

## Construction Law

June 30, 2017

### Significant Proposed Changes to Ontario's *Construction Lien Act*

The Ontario government recently released legislation (Bill 142 – *An Act to amend the Construction Lien Act*) that, when passed, will mean major changes to the Construction Lien Act and the construction industry in Ontario. The draft legislation is the culmination of a review that the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure began over two years ago, in February 2015. Bill 142 received first reading on May 31, 2017. The last major revision to construction lien legislation was the introduction of the current *Construction Lien Act* in 1983.

#### Highlights of Proposed Changes

The proposed changes are numerous and include:

- renaming the *Construction Lien Act*, the “*Construction Act*”.
- changing the monetary thresholds at which a contract is considered “substantially performed” and “completed.”
- specifying examples of “minor irregularities” that will not automatically invalidate a certificate, declaration or claim for lien, including a minor error or irregularity in the name of an owner or of a person for whom services or materials were supplied, or a minor error or irregularity in the legal description of a premises.
- making landlords’ interests subject to a lien for work on the tenancy to the extent of 10% where the lease agreement provides for payment of all or part of the improvement, effectively making the landlord responsible to retain the holdback out of any tenant improvement allowance.
- making landlords subject to the obligation to provide information under section 39.
- introducing a new system of payment rules intended to give more certainty to parties regarding the timing of payments. As proposed, the owner and the general contractor can agree to a schedule for the general contractor to submit its invoices to the owner. (In the absence of an agreement, the general contractor would be required to submit invoices on a monthly basis.) Once the invoice is received by the owner, payment would have to be made within 28 days and once payment is received by the general contractor, the general contractor would be required to pay its subcontractors who supplied services or materials included in the invoice within 7 days (and so on and so forth until all parties supplying materials or services to the project have been paid). If the owner disputes the amount of the general contractor’s invoice, or the quality of the work, within 14 days of receiving the invoice, it can deliver a “notice of non-payment” (and those parties further down the chain can deliver a “notice of non-payment” within 7 days). Mandatory interest would be payable on late payments. This new payment system will only apply to payments made under contracts entered into on or after the amendments come into effect.
- creating new record-keeping requirements for trustees regarding trust funds (and confirming that trust funds for multiple trusts may be deposited into a single bank account, provided that the proper records are maintained for each trust).
- creating a new interim adjudication process to complement the new prompt payment provisions. The adjudication process is commenced by one party delivering a written notice of adjudication. Under this new process, an interim binding decision would be made by an “adjudicator” within approximately 6 weeks of delivery of a notice of adjudication (subject to the parties’ agreement for an extension). Adjudicators have to be qualified by

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a designated entity and listed in a adjudicator registry. The adjudicator's determination will be binding on the parties until the matter is determined by a court or by way of arbitration (leaving open the possibility of a different ultimate result). Amounts ordered to be paid by an adjudicator must be paid within 10 days, or will be subject to interest and a contractor or subcontractor may suspend further work until the principal and any interest are paid. The successful party may also apply to the court for enforcement of the adjudicator's determination. This interim adjudication process will only apply to contracts and subcontracts entered into on or after the amendments come into effect.

- extending the deadline to preserve a construction lien from 45 days to 60 days and to perfect a construction lien from 45 days to 90 days.
- providing that holdbacks may be retained in the form of a letter of credit or bond, in the prescribed forms, instead of in the form of funds.
- allowing condominium owners to remove/vacate liens that attach to the common elements of the building by posting their proportionate share of the common elements as opposed to having to post security for the full value of the lien.
- requiring holdback funds to be paid as soon as the time for registering construction liens has expired or all liens have been satisfied, discharged or otherwise provided for under the Act (unless a notice is published within a particular period of time specifying the amount of the holdback that the payer refuses to pay) and permitting the payment of accrued holdback on an annual or phased basis, where certain conditions are met (including certain contractual provisions).
- allowing the referral of construction lien claims under \$25,000 to the Small Claims Court.
- generally bringing the procedure to prosecute a lien action in line with the prosecution of other types of actions under the *Rules of Civil Procedure*, while maintaining the prescription that lien actions shall be as far as possible summary in nature. For example, leave to issue a third party claim would no longer be required and the provisions regarding carriage of a lien action and settlement meetings would be deleted.
- increasing the amount required to be posted as security for costs to vacate a claim for lien (from the lesser of \$50,000 or 25% of the amount claimed in the claim for lien to the lesser of \$250,000 or 25% of the amount claimed in the claim for lien).
- providing that contractors in a "public contract" (defined as a contract with the Crown, a municipality or a broader public sector organization) over a threshold contract price are required to provide a labour and material payment bond and a performance bond.

For the most part, the non-substantive (procedural) amendments will come into force on the day the Bill receives Royal Assent. The substantive amendments will come into force on proclamation of the Lieutenant General. The Attorney General has indicated that the legislation should come into effect in 2018.

Over the past 35 years, we have seen many changes in the construction industry, including the emergence of large infrastructure projects and private-public partnerships. At the same time, the number of contractual claims have increased as have issues relating to payment for the labour, services and materials supplied by contractors and subcontractors. The proposed legislation is intended to address many of these issues and to provide a revised framework in which these issues can be dealt with by both the parties involved in construction and the Courts.

For further information relating to this bulletin, please contact any member of our Construction Law Group.