

NEW REGULATIONS ADD DETAIL TO THE *CONSTRUCTION LIEN AMENDMENT ACT*

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On December 5, 2017, the Ontario legislature unanimously passed Bill 142, the *Construction Lien Amendment Act, 2017* [1] (the "**CLAA**"). The CLAA made extensive changes to the Construction Lien Act, [2] including the introduction of a prompt payment regime, adjudication, and changes to existing holdback, lien preservation and perfection periods, bonding, and trust provisions.

Although the CLAA made significant changes, it left some important details to be established in regulations. For example, what qualifications would a person need to act as an adjudicator? What mechanisms would be in place to ensure that an adjudicator's conduct is fair and appropriate? Which types of contracts would qualify for payment of holdback on an annual or phased basis?

On April 25, 2018, the Ontario government made four new regulations that answer these and many other questions about the implementation of the CLAA (the "Regulations"):

- O. Reg. 306/18: Adjudication supplies details about the new adjudication process (the "Adjudication Regulation");
- O. Reg. 304/18: General provides guidance on several different CLAA provisions, including prescribing a new surety bond minimum coverage limit and establishing which contracts will qualify for payment of holdback on an annual or phased basis (the "General Regulation");
- O. Reg. 302/18: Procedures for Actions Under Part VIII sets out new or reaffirms existing procedures for disputes under Part VIII; and
- O. Reg. 303/18: Forms replaces some old forms and adds new forms to implement the new provisions.

In the sections that follow, we highlight some of the key provisions in the Adjudication and General Regulations that will affect members of the construction industry.

Adjudicators Need Not be Lawyers or Arbitrators

The Regulations give additional detail on who may act as adjudicators under the CLAA. The CLAA does not expressly state who may qualify as adjudicators. It merely provides that an Authorized Nominating Authority

(the "Authority") shall qualify persons who meet the prescribed requirements.^[3]

The prescribed requirements have now been supplied by the Adjudication Regulation, which sets out six requirements for adjudicators. Among other things, adjudicators must complete a training program and have at least 10 years of "relevant working experience in the construction industry."^[4]

Persons with relevant experience include accountants, architects, engineers, quantity surveyors, project managers, arbitrators and lawyers.^[5] As such, a diverse array of construction industry experts could be qualified as adjudicators. It also remains open to the Authority to find that other types of construction industry experience would be sufficient to qualify as an adjudicator.

Adjudicator Training May be Waived

The Adjudication Regulation requires that adjudicators complete a training program developed and overseen by the Authority.^[6] This could raise concerns about whether the training program will be complete and have been provided to a sufficient number of adjudicators by the time the adjudication provisions to come into effect in the fall of 2019.

Fortunately, the Adjudication Regulation allows the Authority to exempt adjudicators from the training requirement if it finds that the adjudicator has sufficient experience.^[7] As such, the Authority could waive the training requirement if it needed to do so in order to ensure that there will be a sufficient number of adjudicators available by fall 2019.

Authority Has Broad Powers to Oversee Adjudicators

The Adjudication Regulation gives the Authority broad powers to control the quality of adjudicators and their conduct. The Authority must develop a Code of Conduct that applies to all adjudicators.^[8] The Code of Conduct will, at the very least, address conflicts of interest, proportionality and avoiding excess expense, civility and related principles, and confidentiality, among other things. The Authority has the discretion to suspend or disqualify an adjudicator if they no longer meet the requirements for qualification, fail to adhere to the Code of Conduct, or are incompetent or otherwise unsuitable to conduct adjudications.^[9]

Adjudicators Must Be Available Throughout the Province and Have Sufficient Breadth of Experience

Adjudicators must be available throughout Ontario.^[10] The Authority must also take reasonable steps to ensure that adjudicators with sufficient breadth are available to serve the construction industry.^[11]

