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Ontario's New *Construction Act*

Construction Law Seminar and Webcast

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Ontario's New *Construction Act*

Introduction:
Why Change?
And Transition

Geza Banfai



Why Change?

1. The CLA was enacted in 1983. It's 2019.
2. The market failed.
3. The broken dispute resolution system is still broken.

Transitioning to the New Regime

A two-stage process:

- First: CLA reforms
 - July 1, 2018
- Later: Prompt payment and adjudication
 - October 1, 2019

Transitioning to the New Regime – CLA Reforms

- New lien provisions apply to:
 - “contracts”
 - “procurement processes”
 - leasesentered into from July 1, 2018 onwards
- “Contract”:
 - the general contract between Owner and Contractor
 - date of subcontract irrelevant
- “Procurement process”:
 - Request for Qualifications
 - Request for Quotation
 - Request for Proposals
 - Call for Tenders

Transitioning to the New Regime – Prompt Payment and Adjudication

- Pertains to contracts entered into on or after October 1, 2019

In summary:

- For any contract or procurement process predating July 1, 2018: the old CLA will continue to apply
- For any contract entered into from July 1, 2018 until October 1, 2019: the new lien provisions will apply, but no prompt payment obligations and no statutory right to adjudication
- For any contract from October 1, 2019 onwards: new lien provisions, prompt payment and adjudication will apply

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Prompt Payment & Chart

Laura Brazil



Prompt Payment - Overview

- Statutory deadlines for payment
- Trigger for payment = “delivery of a Proper Invoice” in a prescribed form
- Proper Invoices submitted monthly unless the contract provides otherwise
- Contract terms inconsistent with Act not effective

Prompt Payment - Overview

- Calendar days, not business days
- Effective October 1, 2019
- If party only disputes a portion of amount included in “Proper Invoice”, party must pay undisputed amount

Prompt Payment – Payment Deadlines

- Owner to Contractor (s.6.3)
 - Must pay 28 days after Proper Invoice delivered
 - *Unless* Owner delivers notice of non-payment within 14 days
- Contractor to Subcontractor (s.6.4)
 - If Owner pays: Must pay 7 days after Owner pays; or
 - If Owner does not pay:
 - Must pay 35 days after Proper Invoice delivered
 - *Unless* Contractor delivers a notice of non-payment and undertakes adjudication

Prompt Payment –
No Payment Dispute

Prompt Payment –
Owner vs.
Contractor (Owner
Gives Notice)

Prompt Payment –
Owner vs. Contractor
(Owner Fails to Pay or
Give Notice)

Prompt Payment –
Contractor vs. Sub
(Contractor Gives
Notice)

Day 0

Contractor submits "Proper Invoice" to Owner

Day 0

Contractor submits "Proper Invoice" to Owner

Day 0

Contractor submits "Proper Invoice" to Owner

Day 0

Contractor submits "Proper Invoice" to Owner

Day 14

Owner gives Contractor a "notice of non-payment" ("Notice") disputing invoice

Day 21

Contractor gives Sub Notice and undertakes to start adjudication within 21 days or pays Sub on day 35

Day 28

Owner pays Contractor amount payable (in full)

Day 28

Sub gives Sub-sub Notice or pays Sub-sub on day 42

Day 28

Owner neither pays Contractor nor gives Notice

Day 28

Owner pays Contractor amount payable (in full)

Day 35

Contractor pays Sub (7 days after Contractor pays)

Day 35

Contractor pays Sub or gives Notice to Sub and starts adjudication within the next 21 days

Day 35

Contractor gives Sub Notice within 7 days of payment from Owner

Day 42

Sub pays Sub-sub (7 days after Sub pays)

Day 42

Sub pays Sub-sub or gives Sub-sub Notice within 7 days and starts adjudication within the next 21 days



Prompt Payment – Remedies

- Interest on late payment
- Dispute can be referred to adjudication
- Adjudication is binding (on interim basis)

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Adjudication & Chart

Jason J. Annibale



Adjudication – History and Rationale

- Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination on an interim basis
- Aims of adjudication:
 - Remove dispute gridlock
 - Eliminate late payment and non-performance
 - Free up cash flow and resources

