

## Construction Law

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### Ministry of the Attorney General's Review of *Construction Lien Act* Remains Ongoing

by Howard Wise

On February 11, 2015, the Ministry of the Attorney General issued a bulletin indicating that the Attorney General's office was launching a review of the *Construction Lien Act* "...that will include the examination of payment issues within the construction sector." The Ministry bulletin went on to say that the review was commissioned "...in response to stakeholder concerns related to prompt payment and effective dispute resolution in Ontario's construction industry, such as encouraging timely payment for services and materials, and making sure payment risk is distributed fairly." Bruce Reynolds with the assistance of Sharon Vogel, both of Borden Ladner Gervais LLP, have been tasked with overseeing the review. The review is ongoing with a report memo anticipated for the Spring of 2016.

#### Background

The last major revision to construction lien legislation was through the implementation of the existing *Construction Lien Act* in 1983. That overhaul of the construction lien legislation addressed concerns with the *Mechanics' Lien Act* of Ontario, then in effect. Before the *Construction Lien Act* was enacted, the Attorney General created an advisory committee to report on proposed amendments. The *Report of the Attorney General's Advisory Committee on the draft Construction Lien Act, April, 1982*, formed the basis of the *Construction Lien Act*. Part 1 of the report stated the reason for the reform as follows:

....The need for the types of remedies provided by the *Mechanics' Lien Act*, and the proposed *Construction Lien Act*, emanate from the complicated nature of contractual relationships within the construction industry, and the credit-granting practices which are an integral part of that industry. Ordinary contractual remedies are believed to be inadequate in the face of these phenomena.

Every construction project involves numerous tiers of contractual relations. A construction project may be viewed as a pyramid, with the owner standing at the apex of the pyramid. In the most simple form of contract organization, the owner hires a general contractor. This contractor, in turn, engages the services of a number of subcontractors. Each of these may hire further subcontractors, all of whom will be responsible for a specialized aspect of the project. At each step, the base of the pyramid is broadened, as the number of persons supplying services or materials to the improvement increases. While there are many variations of this pattern of organization, each variant contains these general features.

This pyramid results in a complex web of relationships. Each person arranges for the supply of specific services or materials to the improvement, knowing that those services and materials may well be supplied by persons other than the person with whom he deals. Conversely, each supplier looks to those who have employed him for payment, knowing that the money for that payment must come from someone further up the pyramid.

# Goodmans<sup>LLP</sup> Update

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Because defective performance of any part of the contract work may result in a stoppage of payment, and the consequent flow of contract monies down the pyramid, a supplier of services and materials in a construction project may be greatly affected by the behavior of many people with whom he has no contractual relationship. While in theory the proper performance by a supplier of the work which he had agreed to do would entitle him to demand payment from the person to whom the supply was made, in practice the chances of such payment are largely contingent upon the continuous flow of contract monies from the owner down the pyramid.

It was concluded that:

The Act makes it easier for construction to take place, since it assures that credit will be made available. In addition, by providing a uniform regime of rights to all suppliers in the industry, an Act reduces both the costs of negotiating both construction contracts and sub-contracts, and also the uncertainties inherent in any complex system of contractual relationships.

## **Revisiting the *Construction Lien Act***

The statements made 32 years ago appear relevant to construction projects today, although the methods of construction delivery and the way contracts are performed has changed significantly. The complexity of contractual and business relationships, and the breadth of project delivery systems, makes it appropriate to revisit these issues again. At the time of the last overhaul of construction lien legislation, alternate finance, private/public partnerships, design/build finance did not form part of the construction landscape.

It is clear that issues with respect to payment, extended periods of credit, set-off issues, and other issues relating to the flow of funds through the construction pyramid are still problematic. As construction projects have become larger and more complex, the legal relationships between the parties have also become more complex, and often contractors and subcontractors are asked or required to extend credit for the labour, service and materials they perform or supply well beyond 30 and 60 days. Furthermore, developments in other areas of law, including bankruptcy and insolvency and the use of the *Companies' Creditors Arrangement Act*, have had an impact on the ability to deal with issues as they arise in the construction setting.

That is not to say that the existing lien legislation has not been of benefit to the construction industry or that it has not worked. In fact, when one considers the significant project development that has occurred over the past 30 years, it is evident that the construction industry remains robust.

However, on the continuum of change, it is time to revisit the *Construction Lien Act* in light of the existing challenges, including issues relating to payment and dispute resolution. It is important to recognize that, in balancing the various interests, there will be no perfect solution to the problems that the industry faces, and compromise will be required. However, all constituent members of the construction industry must be afforded the opportunity to provide input into the process. The guidelines for review, which were issued in July, 2015, are intended to ensure that this happens. No doubt, 30 years from now, the review process and consequent recommendations will be revisited with a view to gauging whether or not the stated objectives for reform were met.

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