



Ontario Catholic School
Trustees' Association

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June 14, 2017

MEMORANDUM

TO: Chairpersons and Directors of Education
- All Catholic District School Boards

FROM: Patrick J. Daly, President

SUBJECT: **Amendments to the Construction Lien Act**

Summary:

On May 31, 2017 the Ontario government introduced legislation that would, if passed, modernize the *Construction Lien Act*. The proposed changes also amend various holdback rules and introduce a prompt payment system as well as create a new process to accelerate dispute resolution.

The legislation is based on a comprehensive review of the Act in a report to the Ministry of the Attorney General titled "*Striking the Balance: Expert Review of Ontario's Construction Lien Act*". The report came out of extensive consultations with industry and education sector stakeholders and input of an Advisory Group of experts from key sectors. The proposed changes key objective is to improve competitiveness and efficiency in the construction industry.

I wish to thank Glenn Clarke, Controller of Plant, with the Simcoe Muskoka Catholic District School Board for his work on the Construction Lien Act Advisory Group.

The Construction Lien Act:

The Construction Lien Act ("CLA") regulates the way payments are made in the construction Industry, and provides reasonable certainty that those who have contributed services or materials to the improvement of real property will be paid for their contribution.

Under the proposed legislation, the CLA would be amended to establish a prompt payment system with clear payment timelines for all parties involved in a construction project. Disputes that slow down payment could be addressed through a new adjudicative process outside of court.

Updating Construction Lien and Holdback Rules:

The proposed changes to modernize the construction lien and holdback rules include:

- Clarifying the definition of “owner” to better reflect public projects that have multiple owners;
- Extending timelines for contractors and subcontractors to file liens and start court actions from 90 days to 150 days to allow for more time to resolve disputes outside of court;
- Requiring holdbacks to be paid once the timeline to file liens has passed. This would give contractors and subcontractors greater certainty about when the holdback will be paid, allowing them to plan and accept contracts for new work;
- Requiring contractors and subcontractors to follow specific bookkeeping requirements to protect subcontractors in the event of bankruptcy;
- Requiring surety bonding on public sector projects above a certain amount to protect subcontractors and workers if the general contractor files for bankruptcy;
- Allowing condominium unit owners to remove liens from their unit in relation to common elements, such as corridors, lobbies, the garage and roof;
- Providing for the referral of construction lien claims under \$25,000 to the Small Claims Court.

Creating a Prompt Payment System:

The proposed prompt payment system would ensure that contractors, subcontractors and workers are paid in a timely way. Under the proposed changes, the owner and general contractor on a project would be able to:

- Agree to a deadline to submit an invoice. If they do not agree, they would be required to submit invoices on a monthly basis.
- Once they receive an invoice, owners would be required to pay general contractors within 28 days. After they receive payment, general contractors would have to pay subcontractors within seven days. Subcontractors would be required to pay other subcontractors within seven days of receiving payment.

Speeding up Dispute Resolution:

The proposed changes include a new interim adjudication system to prevent payment disputes from delaying work on construction projects, speed up the payment process and reduce time and money spent on litigation. Adjudication would provide an interim binding decision in approximately six weeks.

Adjudication can be used to resolve payment disputes that could result in project delay, including disputes about the valuation of work, payments and set-offs against amounts due under a contract. Adjudications would be informal and inquisitorial. Parties would be free to establish a process by contract or use the default process, which would be available in regulations.

If, after adjudication, the party owing money refuses to comply with the decision, the party eligible for an award would be entitled to suspend further work under the contract. Adjudicator's decisions could not be appealed, but the decision could be challenged on the basis of adjudicator bias or on other matters. If the parties are satisfied with the adjudicator's decision, they may agree to treat the decision as final.

Potential Impacts on School Boards:

Overall, school board representatives who were Advisory Committee members to the review inform OCSTA that most of the proposed changes will be beneficial to school boards. For example, the new dispute resolution process will have a positive financial impact on boards.

However, it was also indicated that prompt payment timelines may be too short and the project security bonding are potential areas of concern for school boards.

If you have any questions, please do not hesitate to contact Stephen Andrews at sandrews@ocsta.on.ca or Dan Duszczyzyn at dduszczyzyn@ocsta.on.ca.

