

Builders' Lien Amendment Regulations

Consultation Document

1. Introduction

In Spring 2019, Bill 152 *The Builders' Lien (Prompt Payment) Amendment Act* (Amendment Act) was passed in the Legislative Assembly. The Amendment Act adds two new Parts to *The Builders' Lien Act* respecting prompt payment and the interim adjudication of disputes.

The Amendment Act closely follows recent amendments to Ontario's *Construction Act*. Ontario has passed regulations to accompany the amendments to its Act, and its new prompt payment and adjudication processes are scheduled to come into force October 1, 2019. To date Ontario has not yet announced its Authorized Nominating Authority. The Ontario Regulations can be found at the following link: <https://www.ontario.ca/laws/regulation/180306>

In June 2019 the federal government passed the *Federal Prompt Payment Construction Work Act*, which comes into force on order of the Governor General. The new federal Act establishes a regime for prompt payment to contractors and subcontractors for construction work performed in respect of federal real property and a regime to resolve disputes over non-payment. The federal Act includes payment provisions and a dispute resolution process. It permits the Governor General to exempt provinces who have enacted a prompt payment and adjudication regime.

Several other Canadian jurisdictions have also been reviewing and considering prompt payment legislation including: Nova Scotia, where framework legislation was passed in 2019; Manitoba and British Columbia, where private members' Bills were introduced but not passed; and New Brunswick, currently in phase 1 of reviewing its *Mechanics' Lien Act* with phase 2 looking towards prompt payment and adjudication.

The Ministry of Justice is now preparing regulations to accompany the Amendment Act and is consulting interested parties and organizations. We would appreciate your feedback and comments on the topics discussed below.

2. Regulations to Part I.1. - Prompt Payment

New Part I.1 creates timelines for providing payment or filing a notice of dispute of payment. The regulation making authority in this Part includes the ability to exempt persons or classes of persons from the operation of this Part, create provisions around the timing for providing proper invoices and paying invoices, and establish the form and manner in which notices will be provided.

(a) Exemptions to New Part I.1

Section 5.11 of the Amendment Act permits persons or classes of persons prescribed in the regulations to be exempt from this Part of the Act. The application of Part I.1 may not be appropriate or applicable to every sector in the construction industry. It may also be appropriate to exempt certain persons or classes of persons at the outset and remove the exemption as the new prompt payment process becomes established.

Question 1: What persons and classes of persons should be exempted from the operation of Part I.1?

(b) Timing of Proper Invoices

Section 5.3(1) of the Amendment Act requires that a proper invoice be provided monthly, subject to the regulations or unless the contract provides otherwise. The parties may agree in their contract to shorten the period by requiring that the invoice be provided weekly, or lengthen the period requiring that the invoice be provided every 3 months, or 6 months. The Ministry is considering establishing restrictions on how far providing a proper invoice may be extended in the contract. For example, that the contract cannot extend the provision of a proper invoice beyond a 3 or 6 month period.

Question 2: Should the regulations include a time limit for how often a proper invoice must be provided in a contract? If so how long?

(c) Timeline for Payment of Proper Invoice

Section 5.4(1) of the Amendment Act requires that a proper invoice be paid no later than 28 days after receipt. This may not work in all sectors of the construction industry where a longer payment period may be more appropriate. The Ministry is considering extending the 28-day payment period in the regulations for certain sectors or certain types of contracts.

Question 3: Which sectors may require an extended payment period?

(d) Form and Manner of Notice of Non-Payment

Subsections 5.4(2) and 5.5(5) of the Amendment Act require that notices of non-payment be given in the prescribed form and manner. Ontario's forms can be found at the following link:

<http://ontariocourtforms.on.ca/en/construction-lien-act-forms/>

Ontario's notice of non-payment forms include the following information:

- The name of the person disputing payment and the person's address;

- The name of the person seeking payment, the person's address and address for service if known;
- A description of the premises;
- The date of the proper invoice;
- The amount that will not be paid; and
- The reasons for non-payment.

Ontario's Regulations also permit notices of non-payment to be provided electronically or by paper.

Question 4: What information should be included in the notice of non-payment?

Question 5: How should notices of non-payment be provided: electronically, paper or both?

3. Regulations to Part II.1 – Dispute Interim Adjudication

New Part II.1 adds provisions respecting adjudication and the creation and designation of an Adjudication Authority (Authority), which will oversee the training and recognition of adjudicators. The regulation making power in this Part includes the ability to exempt persons or classes of persons from the operation of this Part, create additional duties and powers for the Authority, establishing requirements for the qualification of adjudicators, and prescribe the necessary forms.

(a) Exemptions to Part II.1

Section 21.11 of the Amendment Act permits persons or classes of persons prescribed in the regulations to be exempt from this Part of the Act. As with Part I.1, the application of Part II.1 may not be appropriate or applicable to every sector in the construction industry. It may also be appropriate to exempt certain persons or classes of persons at the outset and remove the exemption as the new adjudication process becomes established.

Question 6: What persons and classes of persons should be exempted from the operation of Part II.1?

