

## CONSTRUCTION

### SUMMARY OF AMENDMENTS TO CONSTRUCTION LIEN ACT

by Eric Kay and Josh Suttner

In December 2017, the Ontario Legislature passed the *Construction Lien Amendment Act, 2017* (the "Act"). The Act introduces significant changes to Ontario's construction lien regime and is intended to reduce delays in construction projects and establish a dispute resolution mechanism to keep construction lien actions out of the courts. What follows is a summary of the major changes introduced by the Act, as well as information regarding the timeline for implementing these changes.

#### When the Changes Take Effect and Transition Rules

Minor amendments and small changes to the French language version of the Act took effect on December 12, 2017. Substantive changes will only take effect upon proclamation of the Act. Before any of the significant amendments can be implemented, corresponding regulations must be developed. A first draft of the regulations is expected to be made public in February 2018. It is expected that the amendments that pertain to the lien and holdback process will be implemented first, followed later by the amendments pertaining to prompt payment and adjudication.

The previous *Construction Lien Act* will continue to apply, with respect to an improvement, if:

- a contract for the improvement was entered into before the day on which the Act is proclaimed to be in effect, regardless of when any subcontract under the contract was entered into;
- a procurement process, if any, for the improvement was commenced before the day on which the Act is proclaimed to be in effect by the owner of the premises (including the making of a request for qualifications, a request for proposals or a call for tenders); or
- the premises is subject to a leasehold interest, and the lease was first entered into before the day on which the Act is proclaimed to be in effect.
- Parts I.1 (Prompt Payment) and II.1 (Adjudication) apply in respect of contracts entered into on or after the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* (i.e. the adjudication provisions) comes into force, and in respect of subcontracts made under those contracts.

#### Prompt Payment

The new prompt payment rules will prescribe automatic deadlines for payment to contractors and subcontractors once the payee submits a Proper Invoice. The Act defines a Proper Invoice as:

...a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor's name and address.
2. The date of the proper invoice and the period during which the services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
7. Any other information that may be prescribed.

An owner is required to pay a contractor within 28 days of receipt of a Proper Invoice. A contractor who receives full payment is then required to pay each subcontractor who supplied materials or services which were included in the Proper Invoice within 7 days. The subcontractor has the same 7 day deadline to pay and so on down the construction pyramid. Any failure to pay by a party, at any level of the pyramid, will result in automatic interest accruing, in accordance with the rate prescribed under s. 127(2) of the *Courts of Justice Act*, from the date on which the payment was due to be paid.

An owner, contractor or subcontractor can submit to the payee a Notice of Non-Payment no later than 14 days after receiving a Proper Invoice. The regulations prescribing the form of Notice of Non-Payment have not been promulgated at this time, but at a minimum the notice must state the amount in dispute and the reasons for non-payment. A contractor who receives a notice of Non-Payment or partial payment from the owner is required to pay any subcontractors within 35 days, unless the contractor gives the subcontractors a Notice of Non-Payment within seven days of receiving the notice of non-payment from the owner.

The concept of the Proper Invoice is key to the new prompt payment regime. If the contract between the parties is silent, Proper Invoices are presumed to be due on a monthly basis. The parties may agree otherwise, such as making Proper Invoices due at certain milestones in the contract or as certain conditions are met. The parties cannot make the owner's approval a condition precedent to the submission of a Proper Invoice.

## Adjudication

The Act adds a mandatory dispute resolution scheme to which parties to construction contracts must adhere. The scheme is intended to more quickly resolve certain issues that typically arise and slow down the construction process, so projects can continue with minimal disturbance. The Act outlines that the following matters are appropriate to be decided under the scheme:

- value of services or materials under the contract;
- payment under the contract or change of services under the contract;
- non-payment disputes arising under the prompt payment regime;
- set-off amounts;
- payment or non-payment of holdback amounts

The Act also permits the parties to bring other matters to adjudication and permits the regulators to add other matters to the list.

Adjudicators will be individuals selected by the Authorized Nominating Authority to be established under the Act. The party bringing the matter to adjudication has the opportunity to suggest an individual to resolve the matter; parties cannot choose an adjudicator in the contract in advance. If the adjudicator requested by the party bringing the dispute to adjudication does not agree to hear the matter within four days of the request being submitted, the requesting party must ask the Authority to appoint an adjudicator. The Authority shall do so within 7 days of receiving the request.

