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Construction Lien Act Reform: What it means for CIQS members

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Authors: Richard Wong, Jeff St. Aubin

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The upcoming reform of the Construction Lien Act, expected to take effect in the coming months, will fundamentally alter the dynamics of the construction industry in Ontario. In our view, the two most important of these changes from the perspective of CIQS members will be the introduction of prompt payment requirements and an interim adjudication regime. Each of these areas will introduce new challenges for CIQS members to contend with, including by dramatically shortening payment cycles and altering the way in which disputes are handled, while also opening up exciting opportunities for those who best position themselves to assist clients in adapting to the new laws. For more information regarding the changes in the current draft of Bill 142, please visit our hub here. If you are interested in receiving a blacklined version of the Construction Lien Act overlaid with the changes proposed by Bill 142, please contact the writers directly by e-mail.

Reform of the Construction Lien Act

The last significant reform of the Ontario Construction Lien Act was in 1983, so the proposed changes represent the first, and quite possibly the last, major reform that many working in the construction industry will experience during their careers. Industry stakeholders, including the CIQS, participated in the Ministry's consultation process and developed detailed submissions that shaped the issues under consideration.

Bill 142 passed first reading at the Legislative Assembly of Ontario on May 31, 2017 and is currently in second reading as this Article goes to print. Before becoming law, Bill 142 will need to pass second and third readings, with modifications including those resulting from detailed committee review. In the meantime, associations representing various segments of the industry including owners, lenders, contractors, subcontractors, design professionals and others have been considering the implications of the current wording and reviewing and submitting comments for further consideration. While certain stakeholders have expressed concerns with elements of the Bill, we expect it to pass very quickly i.e. by the end of 2017 or early 2018 with any final changes. The corresponding regulations are also currently being developed and should be available for review shortly.

Mandatory Prompt Payment

Bill 142 proposes to introduce prompt payment requirements that will apply to payments made in the pyramid under construction contracts that are entered into after the

amendments become law. The new prompt payment regime will require that an owner pay the invoiced amount no later than 28 days after receiving a "proper invoice" from a contractor. The requirement for prompt payment also flows down through the pyramid, as a contractor that receives full payment of a proper invoice must then pay each subcontractor within 7 days for that component of the subcontractor's services and materials that were included in the contractor's invoice.

The proper invoice will not be set by regulation, but will continue to be defined by the parties in the contract itself, although it must include certain basic information such as the description of services and materials and quantities where appropriate, as well as other information if prescribed by regulation. However, what is known and of particular note for CIQS members, Bill 142 specifically prohibits payment certification or the owner's prior approval being a condition to the submission of a proper invoice and the starting of the 28 day clock.

Does this mean that payment certification will be less important for an owner? Certainly not. No owner is going to want to release payment simply because their time limit has run out in a situation where they are not reasonably satisfied that the work invoiced has in fact been completed properly. What it does mean is that payment certifiers will be expected to respond extremely quickly after a proper invoice is received.

The actual timeframe available to a payment certifier for the review of a proper invoice is significantly more compressed than the overall 28 day payment window for payment. An owner that wants to dispute an invoice must provide a notice of non-payment to the contractor within 14 days of having received the invoice, and this non-payment notice must set out the amount not being paid and all of the reasons for which payment is being denied. This means that the payment certifier will have to complete its assessment and provide the owner with accurate information for decision-making less than 14 days after the invoice is received.

The owner's need for certainty, coupled with the tight timeframes of the prompt payment regime, will almost certainly translate into increased pressures on payment certifiers. Although the process of payment certification will not change in substance, the timeliness of its completion will become critical. Furthermore, Bill 142 makes no allowance for extra time in situations where payment certification is difficult or even practically impossible in these restricted timeframes. The balancing of competing demands, scheduling of work, and timeliness of reporting, all fall to be managed by the payment certifier and the owner. From our discussions with U.K. counsel on their experiences with similar prompt payment legislation having been adopted there about 20 years ago, it may be necessary for the owner and the payment certifier to develop new protocols and procedures in the contract to initiate some of the work towards certification in advance of the issuance of a contractor's proper invoice, to provide a bit more time to analyze and respond in a more proactive manner.

While the U.K. certainly went through a number of teething issues as the industry tested the boundaries of the new legislation, it is now widely seen to be effective in efficiently dispensing rough justice and keeping funds moving. Therefore, the construction industry in Ontario will need to understand and adapt as quickly as possible, while looking to similar experiences in the U.K. for guidance where applicable. The prompt payment provisions also provide opportunity for CIQS members who can distinguish themselves through the provision of accurate and quick services, backed by an understanding of the new laws and the challenges faced by owners, to capitalize on these changes and provide even more value to their clients.

