

LEGAL UPDATE

L.U. #145

November 17, 2017

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Legislative Update—Bill 142

LUC #145 [2017]

Primary Topic:

IX Construction and Builders' Liens
Jurisdiction: Ontario

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Legislative Update – The Progress of Bill 142 in the Ontario Legislature

Bill 142, the Bill introduced to amend Ontario's *Construction Lien Act*, was carried into its second reading in the Ontario Legislature on September 12, 2017, and was referred to the Standing Committee on the Legislative Assembly on October 4, 2017. The Standing Committee reviewed the Bill on October 25, 2017 and November 1, 2017; further review of the Bill by the Standing Committee is expected. After the Bill is fully reviewed by the Standing Committee, it will be reported to the House with any amendments, and will undergo a third reading.

Bill 142 was created after the extensive report of Bruce Reynolds and Sharon Vogel, "Striking the Balance: Expert Review of Ontario's Construction Lien Act", was published on April 30, 2016. Previous attempts at legislative reform in Ontario, most recently the 2014 Prompt Payment Act, had failed for want of advance consultation with key stakeholders. By contrast, Reynolds and Vogel consulted broadly and incorporated comments and suggestions from numerous stakeholders throughout Ontario. Three major changes recommended in the report, and subsequently incorporated into Bill 142, have drawn widespread approval in principle throughout the Legislature. These changes are: a new prompt payment regime, an adjudication mechanism for dispute resolution, and modernization of the lien and holdback process.

The proposed adjudication section is perhaps the most novel of the proposed changes in that it aims to radically reform how construction disputes are resolved in Ontario by providing for earlier, cheaper and faster decisions. Few can defend the cost and time required to litigate most construction disputes and therefore adjudication as a concept has been met with general approval. However, specific concerns have arisen over the limitations adjudicative determinations will have on the development of case law, and the resolution of future disputes.

MPP Michael Harris summarized these concerns as follows:¹

While we all support prompt-payment measures and moving forward, of course, there will be further concerns and we look forward to hearing those throughout this debate. I know my caucus colleagues will be highlighting a number of areas for possible attention as we move this ahead. Of course, the lack of public notice on written decisions of adjudicators definitely is one of those issues that we heard about. As the bill currently stands, written decisions of adjudicators would be provided to the

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parties involved but would not be made public, thus leaving no body of case law to help or assist in future disputes. For lawyers here or for others, precedent-setting case law is important when making decisions down the road.

We ask why there is no ability to appeal adjudicated decisions....¹

As the Bill is currently drafted, the decision of an adjudicator will only be made available to the parties in the dispute, not the public. In addition to avoiding the potential loss of case precedent, proponents of publicity argue that an impetus to create a better quality decision is created when an adjudicator is aware their decision will be made widely available. Further, making a decision public can help the authorized nominating authority better oversee their adjudicators, provide better training for future adjudicators, and increase the overall quality of the dispute resolution mechanism.

Others have argued that providing decisions to the public can create negative repercussions. For instance, if parties become aware that certain adjudicators tend to lean a particular way on particular issues, parties can engage in “adjudicator shopping” and try to avoid or appoint these adjudicators depending on their desired result. Moreover, many parties choose to use adjudication to resolve their disputes because of the inherent confidentiality in the mechanism. Allowing adjudicator determinations to enter the public sphere can dissuade parties from using adjudication as a dispute resolution forum.

It is noteworthy that in the U.K. adjudicator’s decisions are not public. In Queensland, Australia they are publicly reported. As it currently stands, Ontario would be following the British, not the Australian model. However, given that adjudication decisions are meant to be binding only on an interim basis for the benefit of the immediate parties and not binding on a court hearing the dispute after the conclusion of the project, the value of a precedent database of adjudication decisions is arguably diminished. To the extent development of case law is of prime concern, having a public database of adjudicator’s interim decisions may not be sufficiently valuable so as to override the benefits of confidentiality.

Another concern is whether parties will have sufficient protection from bad adjudication decisions. Bill 142 does not seek to use adjudication to oust the role of the courts, but it is intended to reduce the frequency with which construction disputes do end up in court due to the excessive costs and delay which can be inherent in that process. But it is a misconception to think of adjudication as removing the process entirely from the purview of the

¹Harris, M. (2017, Sept. 13), “Bill 142, An Act to amend the Construction Lien Act”. Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-13&Parl=41&Sess=2&locale=en#para840

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courts. Fundamentally, a party who is unhappy with an adjudicator's decision can always sue after the project is over and start afresh. Further, Bill 142 provides for an application to set aside an adjudicator's decision.

