

The New *Construction Act* – the
Metamorphosis of Bill 142 and
Modernization of the *Construction
Lien Act*

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The Major Changes

- Prompt Payment
- Adjudication
- Preservation, Perfection, and Expiry of Liens
- Holdback and Substantial Performance
- Trust Accounting
- Amended Definitions and Set-off
- Procedural Changes for Lien Actions
- Changes Impacting P3s

Why overhaul the CLA?

- Last significant changes to the CLA took place in 1983
- Construction industry has changed in the last 34 years:
 - P3 projects
 - Condominiums
 - Change in economy (\$ values have risen)

Why overhaul the CLA?

- Review of the Act began in February 2015
- “Striking the Balance: Expert Review of Ontario’s Construction Lien Act”
- Core issues:
 - Modernizing the Act
 - Prompt Payment
 - Dispute Resolution/Adjudication

Status of Bill 142

- Bill 142: “The Construction Lien Amendment Act, 2017”
- First Reading – May 31, 2017
- Second Reading – September 12, 2017
- Referred to Standing Committee on the Legislative Assembly – Oct 4, 2017
- Third Reading – December 5, 2017
- Carried on division
- Royal Assent – December 12, 2017

Liens - Leasehold Properties

Leasehold Interest (s. 19(1))

- If the owner's interest is leasehold and payment for the improvement is accounted for under the lease, the landlord's interest is also subject to the lien, to the extent of 10% of the payment

Notice to Lien Claimants (ss. 19(3))

- Landlord must give notice to lien claimants of intention to enforce forfeiture or terminate the lease because of non-payment of rent

Right to Information (s.39)

Three Major Changes:

- More detailed description of the state of accounts (s. 39(4.1))
- Right to information from landlord whose interest in a premise is subject to a lien (s.39(1)(4))
- Right to information from a mortgagee (s.39(4.2))

Prompt Payment – Rationale

Major Concerns of Stakeholders:

- Timeliness of Payment
- Efficiency of Mechanisms for the Enforcement of Payment for Work Performed

Factors Identified under the Current Regime

- Late Payments are Endemic
- Inequality of Bargaining Power
- Financial Burden on Subcontractors

Prompt Payment (ss.6.1-6.8)

- Trigger for payment = “delivery of a proper invoice” in a prescribed form
- Proper invoices submitted monthly unless the contract provides otherwise
- Restriction on contract conditions

Prompt Payment – Payment Deadlines

- Owner to Contractor (s.6.3)
 - 28 days from the delivery of the proper invoice, UNLESS the owner delivers a notice of non-payment within 14 days after receiving the proper invoice
- Contractor to Subcontractor (s.6.4)
 - 7 days from the receipt of payment from the owner or, if the owner has not paid the contractor, within 35 days of the contractor's delivery of a proper invoice UNLESS the contractor delivers a notice of non-payment

Prompt Payment – Non-Payment

Remedies for Non-Payment:

- Interest on late payment
- Dispute can be referred to adjudication
- Outcome of adjudication is binding – at least on an interim basis

Adjudication – History and Rationale

- Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination
- Construction adjudication used in the U.K. since 1970
- Aims of adjudication:
 - Remove dispute gridlock
 - Eliminate late payment and non-performance
 - Free up cash flow and resources

Adjudication - Adjudicators & Disputes

Adjudicators (s. 13.1)

- Adjudicator: person who is qualified by the Authorized Nominating Authority designated under the Act

Adjudicable Disputes (s.13.5)

- Any party to a contract or subcontract may refer dispute
- Only available for disputes relating to matters prescribed by statute

Adjudication – Procedure

- Notice of Adjudication (s.13.7)
- Appointment of Adjudicator (s.13.7, s.13.9)
- Adjudicator receives documents (s.13.11)
- Adjudicator has powers to design the adjudication process (s.13.12)

Adjudication - Decisions/Enforcement

- Decision rendered in 30 days (s.13.13)
- Party who is required by the adjudicator's determination to make a payment must do so within ten days of receiving the decision (s. 13.9)
- Decision is enforceable in court (s.13.20)

Liens – Preservation and Perfection

Preservation

- Deadline to preserve a lien will increase from 45 days to 60 days from the applicable trigger date

Perfection

- Deadline to perfect a lien by commencing an action will increase from 45 days after the last date the lien could have been preserved to 90 days

Liens - Adjudication

Extension of Time (s.34(10))

- The lien regime will work in parallel with adjudication
- Extension of lien expiry date for matters that are the subject of a lien and an adjudication (only for the purposes of this section)
- This provision encourages parties to proceed with adjudication in the face of lien expiry because the date on which the adjudicator receives documents cannot be after the expiry of the lien period

Liens – Condominium Properties

Preserving Liens (s.34(9))

- Notice of preservation of lien to be given to the condominium corporation and unit owners in a prescribed form

Vacating Liens (s.44(2.1))

- Condominium owner can vacate a lien registered against the common elements by posting their proportionate share based on their common interest.

Holdback – Form of Holdback

Permissible Forms of Holdback (s.22(4)):

- Letter of Credit
- Demand-Worded Holdback Repayment Bond
- Any other form that may be prescribed

Holdback – Release

Mandatory Release

- The release of holdback is now mandatory once the requirements for release under the Act are satisfied.
- However, the Owner shall be allowed to assert set-off if they publish a Notice in the prescribed form

Annual or Phased Release

- Holdback may now be released either on an annual or phased basis – for appropriate projects

Holdback – Substantial Performance

Substantial Performance (s.2(1))

SP occurs when the improvement or party is ready for its intended use, and the cost was not more than:

- i. 3% of the first ~~\$500,000~~ \$1,000,000 of the contract price;
- ii. 2% of the next ~~\$500,000~~ \$1,000,000 of the contract price
- iii. 1% of the balance of the contract price

Holdback – Completion of Contract

Deemed Completion of Contract (s.2(3))

Contract deemed completed and services/materials deemed to be last supplied when the price of completion, correction of known defect, or last supply is not more than lesser of:

- i. 1% the contract price; and
- ii. ~~\$1,000~~–\$5,000

Multiple Improvements (s.2(4))

Contract can provide that multiple improvements on non-contiguous land is deemed to be under a separate contract

Trust Accounting

Contractor's Trust Provisions (s. 8)

- Trust funds must be deposited into a bank account in the trustee's name
- Trustee must maintain written records
- Trustee of multiple trusts may deposit separate trust funds into a single bank account but must ensure written records per trust are maintained re: amount going in and coming out

Amended Definitions

“Improvement” (s. 1(1))

- Amended to add reference to “any capital repair to the land”
- “Capital repair to land” (s.1.1) – any repair intended to extend the normal economic life of the land or any building, structure or works, but does not include maintenance work performed in order to prevent the normal deterioration of the land, building, structure, or works or to maintain the land, building, structure or works in a normal, functional state

Amended Definitions

“Price” (s. 1(1))

- Currently includes: i) the contract/subcontract price agreed upon between the parties or ii) the actual value of the services/materials that have been supplied
- Amended to also include direct out-of-pocket costs of extended duration

Set-off

Set-off by trustee (s.12)

- Set-off by a trustee of an amount from trust funds may only be in respect of debts, claims or damages that are related to the applicable improvement, except in the event of a contractor or subcontractor's insolvency

Lien set-off (s.17(3))

- Set-off by a payer may only be in respect of debts, claims or damages that are related to the applicable improvement, except in the event of a payee's insolvency

Procedural Changes for Lien Actions

- Currently, CLA requires parties to seek leave for many interlocutory steps (s.67)
- Bill 142 removes this section – parties no longer are required to seek leave
- New provision – Rules apply to construction lien and trust claims unless there is a conflict between the Rules and the Act in which case, the Act applies

Procedural Changes for Lien Actions

Sections revoked from the Act:

- Trust claims cannot be joined with lien action
- Actions must be commenced with the court where the land is located
- Claim must be served within 90 days after issued
- Rules regarding third party claims

P3s – Project Co as Owner

- Project Co entity is deemed to be the “owner” for certain provisions, instead of the Crown, municipality or other “broader public sector organization” that owns the premises (s.1.1)
- This definition of Project Co as owner will affect:
 - Prompt payment/adjudication
 - Calculation of holdback
 - Substantial performance

P3s – Bonding Requirements (s. 85)

- All public projects that exceed a certain value will require a performance bond and a labour and material payment bond that:
 - Is of an insurer licensed under the Insurance Act to write surety and fidelity insurance
 - Has a coverage limit of at least 50% of the contract price
 - For L&M bond – must extend protection to subcontractors and suppliers of labour/material

P3s – Bonding Requirements (con't)

Rights of Action if Default – L&M Bond

- Claimant (subcontractor/supplier) has right of action to recover the amount of their claim against the surety and principal (contractor)

Rights of Action if Default – Performance Bond

- Owner has a right of action to enforce the bond against the surety and principal (contractor)

Transition

- Bill 142 has received Royal Assent, but not Proclamation
- Different sections will come into force at different times pursuant to section 86 of Bill 142
- Some existing projects will be grandfathered
- Public and private sector entities should be prepared to adjust their accounting systems, internal policies, and dispute resolution strategies going forward

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