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ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

Ontario's New Construction Act- What You Need to Know!

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"Build it, and they will sue."

Introduction: Its here! Why? How?

- Construction vital to Ontario's economy
- Construction Lien Act has not been significantly updated since 1983
- Between 2002- 2013 the *average* time from invoice to payment has risen from 57.3 days to 71.1 days
- Construction and the related project delivery models and documentation: more complex
- Prompt payment initiatives across the industry
- Expert Review- Vogel and Reynolds with broad stakeholder input led to many recommendations for change made in 2016

Introduction: Its here! What's new?

- New Timelines for liens and holdback release
- New payment provisions and new trust provisions
- New targeted adjudication
- Expanded Definitions
- Procedural Changes
- Proclamation in force coming later in 2018
- The industry will have time to comment when Regulations are published - expected some time in February 2018

Overview

- Changes to the lien timelines and holdback release will be coming into force first
- *Then* the changes to prompt payment and adjudication later in 2018
- Top Ten Takeaways for your business in 2018

Overview

What are the big changes?

1. modernization of Act – definitions, alternative financing, longer lien timelines
2. prompt payment – and “proper” invoice regime
3. adjudication – real time dispute resolution
4. trust changes – separate general and trust accounts

(See: <https://www.ontario.ca/laws/statute/90c30> for current in-force provisions)

Overview

Bill 142 – *Construction Act*

- Royal assent December 12, 2017
- Transition sections provide in force “when proclaimed by Governor in Council”
 - Likely June 2018 for new lien provisions
 - Likely December 2018 for adjudication
 - Act *not* retroactive

Bill 142 is the new “Construction Act”

- Existing projects “grandfathered” if contract entered into before December 12, 2017
- In-force dates, and draft Regulations for comment expected soon... in the coming weeks

New Definitions

“improvement”

“price”

“direct cost”

“capital repair”

“wages”

... and others

New Construction Act

Definitions

“improvement” means

- (a) any alteration addition or **capital** repair to the land
- (b) any construction... including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land... that is essential to the normal or intended use of the land, building, structure or works,
- (c) the complete or partial demolition or removal of any land, structure or works

New in Bill 142

Definitions

Capital repair

(1.1) For the purposes of clause (a) of the definition of “improvement” in subsection (1), a capital repair to land is any repair intended to extend the normal economic life of the land or of any building, structure or works on the land, or to improve the value or productivity of the land, 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.**

New Construction Act

Definitions

“price” means

- (a) the contract or subcontract price
 - i. agreed on between the parties, or
 - ii. if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and
- (b) any direct costs incurred as a result of an extension of the duration of the supply of services or materials to be improvement for which the contractor or subcontractor, as the case may be, is not responsible; (“prix”)

New Construction Act

Definitions

“wages” means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement.

New in Bill 142

Definitions

Direct costs

(1.2) For the purposes of clause (b) of the definition of “price” in subsection (1), the direct costs incurred are the reasonable costs of performing the contract or subcontract during the extended period of time, including costs related to the additional supply of services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred, but do not include indirect damages suffered as a result, such as a loss of profit, productivity or opportunity, or any head office overhead costs.

New in Bill 142

Alternative financing and procurement arrangements

1.1 (1) This section applies if the Crown, a municipality or a broader public sector organization, as the owner of a premises, enters into an agreement with a special purpose entity that requires the entity to finance and undertake an improvement on behalf of the Crown.

New in Bill 142

Where entity deemed to be owner

(2) In the following portions and provisions of this Act and any regulations made for the purposes of them, the special purpose entity is deemed to be the owner of the premises in place of the Crown, municipality or broader public sector organization, and the agreement between the entity and the contractor is deemed to be the contract.

New in Bill 142

Crown, etc., as owner

- (1) For the purposes of section 22, holdbacks shall be determined in reference to the agreement between the contractor and the special purpose entity.
- (2) For the purposes of section 85.1, the agreement between the contractor and the special purpose entity is deemed to be a public contract.

New Monetary Test

“substantial performance” where completion of known defects not more than - 3% of first \$1 million, 2% of next \$1 million, and 1% of balance.

New “Saving provisions”

Part I General

(2) Minor irregularities to which subsection (1) applies include,

- (a) the minor error or irregularity in the name of an owner of a premises or of a person for whom services or materials were supplied;
- (b) a minor error or irregularity in the legal description of a premises; and
- (c) including an owner’s name in the wrong portion of a claim for lien.

Holdbacks

- Allow partial release of holdback on annual basis (s.26.1)
Contracts for more than one year
Contract provides for release of accrued holdback
- Allow for phased release of holdback for separate improvements (particularly for AFP projects as the threshold will be a contract price of a prescribed amount or higher) (s.26.2)

Prompt Payment (s.6.1-s.6.9)

- Once a “proper” invoice is delivered (monthly unless agreed otherwise) then 28 days for owner to pay
- Then 7 days from contractor to subcontractor
- Payer can deliver a notice of non-payment (for set off) (s.6(6))
- No longer set off for debts related to other contracts

New in Bill 142

Part I.1 Prompt Payment

Definition, “proper invoice”

6.1 In this Part,

“proper invoice” means 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 6.2(2), meets any other requirements that the contract specifies;

New in Bill 142

Payment deadline, owner to contractor

6.3 (1) Subject to the giving of a notice of non-payment under subsection (2), an owner shall pay the amount payable under a proper invoice no later than 28 days after receiving the proper invoice from the contractor.

New in Bill 142

Transition

6.8 This Part applies to payments made under contracts entered into on or after the day section 7 of the *Construction Lien Amendment Act, 2017* comes into force.