Adjudication – History and Rationale

- Adjudicators (s.13.1)
 - Adjudicator: person who is qualified by the Authorized Nominating Authority designated under the Act
- Adjudicable Disputes (s.13.5)
 - Any party to a contract or subcontract may refer dispute
 - Only available for disputes relating to matters prescribed by statute – namely, non-payment
 - Adjudication must be commenced before Completion of Contract (unless agreed otherwise)

Adjudication - Timelines

Timeline	Step in Adjudication Process
Commencement of Process	Claimant delivers Notice of Adjudication, which includes proposed adjudicator (s.13.7)
Parties may agree on adjudicator or may have Authority appoint one. If adjudicator does not accept appointment within 4 days following Notice of Adjudication having been given, Claimant is to request that the Authority appoint an adjudicator, which the Authority must do within 7 days of receipt of request for appointment.	Adjudicator appointed (ss.13.7 and 13.9)
Within 5 days of appointment of adjudicator	Adjudicator receives Claimant's documents (s. 13.11)
-	Respondent may respond in writing, subject to directions of any appointed adjudicator (s.13.11.1 and Reg. 306/18, s.17)
Within 30 days of receiving Claimant's documents (subject to limited exceptions)	Adjudicator renders decision (s. 13.13)
Within 10 days of receipt adjudicator's decision	Any payments ordered, must be made (s.13.19 (2))

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Owners

Glenn Grenier



Owners: “Just tell me what I need to do!”

Decide within 14 days after Proper Invoice

- Am I going to pay in full?
(then pay in 28 days)
- Or
- Am I going to dispute?
(then dispute in 14 days and prepare for adjudication that follows)

“Just tell me what I need to do!”

- Clock is started by “Proper Invoice” for Prompt Payment and Adjudication regimes
 - everything flows from a Proper Invoice
 - the timing of payments
 - Notices of Non-Payment
 - possible adjudication
- A Proper Invoice CAN be revised, but the Date of the invoice must remain unchanged

“Just tell me what I need to do!”

Proper Invoice (s.6.1)

- Minimum information required for a Proper Invoice:
 - Contractor’s name and address
 - Date and period of supply of services
 - Information identifying the authority (Contract, PO, SI)
 - Description of the work including quantities if appropriate
 - Amount payable and the payment terms
 - Name/contact info of person to whom payment is to be sent
 - Any other information prescribed
- *** A Proper Invoice may also include additional items/requirements specified in the Contract

“Just tell me what I need to do!”

Proper Invoice

- “shall” be given to Owner monthly unless contract provides otherwise
- Contract provision that makes giving of Proper Invoice conditional upon payment certifier or Owner approval not enforceable (exception for P3s)
- Contract can provide for certification or Owner approval after Proper Invoice given (just do it quickly)
- Contract for testing/commissioning of improvement is allowed and can be precondition for Proper Invoice

“Just tell me what I need to do!”

Decide within 14 days after Proper Invoice

- Am I going to pay in full?
(then pay in 28 days)
- Or
- Am I going to dispute?
(then dispute in 14 days and prepare for adjudication that follows)

“Just tell me what I need to do!”

Going to Dispute

- Are you going to dispute in part?
(Notice on day 14 and pay undisputed part on day 28)

OR

- Are you going to dispute in full?
(Notice on day 14 and pay nothing on day 28)

Either way, you must give Notice!

“Just tell me what I need to do!”

Notice of Non-Payment

- Must be in prescribed form and delivered in prescribed manner (s.6.4(2))
- New regulations specify that it “shall” be in the Form 1.1
- Delivery must be served under rules of court or sent by certified or registered mail to recipient’s last known address
- Must be given by day 14

FORM 1.1
NOTICE OF NON-PAYMENT UNDER SUBSECTION 6.4(2) OF THE ACT

Construction Act

Name of owner: _____

Address: _____

(Complete for each contractor who supplied services or materials to an improvement in relation to the proper invoice)

Name of contractor: _____

Address: _____

Address for service, if known _____

Name of person to whom person having a lien supplied services or materials: _____

(Add the name, address and address for service of other contractors if applicable)

The owner disputes the proper invoice dated _____, 20____, submitted to the owner by the contractor in respect of the improvement. The owner will not pay the following amount payable under the invoice:

(Use A or B, whichever is applicable)

A. The full amount of the proper invoice, being \$ _____.

B. A portion of the amount of the proper invoice, being \$ _____.

The reasons for non-payment are as follows:

Date: _____

(owner)

“Just tell me what I need to do!”

