



Executive Director's Report

Prompt Payment



October 1st—Target Date for Implementation

The target date of October 1st for implementing Ontario's prompt payment is fast approaching; however, Ontario does not yet have an administrative organization in place for its new construction dispute adjudication system but it is coming.

The new adjudication system, coupled with a new prompt payment regime, is to be launched Oct. 1 as part of the second phase of reforms of the old Construction Lien Act; lien modernization provisions took effect in the new Construction Act on July 1, 2018.

Disputes will be heard by a roster of adjudicators coordinated by a new Authorized Nominating Authority (ANA).

Proposals to run the ANA although however, were submitted finally in April. The office of the Ministry of the Attorney General has said that the government will unveil the new ANA in the coming weeks and that Attorney General Caroline Mulroney continues to target Oct. 1 for implementation of the prompt payment and adjudication processes, which is great news.

Construction lawyer Bruce Reynolds, whose recommendations for lien act reform developed with co-counsel Sharon Vogel formed the basis for much of the new Construction Act, and he believes it will take a while for a significant caseload to come onstream.

More challenging may be conducting training courses and the certification of adjudicators such that there are certified adjudicators who are capable and qualified to run an adjudication should someone deliver notice of adjudication in early October.

But that is unlikely to be a major issue according to Reynolds, given that "the number of cases in the early going, in October, November and December, should be very low. In addition, as a fallback, the legislation provides that the attorney general has the jurisdiction to appoint adjudicators herself."

Adjudicators will be drawn from across the construction sector with lawyers, architects, engineers, chartered surveyors and contractors among those targeted for appointment.

Adjudicators will be required to make a decision within 30 days of receiving documents from the parties in dispute, a deadline that can be extended in complex cases if the parties agree. Adjudicators will have extensive powers including an inquisitorial function to bring disputes to a quick resolution.

The first couple of years could be bumpy and hopefully the courts will take a pragmatic view of the process and create guidelines in keeping with the policy objects of this legislation.

On the federal front, the federal government's budget Bill, Bill C97, which includes prompt payment, was introduced and has passed first and second reading. On April 30th it was referred to Standing Committee on finance and the Senate.

Division 26 of Part 4 of the Bill enacts the Federal Prompt Payment for Construction Work Act in order to establish a regime to provide prompt payments to contractors and subcontractors for construction work performed for the purposes of a construction project in respect of federal real property or federal immovables and a regime to resolve disputes over the non-payment of that construction work. At a glance, it appears to be based on the Ontario framework for payment and adjudication. However, careful review of Division 26 by COCA's Prompt Payment Task Force Chair, Ted Dreyer, exposed a flaw. COCA stated the following in its submission to the Standing Committee on Finance, which is reviewing C97:

"COCA supports the pay when paid principle. The problem with the contractual pay when paid clauses that are now commonplace is that they tend to delay the resolution of the disputes that disrupt the flow of funds. Since a contractor with a pay when paid clause in its subcontract has no obligation to pay its subcontractors, the contractor is not particularly motivated to resolve its underlying dispute with the owner that is delaying payment. Since the subcontractor does not have privity of contract with the owner, it is powerless to bring the dispute between the contractor and owner that is delaying payment to a head. Contractual pay when paid clauses are one of the main reasons for the industry wide trend of slow payment.

Prompt payment as it appears in Ontario's *Construction Act* adopts the pay when paid principle but makes it conditional upon the prompt resolution of disputes. The key to prompt payment in the *Construction Act* is section 6.5(5)(a)(iii) which requires a general contractor serving a notice of non-payment upon a subcontractor to give an undertaking to refer its dispute with the owner to adjudication within 21 days. Subsection 6.6(6)(a)(iii) imposes the same obligation upon subcontractors who deliver notices of non-payment to their sub-subcontractors. The *Construction Act* effectively combines the pay when paid principle with a mechanism to ensure that disputes that disrupt the flow of funds are promptly resolved.

