Adjudication under the PPCLA: Exercise caution and act early

June 02, 2023

One of the many significant changes of the new Alberta *Prompt Payment and Construction Lien Act* (the PPCLA) relates to the implementation of an adjudication process for certain types of disputes. The adjudication process was introduced by the PPCLA to facilitate quicker resolution of construction disputes during the project. However, adjudication is not always available for construction disputes. In fact, the PPCLA states that an adjudication may not be commenced if the notice of adjudication is given after the date the contract or the subcontract is “completed”, unless the parties agree otherwise. Therefore, a proper understanding of whether a construction contract has been "completed" will be necessary to meet the timeline to commence an adjudication process.

Alberta is one of the few Canadian provinces that does not define when a construction contract is considered "complete".

The British Columbia *Builders Lien Act* (BC BLA) defines a "completed" contract as a contract that is substantially (but not totally) "completed" or performed. The BC BLA further states in s. 1(3) that an improvement is "completed" if the improvement or a substantial part of it is ready for use or is being used for the purpose intended. The BC Supreme Court recently discussed these provisions in *Stoneworks Marble & Granite Ltd. v Edgeline Construction Ltd.*, 2022 BCSC 1096, where it held that a contract is "complete" when the works are "substantially complete" and ready for the intended use. The court found that the subcontractor, Stoneworks, had substantially "completed" the work at the property, which meant that it was ready to use, despite some minor works.

The Saskatchewan Builders’ Lien Act (SK BLA), the Ontario *Construction Act* (ON CA) and the New Brunswick *Construction Remedies Act* (NB CRA) include a quantitative definition of what constitutes a "complete" construction contract. Aside from some minor nuances, a contract is considered "complete" in all three provinces when outstanding work or repairs do not exceed 1 per cent of the total contract price. Ontario includes a second criterion, that the value of the remaining work be less than $5,000.

The Ontario Superior Court of Justice in *New Generation Woodworking Corp. v Arviv*, 2021 ONSC 1166 recently discussed the 2017 version of the ON CA and determined that since the formula was the lesser of 1 per cent of the contract price or $1,000 (as set

out in the previous version of the Act), and the value of the work left to be done was in the $1,500 to $2,000 range, the contract was not "completed". However, despite including quantitative measures for assessing contract completion, Ontario still employs a fact-based approach and a high evidentiary threshold for proving completion in a construction contract. For instance, in *J-R Sons Roofing v Kumra*, 2021 ONSC 370 the Ontario Superior Court of Justice maintained that a claim of a "complete" contract under the ON CA must be substantiated by evidence. Merely stating that the remaining work is minor is not sufficient. It must be shown that the remaining work satisfies the criteria of the ON CA.

Outside the legislative regime, Alberta jurisprudence provides some guidance with respect to circumstances where a construction contract may be considered "complete". The courts generally take a fact-based approach with an emphasis on the substance of the work that has been "completed". For example, in *Watts v Mcleay,* 1911 CarswellAlta 84 the Court held that, depending on the terms of the contract and the specific facts of the case, if all material and essential services are "complete", the contract is considered "complete" despite there being slight imperfections in the work that can be easily corrected “at a trifling as compared with the amount of the contract-price.” This is in line with decisions from the other Canadian jurisdictions that do define a "completed" construction contract.

Based on the above, it appears that the courts and other various legislative regimes focus on whether the work performed on a specific project can be used for the intended purpose, and whether the remaining deficiencies can be remedied without significant expense compared to the contract price. It is important to note that this is not a new concept in Alberta, and it is in fact included in the PPCLA’s definition of a “substantially performed” contract as follows:

> … a contract or a subcontract is substantially performed
>
> > (a) when the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and
> >
> > (b) when the work to be done under the contract or subcontract is capable of completion or correction at a cost of not more than
> >
> > > (i) 3 per cent of the first $500 000 of the contract or subcontract price,
> > >
> > > (ii) 2 per cent of the next $500 000 of the contract or subcontract price, and
> > >
> > > (iii) 1 per cent of the balance of the contract or subcontract price.

Therefore, the determination of whether a contract is “substantially performed” in Alberta is related to the same two criteria discussed in depth above: whether the work is ready to be used for the intended purpose and whether the deficiencies can be remedied without significant expense as compared to the overall contract value. Therefore, it is likely that Alberta courts will take a similar approach to assess whether a construction contract has been "completed", if and when such dispute arises, notwithstanding the fact that the PPCLA only provides a definition for a “substantially performed” contract.

Takeaways

Given there is no clear definition of "completed" in the PPCLA, it would be prudent for parties to a construction contract to commence an adjudication proceeding before substantial performance of the contract or subcontract is achieved, to prevent an argument that the contract has been "completed". Many other Canadian jurisdictions do provide a definition of a "complete" contract, the focus of which is on the use of the work in accordance with the intended purpose and the cost of remediation of minor deficiencies. This is consistent with Alberta's definition of a "substantially performed" contract. However, until there is more clarity from the courts on when a contract is "completed", the parties should likely err on the side of caution by commencing the adjudication prior to substantial performance in order to not miss the relevant PPCLA deadlines.

By

Stela Hima Bailey, Patricia L. Morrison

Expertise

Construction
