

Ontario's Construction Act: The Construction Industry's New Reality

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On December 12, 2017, Bill 142, the *Construction Lien Amendment Act, 2017* (Ontario) received Royal Assent. The Bill, which implements substantive amendments to the current *Construction Lien Act* (Ontario) and the scheme for how construction projects will operate in Ontario, passed First Reading on May 31, 2017, Second Reading on October 4, 2017 and, following referral to the Standing Committee for review and comment, unanimously passed Third Reading on December 5, 2017. Although the Bill is now considered law, the most substantive amendments will not come into force until a date to be named by proclamation of the Lieutenant Governor (anticipated in early 2018, once the regulations and prescribed forms are drafted and approved).

On April 30, 2016, the Ministry of the Attorney General (MAG) released its report: "Striking the Balance: Expert Review of Ontario's Construction Lien Act" (the Report). Bill 142 adopted most of the amendments proposed by the Report. For an overview of the Report's recommendations, refer to our previous post on the Recommended Changes to Ontario's Construction Lien Act: Work in Progress.

For the time being, the statute is still known as the *Construction Lien Act*, but once the pending proclamations are made, the legislation will be renamed to the *Construction Act*. A selection of the key amendments being implemented by Bill 142 (but not yet in force) are set out below.

Prompt Payment

- Prompt payment is being introduced as Part I.1 of the *Construction Act*, requiring adherence to timelines for amounts payable by owners to contractors, contractors to subcontractors, and subcontractors to subcontractors (sections 6.4, 6.5, and 6.6).
- If these prompt payment timelines are ignored, interest will accrue at a specified rate, except where the payer provides notice of non-payment pursuant to the requirements of Part 1 and the related regulations (sections 6.9, 6.4(2), 6.5(6), 6.6(6)).

Adjudication

- Adjudication is being introduced as Part II.1 of the *Construction Act*, which allows parties to a contract or subcontract to refer a dispute (as identified by section 13.5(1)) to adjudication. An adjudication may only address a single matter, unless the parties and the adjudicator agree

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otherwise (section 13.5(4)).

- Within 30 days after receiving the documents required by section 13.3 of the *Construction Act*, the adjudicator shall make a determination on the matter. The decision of an adjudicator, who must be qualified by the Authorized Nominating Authority, will be binding on the parties (sections 13.9, 13.13).
- Adjudication procedures are currently unknown, and are stated to be as set out in the contract or subcontract, provided they comply with Part II.1 (section 13.6(1)), else they will be governed by the procedures to be set out in pending regulations (section 13.6(2)).

Holdback

- Holdback will no longer need to be retained in the form of monetary funds. Instead, the *Construction Act* will permit holdback to be retained in the form of a letter of credit, a demand-worded holdback repayment bond, or any other form of security that may be prescribed (section 22(4)).
- Payment of statutory holdback will become mandatory, rather than discretionary, with contractual options to provide for payment on an annual or a phased basis (sections 26, 26.1, 26.2, and 27).
- Non-payment of statutory holdback will be permitted, but only on notice to the contractor and with publication of a formal notice in a prescribed form, specifying the amount of the holdback that the owner refuses to pay. The contractor may, in turn, refuse to pay some or all of the holdback it owes to subcontractors, provided notice is given to subcontractors and the matter has been referred to the new adjudication process (section 27.1).

Preservation, Perfection and Expiry of Liens

- The time period for the preservation of a lien has been extended from 45 to 60 calendar days (section 31(2)).
- The time period for the perfection of a lien has been extended from 45 to 90 calendar days (section 36(2)).
- The termination of a (prime) contract will now become a statutory trigger for the expiry of lien rights of a contractor. The other existing lien expiration trigger dates will continue to be completion and abandonment of the contract and the publication of a certificate of substantial performance. Termination of a contract is not expressly included in the (still current) provisions of the *Construction Lien Act* (section 31(2)).

Leasehold Improvements

- For improvements to leasehold properties, if payment for all or part of the improvement is accounted for under the lease terms (or any agreement to which the landlord is a party in connection with the lease), then a lien will attach to the interests of both the tenant named in the lease *and* the landlord, although the landlord's liability is limited to the extent of 10 percent of the amount of such payment

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(section 19(1)). It is, accordingly, no longer necessary for a contractor to provide the landlord with written notice prior to the commencement of work on the leasehold property.

