

Upcoming Changes to the *Construction Lien Act*

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The construction industry should be alive to the imminent changes to the laws that affect them. In December 2017, the *Construction Lien Amendment Act* ("Bill 142") received Royal Assent, confirming that the current construction lien regime would be significantly updated. Bill 142 provides for a variety of changes to the *Construction Lien Act* (the "CLA"), including amendments to lien rights and holdback payments, and the introduction of prompt payment and adjudication provisions. These changes respond to the need to reduce delays in construction projects and to expedite the adjudication of construction disputes. This paper will alert individuals to some of the significant legislative amendments that will be coming into effect and will suggest how members of the construction industry can prepare for these changes.

When will these changes come into effect?

Upon Royal Assent of Bill 142 some minor changes came into force; however, the majority of the amendments will come into effect in two phases. On July 1, 2018, some amendments that introduce substantive changes to the CLA, such as amendments to lien rights and holdback payments, will come into effect. On October 1, 2019, amendments that introduce new provisions on prompt payment and a new framework for dispute resolution in the construction industry will come into effect. These reforms will significantly expand the reach of the CLA and correspondingly, the CLA will be renamed the *Construction Act* (the "Act").

Who will be affected?

The Act will not apply retroactively to construction contracts. The CLA will continue to apply where a:

- a) contract for improvement was entered into before July 1, 2018, regardless of when any subcontract under the contract is entered into;
- b) procurement process was commenced before July 1, 2018; or
- c) premises is subject to a leasehold interest and the lease was first entered into before July 1, 2018.

The Act identifies examples of a procurement process as the making of a request for qualifications, a request for proposals or a call for tenders.

As mentioned, some amendments, including the prompt payment and adjudication provisions, will not come into effect until October 1, 2019. Such provisions will only apply to contracts entered into on the day that the amendments come into effect or afterwards.

Phase 1 Changes: Amendments that come into effect July 1, 2018

Updated definitions

i) *Improvement*: The Act modifies the definition of improvement to capture a "capital repair". Capital repairs will be defined in the Act as repairs that are intended to extend the normal economic life or improve the value or productivity of the land or any building or structure on the land. The definition excludes maintenance work.

ii) *Price*: The Act expands the current definition of price under the CLA. The definition of price will include any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor is not responsible.

Substantial performance

Substantial performance will be found where an improvement is ready for use or is being used for the purposes intended and where it is capable of completion at a cost of no more than 3 per cent of the first \$1,000,000 of the contract price, 2 per cent of the subsequent \$1,000,000 of the contract price, and 1 per cent of the balance. Prior to this amendment, the thresholds for substantial performance were \$500,000.

When contract deemed completed

A contract will be deemed completed when the price of completion, correction of a known defect or last supply is not more than the lesser of 1 per cent of the contract price and \$5,000.

Increased lien rights

The termination of a construction contract will be added to the list of events that trigger the clock for lien preservation. The time for preserving a lien will increase from 45 to 60 days and the 45-day deadline for perfecting liens will extend to 90 days from the last day on which the lien could have been preserved. This will result in a new total period of 150 days, rather than 90 days as previously legislated.

Lien rights against condo common elements

The Act will require a person who preserves a lien related to the common elements of a condominium to give notice of their lien to both the condominium corporation and each unit owner. Where the lien in question implicates a common elements condominium corporation, notice must be provided to the corporation and each owner of a parcel of land mentioned in subsection 139(1) of the *Condominium Act, 1998*.

Vacating liens by payment into court

The Act will increase the maximum amount that is required when vacating a claim for lien. The portion for security for costs will be increased from \$50,000 to \$250,000.

Landlord liability for liens

A new provision in the Act will provide that if a landlord funds a tenant improvement, contractors completing the improvement will have a lien right against the landlord's interest in the land. The lien will be able to cover up to 10 per cent of the amount of the landlord funded tenant improvement.

Exaggerated or false lien claims

The Act provides for an increased standard of liability for exaggerated or false lien claimants. As of July 1, 2018, a lien claimant may be held liable for damages if the claimant preserves a claim for lien or gives written notice of a lien and either (a) knows or ought to know that the amount of the lien has been wilfully exaggerated or (b) knows or ought to know that he or she does not have a lien.¹

Holdbacks

The Act will allow holdbacks to take a form other than cash. After proclamation, a holdback may be established by a letter of credit, bond or other prescribed form.

Release of holdbacks

Two changes will occur with regards to the release of holdbacks. First, a basic holdback or a holdback for finishing work will have to be released at the end of the applicable lien period. Second, if a contract exceeds \$10 million and it is agreed to by the parties, the amendments will allow a holdback to be paid out annually or as stages of the work are completed so long as there are no outstanding, registered liens on the payment date.

