

Recommended Changes to Ontario's Construction Lien Act: Work in Progress

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On September 26, 2016, the Ministry of the Attorney General (MAG) released its report: "Striking the Balance: Expert Review of Ontario's Construction Lien Act" (the Report). The Report's review process, which included consultation with over 60 stakeholder groups, began in February 2015 arising out of the previously proposed prompt payment legislation (Bill 69), and involved a review of the effectiveness of the *Construction Lien Act* (CLA), specifically assessing: (1) whether the statute's policy objectives, drafted in 1983, required revitalization and modernization; (2) the effectiveness of the current payment structures under the CLA; and (3) the adequacy of the existing dispute resolution process under the CLA.

The Report strongly supports maintaining the lien/holdback regime of the CLA as a protectionist measure for construction industry participants. Significantly, the Report also recommends the establishment of a new statute to address matters beyond construction liens and trusts, with the suggested title the "*Construction Act: An Act respecting Security of Payment and Efficient Dispute Resolution in the Construction Industry.*" Of the 100 recommendations identified in the Report (conveniently collected and summarized in Chapter 13), highlights of the Report include:

Preservation, Perfection and Expiry of Liens

- The time period for the preservation of a lien under section 31 of the CLA would be extended from 45 to 60 calendar days.
- Termination of a contract would be added as a trigger for the expiry of lien rights and a mandatory form of Notice of Termination or Abandonment would be required to be published to trigger the commencement of the time limit for the preservation of liens under the CLA.
- The time period for the perfection of a lien would be extended from 45 to 90 days from the last day upon which the lien could have been preserved (i.e., 90 days after the 60th day).
- The common elements in condominium buildings would be required to have a single PIN to which liens could attach, and the interests of all unit owners would be subject to this lien.
- Condominium unit owners would be able to post security proportionate to their unit share of a lien, to have the lien vacated.
- For improvements to leasehold properties, where a landlord funds the improvement though a cash allowance or otherwise requires the improvement, liens would attach to the interests of both the tenant named in the lease and the landlord. However, a landlord's liability in those circumstances would be limited to an amount equal to any deficiency in the holdback (similar to the treatment of

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mortgagees under the CLA).

Holdback and Substantial Performance

- The release of holdback under the CLA would become mandatory, subject to any preserved liens and an owner's right of set-off under the CLA, but specifically excluding an owner's right of set-off for debts, claims and damages in relation to other contracts (section 17(3) of the CLA currently permits set-off for debts unrelated to the improvement).
- If an owner intends to claim set-off in relation to the contract that is the subject of a lien, it would be required to publish a notice of non-payment/ set-off.
- Partial release of holdback would be allowed on either a phased or annual basis if provided for in the construction contract.

What is Liable?

- The definition of "improvement" would be amended to include any capital repair to land and any IT services, materials, equipment and software.

Summary Procedure for Lien Actions

- Construction lien actions would be case managed in all regions of Ontario.
- Leave of the court would not be required to bring interlocutory motions within a lien action, to conduct oral examinations for discovery and examinations of documents, or to commence third party claims.
- Joinder of lien claims and trust claims would be allowed.
- Lien claims under \$25,000.00, would be referred to the Small Claims Court (although certain relief would necessarily remain beyond the jurisdiction of that court, such as declaratory relief) and lien claims between \$25,000.00 and \$100,000.00 would be dealt with by a simplified procedure with limited examinations for discovery and a summary trial procedure.

Construction Trusts

- A trustee under the CLA would be required to follow specific statutory requirements in relation to trust fund bookkeeping similar to that applied in the New York Lien Law.

Prompt Payment

- The Report recommends the creation of a prompt payment regime to be applied to both the public and private sectors that would include, *inter alia*:
 - The requirement that payments

be made, as between an owner and contractor, within 28 days of the owner's receipt of the contractor's invoice, and as between a contractor and a subcontractor, within a further 7 days from the contractor's receipt of payment from the owner, subject to any agreement the parties have made to the contrary;

- o Mandatory non-waivable interest for overdue payments at either the *Courts of Justice Act* or contract rates.

Adjudication

- Adjudication would be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts and subcontracts in both the public and private sectors.
- The parties would have two (2) business days after delivering a Notice of Adjudication to agree on an adjudicator, failing which either party could request that an adjudicator be appointed within five (5) business days.
- Within thirty (30) calendar days, the adjudicator would be required to set and execute his/her process for the adjudication, including addressing evidence, experts, submissions, inspection of the work, and directions, with reasons to be provided in a written decision.
- The decision of the adjudicator would be binding on an interim basis, enforced if necessary, through an Application to the Ontario Superior Court of Justice.

Other Technical Amendments

- The amount of security to be posted to vacate a lien under the CLA would be increased to include the total of the full amount claimed as owing in the claim for lien and the lesser of 25% or \$250,000.00 of the amount of the lien, as security for costs.
- When a mortgagee makes a loan for the purpose of financing both land acquisition and the construction of an improvement, the mortgagee would be required to identify in the mortgage documents the amount intended for the acquisition of land and the amount intended for the improvement.

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- All public sector projects would be required to be surety bonded (regardless of size, since no monetary threshold for contracts has been proposed).

If adopted, the recommendations outlined in the Report will have significant and far reaching ramifications for all participants in the construction industry. While some of the recommended changes aim to create a more efficient and less costly dispute resolution procedure for construction project disputes, through the proposed adjudication process, jurisdiction of the Small Claims Court for minor disputes, and application of the Simplified Rules for disputes valued at less than \$100,000, other recommended changes could have the effect of delaying and increasing the costs of larger lien claims as a result of the enhanced rights of discovery, the unfettered right to bring interlocutory motions, the joinder of trust claims with lien claims, the new requirements for the handling of trust funds, the increased amount required to post for security for costs when vacating liens, and the mandatory requirement to obtain surety bonds on public projects. In addition, these recommended changes to the CLA could create greater and/or new legal liability for landlords and new obligations on mortgagees providing purchase and construction loans, and the longer preservation deadline will also extend the period before which statutory holdback on a project is released.

The Government is currently undertaking meetings with some stakeholder groups, seeking feedback on the recommendations in the Report, but is not expected to pursue other formal consultation before determining the steps it will take with the Report's recommendations.

A full version of the Report can be viewed [here](#).

For further information regarding this matter, please contact [Matthew R. Alter](#) or any other member of the [Construction Law Group](#) at Cassels.

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