

John MacDonald OAA, MRAIC