Attachment: Backgrounder

Proposed Updates to the Construction Lien Act

May 31, 2017

Ontario is introducing legislation that would, if passed, modernize construction lien and holdback rules, introduce a prompt payment system and create a new process to speed up dispute resolution.

The proposed changes to the province's construction laws would address the unequal bargaining power between some parties in the industry and establish a fair payment process.

The government of Ontario is making the largest infrastructure investment in hospitals, schools, public transit, roads and bridges in the province's history – more than \$190 billion over 13 years, starting in 2014–15. These amendments would support that commitment by helping to foster an innovative and dynamic business environment in the construction industry.

The Construction Lien Act

The Construction Lien Act (CLA) regulates the way payments are made in the construction industry, and provides reasonable certainty that those who have contributed services or materials to the improvement of real property will be paid for the contribution they made.

Under the proposed legislation, the CLA would be amended to establish a prompt payment system with clear payment timelines for all parties involved in a construction project. Disputes that slow down payment could be addressed through a new adjudicative process outside of court.

If passed, these amendments would bring Ontario's construction laws up to date to reflect current construction industry practices and support the thousands of workers and businesses in this important sector.

Updating Construction Lien and Holdback Rules

The proposed changes to modernize the construction lien and holdback rules include:

- Clarifying the definition of "owner" to better reflect public projects that have multiple owners
- Extending timelines for contractors and subcontractors to file liens and start court actions from 90 days to 150 days to allow for more time to resolve disputes outside of court
- Requiring holdbacks to be paid once the timeline to file liens has passed. This would give contractors and subcontractors greater certainty about when the holdback will be paid, allowing them to plan and accept contracts for new work
- Requiring contractors and subcontractors to follow specific bookkeeping requirements to protect subcontractors in the event of bankruptcy

- Requiring surety bonding on public sector projects above a certain amount to protect subcontractors and workers if the general contractor files for bankruptcy
- Allowing condominium unit owners to remove liens from their unit in relation to common elements, such as corridors, lobbies, the garage and roof
- Providing for the referral of construction lien claims under \$25,000 to the Small Claims Court.

Creating a Prompt Payment System

The proposed prompt payment system would ensure that contractors, subcontractors and workers are paid in a timely way.

Under the proposed changes, the owner and general contractor on a project would be able to agree to a deadline to submit an invoice. If they do not agree, they would be required to submit invoices on a monthly basis.

Once they receive an invoice, owners would be required to pay general contractors within 28 days. After they receive payment, general contractors would have to pay subcontractors within seven days. Subcontractors would be required to pay other subcontractors within seven days of receiving payment, and so on.

Parties would be free to agree to a timeline for the submission of invoices, before triggering the prompt payment timelines.

In cases where there is a dispute about the amount owed or the quality of the work, owners would be permitted to deliver a notice of non-payment within 14 days of receiving the invoice. Successive payers would be permitted to deliver a notice of non-payment within seven days. Any undisputed amounts must be paid.

Contractors and subcontractors would receive mandatory interest on late payments. They would also be able to suspend work on a project if the matter is heard by an adjudicator and the payer does not comply with the decision.

Speeding up Dispute Resolution

The proposed changes include a new interim adjudication system to prevent payment disputes from delaying work on construction projects, speed up the payment process and reduce time and money spent on litigation.

Adjudication would provide an interim binding decision in approximately six weeks. Adjudication would give parties an alternative to court or provide an interim, binding solution while matters are being heard in court.

Adjudication can be used to resolve payment disputes that could result in project delay, including disputes about the valuation of work, payments and set-offs against amounts due under a contract. Adjudications would be informal and inquisitorial. Parties would be free to establish a process by contract or use the default process, which would be available in regulations.

If, after adjudication, the party owing money refuses to comply with the decision, the party eligible for an award would be entitled to suspend further work under the contract.

Adjudicator's decisions could not be appealed, but the decision could be challenged on the grounds of adjudicator bias or a decision on a matter other than the matter referred. If the parties are satisfied with the adjudicator's decision, they may agree to treat the decision as final.

Whether or not the person owing money complies with the adjudication, the parties may continue to pursue ordinary legal remedies to address the dispute. Time limits for preserving a lien would be extended to encourage parties to adjudicate first.

The adjudicators would be experts who have had extensive experience in the construction industry and who have experience or training in dispute resolution.

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