

CANADIAN BAR ASSOCIATION  
CANADIAN CORPORATE COUNSEL  
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PROMPT PAYMENT  
LEGISLATION UPDATE

MURRAY R. SAWATZKY, Q.C.

WILLIAM LANE

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# AGENDA

- I. Background  
    Prompt payment Ontario
- II. Prompt payment Saskatchewan
- III. Adjudication in Saskatchewan

# BACKGROUND

- Prompt payment legislation is an attempt to deal with the complex supply pyramid, long project delivery time and the resulting slow cash flow on construction projects.
- The average payment is made in Canada (as of late 2016) 71.5 days after the payment is due. The trend appears to be getting worse.
- The concern is that the construction industry is carrying the financing costs of construction.

# BACKGROUND

- The Canadian Construction Association estimates that a 30 day delinquency erodes roughly 10% of profit and a 60 day delinquency reduces profit an additional 10%.
- A 71.5 day average delay in payment for construction work results in the work being 1/5 less profitable than it should be due to late payments.
- Other jurisdictions have prompt payment legislation, including the United States, Great Britain, Australia and New Zealand.

# BACKGROUND - Ontario

- In Canada, Ontario is leading the way with prompt payment legislation.
- Ontario's *Construction Lien Amendment Act, 2017* [Ont. Amendments] received Royal Assent on December 12, 2017. The majority of its changes took effect on October 1, 2019.
- The *Ont. Amendments* were passed in response to a report prepared by Bruce Reynolds and Sharon Vogel entitled, "Striking the Balance: Expert Review of Ontario's *Construction Lien Act*."
- The "Striking the Balance" report recommended a prompt payment regime, which the *Ont. Amendments* largely adopted and incorporated into the *Construction Act* in Part I.1.

# SASKATCHEWAN PROMPT PAYMENT

- Bill 152, an Act to amend *The Builders' Lien Act*, received Royal Assent in May, 2019
- New part I.1 establishes the scheme for prompt payment under construction contracts.

# SASKATCHEWAN PROMPT PAYMENT

- Section 5.1 defines “proper invoice” to mean a written bill or other request for payment for services or materials with respect to an improvement under a contract, if it contains the following information, and subject to subsection 5.3(2), meets any other requirements that the contract specifies:
  - a. The Contractor’s name and address;
  - b. The date of the invoice and the period during which the services or materials were supplied;
  - c. Information identifying the contract or other authority under which the services or materials were supplied;

# SASKATCHEWAN PROMPT PAYMENT

- d. A description, including quantity if appropriate, of the services or materials that were supplied;
- e. The amount payable for the services or materials that were supplied, and the payment terms;
- f. The name, title, telephone number and mailing address of the person to whom payment is to be sent;
- g. Any other prescribed information.

# SASKATCHEWAN PROMPT PAYMENT

- Section 5.3(1) requires that a proper invoice be given to an owner every month, unless the contract provides otherwise.
- This section prohibits a contract from requiring that a proper invoice be certified by a payment certifier or the owner before it is provided for payment. This provision does not apply where testing and commissioning of the improvement or service or materials is required.

# SASKATCHEWAN PROMPT PAYMENT

- Section 5.4 requires the owner to pay a “proper invoice” within 28 days of receiving the invoice from the contractor.
- If the owner disputes payment of all or any portion of a proper invoice, it must do so within 14 days by giving notice of non-payment. The notice of non-payment must be in the prescribed form and set out the amount that is not being paid and the reasons for non-payment

# SASKATCHEWAN PROMPT PAYMENT

- If less than the full amount of the proper invoice is in dispute by the owner, any amount not in dispute must be paid within 28 days of receiving the “proper invoice” from the contractor.
- A contractor who receives full payment is required to pay each subcontractor for the services and materials supplied that were included in the invoice within 7 days after receiving payment.

# SASKATCHEWAN PROMPT PAYMENT

- If an owner does not make full payment, the contractor shall, no later than 35 days after giving the proper invoice to the owner, pay to each subcontractor who supplied services or materials under a subcontract that were included in the proper invoice the amount payable to the subcontractor, to the extent that the subcontractor was not paid fully pursuant to subsection (2).

# SASKATCHEWAN PROMPT PAYMENT

- This subsection requires the contractor to pay each subcontractor whose work is not in dispute, and on a proportionate basis to those subcontractors who are implicated in the dispute. In any other case, subcontractors must be paid on a proportionate basis.

# SASKATCHEWAN PROMPT PAYMENT

- Section 5.6 requires a subcontractor who receives full payment to pay each subcontractor within 7 days after receiving payment from the contractor or 42 days after the proper invoice was given if no payment was made by the contractor.