(b) Requirements to Qualify as Adjudicators

Pursuant to clause 21.13(1)(b) of the Amendment Act, the Authority shall qualify persons who meet the prescribed requirements as adjudicators. Ontario's Regulations provide that a qualified individual may be issued a certificate of qualification to adjudicate if the following qualifications are met:

- Has at least 10 years of relevant working experience in the construction industry. This may include experience working in the industry as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator or lawyer;

- Has successfully completed the training program established by the Authority;
- Is not an undischarged bankrupt;
- Has not been convicted of an indictable offence in Canada or a similar offence outside Canada;
- Pays the Authority the required fee; and
- Agrees in writing to abide by the other requirements for holders of certificates set out in Section 4.

That certificate of qualification will be valid for the time determined by the Authority and may be renewed, suspended or cancelled by the Authority.

The Ontario Regulations set out these additional requirements that a certified adjudicator must agree to abide by:

- Complete continued training programs;
- Comply with the code of conduct
- Provide the authority with proof of continued eligibility, as requested by the authority;
- Notify the authority if the person ceases to be eligible;
- Maintain records as required by the Authority;
- Pay the required fees;
- Comply with the Act and regulations.

Finally, the Ontario Regulations also include a provision allowing a person to be certified as an adjudicator without meeting the prescribed qualifications for a period of 1 year from the coming into force of the section. Such a provision would permit the Authority to qualify adjudicators who have the appropriate education and experience, before the training programs established by the Authority are operational or available across the province.

Question 7: What should be the prescribed initial and ongoing qualifications for an adjudicator?

Question 8: Should there be a limited exception period from meeting the prescribed requirements, similar to that in Ontario?

(c) Additional Duties of the Authority

Section 21.12 of the Amendment Act sets out the duties and powers of the Authority and clauses (1)(f) and (2)(c) permit the Authority to perform any other duties set out in the regulations and exercise any other powers set out in the regulations, respectively. The Ontario Regulations at sections 7 to 15.1 include the following additional duties and powers:

- Ensure initial and ongoing training is available for adjudicators (section 8);
- Create a code of conduct and make it publicly available (section 7);
- Establish and make public a complaints process (section 10);
- Ensure adjudicators are available throughout the province (section 11);

- Ensure adjudicators have sufficient knowledge to account for all industry sectors (section 12);
- Develop and make public education materials (section 13);
- Prepare an annual report (section 14);
- On request, provide information that is provided on the website in a format accessible to the person (section 15);
- Provide administrative support to adjudicators (section 15.1).

Question 9: What additional duties and powers should be assigned to the Authority?

(d) Availability of Adjudication

Section 21.21(1) of the Amendment Act sets out the types of matters that are eligible for adjudication. The existing list does not include a dispute between the parties respecting whether an invoice meets the requirements of a proper invoice. The Ministry is considering adding this type of dispute to the types of matters that may be adjudicated.

Question 10: What other types of disputes, if any, should the adjudication process be made available for?

(e) Notice of Adjudication

Subsection 21.3(3) of the Amendment Act requires that a copy of a notice of adjudication be given to the prescribed persons or entities in the prescribed manner. The Ontario Regulations require that notice be provided by personal service in accordance with the Rules of Court and that an electronic copy of the notice be provided to the Authority. This is in contrast to the notice of non-payment, which can be given electronically and does not require personal service.

Question 11: How should a Notice of Adjudication be provided?

(f) Fees Payable to Adjudicators

Section 21.4 of the Amendment Act considers adjudicators fees. The fee payable is that agreed to by the parties and the adjudicator or where the parties and the adjudicator do not agree to the fee it will be determined by the Authority in accordance with the regulations. The Ministry is considering including a fee schedule in the regulations that may include limits or ranges of fees that may be charged.

Question 12: Should a fee schedule be included in the regulations to guide parties, adjudicators, and the Authority in determining fees? If so should an hourly rate be set or limit on the amount of fees?

(g) Where Adjudicator Fails to Provide a Determination

The Ontario Regulations include provisions respecting what occurs where the adjudicator fails to make a determination. These provisions include resignation of the adjudicator, payment of the adjudicator for the services the adjudicator provided, and how the parties can proceed with a fresh adjudication. The Ministry is considering following Ontario and including provisions in the regulations providing that:

- The adjudicator may resign at any time if the adjudicator determines that the matter is not eligible for adjudication or the adjudicator is not able to conduct the adjudication;
- Where the adjudicator fails to provide a determination or fails to provide a determination within the required timeline, the adjudicator is entitled to fees determined in agreement with the parties, or as determined by the Authority if the parties do not agree; and
- Where the adjudicator fails to provide a determination, except where the adjudicator determined the matter is not eligible for adjudication, the party who gave the original notice of adjudication may give a fresh notice, and the first adjudicator is prohibited from acting.

Question 13: In what circumstances should an adjudicator be entitled to resign?

Question 14: What amount of fee, if any, should an adjudicator who fails to provide a determination be entitled to?

Question 15: How should a fresh notice be provided if a second adjudication is started?

4. Conclusion

If you have any comments regarding the topics and proposed provisions considered in this consultation document please provide them prior to **August 30, 2019** by email to:

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Thank you in advance for your contributions.

Please be aware that your responses will form part of the public record and may be used in the ongoing development of the regulations.