

Adjudication begins in Canada

KEVIN O'NEILL – OPERATIONS DIRECTOR, DRIVER TRETT CANADA CONTINUES THE STORY OF ADJUDICATION'S EMERGENCE IN CANADA* AND THE NEXT STEPS IN ITS INTRODUCTION IN ONTARIO.



*Following on from his interview in Issue 14 of the Driver Trett Digest, p. 25

2018 started out with a bang for the construction industry in Ontario. The long-awaited revisions to the Construction Lien Act (which, when put into effect, will be called “The Construction Act”) received Royal Assent in December 2017, just in time for the holiday season. The revisions to the existing legislation, for the first time in over 30 years, brings the lien legislation into line with the realities of construction in Ontario. The addition of prompt payment regulations, and in particular the introduction of adjudication into the mix, are a major change for the industry, from owners down to sub-trades and suppliers.

Changes to the lien legislation include,

among other things, extension of time periods for preserving and perfecting a lien action from 90 days to 150 days, increasing the threshold for determining a contract to be complete to \$5,000 from \$1,000, among other things. Construction liens under \$25,000 can now proceed in the Small Claims Court.

One of the key matters that may be overlooked by industry participants is the clarification and strengthening of the trust provisions related to holdback monies. Section 8 represents perhaps the largest administrative change to the manner in which funds are received and paid. These changes may prove difficult for many

industry participants in the early days.

There has been a modernisation in the matter of holdback release, which more properly addresses the issues of long duration contracts and agreements under P3 (public-private-partnership) contracts. The Province of Ontario is a world-leader in the procurement and construction of public infrastructure under such agreements. The new Act allows for varied payment of holdbacks, including:

- On an annual basis for projects with a completion schedule longer than a year, and where the contract itself permits.
- On a phased basis, where provided for in the contract.

- On completion of the design phase (now specifically identified), which is key for addressing the needs of the design community on these types of projects.

Of course, the most sweeping changes to the Act are the introduction of a prompt payment regime and the provision of construction dispute interim adjudication. These two matters go hand-in-hand. In introducing the new legislation, the Attorney General noted that, “the average collection period in construction went up from approximately 57 days to 71 days” between 2002 and 2013. The prompt payment rules will result in the general

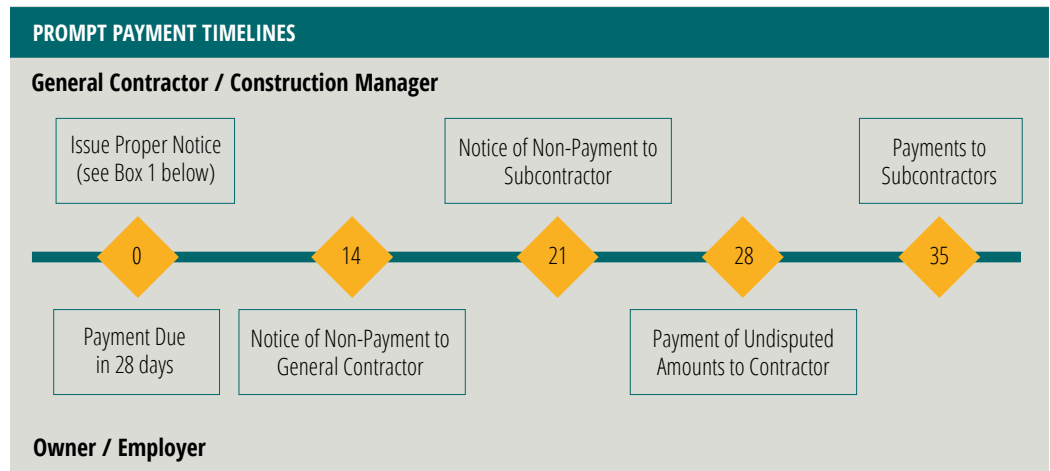
contractor being paid within 28 days, with each cascading payment from general contractor to subcontractor, etc., made within seven days. If there are disputes related to the payment process, the parties are free to invoke the adjudication protocols.

The goal of the prompt payment rules (see Box 1, page 31) is to provide certainty to the entire industry regarding the determination of the invoice amounts, and the timing of payments. While the industry lauds the spirit of the Act overall, there are many parties that have highlighted some of the challenges that will be faced in implementing the new requirements.

