

Nova Scotia's Prompt Payment and Adjudication Engagement Report

Spring 2023

Before finalizing proposed regulations for the amended Builder's Lien Act, the Province sought feedback from those who work with, and in, the construction industry regarding the proposed prompt payment and adjudication processes. It was important to receive feedback from the public and interested groups to ensure the development of this process is transparent to those impacted. An online survey with nine questions regarding the anticipated timelines and processes for prompt payment and adjudication for disputes was live from March 13 to April 10, 2023. The survey link was shared via direct emails with key interest groups, to members of the Construction Association of Nova Scotia, and to the public via tweets sent out by the province.

It was explained to respondents that Nova Scotia was intending to closely follow the Saskatchewan model. Rules for prompt payment proposed proper invoicing (monthly or as determined by contract) with strict timelines for payment of the invoice (28 days) or a notice of non-payment by the owner (14 days). Once paid (even partial payment), general contractors are then required to pay their subcontracts (7 days after receiving payment by the owner), and subcontractors must then pay their sub-subcontracts (within 7 days), and so on.

If payments are not received by the contractor or subcontractors, then a notice of non-payment is to be filed with the Adjudication Authority. The Adjudication Authority will be a non-profit entity with an advisory board of industry and government officials to oversee decision-making. A non-profit entity will help ensure fees and costs to conduct the adjudications are on a cost recovery basis. Adjudicators with construction experience will be trained and certified to handle these types of disputes. Once adjudicators are appointed, determinations will be supplied within 30 days, and can be registered to be considered binding by a court of law. It is important to note, the intent is for the changes to provide rules for proper invoicing and timelines for payment, and a quicker and less expensive process for settling payment disputes than the current lien process – especially for straightforward cases. It is not intended to replace the existing processes but work in tandem with them.

There were 65 responses to the survey containing at least one response to the nine questions posed. While responses were made without full knowledge of the detailed plans for implementing the prompt payment and adjudication system in Nova Scotia, thoughtful and valuable comments and concerns were provided. A sense of the industry's current level of understanding of the issues will also be helpful in identifying key educational points for the Adjudication Authority to address, prior to implementation. The following provides a summary of what we 'heard'. Boxes contain direct comments from respondents.

In Summary:

Prompt Payment and Dispute Processes

- There was a call to ensure key terms were properly defined – e.g. proper invoice, calendar days, etc.
- Also, there needs to be clear communication regarding calendar vs business days, documentation required for invoicing, timeframes for handling disagreements regarding an invoice, and when the invoicing payment countdown starts.

Sometimes an invoice is issued prior to the end of the month so it can be reviewed by month end. The time may properly start the end of the period the invoice relates to. (i.e. - In most cases, the end of the month but could be other periods if a different billing period.)

- There were calls for mandatory acknowledgement of invoices received so claims of losing an invoice cannot be made. It was also noted that many disputes for invoicing are with regards to the proportion of the project that has been completed.
- While there more than a few requests to choose different timeframes (e.g., 30-45-60), most respondents were comfortable with the timeframes proposed and some preferred that there be consistency with other jurisdictions.
- There were several respondents concerned for small businesses and the administrative burden the entire process (invoicing, payment tracking, partial invoice payments, lodging non-payment disputes, adjudication, etc.) was going to cause those who do not have full time administrative staff.

This is not long enough. People go on vacation for 2 weeks all the time, and if you have a small team someone may not always been watching the accounts payable. This is going to create a lot of paperwork for the owners that is not needed. The number of incorrect or over billed invoices on jobs is numerous and happens every month. Being expected to constantly do all this notice of non-payment will prove very time consuming and challenging.

- Clarity regarding the implication for suppliers will also be important, especially those who are not part of a contract:

- *If not on a contract, should be paid immediately, not on prompt payment timelines.*
- *If a material supplier supplies material to a project (no labour), the material supplier's credit terms should apply, i.e. Net 30 and a sub-contractor/general contractor should not rely on the issuance of a "proper invoice" under NS Prompt Payment to their customer as a delay in issuing payment. In cases like this material suppliers are then financing the sub or GC which may not be deemed as fair vs. supplying labour & material.*
- *Currently contractors, in order to get paid from owners, sign statutory declarations saying that all subcontractors have been paid, when in fact they haven't. This is fraud, however it is standard practice. We as wholesaler suppliers find this frustrating.*

- The intricacies with existing processes will need very clear communication to the industry. There were many questions and concerns about the timing of the prompt payment process and its impact on timeframes for revising invoices, change directives, certification, as well as lien, and hold back processes. Even the ability to charge with a breach of contract or go straight to court and bypass adjudication.

