FORWARD TOGETHER

WELCOME
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COFFEE TALK

HEALTH INDUSTRY SEMINAR SERIES

Ontario's *Construction Act* – Countdown to Prompt Payment and Interim Adjudication

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Outline

1. How did we get here?
2. Transition
3. Prompt Payment Amendments
4. Interim Adjudication Amendments
5. Some 2018 Amendments
A Brief History
Or, How Did We Get Here?
CONSTRUCTION PYRAMID

OWNER

GENERAL CONTRACTOR

SUB

SUB

SUB

SUB

MATERIAL SUPPLIER
Legislative History – Key Dates

- pre-1873: No lien legislation in Ontario
- 1873: Mechanics’ Lien Act in force
- 1983: Construction Lien Act
- Dec 2017: Act to amend CLA
- July 1 2018: Construction Act + amendments
- Dec 2018: Additional amendments
- Oct 1 2019: Prompt payment and interim adjudication amendments
Transition Provisions
Or, How do I know which Act Applies?
Transition

• Which Act applies depends on:
  • Whether and when “a procurement process for the improvement” was commenced by the “owner”;
  • If no procurement process, when the contract was “entered into”

• Which Act applies matters: governs timing of liens and holdback release

• Can be tricky – recommend seek legal advice
Transition

• 1983 Act governs:
  • Contracts entered into before July 1, 2018
  • Contracts procured before July 1, 2018

• 2018 Act governs:
  • Contracts entered into on/after July 1, 2018
  • Contracts procured on/after July 1, 2018
Transition Provisions for Prompt Payment and Interim Adjudication Amendments
Transition – Prompt Pmt and Int Adj

• Parts I.1 and II.1 do NOT apply to the following contracts and subcontracts:
  • Contracts “entered into” before Oct 1, 2019
  • Contracts entered into on / after Oct 1, 2019 IF a “procurement process for the improvement that is the subject of the contract was commenced [b/f Oct 1, 2019] by the owner of the premises”
  • Subcontracts made under a contract referred to above
Transition – Prompt Pmt and Int Adj

• New definition: “A procurement process is commenced on the earliest of the making of:
  • A Request for Qualification
  • A Request for Quotation
  • A Request for Proposals
  • A Call for Tenders

• Means: If the “owner” issues a [RFQual; RFQuot; RFP or RFT] before October 1, 2019 for a project, then the contract and all subcontracts for that project will NOT be subject to Parts I.1 and II.1 of the Act
Prompt Payment Amendments 
(in force October 1, 2019) 
New Part I.1 of the Construction Act
Prompt Payment Amendments

• Goal of amendments: strict timelines for payments to General Contractors and Subcontractors

• New concept: “proper invoice” – must include:
  • Date and period of supply
  • Description of what supplied
  • Amt payable and pmt terms
  • Any other info required by Regulations
  • Any other requirements specified in contract

• Note: not applicable to Sub invoices to GC
Prompt Payment Amendments

• “proper invoice” to be issued monthly
  • Unless contract provides otherwise
• “proper invoice” can NOT be conditional on prior certification by pmt certifier or O’s prior approval (**N/A to testing / commissioning)
• “proper invoice” can be reviewed by pmt certifier or O after “proper invoice” given
• “proper invoice” can be revised by GC if O agrees in advance BUT no change to date
Prompt Payment Amendments - Payments by Owner

- O must pay “proper invoice” in full w/in 28 days of receipt

- If O disputes – must give notice of non-pmt within 14 days of receipt of “proper invoice”
  - Must be in form specified by Regulations
  - Must specify amt and reason not paid

- O must pay all amts not identified in non-pmt notice
Prompt Payment Amendments – Payments by GC

• GC must pay subs w/in 7 days of pmt by O

• If O gives notice of non-pmt: GC must, w/in 7 days, give to each affected Sub:
  • Copy of O’s non-pmt notice, AND
  • GC’s notice of non-pmt:
    • Must be in form prescribed by Regulations
    • Must specify amt not being paid; AND

• GC’s undertaking to refer matter to adjudication w/in 21 days
Prompt Payment Amendments – Payments by Subs, etc.

