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The *Construction Act*
How Bill 142 has changed the
Construction Lien Act – what you
need to know

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The Major Changes

- Prompt Payment
- Adjudication
- Liens
- Holdback
- P3s
- Trust Accounting
- Set-off

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 is now law
- Royal Assent was received December 12, 2017
- However, substantive changes come into effect as follows:
 - July 1, 2018 – lien and holdback modernizations
 - October 1, 2019 – prompt payment and adjudication

Grandfathering

- The old CLA will continue to apply to improvement if:
 - Contract entered into before s.2(2) of Bill 142 comes into force (“Triggering Date”)
 - Procurement process commenced before Triggering Date
 - Premises subject to leasehold interest and lease entered into before Triggering Date
 - Prompt payment and adjudication apply only to contracts entered into/after day the adjudication provisions comes into force

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 on an interim basis
- 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)
- Decision is subject to subsequent court or arbitration proceedings

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

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.

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

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 within 40 days (s.27.1)

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 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

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)

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

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



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Materials from today's seminar can be found at; www.ConstructionAct.ca

The image features a dark, moody background of a construction site. A large yellow tower crane is the central focus, extending from the bottom left towards the top center. In the background, a modern glass skyscraper is under construction, with its grid-like structure visible against a grey, overcast sky. The overall tone is industrial and professional.

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