



July 31, 2017

The Honourable Yasir Naqvi, MPP
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Minister,

Re: Bill 142 - *Construction Lien Amendment Act, 2017*

Prompt Payment Ontario wishes to begin by congratulating you and your staff for their efforts in crafting Bill 142, now before the Ontario Legislature. We also applaud the work by Bruce Reynolds and Sharon Vogel in creating the foundation for Bill 142 through the work they have done and continue to do for the Ministry. It was a significant challenge to incorporate the many recommendations contained in “Striking the Balance” in a manner which integrated them into the existing *Construction Lien Act*, and you have met the challenge admirably.

We are pleased to see the feedback process and understand that the objective of such process would be to offer constructive comments on the draft legislation, and as such, we offer the following for your consideration.

1. Generally - transition and implementation

It is obvious that the Bill contains a number of complexities to which the industry and government will need to acclimatize. Not least among these is the new system of adjudication.

We assume there will be a period prescribed between the enactment of the legislation and the coming into force of certain provisions. We offer no comment on this other than to urge that this period be kept as short as is practicable, both in the interests of maintaining a sense of urgency and in getting the legislation into force as quickly as possible.

2. Generally – electronic notices and payment

We believe it would be appropriate that the legislation generally encourage the use of electronic payment and the giving of electronic notices. This is in line with current practices which prevail in much of the marketplace and is consistent with the theme of the legislation, which promotes efficiency in payment and the resolution of payment issues.

The details governing the protocols are probably best covered by Regulations.

3. **S. 6.4 (5) – correction of ambiguity**

Section 6.4 (5) states:

Exception, notice of non-payment if owner does not pay

(5) Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (7), the contractor gives to the subcontractor, in the prescribed manner,

(a) a notice of non-payment, in the prescribed form,

(i) stating that some or all of the amount payable to the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the owner,

(ii) specifying the amount not being paid, and

(iii) providing an undertaking to refer the matter to adjudication under Part II.1 no later than 14 days after giving the notice to the subcontractor; and

(b) a copy of any notice of non-payment given by the owner under subsection 6.3 (2).

The highlighted subclause (iii) is unclear as to what must be done within 14 days: providing the undertaking or referring to adjudication. We understand the intent is to refer to adjudication.

A simple correction might be as follows:

(iii) providing an undertaking to refer the matter to adjudication under Part II.1, such referral to adjudication to take place no later than 14 days after giving the notice to the subcontractor; and

4. **S. 6.5 (6) – suggested need for undertaking at the subcontractor level in parallel to the undertaking requirement at the general contractor level.**

By s. 6.4 (5), a payer contractor is afforded a “pay when paid” privilege in circumstances in which payment is not received from the owner. That privilege is exercisable upon the giving of the required notice and an undertaking to refer the owner non-payment issue to adjudication.

We understand the purpose of s. 6.4 (5) is to promote the adjudication of payment issues at the owner–contractor level. The contractor not in receipt of payment from the owner is encouraged to have the matter adjudicated expeditiously, failing which the contractor remains obligated to pay its subcontractors within the times specified notwithstanding that it has not received corresponding funds from the owner.

This obligation to adjudicate payment issues is not found below the contractor level in the present draft. Specifically, s. 6.5 (6) provides:

Exception, notice of non-payment if contractor does not pay

(6) Subsection (4) does not apply in respect of a subcontractor if, no later than the date specified in subsection (8), the subcontractor required to pay under subsection (4) gives to the other subcontractor, in the prescribed manner,

- (a) a notice of non-payment, in the prescribed form,
 - (i) stating that some or all of the amount payable to the subcontractor is not being paid within the time specified in subsection (4) due to non-payment by the contractor, and
 - (ii) specifying the amount not being paid; and
- (b) a copy of any notices of non-payment received by the subcontractor in relation to the proper invoice.