- Notice of Non-Payment

The reasons for non-payment are as follows:

- Most important part of Notice
- Assume Notice of Non-Payment will be subject to adjudication
 - Why?

“Just tell me what I need to do!”

- Contractor faced with Notice of Non-Payment on day 14 can pay Subcontractor on day 35



OR

“Just tell me what I need to do!”

- Contractor can give “Notice of Non-payment” within 7 days to sub (which includes the following in the mandatory form)

The contractor hereby undertakes to refer the matter to adjudication under Part II.1 of the *Construction Act*, no later than 21 days after submitting this notice of non-payment to the subcontractor.

And

- Start an adjudication within the next 21 days (by day 42)

“Just tell me what I need to do!”

- Notice of Adjudication can be delivered between day 15 – 42
 - Reply to the Notice of Adjudication
- Be Prepared to select Adjudicator with 4 days or have one selected for you within 15 days of Notice
- Claimant must submit documents within 5 days of appointment of Adjudicator and decision rendered within further 30 days
 - Must be ready with own documents and case for non-payment

“Just tell me what I need to do!”

- Be Prepared
- Know your deadlines (multiples of 7)
- Know your documents
- Be prepared to present your case for non-payment within days or weeks (not years)

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Lenders

Geza Banfai



Top 3 Questions of Lenders

1. Has the priority scheme been changed?
2. How will prompt payment affect my operations?
3. How will this legislation affect my risk profile generally?

Top 3 Questions of Lenders

1. Has the priority scheme been changed?

No!

Top 3 Questions of Lenders

2. How will prompt payment affect my operations?

- Holdback changes:
 - Mandatory obligation to pay holdback
 - Provision for phased or annual holdback release (contracts over \$10M)
 - Holdback can be held as cash, L/C, bond
- Likely, added pressure for timely advances on construction loans.

Top 3 Questions of Lenders

3. How will this legislation affect my risk profile generally?

- Likely, it will reduce lender risk.

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General Contractor

Annik Forristal



Top 3 Questions of General Contractors

1. When do I have to pay my Subcontractors?
2. What happens if the Owner has not paid?
3. What should I be doing now to get ready?

General Contractors: “When do I have to Pay my Subcontractor?”

- **Subcontractors must be paid 7 days after payment by Owner or 35 days after submission of the Proper Invoice to Owner (unless a Notice of Non-Payment is issued by the Contractor) (s.6.5(1),(4))**
 - Proper Invoices submitted to Owner monthly unless contract says otherwise
 - Owner must pay 28 days following receipt of Proper Invoice from Contractor

General Contractors: “What happens if the Owner has not paid?”

- **Full payment still due to Subcontractors 35 days after invoicing Owner unless Notice of Non-Payment issued by the Contractor (s.6.5(4))**
 - Notice of Non-Payment must be issued by Contractor 7 days after receipt of Notice of Non-Payment from the Owner or before 35 days after submission of the Proper Invoice to Owner (s.6.5(7))
 - If No Notice of Non-Payment Issued by Contractor:
 - Full payment due to Subcontractor 35 days after submission of Proper Invoice to Owner (s.6.5(4))
 - Where Notice of Non-Payment Issued by Contractor:
 - No Payment By Owner: Payment shall be in accordance with outcome of adjudication
 - Partial Payment By Owner: Subcontractors not responsible for Owner non-payment paid on a rateable basis (s.6.5(3))

General Contractors: “What should I be doing now to get ready?”

- Prepare/amend your contracts for use after October 1, 2019
 - Specify requirements for “Proper Invoice” and timing for invoice issuance
 - Consider providing for phased release of holdback for design phase
 - Consider specifying adjudication procedures
 - Establish system for tracking prompt payment deadlines and notices
- Adjudication Preparation
 - Be in a position to quickly compile documents and information for adjudication – need to be able to back-up your claim for payment or defend your non-payment

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Consultant
&
Designer

Annik Forristal



Top 3 Questions of Consultants and Designers

1. When do I get my money?
2. How does adjudication affect me?
3. Does holdback apply to me?

Consultant & Designer: “When do I get my money?”