- Subs must pay sub-sub / suppliers within 7 days of pmt by GC
- If GC gives notice of non-pmt: Sub must give notice of non-pmt to sub-sub / suppliers

**NOTE:** If a payer fails to give notice of non-payment, payer must pay in full
Prompt Payment Flowchart

Day 0
- “proper invoice”
- O Notice of non pmt (14 days)
- GC Notice of non pmt (7 days)
- O pays (7 days)
- GC pays Subs (7 days)
- Subs pay Sub-subs
- GC serves Notice of adjudication (21 days)
- Day 42
- GC pays

Day 21
- Day 28
- Day 35
- Day 42
- Subs pay

Day 0
Interim Adjudication Amendments
(in force October 1, 2019)
New Part II.1 of the Construction Act
Interim Adjudication Amendments

• Goal of amendments:
  • Expedite resolution of disputes
• Authorized Nominating Authority to be established (MAG designated ADR Chambers):
  • Trains adjudicators
  • Qualifies adjudicators
  • Appoints adj’s when parties don’t agree
  • Sets fees / charges for appointment of adj’s (subj to Regs)
Interim Adjudication Amendments

• Disputes to be adjudicated:
  • Valuation of services / materials provided
  • Payments, incl COs, CCOs
  • Disputes from notices of non-pmt
  • Set off claims
  • Pmt / non-pmt of holdback
  • Any other matters that parties agree or as per Regs

• Available to Subs (not just GC / O)
• Available even where matter being litigated / arbitrated
• Parties can create own procedure (in contract) BUT:
  • Must not conflict w Act; AND
  • Subject to Adjudicator’s powers
Interim Adjudication Amendments

- Adjudicator has broad powers, including:
  - Issue directions re conduct of adjudication
  - Drawing inferences based on conduct of parties
  - Visit site and conduct inspection
  - Obtain assistance of experts (adjudicator determines who pays)
  - Any other powers granted by Regulations
Interim Adjudication Amendments

Adjudication Procedure – Step 1

• Notice of Adjudication issued:
  • Brief description of dispute
  • Nature of relief sought
  • Name of proposed adjudicator (can NOT be specified in contract / subcontract)

• If parties ≠ agree on adjudicator, Authority appoints w/in 7 days of request
Interim Adjudication Amendments
Adjudication Procedure – Step 2

• Within 5 days after adjudicator appointed, applicant serves notice + documents to be relied upon during adjudication

• Respondent may respond in writing (*timing TBD in Regs*)
Interim Adjudication Amendments
Adjudication Procedure – Step 3

• Adjudicator issues determination w/in 30 days after receiving docs
  • Can be extended upon adjudicator’s request (up to 14 days) or agreement of parties

• Binding on parties until decision of Ct or arb

• Can be filed w Ct and enforced as Ct order

• Limited ability for judicial review (w leave) where fraud, bias, etc.
Interim Adjudication Amendments

Adjudication Procedure – Costs

• Costs of Adjudication:
• Adjudicator’s fees shared, subj to s. 13.17
• Each party bears own costs, subj to s. 13.17

• Section 13.17:
  “If an adjudicator determines that a party … has acted in respect of
  the improvement in a manner that is frivolous, vexatious, an abuse
  of process or other than in good faith, the adjudicator may provide …
  that the party be required to pay some or all of the other party’s
  costs, any part of the [adjudicator’s] fee … or both.”
Interim Adjudication Amendments

Adjudication Procedure – Payment

• If determination requires a party to pay:
  • Must pay w/in 10 days after determination
  • Otherwise GC / Sub can suspend work until payment of:
    • Amt payable under determination, PLUS
    • Interest, PLUS
    • GC’s / Sub’s costs of suspending work; PLUS
    • GC’s / Sub’s costs of resuming work
Adjudication Flowchart

