



Ontario
Home Builders'
Association

August 1, 2017

The Honourable Yasir Naqvi
Ontario Attorney General and Minister of Justice
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Honourable Yasir Naqvi:

Thank you for the opportunity to provide comments on Bill 142, *An Act to amend the Construction Lien Act* (the "Act"). As you will recall from our earlier meeting, Ontario Home Builders' Association (OHBA) represents over 4000 members including 1000 builder members in Ontario. Our members have built over 700,000 homes in the last decade in over 500 Ontario communities. The residential construction industry employed over 330,000 people representing \$19.8 billion in wages and contributed over \$56 billion to the province's economy. Our network of 29 home builder associations provides a local network in major centres across Ontario. The Residential Construction Council of Ontario (RESCON) represents more than 200 of Ontario's residential builders. Our members build world-class high-rise, mid-rise and low-rise homes, including rental apartments and social housing buildings. Together, our organizations speak for union and non-union new home building and the residential renovation industry.

Our most significant concerns relate to the prompt payment and adjudication provisions which have been introduced in Bill 142. The residential construction sector is unique in the Ontario construction industry. The nature and size of residential construction projects are normally very different than commercial and industrial projects, and residential projects therefore lend themselves to different practices than those found on larger projects. As a result, the proposed prompt payment and adjudication regimes, which might apply well to commercial and industrial projects, are poorly suited to the residential construction sector. In fact, these proposed provisions would impose significant burdens on contractors, the very people the legislation is intended to protect.

Prompt Payment

Our primary concern with the prompt payment provisions in Bill 142 is that it effectively creates a "pay-when-paid" regime which is inconsistent with the current practice in the residential construction sector and which exposes industry players to excessive costs and abuse. The application of these prompt payment provisions are still unclear, in places, and further explanation is required.

Bill 142 provides that a contractor who receives notice of non-payment from the owner has 7 days to give notice of non-payment to their subcontractor. Within those 7 days, the contractor must presumably determine whether to pay the subcontractor out of his/her own pocket, dispute the owner's refusal to pay, or support the owner's reasons for non-payment and possibly investigate the alleged defect and raise additional reasons for non-payment.



Ontario
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The 7 days provided by the proposed legislation is unreasonably short, particularly considering that, in the residential building sector, many contractors and subcontractors are small, family-run, owner-operated businesses with limited ability to jump immediately into dispute resolution proceedings. This is particularly problematic when you consider that the contractor or subcontractor may no longer have access to the site to inspect the impugned work, or may be labouring under very tight timelines to complete the project, making any distraction (much less an adjudication proceeding) potentially disastrous to the contractor or subcontractor's ability to complete their work on time. Small business owners will find it very difficult to "drop everything" on short notice to address a pending dispute which requires a response within a relatively short time, particularly if that contractor or subcontractor needs to seek their own legal advice in order to properly respond.

Additionally, it is unclear what consequences flow from the contractor's decision in the face of a notice of non-payment from the owner. If the contractor supports the subcontractor's work and pays the subcontractor despite not having been paid by the owner, the contractor must pursue the adjudication process. But if the adjudicator finds in favour of the owner, it would appear that the contractor cannot subsequently withhold funds from the subcontractor in respect of that default, having failed to give a notice of non-payment to the subcontractor within the time prescribed by the Act.

Furthermore, it is not uncommon for a defect to only be discovered later in a project, for instance when a subsequent contractor's work is affected by an earlier contractor's default. At that point, presumably, the earlier contractor's invoice will have been paid. It is unclear whether the owner (or contractor, in the case of a defaulting subcontractor) is precluded from raising those concerns in a subsequent proceeding if they failed to raise those concerns in a notice of non-payment at the time the contractor's invoice was being considered. Similarly, it is unclear whether a contractor or subcontractor, who relies on the owner or contractor's reasons for non-payment, is precluded from raising additional deficiencies after the deadline for their notice of non-payment. If an owner, who only discovers a defect at a later date, is not precluded from pursuing a claim for relief despite not having raised the defect in a notice of non-payment at that time, then it would seem inconsistent if a contractor could not add new reasons for non-payment after the deadline to give a subcontractor notice of non-payment. But in these circumstances, it would seem equally undesirable to allow additional reasons to be added to a notice of non-payment with no real deadline. The legislation must clarify if and when parties are finally precluded from adding new reasons to a notice of non-payment, and what prejudice flows to a contractor who relies on the owner's reasons for non-payment in respect of a subcontractor's default, or chooses not to give any notice of non-payment, being unaware of a defect (or the scope of a defect) which is only subsequently discovered.



Ontario
Home Builders'
Association

We also recommend that provision be made to address the difficulty faced by a contractor who is denied access to the project site and therefore unable to assess the validity of an alleged defect.

If Bill 142 were to be implemented in its present form, the most likely practical result would be that, in order to avoid funding the owner's non-payment out of their own pocket, contractors will have to send notice of non-payment to subcontractors any time the owner gives notice of non-payment to a contractor in relation to a subcontractor's work. This puts the contractor in the position of having to commence adjudication and exposes the contractor to direct and indirect expenses, and potential liability for costs if the subcontractor's work is ultimately upheld, even though contractor is not the one who initiated the dispute.

On a related note, although the Act will provide for the contractor to give information, upon request, about the date on which the "proper invoice" is provided, the tight timelines will make it difficult for subcontractors to keep track of this and act on it in a timely manner.

Keeping track of these dates, inspecting alleged defects, and preparing for adjudications will require at least part-time dedicated staff. This is not a feasible option for the majority of small businesses in the residential construction sector.

We also maintain our concern, which we previously raised with you, about the inconsistency between the "pay-when-paid" regime which results from the prompt payment provisions and the numerous collective agreements in the residential construction sector. We believe that these potential conflicts are significant enough to warrant a response from your office. We are again attaching our submission from November 2016 which raised these points.

Adjudication

The adjudication process proposed in Bill 142 risks creating delay and expense for those involved in a residential construction project, and is open to abuse.

An unscrupulous person could force the parties to incur significant costs and delays by triggering the adjudication process and subsequently pursuing an appeal or judicial review of the adjudicator's decision, to say nothing of parallel lien proceedings.

An adjudication process does not lend itself well to the residential construction sector which is dominated by small, owner-managed businesses which cannot afford to engage legal counsel, investigate allegations of deficiencies, and take time away from work, all while coping with the usual intense pressure to complete ongoing work on time and run a business. Contractors and subcontractors will often feel the need to engage legal counsel to level the playing field when facing a more sophisticated owner or general contractor.



Ontario
Home Builders'
Association

In conclusion, it is our view that the timelines associated with the prompt payment provisions must be amended for residential building projects and additional clarify must be brought to the legislation as it is currently drafted. We further recommend that you engage in additional consultations with the residential construction industry to address our concerns with the proposed adjudication procedure.

Please contact Stephen Hamilton (Shamilton@ohba.ca) for additional follow-up.

Yours Respectfully,

Joe Vaccaro
Chief Executive Officer, OHBA

Richard Lyall
President, RESCON