- No Notice of Non-Payment Issued:
 - Consultant Contract with Owner
 - 28 days after submission of Proper Invoice to Owner
 - Designer Contract with Contractor
 - 7 days after payment of Contractor by Owner (s.6.5(1)) or 35 days after Contractor submission of Proper Invoice to Owner (s.6.5(4))
- Notice of Non-Payment Issued:
 - Payment in accordance with outcome of adjudication

Consultant & Designer: “How does adjudication affect me?”

- Consultants and Designers will need to participate in adjudication where a Notice of Non-Payment has been issued
 - If do not participate in adjudication, risk no immediate payment and need to wait until end of Project to bring claim for payment (i.e., delay and added cost to obtain payment)
- Consultants may also be involved in adjudication between the Owner and Contractor

Consultant & Designer: “Does holdback apply to me?”

- Yes, when performing work for an “improvement” payments will be subject to the 10% statutory holdback
- For Designers, holdback can be released by Owner or Contractor on completion of design phase if contract provides for payment of holdback on phased basis only for the design phase

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Trades
&
Suppliers

Nicole Rozario



Trades & Suppliers – When do I get \$?

Contractor to Subcontractor

- 7 days from receipt of payment from Owner or, if Owner has not paid Contractor, 35 days from Contractor's delivery of a Proper Invoice UNLESS Contractor delivers notice of non-payment

Subcontractor to Sub-Subcontractor

- 7 days from receipt of payment from Contractor or, if Contractor has not paid Subcontractor, 42 days from Contractor's delivery of a Proper Invoice UNLESS the Subcontractor delivers notice of non-payment

Trades & Suppliers – What if I don't get paid?

- Trade/Supplier receives Notice of Non-Payment
- Trade/Supplier gives Notice of Adjudication to Contractor
- Appointment of Adjudicator
- Decision rendered in 30 days
- Party required by the adjudicator's determination to make a payment must do so within ten days
- Decision is enforceable in court
- Decision effectively reviewable in subsequent court or arbitration proceedings at end of project

Trades & Suppliers - What if I don't get paid?

Preservation

- Deadline to preserve a lien will increase from 45 days to 60 days from the applicable trigger date

Perfection

- Deadline to perfect a lien by commencing an action will increase from 45 days after the last date the lien could have been preserved to 90 days

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Landlords & Tenants

Laura Brazil



Landlords – How Does This Affect You?

Lien liability under Section 19

- Old Section 19
 - LL's interest lienable if sent written notice
 - Unless LL disclaims responsibility within 15 days
- New section 19
 - LL's interest lienable if party to agreement in which payment for improvement accounted for (*e.g.* lease)
 - Cannot disclaim responsibility
 - Lien amount capped at 10% of payment amount

Landlords – How Does This Affect You?

Lien liability under Section 19 Cont.

- Direct or indirect payment:
 - Leasehold improvement allowance
 - Rent abatement
 - Non-cash inducements

Landlords – How Does This Affect You?

Lien Liability as Owner

- S. 19(5) now clarifies that LL may be “Owner”
- Owner means:
 - Interest in improved premises
 - Requested improvement
 - Improvement is for LL’s credit, behalf, or with LL’s privity or consent

Landlords – How Does This Affect You?

Section 39 Notices

- Requests for Information
- Must answer within 21 days
- Prior Act: LL not subject to requests
- New Act: LL must answer if subject to s. 19 lien

Landlord – How to Protect Yourself

Lien Liability under Section 19

- What to do:
 - Retain 10 percent of tenant inducement amount and release like basic holdback
 - Calculate the 10 percent broadly

2) Avoiding Lien Liability as “Owner”

- Take a hands-off approach

Landlord – How to Protect Yourself

Section 39 responses

- What to do:
 - Internal process to ensure response in 21 days
- Documents organized to ensure you can provide:
 - Parties, payment amount, state of accounts
 - Note that state of accounts is now defined (s. 39(4.1))