# SASKATCHEWAN PROMPT PAYMENT

- Where payment to a subcontractor is not being made either because the contractor is disputing payment to the subcontractor, or because the subcontractor is disputing payment to another subcontractor, notice must be given to the subcontractor either within 7 days of receiving the notice of non-payment from the owner or before the 35 days required for payment to the subcontractor under section 5.6(4)

# SASKATCHEWAN PROMPT PAYMENT

- If requested, the contractor must provide a subcontractor with confirmation of the date on which a proper invoice was given to the owner.
- Section 7 provides that a reason for non-payment may include exercising a right of setoff pursuant to section 13 or 28. The case law on these provisions restricts setoff in certain circumstances (*Thunderbrick Ltd. v. Yorkton (City)* 1995, 123 DLR (4<sup>th</sup>) 1, 128 Sask R 241 (CA))
- Section 5.9 provides that any amount not paid when due is subject to interest at the pre-judgment interest rate or the amount of interest specified in the contract if it is higher.

# SASKATCHEWAN ADJUDICATION

- New part 2.1 creates an interim adjudication scheme for the resolution of disputes.
- An Authority may be created called the Adjudication Authority.
- Section 21.21(1) lists the matters that may be referred to adjudication:
  - Evaluation of services or materials provided;
  - Payment under the contract including with respect to a change order, whether approved or not, or a proposed change order;

# SASKATCHEWAN ADJUDICATION

- Disputes which are the subject of a notice of non-payment pursuant to Part I.1;
  - Amounts retained pursuant to section 13 or 28 of *The Builders' Lien Act*;
  - Disputes respecting the amount of reasonable costs incurred pursuant to clause 21.7(5)(c) or subsection 21.7(6);
  - Failure or refusal to certify substantial performance;
  - Any other matters that the parties to the adjudication agree to.
- An adjudication, unless consolidated by agreement, may only address a single matter.

# SASKATCHEWAN ADJUDICATION

- A matter may be referred to adjudication even if it is the subject of a Court action or arbitration, except where the action or arbitration has been determined.
- Section 21.22 requires that an adjudication comply with any procedures set out in the contract or subcontract, provided they are in compliance with this Part, and if no procedures are set out in the contract or subcontract, the adjudication must comply with the requirements of this Part and the regulations.

# SASKATCHEWAN ADJUDICATION

- Notice of adjudication must be in writing and may provide the name of a proposed adjudicator.
- There are certain requirements for and restrictions on adjudicators and it must be heard by an adjudicator listed in the registry.
- A notice of adjudication is given to the adjudicator and is to include a copy of the contract and any other document on which the party intends to rely within 5 days of the adjudicator agreeing to act

# SASKATCHEWAN ADJUDICATION

- The adjudicator can perform an onsite inspection with consent. The adjudicator shall be impartial and will determine the manner in which the adjudication will be conducted and may fix the remuneration of any person retained to provide assistance with direct payment to be provided by either or both parties.
- The adjudicator shall make a determination no later than 30 days after receiving the notice of adjudication and other materials from the initiating party.

# SASKATCHEWAN ADJUDICATION

- This 30 days may be extended on the adjudicator's request with consent of the parties for a period of no more than 14 days, or with the written agreement of the parties for a period specified in the agreement.
- A determination must be in writing and include reasons. If a determination is made after the 30 day period, or is not extended, it is of no force and effect.

# SASKATCHEWAN ADJUDICATION

- The parties may agree to terminate the adjudication at any time after the notice of adjudication is given and before the adjudicator makes the determination.
- The determination of the adjudicator is binding until an Order is made by the Court, a decision is made by an arbitrator, or there is a written agreement between the parties.
- This part does not restrict the Court or an arbitrator from considering the merits of a matter determined by an adjudicator.

# SASKATCHEWAN ADJUDICATION

- Each party bears their own costs of the adjudication, although the adjudicator may require one party to pay some or all of the other party's costs if the party acted in a manner that was frivolous, vexatious, an abuse of process or other than in good faith.
- Section 21.62 provides a limited right to request the Court of Queen's Bench to set aside the determination.
- The determination can be enforced by a Court if not paid within 10 days.

# SASKATCHEWAN ADJUDICATION

- Interest accrues on the amount not paid pursuant to the pre-judgment rate, or the contractual rate if higher.
- If the amount is not paid, the contractor or subcontractor may suspend further work and obtain payment and reasonable costs incurred as a result of the resumption of work once payment is made.

# SASKATCHEWAN ADJUDICATION

- The time period for the registration of a lien expiring is the later of the date on which the lien would expire pursuant to section 49 of *The Builders' Lien Act* and the conclusion of the 45 day period following the date of receipt by the adjudicator of documents pursuant to section 21.41.

# CONSIDERATIONS

- Provision of written notices of non-payment.
- Timeliness of all relevant evidence for the adjudicator including expert advice.
- The financial institution's concerns on construction advances if payment certifier values the "proper invoice" less than the adjudicator.
- The enforcement of payment by the interest penalty.

# CONSIDERATIONS

- The effect of a judgment against an owner based on an adjudicator's interim decision in the event the owner does not pay or cannot obtain the financing.
- Will contracts be drafted to include adjudication processes, milestone dates for payment and penalty interest?

# QUESTIONS?