

## **A CONSTRUCTION LIEN PRIMER – PART III PROMPT PAYMENT AND ADJUDICATION UNDER THE NEW CONSTRUCTION ACT**

Last year, in Ontario, the Construction Lien Act (the “Old Act”) was renamed the Construction Act (the “New Act”) and was extensively revised. This is the final News Release of our three-part series on the revisions. It focuses on the new prompt payment and adjudication regime, which imposes rules regarding invoices and timelines for payment, as well as mandatory adjudication, all of which apply to contracts entered into on or after October 1, 2019.

### **Prompt Payment**

The New Act introduces the concept of a “proper invoice”, which triggers payment obligations. Upon delivery of a “proper notice”, the owner must make payment within 28 days unless it issues a “notice of non-payment” within 14 days stating the amounts it refuses to pay and the reasons why. Where the owner issues a notice of non-payment, the contractor must nevertheless pay its subcontractors, unless the contractor commences an adjudication to resolve the dispute with the owner.

A “proper invoice” is defined in the New Act as one that includes the contractor’s name and address, the date of the proper notice, the period during which the services or materials were supplied, information identifying the contract, any change orders, or other basis for submitting the invoice, a description of the services or materials and quantities, the amount payable and the payment terms, as well as the name, title, telephone number and address of the person to whom payment is to be made. In addition, the invoice must meet any other requirement that the contract specifies (except that the owner’s prior approval of the proper invoice, or the consultant’s prior certification of the payment, cannot be a prerequisite for a “proper invoice”).

Considering the critical importance of “proper invoices” in triggering payments and adjudications, the negotiation of prerequisites to payment demands careful attention.

### **Adjudication**

Where a notice of non-payment has been issued, the contractor has the right to compel the owner to participate in an adjudication, which is akin to a speedy mandatory arbitration. Disputes such as the following may be adjudicated: the valuation of services and materials, payments (including in respect of holdbacks, change orders, or proposed change orders, whether or not approved), set-off, and any other matter that the parties agree to adjudicate or that may be prescribed by regulation.

The decision of an adjudicator is NOT final. The parties are bound by it unless and until the matter is submitted to an arbitration or a court application, in which event the arbitrator’s or court’s decision will override that of the adjudicator. The adjudication process is designed for prompt resolution, whereas arbitrations and court applications, with all their attendant checks and balances, act as a safeguard to ensure fairness.

The parties cannot agree in advance to name a particular adjudicator. The adjudicators are individuals who have been qualified as adjudicators by the Adjudication Authority established by the New Act. They need not be lawyers. The parties may only select the adjudicator after the application for adjudication is made. If they cannot agree, the Adjudication Authority will appoint one.

### **Practical Implications and Potential Problems**

While other jurisdictions have implemented prompt payment and adjudication regimes in other contexts, Ontario is the only jurisdiction in the world to impose one on the construction lien process. This may result in certain pitfalls for owners. For example:

- a contractor may register a lien even before it engages in the adjudication process. An owner may be required to pay

costs into court to bond-off a lien at the same time as it is incurring the costs of an adjudication;

- a contractor may register a lien even if the adjudication was decided in favour of the owner – again requiring the owner to pay money into court to bond-off the lien although it has been successful at adjudication. In that scenario, if the owner disagrees with the outcome of the adjudication, and is successful on the ensuing arbitration or litigation, it has no corresponding security for repayment of the amounts it paid in connection with the adjudication; and
- even if the contractor is successful on adjudication and the owner pays the contractor, there is no requirement under the legislation for the contractor to remove the lien in a timely manner. As a result, the burden falls on the owner who wishes to remove the lien, to pay money into court to remove the lien from title using the “bonding-off” process.

As a protective measure, owners may want to ensure that arbitration clauses in their contracts require the parties to submit to arbitration with a preselected arbitrator. In this way, where the contractor forces an adjudication, the owner can quickly pivot to arbitration to challenge the adjudicator’s decision. Owners should also take advantage of provisions that permit parties to craft their own adjudication procedures.

Owners may consider including in their contracts a requirement that the contractor

provide a letter of credit equal to the amount the owner is required to pay to the contractor pursuant to an adjudicator’s decision. In this way, an owner will have security if it is successful in challenging the adjudicator’s decision on arbitration or litigation.

### What to Expect

Over the next several years, owners, contractors and subcontractors will need to find ways to manage the constraints imposed by the new regime.

Internal processes for reviewing, approving and authorizing payment of invoices will need to be streamlined. Consultants, who have traditionally been retained to issue certificates for payment based on inspections, will be pressured to observe accelerated response times in order to enable owners to respond within the prescribed time period for issuing notices of non-payment. Contractors will need to become adept at preparing complete, “proper invoices” and supplying information to support them. Owners and contractors will need to establish the extra requirements to be specified for “proper invoices”. Thought must be given to the types of disputes parties may wish to adjudicate, and what particular additional or alternative adjudication procedures they wish to include in their contracts. Parties must also prepare themselves for duplication of adjudications, arbitrations and court applications and the associated legal costs.

In other words, the entire construction and design industry faces major adjustment in adapting to this new legislative landscape.

*This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.*



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MARY ANN BADON  
416-598-7056  
mbadon@dv-law.com

FRANCINE BAKER-SIGAL  
416-597-8755  
francine@dv-law.com

JEANNE BANKA  
416-597-0830  
jbanka@dv-law.com

CANDACE COOPER  
416-597-8578  
ccooper@dv-law.com

DENNIS DAOUST  
416-597-9339  
ddaoust@dv-law.com

ALLISON FEHRMAN  
416-304-9070  
afehrman@dv-law.com

SAHISTA FITTER  
416-597-5742  
sfitter@dv-law.com

GASPER GALATI  
416-598-7050  
ggalati@dv-law.com

S. RONALD HABER  
416-597-6824  
rhaber@dv-law.com

MICHAEL HOCHBERG  
416-597-9306  
mhochberg@dv-law.com

WOLFGANG KAUFMANN  
416-597-3952  
w Wolfgang@dv-law.com

LYNN LARMAN  
416-598-7058  
llarman@dv-law.com

MIMI LIN  
416-597-8493  
mimil@dv-law.com

MELISSA M. MCBAIN  
416-598-7038  
mmcbain@dv-law.com

PORTIA PANG  
416-597-9384  
ppang@dv-law.com

JAMIE PAQUIN  
416-598-7059  
jpaquin@dv-law.com

BRIAN PARKER  
416-591-3036  
bparker@dv-law.com

DINA PEAT  
416-598-7055  
dpeat@dv-law.com

CLAIRE RENNEY-DODDS  
416-488-3568  
crenney-dodds@dv-law.com

LUCIA TEDESCO  
416-597-8668  
ltedesco@dv-law.com

NATALIE VUKOVICH  
416-597-8911  
nvukovich@dv-law.com

DEBORAH A. WATKINS  
416-598-7042  
dwatkins@dv-law.com