- Day 0: Notice of Adjudication
- Day 1: Request for Adj’r
- Day 11: Adj apptd
- Day 16: Docs served
- Day 46: Adjudicator determination
- Day 60: Payment

- 4 days
- 7 days
- 5 days
- 30 days
- up to 14 days
- 10 days
Some 2018 Amendments (in force July 1, 2018)
July 1 Amendments – Lien Rights

- 1983 Act: 45 days to preserve lien
- July 1: 60 days
- 1983 Act: total 90 days to perfect lien
- July 1: total 150 days
July 1 Amendments – Holdback

• New s. 26.1 and 26.2: Allow for holdback release on
  • Annual basis, OR
  • In phases (as identified in contract)

• Applies only where:
  • Contract price > amt prescribed by Regs ($10 million); AND
  • Contract provides for annual / phased release of holdback
July 1 Amendments – Payment of Holdback

• O must pay holdback when due
• Unless w/in 40 days of CSP publication
  O publishes notice of non-pmt; AND
• Within 3 days gives notice to GC (Reg)
July 1 Amendments – Trust Accounts

• Trust funds must be deposited into bank acct in trustee’s name
• Trustee must maintain “written records” detailing amts rec’d and paid out and any other prescribed info
• NEW: Can comingle $$ from different projects in one bank acct as long as trustee maintains required records in respect of each trust
July 1 Amendments – Tenant Work

• Contractors working for tenants may have lien vs. owner’s (LL’s) interest where pmt for all or part of the improvement is “accounted for”:
  • under the lease or any renewal; OR
  • under any agreement to which the LL is a party that is connected to the lease

• Then: LL’s interest subj to lien to extent of 10% of the amt of such pmt
July 1 Amendments – Substantial Performance (aka “3%+2%+1% formula”)  

- **1983 Act:**
  - 3% of 1st $500,000 = $15,000 plus  
  - 2% of next $500,000 = $10,000 plus  
  - 1% of remainder of contract price  

- **July 1:**
  - 3% of 1st $1.0 million = $30,000 plus  
  - 2% of next $1.0 million = $20,000 plus  
  - 1% of remainder of contract price  

- Means will attain Substantial Performance sooner
July 1 Amendments – Vacating Liens by Paying Security into Court

• 1983 Act: Security amt =
  • Full amt of lien, plus
  • Lesser of $50,000 or 25% of the lien for costs

• Means if lien > $200,000 the max security for costs = $50,000

• July 1: Security amt =
  • Full amt of lien, plus
  • Lesser of $250,000 or 25% of the lien for costs

• More expensive to vacate liens > $200,000
• Means more security available for large liens
Crystal Ball Gazing
Or, Where Do We Go From Here?
Crystal Ball Gazing

• Predictions:
  • There will be teething pains
  • Lot of procurements issued or contracts signed before October 1, 2019
  • Lot of adjudications – at least for a few years
Crystal Ball Gazing

• Os will have to amend contracts
  • Different definitions of “proper invoice”
  • Adjudication process (subj to Adj / Act)

• Os will likely amend Consultant agreements:
  • To deal w prompt pmnt issues
  • To deal / assist w adjudication issues

• Q: What consequences of failing to give notice of non-payment?

• Q: What consequences of failing to set out all reasons for non-pmt?
Crystal Ball Gazing

• Adjudication:
  • Sacrifice correctness for speed?
  • How realistic that parties will re-litigate?

• What impact on project?

• Q: What if Adj determines O ≠ responsible to pay GC – what can “innocent” supplier do?
Summary

• Lot of changes already here; BIG changes coming
• New Act & Regs = new way of doing things
• Need to develop new processes to deal with:
  • Invoicing (preparation; review; certification)
  • Payment (w/in 28 days)
  • Adjudication