Trust accounting

On July 1, 2018, the Act will add new rules about trust accounting practices. Trust funds received for all new projects after July 1, 2018 must be deposited into a trust account that bears the name of all trustees. The changes will also impose duties on contractors to keep diligent records of their trust accounts. Trustees will have to keep a written record of all amounts paid into the trust account and amounts paid out, and of any other transfers. These changes will strengthen the claims of subcontractors who assert that certain funds held by contractors were held in trust for their benefit.

¹ Additionally, the Act empowers a court to discharge a lien that is frivolous, vexatious or an abuse of process.

Mandatory surety bonds

The Act will require a contractor to a public contract, if the contract price is \$500,000 or greater, to provide a labour and material payment bond and a performance bond. If the contract price is between \$500,000 and \$100 million, each bond must be equal to 50% of the contract price. If the contract price is over \$100 million, each bond must be equal to \$50 million in coverage.

Phase 2 Changes: Amendments that come into effect October 1, 2019

Prompt payment

The Act introduces the concept of a “proper invoice” and various provisions relating to payment. The Act provides for payment deadlines where a proper invoice has been submitted. For example, an owner will have to pay a contractor within 28 days of receipt of a proper invoice. Parties can create their own payment schedule; however, if the construction contract is silent on proper invoices, they will be presumed to be due on a monthly basis.

If an owner disputes a proper invoice, the owner will have to provide notice of non-payment to the payee within 14 days of receiving a proper invoice. In this notice, the owner will be required to state the amount not being paid and set out reasons for why the owner refuses to pay.

When a contractor submits a proper invoice and receives payment flowing from that invoice, the contractor will have 7 days to pay each subcontractor who supplied services or materials under a subcontract with the contractor that were included in the proper invoice, unless they provide notice of non-payment.

If the contractor has not received some or all of the amount owed to them by the owner, the contractor will be able to provide notice of non-payment to the subcontractor. In such an event, the contractor will have to undertake to refer the matter to adjudication within 21 days after providing notice to the subcontractor. Alternatively, if the contractor disputes the entitlement of the subcontractor to any payment, the contractor will have to provide a notice of non-payment that states the amount not being paid and the reasons for the refusal of payment.

Even if an owner makes no payment, a contractor has 35 days after it sends its proper invoice to pay its subcontractors, unless the contractor provides a notice of non-payment. If a party fails to pay an amount due after the non-payment is adjudicated, the party entitled to payment may suspend work or terminate its contract.

Construction dispute interim adjudication

On October 1, 2019, parties to a construction contract will have an alternative dispute resolution mechanism available to them. Parties may establish their preferred forum for dispute resolution in advance. As of October 1, 2019, a party may refer a matter for interim adjudication by the Authorized Nominating Authority (“Authority”) at any time prior to the completion of the contract or subcontract, even if the matter is already the subject of a court action or arbitration. With the consent of the other party, a matter can be referred for adjudication after completion of the contract. Parties will not be able to contract out of this interim adjudication mechanism.

The Act will empower the Authority to adjudicate disputes concerning:

- a) the value of services or materials under the contract;
- b) payment under the contract or change of services under the contract;
- c) non-payment disputes arising under the prompt payment regime;
- d) set-off amounts; and
- e) payment or non-payment of holdback amounts.

The jurisdiction of the Authority is not comprehensively defined and other disputes will be addressable under this mechanism.

Who will adjudicate the dispute?

Parties will be able to agree upon an adjudicator in advance and enter such agreement into their contract. If parties cannot agree on an adjudicator or if the adjudicator does not accept a request to adjudicate the matter within 4 days, the referring party must request the appointment of an adjudicator by the Authority. The Authority will then appoint an adjudicator within 7 days of receiving the request.

Adjudicators will provide their decisions within 30 days of receiving any requested documents related to the matter. Adjudication fees will be split by the parties, regardless of the outcome and each party will bear their own costs. Parties and their adjudicator will be able to consent to an adjudication fee. If an agreement cannot be reached, fees established by the Authority will apply. Established fees will be publicly available on the Authority's website.

The decisions that flow from this dispute mechanism will be enforceable by the courts. There is no appeal process available within the adjudication regime, so parties will have to appeal these decisions by seeking judicial review.

Municipal interest (October 1, 2019)

On October 1, 2019, liens will no longer attach to municipal lands.

Implications

Owners and contractors should familiarize themselves with the requirements of a proper invoice and seek agreement on payment schedules in their construction contracts to manage the expectations of all parties involved.