Proponents of adjudication argue that including a further appeal mechanism within the scheme of Bill 142 is counterintuitive to the reasoning behind implementing an adjudication scheme, namely, providing parties with prompt, binding decisions during the project. Allowing parties to appeal adjudicator determinations will in effect create an unwarranted secondary litigation process, and undermine the objective of providing for prompt resolution of payment issues during the project by preventing the flow of funds pursuant to an adjudicator's decision while appeals are exhausted.

There has also been some criticism that the prompt payment proposals do not contain sufficient enforcement mechanisms to protect smaller contractors and workers. As stated by MPP Monique Taylor during the debates, for example:

The debate is really just beginning on this bill. We've heard already and we've seen for the last number of years that construction workers are asking for this to be put forward. This could have been done years ago, but the Liberals backtracked on one of their own bills that had already passed second reading.

We know that contractors and people who are doing the small jobs, the construction jobs, on the construction sites are the ones who pay the biggest cost for this. They're the ones who aren't getting paid on time. We've seen it very clearly in Hamilton with the building of Tim Hortons stadium, our Ticats stadium, where the ripple effect just continued all the way down the line and people weren't getting paid for the work that they were doing. It doesn't just hurt the company owner; it hurts the people who are going to work every day, punching the clock and coming out without the paycheck at the end of the day.

One of our biggest concerns is the lack of enforcement that we're seeing within the bill as it's currently written. We're hoping, as the bill moves forward and moves on to committee, that changes will be made to ensure there is an enforcement process that is put into this bill, because we can put as much legislation before this House as we choose, but without the enforcement piece, nothing is ever going to be done because there will be no action when it actually hits the street.²

The above Hansard excerpt is interesting in that it demonstrates the lack of political opposition to the concept of the Bill. Indeed, the governing Liberals are mostly criticized for having taken too long to get to this point!

² Taylor M. (2017, Sept. 13), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-13&Parl=41&Sess=2&locale=en#para840; Tabuns, P. (2017, Sept. 14) "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-14&Parl=41&Sess=2&locale=en#para1617; Forster C. (2017, Sept. 28), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2017-9-28&Parl=41&Sess=2&locale=en#para250; Bisson, G. (2017, Oct. 3), "Bill 142, An Act to amend the Construction Lien Act". Ontario. Legislative Assembly of Ontario. Retrieved from the Legislative Assembly of Ontario website: http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=en&Date=2017-10-03&detailPage=%2Fhouse-proceedings%2Ftranscripts%2Ffiles_html%2F03-OCT-2017_L101.htm&Parl=41&Sess=2#para1273

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However, the substance of the criticism is that there is inadequate enforcement provided in Bill 142 for payment breaches. This underscores that proponents of adjudication still have their work cut out for them in terms of explaining the benefits of the process as a means to advance the goals of prompt payment. Indeed, payments are improperly withheld or late the contractor or subcontractor has the ability to enforce prompt payment by initiating an adjudication proceeding. If the payer does not pay the determination within the specified period of time, which on any analysis will be quicker and less expensive than going to court, the unpaid contractor or subcontractor has the ability to legally suspend work until they are paid the amount owed to them, in addition to interest and reasonable costs incurred by the unpaid party as a result of the suspension of the work. Put another way, Bill 142 does contain “teeth” to ensure prompt payment, with adjudication being the main lever that an unpaid contractor or subcontractor has access to real time resolution of payment disputes while the project is still being constructed.

In sum there is momentum to the process but there is also still work to be done in terms of education on novel concepts such as adjudication and in crafting amendments to the Bill in its current form, not to mention the regulations. All of this will be occurring with a provincial election looming in Ontario on June 7, 2018. Nevertheless, there is reason for optimism. Broad stakeholder consultation in the expert review stage has likely smoothed over many of the objections and concerns one might otherwise have expected. Crucially, there is broad political consensus that the changes as proposed in principle are needed, particularly insofar as prompt payment is concerned. The next few months will be critical to the introduction of this significant legislative reform.