The flaw in the proposed Act is that it adopts the pay when paid principle without making it conditional upon the timely resolution of disputes. There is no equivalent to subsections 6.5(5)(a)(iii) and 6.6(6)(a)(iii) in the proposed Act. A general contractor who serves a notice of non-payment to its subcontractor has no obligation to refer its dispute with the Federal government to adjudication. Although the subcontractor has the right to refer its dispute with the general contractor to adjudication, it is hard to see what good it will do them. A general contractor served with a notice of adjudication by a subcontractor will simply point to subsection 10(3) and say that it has no obligation to pay the subcontractor because it was not paid by the government and it delivered a notice of non-payment as required by section 10(3). Unlike the *Construction Act*, the proposed Act does not make pay when paid conditional upon prompt resolution of disputes that disrupt the flow of funds. Instead, the proposed Act leaves subcontractors and sub-subcontractors twisting in the wind.

Prompt payment legislation is needed to make sure that contractors and subcontractors are paid on time for their work. So we applaud the Federal government to taking up the issue. However, unless the proposed Act is amended, it will make the problem that the government is trying to solve even worse."

Protecting What Matters Most Act



STATUS OF NEW FRAMEWORK

Bill 100, Protecting What Matters Most Act (Budget Measures) 2019 is our provincial government's budget Bill. It is a very large omnibus Bill that enacts, amends and repeals various statutes.

Among the statutes that it enacts is the Modernizing the Skilled Trades and Apprenticeship Act, 2019 (MSTAA) which sets out a framework for a Ontario's new skilled trades and apprenticeship system to replace the system put in place by the former government in April 2012.

Bill 100 was introduced for first reading on April 11th, has passed second reading and has been referred to the Standing Committee on Finance and Economic Affairs for public hearings and clause-by-clause review. It's expected to be reported back to the legislature mid May and we expect a third reading vote shortly thereafter.

If passed, MSTAA will replace the Ontario College of Trades and Apprenticeship Act, 2009. The MSTAA is framework legislation for the new skilled trades and apprenticeship system. It will be brought out through regulations. Here are some of the important features of the MSTAA:

- MSTAA gives significant power to the Minister and also to the "Registrar", a new position within the Ontario Public Service
- The MSTAA introduces the concept of "skill sets" which will be prescribed by regulation
- Trades will also be prescribed by regulation
- Both skill sets and trades will be made up of "activities" and the activities of a skill set or trade will be defined by Ministerial policy
- "Restricted activities", which will be defined by regulation, will replace compulsory trades; restricted activities may be included in a trade or skill set by regulation; a restricted activity can be included in one or more skill sets or trades
- Journeyperson to apprentice ratios may be prescribed for skill sets and trades and they may be 1:1 or other than 1:1
- The Registrar will establish an apprenticeship program for each trade and skill set
- The Minister will have the authority to approve in-class training providers
- The Registrar will be responsible for administering the MSTAA and the duties of the role are specified
- The Registrar has the authority to appoint inspectors who may inspect or investigate
- The Registrar and inspectors have the authority to issue compliance orders, notices of contravention and administrative monetary penalties
- There are no boards and committees proposed under the MSTAA but the Minister has the power to strike committees to advise him/her or the Registrar
- Cabinet will have the authority to delegate some of the Registrar's functions to an "administrative authority" through an "administrative agreement"
- The transition from the OCoT model to this new model is complex and the MSTAA proposes many transitional provisions

Upcoming Events

May 2019



IHSA Drywall Labour-Management Committee Meeting

May 9, 2019

(Paul Gunning attending)

COCA WSIB/OHS Meeting

May 28, 2019 Toronto

(Paul Gunning attending)

May 2019



UPCOMING Mathews Dinsdale Seminars/Webinars

Copy the following URL to your browser to register for new sessions or review archived session videos:

<http://www.mathewsdinsdale.com> (see right side)

Worker's Compensation Bootcamp Level 1

Wednesday May 29, 2019

9:00 am to 4:00 pm

If you have any questions, please call me at 519-671-5930.

Paul Gunning
Executive Director