Substantial Performance and Completion

- The thresholds for deemed substantial performance and deemed completion of a contract are increased to when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than 3% of the first \$1,000,000 of the contract price, plus 2% of the next \$1,000,000, plus 1% of the balance of the contract price (section 2).
- Specified examples of permissible “minor errors or irregularities” that will not invalidate a certificate, declaration or claim for lien are now included, and a requirement to demonstrate prejudice from errors or irregularities is also being introduced (section 6).
- Certificates or declarations of substantial performance of a contract will now require a legal description of the premises both for projects where liens attach to the premises and those where liens do not attach to the premises. For liens not attaching to the premises, the name and address of the person or body to whom a copy of the claim for lien must be given will now also be required (section 32(2)).

Construction Trusts

- A contractor or subcontractor who is a trustee under section 8 must comply with requirements respecting the depositing and record keeping of trust funds (section 8.1(1)).

Capital Repairs Liable

- Liable repairs will need to be a “capital repair to the land” going forward, as opposed to only a “repair to the land.” “Capital repair” will be a newly defined term, covering “any repair intended to extend the normal economic life of the land or of any building, structure or works on the land, or to improve the value or productivity of the land, building, structure or works, but not including maintenance work performed in order to prevent the normal deterioration of the land, building, structure or works, or to maintain the land, building, structure of works in a normal, functional state” (section 1(1.1)).

Summary Procedure for Lien Actions

- Leave of the court will no longer be required to bring interlocutory motions within a lien action (section 67 is being repealed) or to commence third party claims (section 56 is being repealed). The procedure for lien actions is expected to be addressed in the regulations.
- Joinder of lien claims and trust claims will also now be allowed (section 50 is being repealed).

Other Technical Amendments

- The amount of security for costs required to vacate a lien has been increased from “the lesser of \$50,000 or 25 per cent” of the lien, to the “lesser of \$250,000 or 25 per cent” of the lien (section 44(1)(d)).
- A letter of credit containing reference to an international commercial convention is acceptable as security as long as the convention text is written into the terms of the credit, the letter is unconditional, and accepted by a bank listed in Schedule 1 to the *Bank Act* operating in Ontario (section 44(5.1)).
- The court may on a motion order the discharge of a lien on the basis that the claim for lien is frivolous, vexatious or an abuse of process (section 47(1)).
- Where a person preserves a claim for lien or gives written notice of a lien where the person knows or ought to know that the amount of the lien has been wilfully exaggerated or that the person knows that he or she does not have a lien, the court may on a motion order that the lien amount be reduced by the exaggerated portion (section 35).
- Where a contractor enters into an agreement with the Crown, a municipality, or a broader public sector organization, a labour and material payment bond and performance bond will be required from the contractor where a contract price exceeds the amount prescribed for the applicable owner pursuant to the regulations (section 85.1).

Although it has yet to be determined exactly how the revised legislation will impact the construction industry, these amendments and new requirements will, no doubt, have a significant impact on the way owners, contractors, and subcontractors conduct their business in relation to construction projects in Ontario. Specifically, the new requirements for prompt payment, adjudication, and the mandated release of statutory holdback are anticipated to have far reaching ramifications for all players involved in the construction pyramid.

While many of the amendments proposed by the Report were ultimately adopted by the legislature, a selection of proposed amendments not implemented by Bill 142 include the following:

- The common elements in condominium buildings will not be required to have a single PIN to which liens could attach.
- Condominium unit owners will not be entitled to post security proportionate to their unit share of a lien, to have the lien vacated from their premises.
- Construction lien actions will not be case managed in all regions of Ontario.
- Lien claims between \$25,000.00 and \$100,000.00 will not be dealt with by a simplified procedure (subject to any new procedures to be prescribed pending regulations, since section 50(2) refers to prescribed procedures).
- When a mortgagee makes a loan for the purposes of financing both land acquisition and the construction of an improvement, the mortgagee is not required to identify in the mortgage documents

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the amount of the advance intended for the acquisition of land and the amount intended for the improvement.

Once the regulations are drafted, commented upon and approved, it is expected that the new provisions will be proclaimed. The regulations are currently expected to be released for review and comment sometime in February 2018.

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

For further information regarding this matter, please contact Matthew Alter or any other member of the Construction Law Group at Cassels.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.