- *This glosses over issues related to assessing and disagreeing with the extent of the Contractor's actual progress on the site vs that which is claimed and the Certificate of Payment process embodied in standard construction contracts across Canada. Contractors over-claim on a fairly regular basis and yet the contracted Certification process is basically over-ridden with the prompt payment legislation. On a project of any significant complexity a 3rd party dispute resolution body simply doesn't have the necessary level of detail or project knowledge available to ascertain who is right. This means that the Owner is obligated to pay for work that may not actually be evident as complete in the first instance - which circumvents the dispute mechanism in the contract. Lenders are therefore also exposed.*
- *If owner and contractor agree to an adjusted invoice, will that bind the subcontractor to adjust their invoice? It appears that is the impact of the process*
- *What is the role of payment certifier in regards to dispute has this been considered?*
- *Isn't this the whole point of lien law, so if a subcontractor doesn't get paid within less than 60 days they can lien?*

- There were many calls for requiring enforcement and penalties for not following the timelines and processes. Requests for mandatory reporting of delinquents (owners and contractors) on CANS website so industry knows who to work with, or not. Also, knowing when contractors had been paid – and posting it on CANS or the Authority’s website. When rulings have been paid as well.
- Concerns were voiced about partial payment for systems that cannot track partial amounts and the amount of paperwork the processes would be creating. If invoices are sent back for correction, what is the turn around time? Can adjustments be made after the 14 days? Also, how holdbacks would work in the case of a partial payment?
- Also noted were questions regarding if a bank or insurance company was responsible for payment and they were delayed in making the payment? Another questioned how laypersons will know about the new rules, especially 5 years in? Will contractors be obligated to have the rules in their contracts, and a penalty if they do not?

- *Our system has no means to make partial payments. We would normally reject the invoice and agree to paying a re-submitted invoice for any amount not in dispute.*
- *Partially paying an invoice is reasonable when the dispute can be limited to a portion of the invoice. Many disputes are multifoliate, with many different aspects that may affect the decision to pay or not pay. As long as it is not a requirement to partially pay it should be fine; anything else might affect the balance of power in a dispute; an owner with one project is at a disadvantage when working with a major contractor with lawyers and cash flow.*

Adjudicators

- Concerns raised about the adjudicators were with regards to whether Nova Scotia would have enough qualified people that are not biased; and specifically, to have enough ready by the time these changes roll out.
- Suggestions for adjudicator qualifications included: having local knowledge, not just legal or construction experience. Another thought those who do invoicing and accounts payable would be valuable. As well it was suggested that recertification should happen every two years.
- Several were concerned about the parties being able to pick an adjudicator – believed introduced a bias or would slow down the process.

Adjudication Process

- Suggestions included having the adjudication process be available by remote means (Teams, Google Meetings, etc.).
- There was no consensus on the timelines for adjudication. Several noted the timeframe was too long, others too short i.e. that the dispute would not be settled before the next pay cycle would start. Another wanted assurance that processes would be consistent with other jurisdictions that also had prompt payment and adjudication processes in place.

- Concern was raised again about how onerous the processes are with getting documentation submitted – especially for complex situations, which meant the adjudicator could not properly assess the claims. This would lead to further arbitration and court processes – so not helpful dragging out the dispute processes further. Also, could create a backlog, slowing down the process.

Large construction projects where disputes can be very complex and for large sums of money, it could be problematic to have such matters dealt with in a summary procedure of adjudication which results in a decision in less than two months without the processes and protections normally found in arbitration and court proceedings.

- Conversely, another respondent believed,

Most time these timelines are delayed because of debates as to the actual amount of work performed. Adjudication could help resolve the amount in dispute. In particular issues are worsened when contractors are forced to complete change order work under dispute because owners refuse to deal with direct costs or delay. Adjudication would help this immensely.