Parties may define their own adjudication rules or requirements, provided they comply with the minimum requirements set out in the Act. Parties may not begin the adjudication process after the contract has been completed, unless they have consent of the other party.

The adjudicator is given wide investigatory powers under the Act. The first investigative tool is the requirement that the requesting party provide a copy of the contract and any documents they intend to rely on to prove their claim within 5 days of the adjudicator's appointment. The adjudicator is required, subject to the extension provisions in the Act, to provide a decision on the matter within 30 days of receiving the above documents from the requesting party.

In making its determination, the adjudicator may:

- outline and define the rules and conduct of the adjudication;
- determine questions of fact and law;
- draw inferences from the conduct of parties to the adjudication;

- conduct on-site inspections, subject to the approval of the owner and anyone from whom consent is required;
- obtain assistance from third party experts; and
- utilize any other power as prescribed by the regulations.

The fees associated with adjudication are to be split by the parties, regardless of the outcome. Each party is to bear their own costs.

The decision of an adjudicator is enforceable by court order. There is no appeal route for an adjudicator's decision under the Act. Judicial review may be sought, with leave of the Divisional Court. Such application for review must be filed within 30 days of the adjudicator's decision. Section 13.18 (5) of the Act the grounds on which the decision of an adjudicator may be set aside on judicial review to one or more of the following:

1. The applicant participated in the adjudication while under a legal incapacity;
2. The contract or subcontract is invalid or has ceased to exist;
3. The determination was of a matter that may not be the subject of adjudication, or of a matter entirely unrelated to the subject of the adjudication;
4. The adjudication was conducted by someone other than an adjudicator;
5. The procedures followed in the adjudication did not comply with the procedures to which the adjudication was subject, and the failure to comply prejudiced the applicant's right to a fair adjudication;
6. There is a reasonable apprehension of bias on the part of the adjudicator;
7. The determination was made as a result of fraud.

## Alternative Financing and Procurement

The Act adds clarification for circumstances where the financier and owner are separate entities. Clarifications to the definitions of owner and contract now aid in determining which owner or contract governs for the purposes of the Act. In public projects, rather than have the Crown act as the owner for the purposes of the Act, now the special purpose entity which is controlling the project on behalf of the Crown is deemed to be the owner and the agreement between the special purpose entity and the contractor is deemed to be the contract to which the Act applies. These deeming provisions are limited in their application and only apply to certain portions of the Act (prompt payment, adjudication, declaration of substantial performance). For

other sections of the Act, the Crown may continue to be the owner as defined in the Act.

The Act also allows for projects that incorporate multiple construction sites and facilities, whose contracts were all bundled under one contract or agreement, to be administered as if they were separate and distinct improvements. This would allow contractors at one site to be paid earlier and at different times than other sites. The parties may define certain phases of construction, the completion of which allows payment to be made to individual sites. Each phase should be defined in the contract between the parties, placing a heavy onus on the parties to contemplate a through timeline for the project in the initial contract.

### Trust Accounting

The Act imposes much more detailed record-keeping on parties in the construction pyramid who are in control of trust funds. The bank account into which funds are deposited must bear the name of all trustees. The trustee(s) must keep written records of any amounts deposited into or paid out of the trust account, any transfers made for trust purposes and any other record-keeping information prescribed by the regulations. As long as the trustees are the same, there is no requirement to maintain a distinct and separate trust account for each project, and funds from multiple trusts may be deposited into one trust account.

### Additional Amendments

The Act introduces the following notable amendments, in addition to those outlined above:

- the timing for preserving a lien is extended from 45 to 60 days;
- the 45 day deadline for perfecting liens is extended to 90 days from the last day on which the lien could have been preserved;
- termination of the contract will now begin the timer for lien preservation;
- contractors performing a public contract, as defined by the Act, will be required to provide two bonds, each for at least 50% of the contract price; one bond for labor and material payment and the other for performance;
- holdbacks may be kept in the form of credit letters, bonds or other forms rather than simply cash;
- the definition of Improvement now includes a Capital Repair;
- construction claims for less than \$25,000 must now be brought in Small Claims Court;

- liens no longer attach to municipal lands;
- basic and finishing holdback amounts must be released once the requirements for such release under the Act are satisfied; and
- the parties may agree to annual, phased or segmented holdback releases provided that there are no outstanding, registered liens.

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