

Canada: October 1, 2019 Construction Act "Cheat-Sheet"

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Ontario's *Construction Act* introduced significant changes, some of which came into force on October 1st, 2019. Owners, general contractors, sub-contractors, suppliers, and municipalities all need to have an understanding of these changes. Here is a brief overview and summary of the top 3 issues to be aware of:

1. Interim Adjudication

There is a new adjudication regime that provides a quick and simplified approach to disputes with an experienced construction adjudicator.

Permitted Disputes

The following disputes are permitted to be referred to adjudication:

- The valuation of services or materials provided under the contract;
- Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- Disputes that are the subject of a notice of non-payment;
- Amounts retained as set-offs;
- Payment of a holdback;
- Non-payment of a holdback; and
- Any other matter that the parties to the adjudication agree to.

Timelines

The key timelines are as follows:

- Once a party initiates the adjudication process by submitting notice to the other party, they must propose an adjudicator to resolve the dispute.
- When an adjudicator has been proposed, the responding party has 4 days to agree. If the parties cannot agree to an adjudicator within 4 days, the initiating party must request the Authority to appoint one. Once they receive the request, the Authority must appoint an adjudicator within 7 days.
- Once an adjudicator has been appointed, the initiating party must provide all documents in support of the claim within 5 days. The adjudicator will determine the appropriate timing and delivery of the response.
- The written decision of the adjudicator will follow within 30 days. Adjudicators will be permitted to delay their written decision by a maximum of 14 days.
- Once the decision has been rendered, any payment specified as part of the adjudicator's order must be made within 10 days.

2. Prompt Payment/Proper Invoice

The prompt payment amendments are intended to streamline the payment process by prescribing strict timelines for payment by owners to contractors, contractors to subcontractors, and subcontractors to subcontractors/suppliers.

Proper Invoice Requirements

Prompt payment is triggered by the contractor issuing a "proper invoice" to the owner. The following must be included in a "proper invoice":

- The contractor's name and address, date of the proper invoice, and period during which services or materials were supplied;
- Information identifying the authority, contract or otherwise, under which the services or materials were supplied;
- A description, including quantity, where appropriate, of the services or materials supplied;
- The amount payable for services or materials supplied, and payment terms;
- The name, title, telephone number and mailing address of the person to whom payment is to be sent; and
- Any other additional information that may be prescribed by the specific terms of the contract or regulation, which could include statutory declarations or WSIB-related confirmations.

Timelines

The key timelines are as follows:

- 28 days: After receipt of the proper invoice, an owner is required to pay the amount set out in the invoice within 28 days.
- 14 days: If the owner refuses to pay all or part of the amount payable, the owner must, within 14 days of receiving the proper invoice, provide the contractor with a Notice of Non-Payment (the "Notice"). The Notice must specify the amount that is being disputed, and the reasons for same.
- 7 days: A contractor is required to pay its subcontractors within seven days of receiving payment from the owner. The contractor must pay the full amount owing to the subcontractor unless the contractor provides their own Notice to the subcontractor. Again, the Notice must specify the amount that is being disputed, and the reasons for same. The obligations of making payment within 7 days of receiving payment continues down the construction pyramid along with the obligations to provide a Notice in situations where payment is disputed.
- Note that a proper invoice is only required from the party having a direct contractual relationship with the owner. Sub-contractors and suppliers are not required to provide a proper invoice.

3. Impact on Municipalities

In addition to the interim adjudication amendments and prompt payment provisions, October 1, 2019 has also brought changes to how municipalities are impacted by liens.

Historically, liens could not attach to the federal or provincial government's interest in lands. As of October 1, 2019, the same is true for lands owned by municipalities. As a result, lien claimants no longer need to register a lien on lands owned by a municipality. Now, for lien claims to be properly preserved, the claim for lien is to be served on the clerk of the municipality without the need to formally register a traditional claim for lien. A Certificate of Action is not required and the Statement of Claim need only be issued. The lien will constitute a charge on the holdback required to be retained by the municipality.

How the above changes are implemented in practice remains to be seen, but stay tuned for future articles discussing same.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.