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## PROMPT PAYMENT AND ADJUDICATION –

*A Seismic Shift in the Management of Construction Projects*

By Christophe Shammass

Effects of the amendments to the *Construction Lien Act* (now the *Construction Act*) are already being felt by participants in the construction industry and their lawyers. However, without doubt, the most significant changes will take effect on October 1, 2019, with the introduction of the prompt payment and adjudication provisions of the Act.

Subject to the transition provisions set out in more detail below, these new provisions will apply to all construction projects apart from the operation or maintenance portion of alternative financing and procurement (AFP) projects.

### The transition provisions – which legislation applies?

As with the changes to the Act that came into force in July of 2018, the amendments that introduce the prompt payment and adjudication provisions will not apply to construction projects where:

- a) the prime contract between the owner and the contractor was entered into before July 1, 2018;
- b) a procurement process for the improvement was commenced before July 1, 2018 by the owner; or
- c) in the case of a premises that is subject to a leasehold interest, that interest was first entered into before July 1, 2018.

The date on which a subcontract was entered into is not a relevant consideration in determining which legislation applies. Subcontractors or their lawyers should find out on what date the prime contract was entered into to determine which legislation applies.

Under the Act, a “procurement process” commences on the earliest of the making of, (a) a request for qualifications; (b) a request for quotations; (c) a request for proposals; (d) a call for tenders. While the commencement date for a procurement process will be clear for many construction projects, there will be others where the commencement date of a procurement process or whether there even was a procurement process is open to interpretation.

## The “proper invoice” – the trigger for prompt payment

The trigger for the prompt payment provisions of the legislation is the giving of a “proper invoice” by a contractor to the owner. A “proper invoice” is defined as a written bill or other request for payment for services or materials in respect of an improvement under a contract. A proper invoice must contain the following information:

- (a) the contractor’s name and address;
- (b) the date of the proper invoice and the period during which the services or materials were supplied;
- (c) information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied;
- (d) a description, including quantity where appropriate, of the services or materials that were supplied;
- (e) the amount payable for the services or materials that were supplied, and the payment terms;
- (f) the name, title, telephone number and mailing address of the person to whom payment is to be sent; and,
- (g) any other information that may be prescribed (currently nothing other than what is in the Act is prescribed).

The Act also provides that the owner and contractor can agree on further requirements for a proper invoice and incorporate those requirements into the contract.

The Act requires that proper invoices be “given” to an owner on a monthly basis, unless the contract provides otherwise. To constitute proper service under the Act, the proper invoice must be served in any manner permitted by the *Rules of Civil Procedure* or sent by certified or registered mail addressed to the intended recipient at the recipient’s last known mailing address. Some manners permitted by the *Rules* include personal service, fax or email, if the parties explicitly agree to service by email.

While the contract can include additional requirements for a “proper invoice”, the Act is clear that parties cannot contract out of the requirements of the Act. Further, the Act specifically prohibits pay-when-paid clauses and clauses that make the giving of a proper invoice conditional on prior approval by the owner or a payment certifier.

## The prompt payment timelines – when should you be paid?

### *Timelines for the owner*

Once an owner receives a “proper invoice”, there are two deadlines that the owner must be aware of. If the owner wishes to make full payment to the contractor, it must make payment within 28 days of receipt of a proper invoice.

If the owner disputes all or part of the invoice, it has 14 days to give a notice of non-payment specifying the amount of the invoices that is not being paid and detailing all of the reasons for non-payment. If the owner decides to only make a partial payment to the contractor, the partial payment has to be made within 28 days of the owner’s receipt of a proper invoice.

### *Timelines for the contractor – depending on full payment, partial payment and no payment*

If the contractor receives full payment from the owner, it has seven days from the receipt of payment to pay each subcontractor who supplied services or materials under the subcontract that were included in the proper invoice.

If the contractor does not want to pay all or part of the amounts owing to subcontractors, it has until 35 days from the date that it gave the proper invoice to the owner to deliver a notice of non-payment. If the contractor decides to only make a partial payment to a subcontractor, the partial payment has to be made within seven days from the contractor’s receipt of payment from the owner.

If the contractor only receives partial payment from the owner, it has seven days from the receipt of payment to pay each subcontractor who supplied services or materials under the subcontract that were included in the proper invoice on a pro rata basis unless the amount not paid by the owner is specific to services or materials supplied by a particular subcontractor, in which case the remaining subcontractors will receive priority.

If the contractor does not want to pay the subcontractor the amounts that were not paid by the owner, it has seven days from the receipt of the notice of non-payment from the owner to deliver to the subcontractor a copy of the owner's notice of non-payment as well as its own notice of non-payment that states some or all of the amount payable to the subcontractor is not being paid due to non-payment by the owner, that specifies the amount not being paid and that provides an undertaking to refer the matter to adjudication no later than 21 days from the giving of the notice.

Similarly, if a contractor receives no payment from the owner, it has seven days from the receipt of the notice of non-payment from the owner to deliver a copy of the owner's notice of non-payment as well as its own notice of non-payment in the form prescribed in the paragraph above.

It should be noted that unless the contractor gives a notice of non-payment to its subcontractors, the Act requires that the contractor pay each subcontractor who supplied services or materials under a subcontract that were included in the proper invoice within 35 days of giving a proper invoice to the owner. This means that, unless the contractor gives notice of non-payment, it will have to pay its subcontractors in full even when it has not been fully paid.

