



Prompt Payment in Canada – An Update

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Agenda

- 1. Ontario's new Construction Act**
- 2. Federal initiative**
- 3. Other provinces**
- 4. Some lessons learned**

Quick History – the Ontario experience

- Spring 2013 - Consensus draft re. prompt payment legislation (OGCA and NTCCC)**
- May 2013 - Bill 69 introduced**
- Early 2014- Bill 69 dies in Committee**
- Feb. 2015 - Ontario MAG retains Reynolds & Vogel re Expert Review**
- April 2016 - Reynolds & Vogel report delivered – recommendations re. CLA reform, adjudication, prompt payment,**
- May 2017 - Bill 142 (Construction Act) introduced**
- Dec. 2017 - Construction Act passed by unanimous vote in Legislature, Royal Assent received**
- July 1, 2018 - CLA reform provisions take effect**
- Oct. 1, 2019 - Prompt payment, adjudication takes effect**

Ontario – the new Construction Act

- **Replaces the Construction Lien Act**
- **Deals with three broad areas:**
 - Lien reform
 - Prompt payment regime
 - Adjudication system
- **Comes into force in 2 stages:**
 - Lien reform: July 1, 2018
 - Prompt payment & adjudication: October 1, 2019

Prompt Payment – Basic Principles

- **Trigger for payment = “delivery of a proper invoice”**
- **“Proper invoice” defined to include the basic information people are accustomed to seeing in invoices + such other matters as the contract may prescribe**

Prompt Payment – Basic Principles

- **Proper invoices submitted monthly unless the contract provides otherwise – you can contract for whatever timing you wish *for invoicing* (e.g. milestones)**
- **Certification is NOT permissible as a precondition to proper invoice (exception: P3s)**

Prompt Payment – Payment Deadlines

Owner to Contractor

- **28 days from the delivery of the proper invoice, UNLESS the owner delivers a notice of non-payment within 14 days after receiving the proper invoice**

Contractor to Subcontractor

- **7 days from the receipt of payment from the owner or, if the owner has not paid the contractor, within 35 days of the contractor's delivery of a proper invoice UNLESS the contractor delivers a notice of non-payment**

Prompt Payment – Notice of Non-Payment

Must be delivered in time!

- **14 days of receiving proper invoice (owner to contractor)**
- **7 days after receipt of payment (contractor to subcontractor)**
- **7 days after receipt of notice of non-payment from owner (contractor to subcontractor)**
- **35 days after giving proper invoice (contractor to subcontractor; if owner does not pay and does not give notice of non-payment)**

Prompt Payment – Notice of Non-Payment

Must:

- **Be in the prescribed form**
- **State that some or all of the amount payable is not being paid**
- **Specify the amount not being paid**
- **Detail the reasons for non-payment**

Prompt Payment – Part Payment

- **If party only disputes a portion of amount included in “proper invoice”, party must pay undisputed amount**
- **If the party (e.g. the GC) only receives part payment, that party must pay ratably down to its payees (unless the partial payment can be attributed to any particular subcontractor(s), in which case it’s distribute ratably to the others)**

Prompt Payment – Remedies

Remedies for Non-Payment:

- **Interest on late payment**
- **Dispute can be referred to adjudication**
- **Lien**

Adjudication – History and Rationale

- **Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination on an interim basis**
- **Adjudication used in the U.K. since 1970; also in Australia**
- **Aims of adjudication:**
 - **Remove dispute gridlock**
 - **Eliminate late payment**
 - **Free up cash flow and resources**

Adjudication - Adjudicators & Disputes

Adjudicators

- **Adjudicator: person who is qualified by the Authorized Nominating Authority designated under the Act**

Adjudicable Disputes

- **Only available for disputes relating to matters prescribed by statute; essentially payment & valuation disputes**
- **Any party to a contract or subcontract may refer dispute to adjudication**

Adjudication – Procedure

- **Starts with Notice of Adjudication**
 - **Appointment of Adjudicator**
 - **Adjudicator receives documents**
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- **Adjudicator has broad inquisitorial powers to design the adjudication process**

Adjudication - Decisions/Enforcement

- **Decision rendered in 30 days (can be extended by 14 days upon adjudicator request + consent of parties; longer if all parties & adjudicator consent)**
- **Party who is required by the adjudicator's determination to make a payment must do so within 10 days of receiving the decision**
- **Decision is enforceable**
- **Decision is subject to subsequent court or arbitration proceedings**

Federally

- **Spring 2016 – Bill S-224 (“Canada Prompt Payment Act”) introduced in Senate**
- **May 2017 - Bill S-224 passed in the Senate**
- **House of Commons did not consider**
- **January, 2018 – PSPC retained Reynolds & Vogel to undertake a consultative study (as they had in Ontario) re prompt payment & adjudication on federal projects**
- **June, 2018 – Reynolds & Vogel deliver report**

Federally

- **Reynolds & Vogel report contains 53 recommendations, essentially mirroring the prompt payment/adjudication regime in Ontario.**
- **PSPC now considering it**
- **Stay tuned!**

Elsewhere in Canada

- **Quebec: pilot project under way in public sector, using prompt payment/adjudication scheme similar to Ontario's**
- **Manitoba: Bill 218 prompt payment bill pending**
- **Prompt payment being actively considered in B.C., Alberta, Saskatchewan, New Brunswick, Nova Scotia**

Some lessons learned from the experience in Ontario

- **Consultation = critically important.**
- **Education – both industry and government - is key.**
- **Important to remain persistent with the legislators.**
- **Pick your battles – not every hill is worth dying on.**
- **Alignment – seek a common set of rules across Canada if possible.**

Thank you.

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