If the contractor does not pay a subcontractor, all the subcontractor needs to do to avoid its own obligation to pay its sub-subcontractors and suppliers is deliver the required notice under s. 6.5 (6). If the sub-subcontractor or supplier in receipt of this notice seeks to then adjudicate its entitlement to payment, we believe it likely that the non-paying subcontractor will simply point to the fact that it has not received funds from the contractor upstream, that it has delivered the required notice under s. 6.5 (6), and that its payment obligation to the sub-subcontractor or supplier is thereby suspended. We believe that the adjudicator will thereupon be driven to dismiss the claim of the sub-subcontractor or supplier, having been compelled to find that payment is not due by operation of s. 6.5 (6).

This would force a suspension of payment by the subcontractor to its sub-subcontractors and suppliers for an indeterminate period of time, in circumstances which the unpaid sub-subcontractor or supplier could not effectively control. If the payment issue which prevented the flow of funds from the owner to the contractor, or from the contractor to the subcontractor, is never adjudicated, the sub-subcontractors and suppliers would appear to be without an effective remedy, at least in the short term. We believe this outcome is paradoxical, and not in keeping with the intent of the legislation generally.

We would suggest that s. 6.5 (6) be amended to include a provision similar to that found in s. 6.4 (5) (iii), namely a requirement for an undertaking by the unpaid subcontractor to refer to adjudication within 14 days (failing which the obligation to make payment within the prescribed time remains, as it does for the contractor).

Besides correcting the problem outlined above, such an amendment would also achieve parity at both the contractor and subcontractor level, i.e. adjudications of payment issues would be encouraged at all levels. We are mindful that major subcontractors such as mechanical and electrical often engage multiple sub-subcontractors and suppliers, and in many respects are in the same position as the contractor as both recipients and payers of substantial funds upon a project. They should be similarly encouraged to take payment issues to adjudication, as *quid pro quo* for the privilege of deferring their own payment obligations to downstream sub-subcontractors and suppliers.

5. S. 13.3 (2) – who may qualify as adjudicators

We would encourage that any Regulations prescribing the qualifications for adjudicators not be drafted in such manner as to prevent the qualification of non-lawyers as adjudicators.

We assume the qualification and training requirements will be reasonably rigorous so as to ensure confidence in the system by users. We also appreciate that some basic level of legal knowledge will likely be necessary. We are mindful, however, that many disputes going to adjudication may more appropriately be resolved by others with specialized industry expertise, such as construction executives, cost consultants, design professionals and so on. In principle, anyone who meets the training and qualifications requirements should be eligible to act.

6. **S. 13.5 (1) – suggested amendment to item 2 (changes)**

Section 13.5 deals with the disputes which are permissible to take to adjudication:

13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

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 under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
5. Non-payment of holdback under section 27.1.
6. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

The highlighted item 2 refers to disputes respecting payment, including in respect of change orders. We believe the reference to “change order” is unduly restrictive; payment disputes over change do not necessarily involve change orders as such, but also change directives, disputed requests for change orders and change directives, and so on.

We would suggest that this item be amended as follows:

2. Payment under the contract, including in respect of a changes, whether approved or not, or proposed changes.

7. **S. 13.5 (1) – suggested amendment to include terminations**

In addition, we believe that an express provision in respect of the adjudicator’s jurisdiction should include reference to the termination or purported termination of the contract. Part 9 of your report, *Striking the Balance*, included the following:

Examples of types of disputes that have been adjudicated in the U.K. include: final account claims; extension of time/loss and expense claims; value of variations; disputed terminations; a claim to enforce post-termination rights (in absence of agreement); and recovery of costs to complete a project following termination. The U.K. also allows adjudications to proceed in relation to disputes of a technical nature.

One of the footnote references to the above excerpt includes a reference to the decision in *Volker Stevin Ltd v Holystone Contracts Ltd* [2010] EWHC. In that case, there were actually two adjudications relating to the termination of a subcontract in which it was subsequently determined that the adjudicators in each instance had the appropriate jurisdiction to make a determination on the termination of contract issues.

Further, other current and proposed amended sections of Bill 142 relate specifically to termination of a contract: proposed new section 31 (6) dealing with notice of termination of a contract, proposed new section 31 (7) providing that a party can contest the validity of a termination of contract, proposed amendment to the current section 72 which now includes a reference to “termination of the contract or a subcontract”, and so on.