Interim Adjudication

Bill 142 also proposes to introduce a new statutory interim adjudication regime that will apply to all contracts and subcontracts in the private and public sectors entered into after the legislation becomes law. This regime will allow any party to a contract or subcontract to submit certain disputes to an adjudicator for resolution, even if the dispute is already subject to an ongoing arbitration or court action. The types of disputes that can be referred to interim adjudication are those related to the value of services and materials, payment (including unapproved and proposed change orders), notices of non-payment, set-off, the release of holdback, and any other matter that the parties agree to or may be prescribed by regulation.

Interim adjudication is intended to provide quick decisions to keep project funds flowing between the parties. As compared to traditional arbitration and court proceedings, interim adjudication will proceed at a blistering pace. After the adjudicator is selected (a process which is discussed further below), the party that initiated the adjudication has only 5 days to provide the adjudicator with the contract and any other documents on which that party intends to rely. After the adjudicator receives these documents, the entire adjudication must be completed and a decision rendered within 30 days, following which any late decision would be of no force or effect – a strong measure to ensure that the timelines are adhered to. Extensions are permitted, but only with the consent of the parties and the adjudicator.

The interim adjudication process is not intended to provide perfect decisions based on the fullness of time. The speed of the proceedings simply will not allow for the same depth of argument and decision making that would be achieved through an arbitration or a trial. Interim adjudication is also not final, as a party may continue to pursue the matter through a subsequent arbitration or a trial. What interim adjudication does achieve is the issuance of a quick decision that may require a party to make (or not make) a payment to another party. In those instances, the payment must be made within 10 days of the decision, failing which the contractor or subcontractor that should have received the payment may suspend work. This will ensure that interim adjudication keeps funds flowing, whereas traditional arbitration or court actions could take months or years to trigger a payment requirement.

The interim adjudication regime will introduce an entirely new way of dealing with construction disputes and it will almost certainly result in upheaval as the parties to construction contracts adjust to this new approach. However, experience in other countries including the U.K. has shown that parties can and will adapt, and in many cases such “interim” adjudication often settles the dispute in question, as parties decide to move on as opposed to revisiting those decisions.

For CIQS members, a particularly interesting aspect of the interim adjudication regime is the potential to serve as adjudicators. Bill 142 does not articulate who may serve as an adjudicator, but rather provides for the designation of an Authorized Nominating Authority, which will qualify persons as adjudicators, develop and oversee adjudicator training programs, appoint adjudicators, and maintain a public registry of adjudicators. The recommendations to the government prior to Bill 142 included that an adjudicator:

- be a natural person free from conflict of interest;
- possess at least 7 years of relevant working experience in the Ontario construction industry;
- be good standing in a self-governing professional body, specifically including a quantity surveyor; and
- have completed a standardized Ontario training course with continuing education

requirements.

The recommendations also propose that eminently qualified individuals in key centres such as Ottawa, Toronto, London and Windsor be selected as an initial group of adjudicators until the training and qualification system is fully implemented.

However, we will need to await the issuance of the regulations and the creation of the Authorized Nominating Authority to confirm the exact requirements of an adjudicator. In other jurisdictions, particularly the U.K., quantity surveyors have served as adjudicators and those that are interested in Ontario should keep an eye on the appointment of the Authorized Nominating Authority and its approach to qualifying individuals as adjudicators for the public registry, and the government may designate the Minister of Economic Development, Employment and Infrastructure as an interim authority. Designation as an adjudicator and inclusion on this registry is also critical, as Bill 142 requires that all adjudicators be selected from this registry, either by the parties or by the Authorized Nominating Authority if the parties cannot agree. Note however that in contrast to say a DRB (dispute review board), the adjudicator is prohibited from being appointed on a standing basis, and is selected only after the notice of dispute for a particular dispute has been issued, and for the particular issue at hand. In our view, the core skill sets required to serve as an effective adjudicator are expected to include solid understanding of the various issues in dispute in the construction industry in general, dispute resolution procedures and mechanisms, general legal and other principles, and decision writing.

Aside from the possibility of serving as adjudicators, CIQS members may also find opportunities in assisting their clients in dealing with the rapid speed of adjudication under the new regime. A client faced with an adjudication will only have a few weeks to compile all of the information that they need to respond and present their case. A team who can hit the ground running and work with these aggressive timeframes may make the difference between a favourable and unfavourable decision in the interim adjudication process.

Moving Forward

Bill 142 will be a singular event for many in the construction industry, as it will represent a significant and immediate overhaul of legislation that is central to the day-to-day functioning of the administration of a construction project. The impact of these changes will be unavoidable, and from a legal perspective, we are already being asked – given the length of project delivery of large construction projects – to consider various issues and supplementary conditions and clauses that will best serve our clients before, during and after the transition. For CIQS members, the reform of the Construction Lien Act introduce additional challenges, but also holds the promise of new opportunities, and those who understand the coming changes and the specific needs of their clients will be an asset in helping to navigate these fast-moving waters.

Note: These comments are of a general nature, and only in relation to the draft of Bill 142 as of first reading, and are not intended to provide legal advice, as individual situations will differ and should be discussed with a lawyer.