

Bill 142 – An Act to Amend the *Construction Lien Act*

On May 31, 2017, Bill 142 – An Act to Amend the *Construction Lien Act* - passed first reading in the Ontario Legislative Assembly. With some notable exceptions pertaining to liens, Bill 142 implements the recommendations made by Bruce Reynolds and Sharon Vogel in their report released in September 2016. Here is a summary of Bill 142 as it relates to adjudication, prompt payment, liens, and the bonding of public projects.

Adjudication

Bill 142 will give parties to a contract or subcontract the right to have certain types of disputes resolved on an interim basis by binding adjudication.

Adjudicators will be retained and paid for by the parties themselves to rule upon a dispute. Bill 142 will create an Authorized Nominating Authority that will train and qualify people to act as adjudicators. Bill 142 does not specify who may qualify to act as an adjudicator, but in other jurisdictions adjudicators are lawyers, engineers, architects, and quantity surveyors.

Bill 142 sets out *default* rules for adjudication. The parties to a contract or subcontract are at liberty to add rules and procedures provided that any modifications do not conflict with the default statutory rules. An example of a permissible modification of the default statutory rules would be expanding the scope of disputes that can be referred to adjudication. If Bill 142 is passed, you should expect to see contracts and subcontracts with customized procedures for adjudication.

Bill 142 provides that the following disputes may 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) Non-payment of a holdback; or
- (d) Any other matter that the parties to the adjudication agree to, or that may be prescribed by regulation.

At the risk of oversimplifying, Bill 142 allows the parties to refer a dispute to adjudication in any case where the dispute has disrupted, or is about to disrupt, the flow of funds down the construction pyramid.

Bill 142 lays out the timeline for adjudication. Any party can start an adjudication by sending a notice of adjudication to the other parties to the contract. If the parties cannot agree who will adjudicate the dispute within 4 days, then the party who sent the notice must notify the Authorized Nominating Authority. The Authorized Nominating Authority will appoint an adjudicator within 7 days. Within 5 days of the date the adjudicator is appointed, the party who started the adjudication must deliver to the

adjudicator a copy of the contract and any documents the party intends to rely upon in the adjudication. An adjudicator must make a decision within 30 days of the date that he or she receives the documents from the party who started the adjudication. Bill 142 allows the parties to extend the deadline for an adjudicator's decision for a further 14 days. The bottom line is that an adjudicator must make a decision no later than **60 days** from the date that the notice of adjudication was delivered.

The adjudicator's ruling will be binding and enforceable, but only on an interim basis. Any party is free to re-litigate a dispute before a judge or an arbitrator who may decide the case differently than the adjudicator. However, the ruling of the adjudicator will be binding until a final determination is made by the Court or an arbitrator. In the meantime, any money that is payable pursuant to an adjudication must be paid within **10 days**. A contractor or subcontractor who is not paid within 10 days of the ruling of the adjudicator may **suspend work** until the money is paid. Furthermore, a creditor may apply to Court for an order compelling payment by any delinquent payor.

A party may only challenge the ruling of an adjudicator in the following circumstances:

- (a) A party participated in the adjudication while under a legal incapacity (e.g. bankruptcy or receivership);
- (b) The contract or subcontract is invalid or has ceased to exist;
- (c) The determination dealt, in whole or in part, with a matter that may not be the subject of adjudication or with a matter entirely unrelated to the subject of adjudication;
- (d) The adjudication was conducted by someone other than an adjudicator;
- (e) The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject;
- (f) There is a reasonable apprehension of bias on the part of the adjudicator; or
- (g) The determination was made as a result of fraud.

Bill 142 does **not** give the parties any right of appeal from the decision of an adjudicator. Bill 142 does not allow a Court to set aside the ruling of an adjudicator even where the adjudicator made an error of law or fact. Of course, a party that is dissatisfied with the ruling of an adjudicator may re-litigate the claim in Court or before an arbitrator, but that takes time.

One of the recommendations in the Reynolds-Vogel report with respect to adjudication was that the parties may refer any dispute involving \$25,000 or less to the Small Claims Court for adjudication. Bill 142 is silent on this point. We may see that recommendation get implemented by the regulations.

Prompt Payment

Bill 142 implements a system of prompt payment in substantially the same form as recommended in the Reynolds-Vogel Report:

- The parties to a contract or subcontract are free to negotiate when invoices may be rendered (e.g. monthly, every 60 days, or milestones), but, in the absence of any agreement, invoices shall be rendered monthly.
- The first step in the prompt payment process is the delivery of a "proper invoice" by the contractor to the owner. Bill 142 defines the minimum elements of a "proper invoice", but the parties are free to add additional requirements in their contract.
- An owner must pay a contractor within 28 days of receiving a "proper invoice", unless the owner delivers a notice of non-payment in the prescribed form within 14 days of receiving a "proper invoice".
- A contractor who receives full payment from an owner must pay any subcontractor whose work was included in the contractor's "proper invoice" to the owner within 7 days of the date they receive payment, unless the contractor gives a notice of non-payment to the subcontractor detailing the reasons for non-payment.
- If a contractor does not receive payment from an owner, the contractor must still pay any subcontractor whose work was included in the contractor's "proper invoice" to the owner within 35 days of submitting their invoice to the owner, *unless* the contractor delivers a notice of non-payment to the subcontractor notifying the subcontractor of the shortfall in payment from the owner and undertaking to refer the matter to adjudication within 14 days.
- Any notice of non-payment by a contractor to a subcontractor must be delivered:
 - Within 7 days of the date the contractor receives a notice of non-payment from the owner; or
 - If no notice of non-payment is given by the owner to the contractor, within 35 days of the date of the "proper invoice" delivered by the contractor to the owner.

The prompt payment provisions of Bill 142 are complicated and are difficult to summarize. If Bill 142 is enacted, then contractors and subcontractors will need to familiarize themselves with the details of the prompt payment provisions of Bill 142.

Overhaul of Lien Rights

Bill 142 makes the following changes to the lien remedy:

- The deadline for preserving (i.e. registering) a lien is extended from 45 to 60 days from the triggering event in order to better co-ordinate the preservation period with standard payment terms within the industry.

- The running of the 60 days for the expiration of lien rights will be delayed when a dispute is subject to adjudication.
- Payment of the 10% holdback will be mandatory once lien rights expire, unless the payor delivers a notice of non-payment.
- The deadline for perfecting a claim for lien is extended by an additional 45 days to encourage early settlement of lien claims.
- The interest of a landlord in a property is subject to a claim for lien for up to 10% of any tenant's improvement allowance payable pursuant to the lease.

Two important recommendations in the Reynolds-Vogel report were not implemented by Bill 142. First, Bill 142 did not implement the recommendation for simplifying the process of registering liens for work on the common elements of a condominium corporation. Second, Bill 142 does not prohibit a contractor from contracting out of their right to file a general lien as recommended by Reynolds and Vogel.

Bonding of Public Projects

Bill 142 requires contractors who enter into "public contracts" to post labour and material bonds where the value of the contract exceeds an amount to be determined in the regulations.

Labour and material bonds provide security for payment for subcontractors who contract directly with the general contractor. Labour and material bonds are backed by a "surety" (typically an insurer or financial institution) who guarantees payment to the subcontractor in the event the general contractor defaults on their payment obligations. To make a claim on a labour and material bond a subcontractor must comply with the term of the bond, which usually require giving notice of a claim to the surety within 90 days of the subcontractor's date of last supply.

"Public contracts" means a contract entered into between a contractor and the Provincial Crown, a municipality, or a "broader public organization". "Broader public organizations" includes every publically funded organization and all hospitals, school boards, universities, colleges, children aid societies, and community care access corporations.

Next Steps

Bill 142 has only passed the first step of the legislative process. The next step is for Bill 142 to be referred to a legislative committee who will receive submissions from industry stakeholders. The committee hearings will likely occur in the Fall of 2017. It is possible for Bill 142 to be amended during the legislative committee process. Attorney General Yasir Naqvi has said that his objective is to have the legislation pass final reading before the end of the 2017.

Questions

Bill 142 is a substantial and complicated piece of legislation. It will take time to fully digest its effect and implications. Here are two issues that I noticed on my preliminary review of the Bill.

First, there is potential conflict between lien rights and adjudication. If, for example a sub-contractor loses an adjudication, should they have the right to file a claim for lien for the full amount of their claim despite the ruling? On the one hand, if a subcontractor is able to file a claim for lien for the full amount, that will interrupt the flow of funds on the project and tend to defeat the objective of prompt payment and adjudication as interim dispute resolution. On the other hand, if the effect of an adverse ruling of an adjudication against a subcontractor is that the subcontractor's lien may be vacated for a lesser sum as determined by the adjudicator, then the subcontractor's lien rights will be effectively decided at the adjudication stage for all practical purposes. Bill 142 seems to adopt the second approach. That is not fair for the subcontractor considering that adjudication is only intended as an interim ruling.

Second, it is unclear how mandatory payment of the holdback is intended to work as between contractors and subcontractors. Advocates for prompt payment often cited the example of the excavator who has to wait until the end of the project in order to receive their holdback. On the one hand, Bill 142 appeared to make a subcontractor's basic holdback payable upon the expiration of their lien rights, meaning 60 days after their date of last supply. On the other hand, the new section 27.1 allows a "payer" to withhold payment of the holdback by delivering a notice of non-payment within 40 days of the publication of certificate of substantial performance. That suggests that subcontractors are not expected to be paid their holdback until the entire project is found to be substantially complete. If so, that tends to defeat the objective of prompt payment.

Hopefully these two issues can be addressed during the committee process.

Ted Dreyer is a construction lawyer and the chair of the Construction Lien Task Force of the Council of Ontario Construction Associations. You may contact him at edreyer@kw-law.com regarding any thoughts that you have concerning Bill 142.