As a result, we suggest that the proposed section 13.5(1) include the following:

6. Issues relating to termination of a contract or subcontract including the validity of such termination and post-termination rights;
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

8. S. 13.8 (1) (2) – consecutive adjudications

We wish to address to issues relating to the issue of “consecutive adjudications”. First, although it may seem obvious, and perhaps it is covered by the adjudicator’s inherent jurisdiction, however if there are consecutive adjudications, you may want to consider some provision associated with the consent of the adjudicator and the ability of the adjudicator to amend the timelines accordingly in order to manage what could be a series of consecutive adjudications.

Second, we have concerns with the current wording in proposed section 13.8 (2) in that we believe the intention is to streamline as many adjudications involving the same issues or parties or both into a series of consecutive adjudications with one adjudicator. However, there remains a concern about the ability to have concurrent proceedings addressing the same dispute.

What if the Contractor chooses not to have the various questions or issues determined consecutively by a single adjudicator? It is theoretically possible to have three or more sets of concurrent proceedings relevant to the same contract, if not the same dispute – a Court hearing relevant to adjudication no. 1 and dispute no. 1, two adjudications re dispute no. 2; and an arbitration re both disputes and a court application disputing the jurisdiction of the adjudicator in adjudication no. 1 and possibly others; and this example will the Contractor and one subcontractor. Imagine multiplying this to various subcontractor streams. As you know, efforts made to streamline arbitrations between a contractor and owner and various subcontractors have had limited success in Ontario.

What we believe we should be avoiding is a situation that took place in the UK as set out in the decision of *Herschel Engineering Ltd v Breen Properties Ltd* [2000] HT 00/107 where it was found that a party could commence court proceedings, and then commence concurrent adjudication proceedings dealing with the same issue provided that the court had not given final judgment. Further, it was determined that commencing court proceedings or arbitral proceedings did not operate as a waiver of the right to adjudicate.

In a similar vein, the decision in *Carillion Construction v Stephen Andrew Smith* [2011] EWHC 2910 (TCC) involved a situation we would also want to avoid, namely a multiplicity of adjudications where earlier determinations in adjudications were being challenged and later ones were continuing concurrent to those challenges. In effect, it was a situation of “serial adjudications”. Paragraph 56 of the *Carillion Construction decision* provides some guidance on factors in avoiding serial adjudications (<http://www.bailii.org/ew/cases/EWHC/TCC/2011/2910.html>).

We suggest wording to provide greater control over the processes so as to avoid a multiplicity of adjudications or serial adjudications.

9. S. 13.17 – suggested revision to adjudicator’s authority regarding costs

The rules respecting costs of adjudications are contained in s. 13.16 and 13.17 as follows:

Costs

13.16 Subject to section 13.17, the parties to an adjudication shall bear their own costs of the adjudication.

Frivolous, vexatious, etc.

13.17 If an adjudicator determines that a party to the adjudication 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, as part of his or her determination of the matter, that the party be required to pay some or all of the other party's costs, any part of the fee amount determined under section 13.10 that would otherwise be payable by the other party, or both.

In essence, each party bears their own costs, subject to the authority of the adjudicator to reallocate costs if it is found that a party has behaved in a manner which was frivolous, vexatious, abusive of the process, or in bad faith. We interpret these requirements as thresholds which must be met before the adjudicator acquires any jurisdiction to reallocate costs.

We suggest that this threshold is too high, and that the adjudicator's authority over costs be similar to that enjoyed by a judge under the *Courts of Justice Act*. This is in line with the widely-held understanding in the industry that the winner will likely recover at least some portion of its costs, captures the benefit of mechanisms designed to mitigate disputes such as the use of offers to settle, and will have the salutary benefit of encourage the resolution of disputes.

