

## Q&A: The revised Construction Lien Act brings adjudication to Ontario

**KEVIN O'NEILL - OPERATIONS DIRECTOR, DRIVER TRETT EASTERN CANADA DISCUSSES WHAT THE REVISED ACT INVOLVES AND THE BENEFITS IT SHOULD DELIVER TO THE ONTARIO CONSTRUCTION MARKET (AND BEYOND...).**

**On May 31, 2017, the Attorney General, Hon. Yasir Naqvi, introduced legislation in the Legislative Assembly of Ontario to amend the Construction Lien Act. What are the key amendments to the existing Construction Lien Act legislation?**

Put simply, they include:

- Introduction of a prompt payment regime.
- Introduction of mandatory adjudication for all construction projects, large and small, across the province.
- Modernisation of the Act to address alternative financing and procurement (AFP) projects (P3s), condominiums, tenant work, etc.
- Technical amendments related to holdback, liens, bonding, and trusts.

**What purpose will the prompt payment regime serve?**

The new regime is intended to streamline the payment process through all levels of the construction supply chain.

**How does it do this?**

Payment is due no later than 28 days following receipt of a 'proper invoice'. Any reductions in the amount payable must be identified by the owner in a 'notice of non-payment' within 14 days of the submission of the proper invoice.

**What penalties are there if someone still doesn't pay?**

Mandatory interest, based on the interest rate set out in the Courts of Justice Act (currently 0.8%), will begin to accrue on the outstanding balance if the amount due is not paid when due (a detailed

calculation model is expected in the regulations). The parties are free to contract for interest rate above the statutory rate, but not below.

**Does this just apply between owners and main contractors or does it include the wider construction market?**

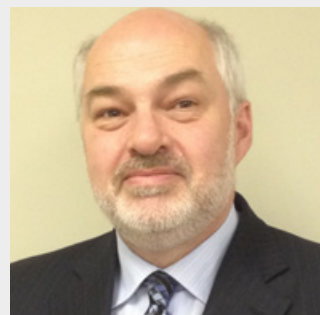
Similar payment structures apply to the payment of subcontractors by contractors, with payment made to subcontractors within seven days of payment by the owner to the contractor. Any disputes which might arise with regard to payment can be quickly referred by either party to an adjudicator.

**So, is adjudication common practice in Canada as a whole?**

No, currently Ontario contractors and trade contractors' only recourse, outside of termination, is to initiate lien proceedings to pressure payment of outstanding invoices; or to simply accept reduced payment for services. The introduction of adjudication is perhaps the single largest and most sweeping change in the administration of construction contracts in Ontario. Introduced to the UK construction industry some 20 years ago, adjudication provides a quick and enforceable decision to the parties. The new legislation in Ontario borrows heavily from the UK experience.

**How does adjudication work in Ontario now?**

Following appointment of an adjudicator, the overall process is only 42 days from initiation to decision. The party wishing to refer a dispute to adjudication is to provide a written notice to the other party



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outlining the nature and description of the dispute at hand, the nature of redress sought, and propose an adjudicator from an Authorized Nominating Authority. Within four days the other party must agree to the proposed adjudicator, or an adjudicator will be appointed by the Authorized Nominating Authority in a further three days. The party requesting the adjudication must provide all relevant documents to the adjudicator within five days of appointment of the adjudicator. The adjudicator is free to conduct the adjudication as they determine to be appropriate in the circumstances. The adjudicator shall provide its written determination, with reasons, within 30 days of receiving the documentation. The fees associated with the adjudicator shall be paid equally by the parties.

**And how enforceable is the decision?**

As in most jurisdictions, the determination by the adjudicator is binding on the parties, although the matter may still be determined afterwards by a court or through arbitration. The adjudication process is thought to provide a less costly and more timely means for contractors, subcontractors, and suppliers to

secure their rights to payment for work performed and services delivered; without resorting to the Lien provisions of the Act.

**This legislation presently only applies in Ontario, do you see adjudication catching on in the wider Canadian construction market?**

The construction industry across Canada is taking a keen interest in Ontario's dive into the adjudication pool, although the result is still uncertain. Will the revisions be successful in improving the flow of funds through the construction supply chain? Will the other provinces and territories update their legislation to follow Ontario's lead? Will a national standard evolve to replace the uneven patchwork of rules and regulations? Only time will tell. Having incorporated the lessons learned from over 20 years of experience with adjudication in the UK and elsewhere, it appears that adjudication will get off to a running start in Ontario.

**It would seem that there are still lots of questions to be answered when it comes to measuring the success of adjudication in Ontario, and Canada as a whole – perhaps you could update us further when a significant number of disputes have been suitably resolved?**

I'd be happy to, or perhaps one of my West coast colleagues will have more news and feedback if/when adjudication spreads across the country. ■

[Ed note: this Digest has many other adjudication articles covering jurisdictions from Malaysia and the Middle East to the established UK market, visit the Digest archive to brush up on other lessons learned from around the world.]