- With regards to an extension for determinations, one respondent wanted to ensure only two weeks were allowed.
- As noted previously, several believed conflicts should be filed with CANS and a rating system set up for owners/contractors to highlight frequent payment disputes.

The maximum extension should be 14 days after the initial 30- no further extensions should be granted.

Determinations

- Several also noted the ability to stop work should be sooner – once a dispute has been lodged, while others were against the power of adjudicators to determine work stoppage.

Allowing the adjudicator to instruct that one of the parties can stop providing services shows a lack of understanding of how construction projects work. Can you imagine what happens if someone stops work on say, a hospital? How is the public interest served by this? There are already standard contractual mechanisms for suspension, termination and arbitration that work perfectly well. Anything beyond that is over-reach and effectively neuters the Dispute Resolution section of the standard Canadian Construction contracts.

Fees

- Concerns were expressed with how costly the process will be and whether the parties involved should have the ability to establish their own dispute resolution process. One believed placing a lien was less expensive. Another was concerned about our small province being able to sustain the process and recommended that the regulations contain the ability to join an existing Nominating Authority in the future should it be necessary. Another believed the Adjudicating Authority would need to set guidelines and be required to minimize costs. A review of the Adjudication Authority was also suggested.
- Regarding paying the fees, it was generally believed by those responding that the fees should be the burden of the losing party.

Transition

- Concerns regarding transition to the new rules centered around giving the industry lots of notice (6 to 12 months) to train and modify processes and the Authority and adjudicators being ready when the change comes into play.

If the government insists on pursuing this idea, then it had better

(a) make sure the legislation and the 3rd party Authority are fully established well in advance of the effective date and

(b) make sure that it doesn't come into effect before a sufficient roster of adjudicators has been trained and approved.

Otherwise, it will a fiasco because disputes will be filed and the mandatory timeline for resolution will not be met ...then what? Ontario tried to make everything happen at once and couldn't answer many of the questions the prospective adjudicators were asking during the training sessions.

- Regarding the timing of the transition, one comment expressed the importance for contracts that start before the new rules come into play, that all contracts made under it should also follow the old rules. Another wanted to ensure it did not start before the 2024 season.
- Several wanted all new projects to follow the rules. Several stressed the importance of getting it in place as soon as possible.

- *Projects that start in the old Act, should complete in the old Act and not convert, as it is impossible for the owner and contractor to negotiate and quantify the cost to switch Acts.*
- *Could this possibly take effect in the fall or winter? Before the construction bidding season starts in March.*
- *Makes sense to grandfather in existing projects while making the norm for new projects.*

Overall Support

- Overall, frustration with current processes and lack of respect for proper business practices were voiced by many and the planned changes were largely supported.

• *THIS NEEDS TO BE IMPLEMENTED ASAP. ITS GETTING OUT OF HAND ITS LITERALLY KILLING SMALL COMPANIES.*

• *I believe it is appropriate and timely that this legislation be put into place in order to protect all parties- the owner, the contractor and the various professions. For too long, owners have used the hold back monies as a "deficiency allowance" to strong-arm contractors into completing contract based or extra work, when the hold back is intended to protect the owner against unscrupulous contractors who may be unable or unwilling to complete contract work. This holdback is intended to enable an owner to engage an alternate contractor to complete the work, using unpaid contract funds and the holdback funds-not to punish or penalize contractors as has been the case in the past even with municipal and provincial government agencies.*

- *As a contractor for over 20 years in business I have stepped back from the roll of offering my company as a subcontractor to the construction industry because of the lack of support when it comes to getting paid on time. We feel like we are the bottom of the barrel and become the loan bank for general contractors' developers to profit. That and other factors I feel are causing the construction industry to stumble in Nova Scotia. I really hope there is positive change from this movement as there is a win for all party's involved. Thank you for your effort.*
- *This is long overdue. It is grossly unfair to have to struggle to meet payroll and attempt to keep up with paying suppliers. When I spoke with a GC and said in my (BC) municipality experience, invoices received by the 5th of the month were paid by the 25th of the same month, he laughed and said "welcome to the real world". I was absolutely taken aback. This is a most welcomed upcoming change.*