New in Bill 142

Part II Trust Provisions

Contractor's, subcontractor's duties re trust funds

8.1 (1) Every person who is a trustee under section 8 shall comply with the following requirements respecting the trust funds of which he or she is a trustee:

1. The trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the trust funds, the funds shall be deposited into a bank account in all of the trustees' names.

New in Bill 142

Contractor's, subcontractor's duties re trust funds (cont'd)

2. The trustee shall maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information.
3. If the person is a trustee of more than one trust under section 8, the trust funds may be deposited together into a single bank account, as long as the trustee maintains the records required under paragraph 2 separately in respect of each trust.

New in Bill 142

Trust funds in single account

(2) Trust funds from separate trusts that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust.

Note: mandatory non-waivable interest on payments (s.6.9)

New in Bill 142

Part II.1 Construction Dispute Interim Adjudication Availability of adjudication (s.13.1-13.23)

- Any party to a construction contract has the right to refer a dispute to adjudication
- Permit back to back adjudications
- Parties free to establish their own procedures, at a minimum statutory procedure
- Some will be in writing.
- Adjudicators not necessarily lawyers
- Generally single issue adjudications

New in Bill 142

Interim Adjudication

- Adjudicator nominated after dispute arises
- Then 2 days to agree on adjudicator, failing which Nominating Authority appoints adjudicator
- Adjudicator immunity

New in Bill 142

Interim Adjudication- concerns?

- Procedural fairness
- Tight timeliness
- “quick and dirty” decision
- “ambush and “smash and grab” tactics – UK concerns

New in Bill 142

Details – What can be adjudicated

13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.

New in Bill 142

Details – What can be adjudicated

13.5 (1) continued

4. Amounts retained under section 12 (set-off by trustee) or under subsection 17(3) (lien set-off).
5. Non-payment of holdback under section 27.1.
6. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

New in Bill 142

Documents for adjudication

13.11 No later than five days after an adjudicator agrees or is appointed to conduct the adjudication, the party who gave the notice of adjudication shall give to the adjudicator a copy of the notice, together with,

- (a) a copy of the contract or subcontract; and
- (b) any documents the party intends to rely on during the adjudication.

New in Bill 142 - procedures

Streamlining

Lien claims under \$25,000 – referred to Small Claims court (s.58(1)(c))

Claims then to \$100,000 – follow simplified rules

Can now join lien and trust claims (unless prohibited in the Regulations)

New in Bill 142 - procedures

Part III The Lien

Crown, municipal interest in premises

- 16 (1)** A lien does not attach to the interest in a premises of,
- (a) the Crown; or
 - (b) a municipality.

New in Bill 142

Part III The Lien

Crown, municipal interest in premises

- No longer register liens against municipal lands, just give them
- No change regarding hospitals, universities and school board lands.

New in Bill 142

Part III The Lien

Remove lot by lot registration for subdivision lots

Change the test under s.86 from “grossly exaggerated” to “wilfully preserved or perfected” a lien without foundation or a lien that is “frivolous, vexatious or an abuse of process”

New in Bill 142

Part IV Holdbacks

Payment of holdback

26.1 (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22(1) on annual basis, in relation to the services or materials supplied during the applicable annual period.

26.2 (1) If the conditions in subsection (2) are met, a payer may make payment of the accrued holdback he or she is required to retain under subsection 22(1) on the completion of phases of an improvement, in relation to the services or materials supplied during each phase.

New in Bill 142

Part VI Right to Information

State of accounts

(4.1) A state of accounts under subsection (1) shall contain the following information, as of a specified date:

1. The price of the services or materials that have been supplied under the contract or subcontract.
2. The amounts paid under the contract or subcontract.
3. In the case of a state of accounts under paragraph 4 of subsection (1), which of the amounts paid under the contract or subcontract constitute any part of the payment referred to in subsection 19(1).

New in Bill 142

State of accounts (cont'd)

4. The amount of the applicable holdbacks.
5. The balance owed under the contract or subcontract.
6. Any amount retained under section 12 (set-off by trustee) or under subsection 17(3) (lien set-off).
7. Any other information that may be prescribed.

Top Ten Takeaways:

Key questions to ask:

1. Is the supply lienable? Have regard to expanded definitions?
2. Do the services/ materials enhance the value, were they are an installation, alteration or repair?
3. Are the premises federal lands, Crown lands, a municipality, a railway or a highway?

Top Ten Takeaways (cont'd)

Continuing on:

4. Who is your owner? Are the premises leasehold?
5. Is the invoice “proper”?
6. Targeted Adjudication – real time dispute resolution get legal advice, and claim preparation assistance
7. New Trust fund rules: have project draws in a separate account, can be a mixed trust account

Top Ten Takeaways (cont' d)

8. Have regard to limitation periods that will change **on proclamation** to: 60 days to lien, 90 days to sue to perfect (from last lien date), and 2 years to set down for trial remains the same
9. New appeal regime (s. 71(3)) interlocutory appeals and appeals, with leave, to Divisional Court
10. Overall - *more* remedies (adjudication, liens, and trust claims) than before (still s.38 if liens expire still have contract claims and trust claims)

Selected Resource Materials

<http://www.constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf>

Adjudication: “*Case Comment: RMC Building & Civil Engineering v. UK Construction Limited*”, OBA Newsletter, February 3, 2016, Andrew Heal

Overview Briefing: “*Striking the Balance*”, September 2016, Reynolds and Vogel

“*Its Finally Here! Ontario Reforms the Construction Lien Act*”, June 9, 2017, