

Goodmans^{LLP} Update

New Requirements for Publishing Certificates of Substantial Performance

The new *Construction Act* changed the requirements for publishing certificates of Substantial Performance in Ontario. This change will likely impact how all members of the construction industry publish, search for, and locate certificates of Substantial Performance for construction projects across the province.

Substantial Performance

Under the *Construction Act*, two elements must be satisfied for a project to achieve Substantial Performance:

- a. When the [project] or a substantial part thereof is ready for use or is being used for the purposes intended; and
- b. When the [project] is capable of completion or, where there is a known defect, correction at a cost of not more than:
 - i. 3 per cent of the first \$1,000,000 of the contract price,
 - ii. 2 per cent of the next \$1,000,000 of the contract price, and
 - iii. 1 per cent of the balance of the contract price.

After the contractor applies for Substantial Performance on a project, the payment certifier will determine whether those two elements have been satisfied. If they have, the payment certifier will certify Substantial Performance by signing a certificate in the prescribed form (the “**Certificate**”). If there is no payment certifier, the owner and contractor will make the determination jointly and will both sign the Certificate.

Publishing Certificates of Substantial Performance

A Certificate has no effect until a copy is published in a “construction trade newspaper”. This is an important step, as lien periods under the *Construction Act* are tied to the date on which a Certificate is published.

Under the previous *Construction Lien Act*, the definition of “construction trade newspaper” was fairly strict. It was limited to printed newspapers with frequent publication across Ontario:

“construction trade newspaper” means a newspaper having circulation generally throughout Ontario, that is published no less frequently than on all days except Saturdays and holidays, and in which calls for tender on construction contracts are customarily published, and that is primarily devoted to the publication of matters of concern to the construction industry.

As a result, Certificates were published in the Daily Commercial News, which was one of the only newspapers in Ontario that met the strict criteria. This gave all members of the construction industry a reliable source to search for Certificates issued across the province.

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Under the new *Construction Act*, the definition of “construction trade newspaper” has been expanded to include newspapers in electronic format:

“construction trade newspaper” means a newspaper,

- a. that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario,
- b. that is published at least daily on all days other than Saturdays and holidays,
- c. in which calls for tender on construction contracts are customarily published, and
- d. that is primarily devoted to the publication of matters of concern to the construction industry

Impact

Over the past month, Goodmans has noticed that web-based companies are now publishing Certificates online. These companies are alternatives to the Daily Commercial News. They are advertising to lawyers and members of the construction industry alike, and offer certain “add-on” services once the Certificate is posted.

The impact of the new definition of “construction trade newspaper” is apparent. Owners, contractors, subcontractors, and lawyers will likely need to check multiple sources – not just the Daily Commercial News – to determine whether a Certificate has been published for a given project.

As such, members of the construction industry will need to implement a more rigorous approach to searching for Certificates to ensure that lien rights are not lost or compromised.

For more information on the new requirements, please contact any member of our [Construction and Infrastructure Group](#).