***Timelines for the subcontractor – depending on full payment, partial payment and no payment***

If the subcontractor receives full payment from the contractor, it has seven days from the receipt of payment to pay each subcontractor who supplied services or materials under the subcontract that were included in the proper invoice the amount payable to the subcontractor.

If the subcontractor does not want to pay all or part of the amounts owing to subcontractors, it has until 42 days from the date that the contractor gave the proper invoice to the owner to deliver a notice of non-payment. If the subcontractor decides to only make a partial payment to its subcontractor, the partial payment has to be made within seven days from the subcontractor's receipt of payment from the contractor.

If the subcontractor only receives partial payment from the contractor, it has seven days from the receipt of payment to pay each of its subcontractors who supplied services or materials under the subcontract that were included in the proper invoice on a pro rata basis unless the amount not paid by the contractor is specific to services or materials supplied by a particular subcontractor, in which case the remaining subcontractors will receive priority.

If the subcontractor does not want to pay its subcontractor the amounts that were not paid by the contractor, it has seven days from the receipt of the notice of non-payment from the contractor to deliver to its subcontractor a copy of any notices of non-payment received by the subcontractor as well as its own notice of non-payment that states some or all of the amount payable to the subcontractor is not being paid due to non-payment by the contractor, that specifies the amount not being paid and that provides an undertaking to refer the matter to adjudication no later than 21 days from the giving of the notice.

Similarly, if a subcontractor receives no payment from the contractor, it has seven days from the receipt of the notice of non-payment from the contractor to deliver copies of the notices of non-payment it has received as well as its own notice of non-payment in the form prescribed in the paragraph above.

It should be noted that unless the subcontractor gives a notice of non-payment to its subcontractors, the Act requires that the subcontractor pay each subcontractor who supplied services or materials under a subcontract that were included in the proper invoice within 42 days of the contractor giving a proper invoice to the owner. This means that, unless the subcontractor gives notice of non-payment, it will have to pay its subcontractors in full even when it has not been fully paid.

### Interim adjudication – what if there is a dispute?

The other major change to the Act is the introduction of an adjudication scheme designed to provide a streamlined mechanism for resolving disputes between parties in a manner that allows projects to continue despite the existence of disagreements. The adjudication provisions of the Act apply to both contracts and subcontracts. Based on the timelines provided in the Act, adjudications are expected to be resolved within six weeks of the delivery of a written notice of adjudication.

The Act sets out the types of disputes that can be referred to adjudication:

- (a) the valuation of services or materials provided under the contract;
- (b) payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- (c) disputes that are the subject of a notice of non-payment;
- (d) amounts retained by way of set-off;
- (e) payment of holdback;
- (f) non-payment of holdback where notice provided; and,
- (g) any other matter that the parties agree to adjudicate.

A party who wishes to refer a dispute to adjudication shall give to the other party a written notice of adjudication. At the time of the dispute, the parties can either agree on an adjudicator or request that the Authorized Naming Authority appoint an adjudicator. The parties to a contract or subcontract cannot agree on the name of the adjudicator at the time the contract or subcontract is entered into.

No later than five days after an adjudicator is appointed, the party who gave the notice of adjudication shall give the adjudicator a copy of the notice together with a copy of the contract or subcontract and any documents that the party intends to rely on in the adjudication. The responding party has the opportunity to respond in writing although the Act does not provide a timeline for when the responding party has to submit its documents.

The adjudicator has 30 to 44 days from the date it receives the documents from the party requesting adjudication to render its decision. In order to make its decision, the adjudicator has several powers available to it including requiring further documents, conducting an on-site inspection and obtaining the assistance of experts.

There is little in the Act mandating how the adjudication is to be conducted and so it will be up to the adjudicator's discretion whether a determination can be made based only on the documents or whether an oral hearing or verbal testimony is necessary.

The determination of the adjudicator is binding on the parties until the matter is determined by the court or arbitration. This means that the parties can re-argue the merits of the adjudication after the project has been completed but, for the purposes of completing the project, the adjudicator's decision is final subject to the right to seek leave of the court to bring an application to set aside the adjudicator's determination. It should be noted that the grounds for setting aside an

adjudicator's determination are very narrow.

If the adjudicator determines that an amount is payable, and that amount is not paid within ten days, the contractor or subcontractor that is entitled to payment is entitled to suspend further work until it is paid the full amount (including interest) as well as any reasonable costs incurred by the contractor or subcontractors as a result of the suspension of work.

### Takeaways

While the prompt payment and adjudication schemes will undoubtedly provide more clarity and certainty, organizations will have to change the way that they do business to gain the benefit of the new legislation and not get caught off guard. Contracts will have to be re-drafted, projects will have to be staffed differently and companies will have to implement better document management systems.

Construction contracts and subcontracts will likely have to be re-drafted to meet the new requirements of the legislation. As was mentioned above, any provisions that do not comply with the new provisions will be void. Further, owners and contractors will want to ensure that the contract is clear about what constitutes a proper invoice and how often a contractor is expected to submit a proper invoice.

Organizations will need to implement systems to address the prompt payment provisions of the Act. Organizations will have to be able to track deadlines and review invoices and notices quickly to determine who is entitled to payment and who is not.

Finally, organizations will need to be able to respond to the strict timelines in the mandatory adjudication process, which will apply to disputes of all sizes. Organizations will need to ensure that they can gather the evidence necessary (both documents and witnesses) to support their position. This will likely require the staffing of projects to be adjusted to ensure that there are enough personnel to assist with the adjudication process, even where external lawyers are retained.

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