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Changes to the Construction Lien Act (Ontario)

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The *Construction Lien Amendment Act, 2017* has made sweeping changes to the *Construction Lien Act* which come into force in two rounds of amendments – July 1, 2018 and October 1, 2019. Both rounds of amendments have a big impact on everyone in the construction industry. The July 1, 2018 changes modernize the lien provisions. The October 1, 2019 amendments will make substantial changes – the introduction of a prompt payment scheme and mandatory adjudication for certain disputes.

Summary of July 1, 2018 Amendments

Name Change – the name of the Act will be changed to the *Construction Act*.

Who is Impacted – the amendments will only apply where:

- (a) The head contract (i.e. between the owner and the general contractor) is entered into on July 1, 2018 or after. It does not matter when subcontracts are entered into.
- (b) The procurement process for the improvement was commenced on July 1, 2018 or after.
- (c) The premises is subject to a leasehold interest and the lease entered into on July 1, 2018 or after.

This means that for at least a few months after July 1, 2018, most projects will still be governed by the old provisions of the *Construction Lien Act*. At some point in the future, all construction projects will be governed by the new provisions.

Definitions

- (a) **Improvement** - the definition has been changed to include any capital repair that extends the normal economic life of the land or any building. It does not include maintenance work to prevent normal deterioration. Maintenance work will not be lienable.



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- (b) **Price** – this has been defined to include any direct costs incurred by the contractor as a result of delay that is not caused by the contractor. This means that costs incurred as a result of delay can be included in a lien. Direct costs do not include indirect damages like lost profit, productivity or overhead.

Trust Provisions - trustees of trust funds are now statutorily required to deposit the funds into a bank account in the trustee's name and maintain written records respecting the trust funds.

Lien on Leasehold Interest – a contractor will no longer have to send a notice of the improvement to the landlord in order to lien the interest of the landlord in the premises. However, the landlord's interest in the premises will only be subject to the lien for 10% of any payment for the improvement under the terms of the lease or another agreement with the landlord.

Holdbacks

- (a) Holdbacks do not have to be held in cash but may be maintained in the form of a letter of credit or demand-worded holdback repayment bond.
- (b) While the provision used to say that payors “may” release the holdback once the lien period has expired, the new provision says that payors “shall”, making it mandatory upon the expiry of the lien period.
- (c) It will be permissible to release the holdback on annual basis or milestone basis, if certain conditions are met.

An owner can avoid releasing the holdback immediately once the lien period expires if, within 40 days of the publication of the certificate of substantial performance, the owner publishes a notice of non-payment in the prescribed form and notifies the contractor of the publication of this certificate.

There are provisions that also allow contractors and subcontractors to not pay the holdback, however, those provisions do not come into force until October 1, 2019. This means that for a short amount of time, contractors and subcontractors will be obligated to release holdback amounts, even if the owner has refused to do so.

Lien Period - the lien period has been extended to 60 days. A subcontractor's lien rights will also expire 60 days after the main contract is completed, abandoned or terminated.

Termination of Contracts – if a contract is terminated, a notice of termination must be published in the prescribed form.

Condominium Liens – in order to lien the common elements of a condominium, a contractor will be required to give notice of the preservation of the lien to the corporation and every owner of a unit in the condo.

Amount to vacate a lien – the *Construction Lien Act* provided that a lien could be vacated by posting into Court the lesser of \$50,000.00 or 25% of the amount of the lien. The \$50,000.00 figure has been increased to \$250,000.00.

Substantial Performance – the formula for determining substantial performance of a contract has been increased to 3% of the first \$1 million (from \$500,000.00), 2% of the next \$1 million (from \$500,000.00) and 1% of the remainder.

Public Work Contracts – all contractors working under a public contract (contracts with the crown, a municipality or broader public-sector organization) will be required to provide labour and material bonds and performance bonds.

Summary of October 1, 2019 Amendments

On October 1, 2019, the prompt payment regime and associated mandatory adjudication come into effect. It will apply to all contracts entered into after October 1, 2019.

Prompt Payment

The purpose of prompt payment is to ensure that people down the chain get paid in a timely fashion.

Proper Invoice – the first step in the regime is the submission of a “proper invoice” by the general contractor to the owner. There are specific requirements for what constitutes a “proper invoice”.

