

Goodmans^{LLP} Update

Construction Act: Here We Go!

The *Construction Lien Amendment Act*, passed in December 2017, amends the *Construction Lien Act* (the “**Existing Act**”) and repeals and replaces the name of the Existing Act with the *Construction Act* (the “**New Act**”). Regulations to the New Act followed earlier this year.

The New Act has three primary purposes: to (i) modernize the Existing Act; (ii) provide for new prompt payment legislation throughout Ontario; and (iii) introduce adjudication provisions for disputes arising in the course of a construction contract. Full implementation of the New Act will occur on a progressive basis. While the prompt payment and adjudication provisions will not come into effect until October 2019, the modernization provisions come into effect on July 1, 2018.

Over the coming months, Goodmans Construction Law Group will provide updates highlighting the numerous changes introduced by the New Act. The next several updates will address the modernization provisions which will soon take effect, with subsequent updates addressing the prompt payment and adjudication provisions to follow.

Transitional Rules

Section 87.3 of the New Act provides transitional rules for contracts and leases. It states:

Transition, Construction Lien Amendment Act, 2017

87.3 (1) This Act, as it read immediately before the day subsection 2 (2) of the Construction Lien Amendment Act, 2017 came into force, continues to apply with respect to an improvement if,

- (a) a contract for the improvement was entered into before that day, regardless of when any subcontract under the contract was entered into;
- (b) a procurement process, if any, for the improvement was commenced before that day by the owner of the premises; or
- (c) the premises is subject to a leasehold interest, and the lease was first entered into before that day. 2017, c. 24, s. 61 (1).

Examples, procurement process

(2) For the purposes of clause (1) (b), examples of the commencement of a procurement process include the making of a request for qualifications, a request for proposals or a call for tenders. 2017, c. 24, s. 61 (1).

Note: On October 1, 2019, the day named by proclamation of the Lieutenant Governor, section 87.3 of the Act is amended by adding the following subsection: (See: 2017, c. 24, s. 61 (2))

Same

(3) Parts I.1 and II.1 apply in respect of contracts entered into on or after the day subsection 11 (1) of the Construction Lien Amendment Act, 2017 comes into force, and in respect of subcontracts made under those contracts. 2017, c. 24, s. 61 (2).

Therefore, the New Act will only apply to contracts and procurement processes entered into or engaged in after July 1, 2018. A “contract” is defined under Section 1(1) of the New Act as a contract between the owner and contractor and “includes a joint venture entered into for the purposes of an improvement or improvements” (this latter part of the definition being a new addition to the definition of “contractor”).

With respect to leasehold interests, Section 87.3(c) provides that the Existing Act applies to any lease entered into before July 1, 2018. This is significant given leases entered into before July 1, 2018 may extend over a number of years when factoring in renewal periods. Where this occurs, the provisions of the Existing Act will continue to apply.

Time to Preserve and Perfect the Claim for Lien

The time periods in which to register a Claim for Lien and commence an action will be extended. The existing 45-day lien period in which to preserve the Claim for Lien has been extended to 60 days, and the period in which an action must be commenced to perfect the Claim for Lien has been extended to 90 days from the last date upon which the lien could be preserved. The extensions are intended to enable the parties to negotiate and resolve differences before the need for registering or serving a Claim for Lien, or ultimately commencing an action, arises.

Definition of Substantial Performance

The New Act changes the calculation used to determine whether a contract is substantially performed. Under Section 2(1)(a) of the New Act, the calculation will now be made on 3% of the first \$1,000,000 of the contract price, 2% of the next \$1,000,000 of the contract price and 1% of the balance of the contract price. This adjustment (from \$500,000) was intended to make it easier to achieve the substantial performance and was a sensible solution to address the increases in the size and nature of construction contracts. The first portion of the definition of substantial performance has not changed, namely, where the improvement, or substantial part thereof, is ready for use or is being used for the purposes intended (Section 2(1)(a)).

Trust Provisions

Under Section 8 of the New Act, the trustee (being the contractor or subcontractor as those terms are defined therein), must comply with certain specific requirements for the trust funds.

Section 8.1(1)

- requires that the trustee deposit trust funds into a bank account in the trustee’s name;
- requires that the trustee make handwritten records respecting the trust funds, detailing the amounts received into and paid out of the funds, and any transfers made for the purposes of the trust; and
- if the person is a trustee under more than one trust under Section 8, permits the trustee to deposit the funds into a single account, provided the trustee maintains the records required under Section 8.1(2) in respect of each trust.

Section 8.1(2) provides a deemed traceability provision. This provision has been added to address issues regarding competing interests in the event of a bankruptcy or claims to the trust fund.

Holdback Provisions

The New Act allows for substitute forms for holdback to be maintained (Section 22(4)), and includes provisions allowing for the release of holdback on an annual basis (Sections 26.1(1) and 26.1(2)) as well as on a phased basis (Sections 26.2(1) and 26.2(2)).

Where an owner refuses to pay some or all of the holdback required, the owner is then required to publish, within 40 days after publication of the applicable Declaration or Certificate of Substantial Performance, a notice refusing to pay all or some of the holdback amount. This, in turn, may trigger the contractor’s right to refuse to pay holdback to its subcontractors.

When to Lien?

As the transition rules take effect, all parties involved in construction will be affected by the changes introduced by the New Act. To protect one's commercial interests, parties involved in the construction process should be reviewing and revising both their forms of contract and internal policies in response to the numerous changes. While the full impact of the changes will not be felt until the prompt payment and adjudication provisions become effective, when considering one's lien rights, it is suggested the most conservative approach be taken to both preserving and perfecting the Claim for Lien. If there is any doubt as to whether a contract falls under the pre-July 1, 2018 regime, it is prudent to register and perfect the Claim for Lien utilizing the provisions of the Existing Act. There is no risk to registering early and it could avoid a challenge based on late registration in the event the New Act applies to the work performed by a contractor, subcontractor or supplier.

For further information concerning these developments, please contact any member of our [Construction Law Group](#).

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