

Ontario's Construction Act: Update on Substantive Amendments

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In December 2017, Bill 142, the *Construction Lien Act Amendment Act, 2017* (Ontario) received Royal Assent, introducing substantive amendments to the current *Construction Lien Act* (Ontario). For an overview of the key amendments, refer to our previous article *Ontario's Construction Act: The Construction Industry's New Reality*.

Timeline

Though a selection of amendments were expected to come into force in early 2018, Ontario's Lieutenant Governor has now proclaimed July 1, 2018, as the date when the first tranche of amendments for the new *Construction Act* will come into force. The Lieutenant Governor has also proclaimed that, for now, a second tranche of amendments will come into force on October 1, 2019.

Along with several other changes, the notable amendments that come into force on **July 1, 2018** include:

- Name change from the *Construction Lien Act* to the *Construction Act*
- Timelines for the preservation and perfection of liens (ss. 31, 36)
- Thresholds for substantial performance (s. 2)
- Permissible forms of holdback (s. 22)
- Mid-project release of holdback (ss. 26.1, 26.2)
- Mandatory payment of holdback (s. 27)
- Liening condominium projects (s. 44(2.1))
- Liening leasehold premises (s. 19)
- Contractor's, subcontractor's duties regarding trust funds (s. 8.1)

The key amendments that will be delayed and not come into force until **October 1, 2019** include, among other amendments:

- Prompt payment (Part I.1)
- Adjudication (Part II.1)
- Amended manner of liening municipal lands (s. 16)

Regulations

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In addition, the regulations to the *Construction Lien Act* (R.R.O. 1990, Reg. 175) will be revoked as of July 1, 2018. Four new regulations have been drafted covering:

- General matters (O. Reg. 304/18)
- Forms under the *Construction Act* (O. Reg. 303/18)
- Procedure for adjudication under the *Construction Act* (O. Reg. 306/18)
- Procedures for actions under the *Construction Act* (O. Reg. 302/18)

The four proposed regulations were posted by the Ministry of the Attorney General for public comment on February 9, 2018, and comments were closed on March 8, 2018. The regulations were finalized at the end of April 2018. Of particular note are the following:

- Surety bonds are required for public projects over \$500,000, a change from the \$250,000 amount initially proposed (O. Reg. 304/18, s. 12)
- Annual and phased holdback release is allowed on projects of \$10 million or more, a change from the \$20 million threshold initially proposed (O. Reg. 304/18, ss. 5, 6)

The finalized regulations also provide a landing spot for some of the provisions that were repealed from the *Construction Lien Act*, which were noted in our prior post, including:

- Interlocutory steps shall continue to be prohibited without the consent of the court (O. Reg. 302/18, s. 13)
- Leave of the court will continue to be required for joining third party claims to lien proceedings (O. Reg. 302/18, s. 4(2))

Under 50(2) of the *Construction Lien Act*, the joinder of trust claims and lien claims was strictly prohibited. As of July 1, 2018, section 50(2) of the *Construction Lien Act* is being repealed and replaced with a new, unrelated provision. The finalized regulations make no reference to the joinder of trust claims and lien claims under the *Construction Act*. Time will tell how the new legislation will treat this particular issue.

Transition Provisions

All participants in construction projects need to take note of the transition provisions in section 87.3 of the *Construction Act*. Pursuant to that section, the provisions of the current *Construction Lien Act* continue to apply with respect to an improvement if:

- A contract for the improvement was entered into before July 1, 2018, regardless of when any subcontract under the contract was entered into;
- A procurement process, if any, for the improvement was commenced before July 1, 2018, by the owner of the premises; or

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- The premises is subject to a leasehold interest, and the lease was first entered into before July 1, 2018

Any contract entered into on or after July 1, 2018, but prior to October 1, 2019, will be subject to the amendments that will come into force on July 1, 2018. Any contract entered into on or after October 1, 2019, will be subject to the prompt payment and adjudication amendments (and any other October 1, 2019 amendments), together with all other amendments as of July 1, 2018.

The pending amendments and regulations can be viewed within the current *Construction Lien Act*, in greyed notations, [here](#).

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