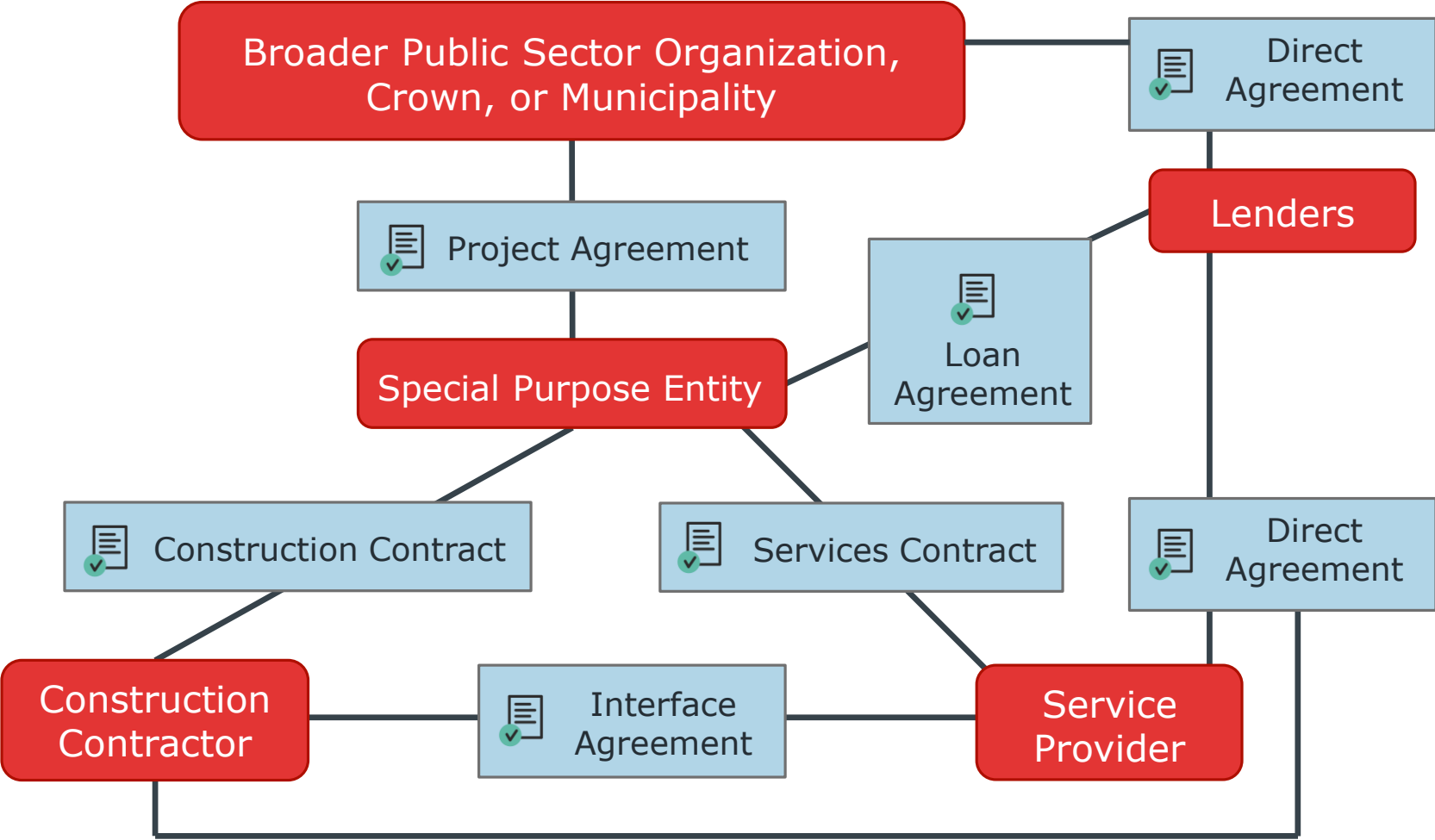
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P3s

Jason J. Annibale



Alternative Financing and Procurement Arrangements (P3s)



P3s

- Special purpose entity deemed an “Owner” with a “contract” with the construction Contractor for the following purposes:
 - Substantial performance
 - Holdbacks
 - Liens
 - Rights to information

P3s

- Mandatory bonding
- Modification to prompt payment regime
- Modification to adjudication regime

Disclaimer

This presentation is provided for general information purposes only and nothing herein constitutes legal advice. For legal advice, contact McMillan LLP using details at the end of this presentation.



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