The Association of Municipalities of Ontario (AMO), in its submission to the Standing Committee of the Legislative Assembly, highlighted the short timeframes for determining if the work being invoiced has been properly completed. This would have to occur within 14 days of the issuance of a 'proper invoice' so that a notice of non-payment could be issued. The AMO also stated that the new Act will "require every municipality to redraft all of their construction contracts, develop new project management procedures and change processes to ensure faster payment."

Taking these concerns to heart, the Government will not implement the prompt payment and adjudication procedures until October 2019, to allow the industry to prepare for these changes.

The introduction of adjudication as a means for interim dispute resolution is a



dramatic change for the industry. Taking heavily from the experience of the UK, the construction interim dispute resolution provides quick justice for disputes related to a specific set of matters. These are:

- Valuation of services or materials provided under the contract.
- Payment under the contract, including change orders or proposed change orders (approved or not).
- Disputes related to a notice of non-payment.
- Amounts related to set-off by trustee or lien set-off.
- Non-payment of holdback.
- Any other matter which the parties to the adjudication agree to, or that may be prescribed.

The adjudication procedure is designed to address issues mostly related to money, unless the parties have agreed to include other matters in their contract. In what

is a unique arrangement, lien provisions continue to exist, even with the introduction of adjudication. Of course, being an interim dispute mechanism, the determinations of the adjudication are binding on the parties, but may later be subject to determination by a court or an arbitrator.

The adjudication process is straightforward. The party which initiates the adjudication proceeding provides a written notice to the other party, outlining the matter in dispute, the nature of the redress being sought, and the name of the proposed adjudicator. If the parties do not agree on the adjudicator, they may request that the authorised nominating authority appoints an adjudicator.

Once the adjudicator is appointed, the party which gave notice must provide the adjudicator with a copy of the contract and its supporting documents. The adjudicator then has 30 days to make their

determination but may request an extension of up to 14 days.

Without any means of enforcing a decision, the entire process of adjudication would be meaningless. The Act provides for many courses of action. Once the determination is made, any amount owing must be paid within 10 days. If not paid, the contractor or subcontractor may suspend further work until the payment of:

- a) the amount of the determination.
- b) any interest accrued on the amount.
- c) any reasonable costs incurred as a result of suspension of the work, including any costs for resumption of work.

The contractor or subcontractor may also file a certified copy of the determination of the adjudicator with the court, and that determination is enforceable as if it were an order of the court. At an industry gathering in November, speakers suggested that the new prompt payment and adjudication measures would produce a major shift in power in the contractual relationship, particularly for very small contractors. Smaller sub-trades would be able to enforce matters determined by adjudicators without threat of termination.

The Construction Act will come into force in stages over the next two years. The administrative changes regarding liens and trust matters come into effect on July 1, 2018. The prompt payment and adjudication aspects do not come into effect until October 1, 2019. In the interim, the entire construction industry, from owners to consultants, contractors, subcontractors, and suppliers will be preparing for the profound changes to come. ■

BOX 1 - PROMPT PAYMENT REGIME

The prompt payment regime clearly defines the various documents and notices to be produced by the parties. The payment timeline is triggered by submission of a 'proper invoice' by the party. A proper invoice must contain certain standard information such as:

- the contractor's name and address
- the date of the invoice and the period in question
- the contract or agreement number, a description of the services or materials that were supplied
- the amount payable with the payment terms
- the detailed information as to where the payment is to be sent
- any other information as the contract may require

In contrast to typical current practice, the giving of a proper invoice can no longer be subject to the prior certification by a

payment certifier or the owner's prior approval.

Payment of a proper invoice must occur within 28 days (see Fig. 1 for further details).

An owner who disputes a proper invoice must issue a notice of non-payment within 14 days of receiving a proper invoice. For any amounts which are not disputed, the owner must pay those amounts, in full, within the original 28 day time-frame.

Contractors must pay their subcontractors and suppliers within 35 days of the initial 'proper invoice' subject to any notice(s) of non-payment. If a subcontractor's work is subject to a notice of non-payment from the owner, the contractor must pass on a notice to the subcontractor within seven days of receipt of the initial notice of non-payment.