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Prompt Payment in Canada

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Agenda

- **“What’s the problem?”**
- **History of prompt payment initiatives in Ontario, Federally**
- **Ontario Bill 142, *An Act to Amend the Construction Lien Act, 2017***

The Problem

- **Payment times have been increasing**
- **Disputes have been rising**
- **Lien remedy problematic**
- **Court system not working**

The result – *trouble!*

How much trouble?

Ipsos/Reid Survey of Ontario trade contractors – 2015:

- **23.9% of trade contractors were forced to lay off workers because of delays in receiving payments;**
- **39.1% of trade contractors declined to pursue or take on additional work because delays in receiving payments had stretched their line of credit or their prudent use of reserves;**
- **57.4% of trade contractors avoided or delayed investing in machinery and equipment because of delays in receiving payments;**
- **61.1% of trade contractors added a contingency factor to the bids because of owner, builder or general contractor's reputation for late payment.**

How bad is it out there?

- **Average age of current receivables among trade contractors : 61.3 days.**
- **18.7% - almost one in every five - is carrying current receivables with an average age of 90 days or more.**
- **Fewer than 3% of accounts outstanding for more than 30 days were paid within 45 days allowed for preserving a lien.**
- **19.5% of invoices that were outstanding for more than 30 days (excluding holdback monies) took 90 days or more to settle.**
- **24.7% of trades surveyed - almost a quarter - reported that late payments had caused their company to face a threat of insolvency.**
 - *Ipsos/Reid Ontario Survey, 2015*

Prompt Payment: Some history

- **2012-2013 – NTCCC/OGCA joint initiative – “Consensus Draft”**
- **2013 – Ontario Bill 69**
- **2015 – Appointment of Reynolds/Vogel by Ontario Ministries of Attorney-General and Economic Development, Employment and Infrastructure to review CLA reform, etc.**

Some history...

- **2016 – Release of “Striking the Balance-Expert Review of Ontario’s Construction Lien Act”, by Reynolds/Vogel**
- **2017 – Ontario Bill 142, *Construction Lien Amendment Act, 2017***

Some history...

Federally:

- **April, 2016 – Senate Bill S-224, “An act respecting payments made under construction contracts”**
- **March, 2017 – S-224 passes the Senate**
- **Presently – on its way to House of Commons**

The Proposed *Construction Lien Amendment Act, 2017*

- **Title of CLA to be changed to “*Construction Act*”**
- **Passage anticipated by end-2017**
- **The three major areas of change:**
 - **CLA reform**
 - **Prompt payment regime**
 - **Adjudication**

CLA Reform

Include:

- **The “3/2/1” formula for substantial performance calculated by reference to \$1M (up from the present \$500K)**
- **Lien period = 60 days (current = 45 days)**
- **Formalizing “written notices of lien”**
- **Landlord liability for T.I. work to 10% of the value of landlord’s contribution**
- **Holdbacks in the form of L/Cs and bonds, in addition to cash**
- **Annual & phased holdback releases**
- **Prescribing mandatory holdback payment**

Prompt Payment

- **The concept of “proper invoice”.**
- **Proper invoices to be given to an owner on a monthly basis, unless the contract provides otherwise.**

Prompt Payment

- **Subject to the giving of a timely (14 days) notice of non-payment, owner to pay the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the contractor.**
- **Subject to the giving of a timely notice of non-payment, a contractor who receives full payment of a proper invoice to pay each subcontractor no later than 7 days after receiving payment.**

Prompt Payment

The balance between “freedom of contract” and “prompt payment”:

- Parties remain free to contract on whatever *invoicing terms* they wish.
- But *payment* must be made within 28 days (owner to GC), and 7 days thereafter (GC to sub, etc).

Prompt Payment

- **Allows “pay when paid” by GC to subs, provided GC gives timely notice and proceeds to adjudication within 14 days.**
- **Mandates payment of those portions of proper invoices not in dispute.**
- **Provides for mandatory interest on overdue payment.**

Adjudication

- **Adjudication is what makes prompt payment work!**
- **A system for fast-track, interim binding rulings on payment issues**

Adjudication

What can be adjudicated:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment.
4. Amounts retained by set-off.
5. Non-payment of holdback.
6. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

Adjudication

What the adjudicator can do:

1. Issue directions respecting the conduct of the adjudication.
2. Take the initiative in ascertaining the relevant facts and law.
3. Draw inferences based on the conduct of the parties to adjudication.
4. Conduct on-site inspection.
5. Obtain the assistance of others (merchant, accountant, actuary, building contractor, architect, engineer or other person) in such a way as the adjudicator considers fit, to enable him or her to determine better any matter of fact in question.
6. Make a determination in the adjudication.
7. Any other power that may be prescribed.

Adjudication

- **Generally, adjudicator may conduct the adjudication in the manner he or she determines appropriate in the circumstances.**
- **Closer to an “inquisitorial” model of justice, rather than “adversarial”.**

Adjudication

- **Adjudicator to make a determination no later than 30 days.**
- **Subject to extension for no more than 14 days; longer if both parties agree and adjudicator consents.**

Adjudication

- Adjudicator's determination is binding and enforceable until any later determination by a court or in arbitration, i.e. if adjudicator rules that a party is required to pay, payment must be made no later than **10 days** after the determination has been communicated to the parties.
- Right to suspend work if payment not made.

Thank you.

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