Payment Terms – by default payments must be made monthly, but GC and owner can agree on more onerous terms or milestones. Payment certification cannot be precondition to payment.

Payment periods: 28+7+7+7

- (a) GC must be paid within 28 days of the submission of the proper invoice.
- (b) Subcontractor must be paid within 7 days of receipt of the payment by the GC.
- (c) Sub-subcontractor must be paid within 7 days of receipt of the payment by the subcontractor.

The days are calendar days, not working days.

Notice of Non-Payment (Owner)– instead of paying within the deadlines set out above, an owner may give their payee (i.e. the person they are supposed to pay) a notice of non-payment which can dispute all or part of an amount claimed as owing.

- (a) an owner must deliver a notice of non-payment within 14 days of the submission of the proper invoice (any amounts that are not disputed must still be paid within 28 days).
- (b) in response to the notice of non-payment, the GC must:
 - (i) pay its subcontractor in full; or,
 - (ii) give its subcontractor a notice of non-payment within 7 days of receipt of the notice from the owner AND start an adjudication within 21 days.
- (c) in response to a notice of non-payment from the GC, the subcontractor must:
 - (i) pay the sub-subcontractor in full; or,
 - (ii) give the sub-subcontractor a notice of non-payment within 7 days of receipt of the notice from the GC.

Notice of Non-Payment (GC and lower)– even if the GC is paid in full, it can still dispute the amount claimed by the subcontractor by giving the subcontractor a notice of non-payment within 7 days of receipt of payment from the GC. In response to the notice of non-payment, the subcontractor must:

- (a) pay its sub-subcontractor in full; or,
- (b) give its sub-subcontractor a notice of non-payment within 7 days of receipt of the notice from the GC AND start an adjudication within 21 days.

The same idea applies down the chain.

Non-Payment - if the owner fails to pay the GC within 28 days and fails to give a notice of non-payment, the GC must either:

- (a) pay its subcontractors; or,
- (b) give its subcontractor a notice of non-payment AND start an adjudication within 21 days.

Adjudication

Adjudication is the mechanism to enforce the prompt payment regime. Decisions of the adjudicator are binding in the interim to allow money to flow (within 10 days of the decision), but the dispute can be arbitrated or litigated at the end of the project.

What does it apply to – adjudication will only apply to certain disputes involving payment:

- (a) valuation of services or materials;
- (b) payment under the contract;
- (c) change orders;

- (d) notice of non-payment;
- (e) set-off;
- (f) holdback payments;
- (g) labour and material bonds; and,
- (h) other issues that the parties agree are to be adjudicated.

The Process

- first step is service of Notice of Adjudication.
- within 4 days of service of Notice of Adjudication, the parties must appoint an adjudicator. If no adjudicator has been appointed, the Authorized Nominating Authority (“ANA”) will appoint one, on request, within 7 days. The adjudicator cannot be named in the contract.
- Adjudicator must consent to the appointment within 4 days.
- 5 days after the appointment of the adjudicator, the referring party must provide the adjudicator with certain documents.
- 30 days after receiving the documents, the adjudicator makes a decision (can be extended on consent).
- 10 days after decision, money flows.

Adjudication Fees

- The parties can agree on adjudicators fees or they will be set by the ANA.
- By default each party will bear its own costs.
- Adjudicators can award costs in some circumstances.

Power of the Adjudicator

- In addition to the following, adjudicator’s powers can be specified in contract:
 - o Issue directions in respect of the conduct of the adjudication;
 - o Take the initiative in ascertaining facts and law;
 - o Draw inferences;
 - o Conduct inspections;
 - o Obtain assistance from other professionals; and,
 - o Make determinations.
- Rules can be set by the parties as long as they are not inconsistent with the Construction Act
- The process agreed to in the main contract flows down to the contracts between the GC and subs etc.

Enforcement/Appeal of Adjudicator’s Determination

- Adjudicator’s determinations can be filed with the Court and enforced like a Court Order.
- The failure to comply with an adjudicator’s determination grants the right to suspend work. A party who suspends work as a result is entitled to is demobilization and remobilization costs.
- A motion for leave to bring an application for judicial review of adjudicator’s determination must be filed 30 days after the determination is communicated to the parties.

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