Closing Ledore on non-compliance with the PPCLA

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A reminder that failing to comply with the Prompt Payment regime may put contractual remedies at risk

The recent decision of *Ledore Investments v. Dixin Construction,* 2024 ONSC 598 (*Ledore*) provides an important reminder to construction industry participants: comply with the terms of Prompt Payment legislation or risk losing your contractual rights to dispute payment or assert set off.

In *Ledore,* a sub-contractor sought to recover amounts for unpaid invoices it had issued to the general contractor. In defence of the alleged nonpayment, the general contractor asserted a contractual right of set-off. At the adjudication, it was determined that the invoices submitted by the general contractor to the owner were not in the "proper invoice" format and did not comply with the provisions of the Ontario prompt payment legislation (although they were in fact paid by the owner). As a result, the adjudicator determined that the prompt payment provisions of the Ontario *Construction Act* were not triggered, and the general contractor was under no obligation to pay the outstanding invoices. The general contractor's lack of compliance with the "proper invoice" requirement of the prompt payment legislation was fatal to the sub-contractor's claim.

Despite deciding that the invoices were not owing to the subcontractor in that instance, the adjudicator in *Ledore* also emphasized that when the prompt payment legislation is triggered, it is necessary to comply with the notice requirements in order to exercise contractual rights of set-off or to dispute payment. In *Ledore*, the general contractor had failed to deliver any notices of non-payment to the sub-contractor for the disputed invoices. As a result, the adjudicator noted that if the general contractor had issued "proper invoices", such that the prompt payment obligations were triggered, there would be no opportunity for the general contractor to rely on set-off because it had not complied with its prompt payment obligations to dispute invoices by giving notice in the prescribed manner and timeline.

Ledore applied for judicial review of the adjudicator's decision and it was subsequently remitted back to the adjudicator for reconsideration, on a procedural fairness basis. However, despite the reconsideration and the basis for the decision, *Ledore* provides an important reminder for all construction industry participants – notice requirements under

a prompt payment regime are mandatory and can impact rights and defences going forward.

The prompt payment provisions in Ontario's *Construction Act* are similar to those in Alberta's *Prompt Payment and Construction Lien Act (*the PPCLA). As such, the logic in *Ledore* is consistent with the clear language of the prompt payment provisions in the PPCLA and is an important reminder that if a party fails to deliver the required notices of dispute or notices of non-payment, it *must* pay the amount outlined in the invoice in accordance with the applicable timelines set out in the legislation. In other words, serving a notice of dispute or non-payment is a statutory pre-requisite to accessing contractual remedies and defences, like set-off, in the context of the prompt payment regime.

As Alberta approaches the two-year anniversary of its prompt payment legislation, *Ledore* reflects the PPCLA's primary purpose - that owners, contractors, and subcontractors all engage in a dispute or pay model. Failing to comply with the notice deadlines in the Prompt Payment regime comes with serious risk, regardless of the defences contained in the contract. However, taking proactive steps such as involving counsel early, and amending contracts and project control processes to reflect and comply with PPCLA notice requirements, may make all the difference in preserving contractual rights and remedies in the event a dispute does arise.

For more information on *Ledore,* or about prompt payment and adjudication generally, please reach out to one of the key contacts listed below.

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