10. S. 26.1 (2) (d) (ii) and 26.2 (2) (c) (ii) – correction required to remove reference to “expiry” of liens

Sections 26.1 and 26.2 deal with holdback releases on an annual and phased basis:

Payment of holdback on annual basis

26.1 (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22 (1) on an annual basis, in relation to the services or materials supplied during the applicable annual period.

Conditions

(2) Subsection (1) applies if,

(a) the contract provides for a completion schedule that is longer than one year;

(b) the contract provides for the payment of accrued holdback on an annual basis;

(c) the contract price at the time the contract is entered into exceeds the prescribed amount; and

(d) as of the applicable payment date,

(i) there are no preserved or perfected liens in respect of the contract, or

(ii) **all liens in respect of the contract have expired** or been satisfied, discharged or otherwise provided for under this Act.

Payment of holdback on phased basis

26.2 (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22 (1) on the completion of phases of an improvement, in relation to the services or materials supplied during each phase.

Conditions

(2) Subsection (1) applies if,

(a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;

(b) the contract price at the time the contract is entered into exceeds the prescribed amount; and

(c) as of the applicable payment date,

(i) there are no preserved or perfected liens in respect of the contract, or

(ii) **all liens in respect of the contract have expired** or been satisfied, discharged or otherwise provided for under this Act.

The highlighted portions in both, referencing the “expiry” of liens, is an error. Liens in respect of the contract will clearly not have “expired” as at the date of any annual or phased holdback release; rather they remain intact subject to later preservation and perfection.

The intent here would appear to be that in order to release holdback on an annual or phased basis, title should be clear of any preserved or perfected lien. We suggest that these subsections be amended to delete the reference to expiry of liens.

11. S. 27 (1) – suggested clarification of consequences for non-compliance

Section 27 (1) deals with non-payment of holdback, and prescribes a requirement to publish notice of that non-payment, as follows:

Non-payment of holdback

27.1 A payer may refuse to pay some or all of the amount required to be paid under section 26 or 27, as the case may be, if, no later than 40 days after publication of the applicable certification or declaration of substantial performance under section 32, the payer publishes, in the manner set out in the regulations, a notice in the prescribed form, specifying the amount of the holdback that the payer refuses to pay.

What is not clear, however, is what happens if the notice of non-payment of holdback is not published.

We suggest that the consequence for not publishing be identical to that for failure to deliver a notice of non-payment, i.e. that the obligation to pay remain intact and enforceable. This section should be amended to include this clarification.

12. S. 87 (1.1) – manner of service of written notices of lien

Section 87 (1) prescribes the general rule for service of documents under the legislation, which include personal service and service by certified or registered mail.

Section 87 (1.1), however, modifies this rule in the case of written notices of lien, and requires service in a manner permitted by the rules of court for an originating process:

How documents may be given

87. (1) Except where otherwise ordered by the court, all documents and notices required to be given or that may be given under this Act, may be served in any manner permitted under the rules of court or, in the alternative, may be sent by certified or registered mail addressed to the intended recipient at the recipient's last known mailing address,

- (a) according to the records of the person sending the document; or
- (b) as stated on the most recently registered instrument identifying the recipient as a person having an interest in the premises. R.S.O. 1990, c. C.30, s. 87 (1).

Exception, written notice of lien

(1.1) Despite subsection (1), a written notice of lien shall be served in a manner permitted under the rules of court for service of an originating process.

We believe the requirement in s. 87 (1.1) is excessively onerous and contrary to the objective of written notices of lien generally - an expeditious and efficient method of “staying the hand of the paymaster” in circumstances of delayed or non-payment. Imposing a requirement for personal service (being the manner prescribed for service of an originating process under the rules) will add expense and complication in circumstances in which we do not believe there is any policy reason to do so. We suspect that this requirement will lead many to simply forego written notices of lien entirely, thereby nullifying their efficacy.

We would suggest that s. 87 (1.1) be deleted.

We trust that these comments and suggestions are helpful, and remain available to liaise with the Ministry and Mr. Reynold's team on these and any other points raised in the Bill. We look forward to working with you and the government in bringing this Bill into law.

Sincerely,



Ron Johnson
Director, Prompt Payment Ontario