

September 20, 2017

Construction Lien Act Amendments, Part 2 – Interim Adjudication

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In September 2017, the Ontario legislature is debating [legislation](#) which, if passed, will have a significant impact on the construction industry. The bill makes numerous amendments to the *Construction Lien Act* (which would simply be called the “*Construction Act*”) in response to an in-depth [report](#) prepared by the government.

One of the proposed amendments to the Act is a mandatory interim adjudication system intended to expedite the resolution of disputes and minimize disruptions to construction projects.

Under the new process, a party to a construction contract may refer to adjudication any dispute with respect to:

1. Valuation of services or material provided;
2. Payment under a contract, including any change orders (whether approved or not);
3. Disputes subject to a “notice of non-payment”;
4. Set-off;
5. Release of hold-back; or
6. Any other matter that the parties agree to or prescribed by regulation.

Adjudication can only be commenced before the completion of the contract/subcontract, unless the parties to the adjudication agree otherwise.

To initiate adjudication, a party has to give the other party a “written notice of adjudication” setting out the names and addresses of the parties, a brief description of the dispute, the nature of the redress sought, and the name of a proposed adjudicator.

Adjudicators must be approved by a government-appointed nominating authority. Parties may agree on a specific adjudicator, but only after a dispute has arisen. They are not permitted to put a clause in their contract at the outset of a project that selects an adjudicator in advance. If an adjudicator has not agreed to the adjudication with 4 days after the notice of adjudication, the initiating party must ask the nominating authority appoint one. After the request, the nominating authority has 7 days to make the appointment.

Parties may agree to their own adjudication procedures in their contract or subcontract, as long as they comply with the requirements in the proposed legislation. If the same matter or related matters are subject to adjudications, the parties may consent to having the disputes adjudicated consecutively by a single adjudicator. Parties may also consent to having a single adjudication address multiple matters.

After the adjudicator is appointed, the initiating party must give the adjudicator a copy of the contract and any documents they intend to rely on. As currently set out, an adjudicator has fairly broad discretion to control the adjudication process, and may:

- Issue directions respecting the conduct of the adjudication;



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- Take initiative in ascertaining relevant facts and law;
- Draw inferences based on the conduct of the parties;
- Conduct an on-site inspection;
- Obtain the assistance of third parties, including merchants, accounts, actuaries, contractors, architects, engineers, or any other person; and
- Make a determination in the adjudication.

The adjudicator must render a written decision within 30 days of receiving the documents. The parties may consent to an extension of this time period, but for no longer than 14 days. The decision is binding on the parties on an interim basis—that is, until the dispute is resolved in court or by way of arbitration conducted in accordance with the *Arbitration Act, 1991*.

Any money required to be paid under the adjudicator's order must be paid within 10 days. A contractor or subcontractor may suspend further work on the contract if they are not paid any amounts they are owed within this time period.

Parties must bear their own costs and split the adjudicator's fees equally. An adjudicator can only order a party to pay some or all of the other party's costs or the arbitrator's fees if that party has acted in a way that is frivolous, vexatious, an abuse of process, or bad faith.

A party may apply to a Court within two years for enforcement of the adjudicator's determination.

Alternatively, a party may apply to a Court within 30 days to set aside the adjudicator's determination on several grounds—for example, a party was under a legal incapacity, the contract was invalid, the adjudicator had a reasonable apprehension of bias, or the determination resulted from fraud. The set-side application does not stay the operation of the adjudicator's determination unless a Court orders otherwise.

In light of these recent amendments, companies involved in construction clearly have evolving legal rights and obligations. The Litigation, Real Estate, and Corporate groups at Perley-Robertson, Hill & McDougall LLP/s.r.l. can assist companies navigate these rights and obligations throughout the entire lifecycle of a construction project.

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