Fee Schedule for Adjudicators Must be Publicly Available

The CLAA provides that if the parties to an adjudication and the adjudicator cannot agree to the fees payable

to the adjudicator, then a fee established by the Authority shall apply.^[12] The Adjudication Regulation requires that the Authority publically post on its website the schedule of fees payable to the adjudicator.^[13]

Payment of Annual or Phased Holdback If Contract is \$10 Million or More

In addition to the adjudication sections of the CLAA, the Regulations also supplement the technical sections dealing with holdback, bonding, and notice requirements, among other things. One such change involves CLAA sections 26.1(1) and 26.2(1), which permit a payer to pay holdback on an annual or phased basis if, among other things, the contract price exceeds a prescribed amount. The General Regulation prescribes that the contract price must be \$10 million or more.^[14]

Bonding Minimum Coverage Limits for Large Public Projects and Exemption for Small Projects

The Regulations also affect the technical sections in the CLAA concerning bonding requirements for public projects. The CLAA requires that contractors working on public projects must provide a labour and material payment bond and a performance bond that each have a minimum coverage limit of at least 50 percent of the contract price.^[15] However, the Crown, municipality or broader public sector organization may require a different coverage limit, so long as it meets or exceeds any prescribed limit.^[16]

The General Regulation prescribes different coverage limits for very large public works. The Crown, municipality or broader public sector organization may set a minimum coverage limit of \$50 million if the contract price is \$100 million or more, instead of requiring a minimum coverage limit equal to 50 percent of the contract price.^[17]

Further, the General Regulation exempts small projects from all of the s. 85.1 CLAA bonding requirements. The bonding requirements only apply to a public contract if the contract price is \$500,000 or more.^[18]

Publication and Deadlines for Non-Payment of Holdback

The Regulations provide more detail about the notice requirement for non-payment of holdback. CLAA section 27.1 provides that an owner may refuse to pay some or all of the holdback owing to a contractor in certain circumstances. The owner must, among other things, publish a notice of non-payment in a manner set out in the regulations and notify the contractor in accordance with the regulations. The General Regulation provides that the notice of non-payment must be published in a trade newspaper and that the contractor must be notified of the publication within three days of the publication.^[19]

Many Questions Remain to be Addressed

Although the Regulations provide much additional detail on how the CLAA will be implemented, many questions remain to be answered. For instance, the Authority has yet to develop the training program for

adjudicators, draft the Code of Conduct, or establish fee schedules. It also remains to be seen how the Authority will choose to exercise its discretion in waiving training requirements, determining whether a proposed adjudicator has sufficient "relevant working experience", and disqualifying adjudicators.

Such details are important as they will affect the quality of the adjudications. The rapid and enforceable decision of the adjudicator is what drives the prompt payment provisions.

We can expect further information on these and other questions over the coming months as the government and Authority prepare to implement the new CLAA.

Timing of New Regulations

It is important to note that the new Regulations come into force at different times. In fact, some sections of the Regulations come into effect at different times than other sections in the same Regulation. We will provide more guidance on the timing of these new regulations in an upcoming bulletin.

by Laura Brazil and Glenn Grenier

[1] S.O. 2017 C.24 ("CLAA").

[2] R.S.O. 1990, c. C.30.

[3] CLAA, s. Section 13.3(b)

[4] Adjudication Regulation, s. 3(2).

[5] Adjudication Regulation, s. 3(3).

[6] Adjudication Regulation, s. 4(a).

[7] Adjudication Regulation, s. 3(4).

[8] Adjudication Regulation, s. 7(1).

[9] Adjudication Regulation, s. 5(1).

[10] Adjudication Regulation, s. 11.

[11] Adjudication Regulation, s. 12.

[12] CLAA, s. 13.10(2)(b).

[13] Adjudication Regulation, s. 9(1).

[14] General Regulation, ss. 5 and 6.

[15] CLAA, s. 85.1(4) and (5).

[16] CLAA, s. 1.1(4)(2).

[17] General Regulation, s. 5.

[18] General Regulation, s. 12.

[19] General Regulation, s. 7(1) and 7(2).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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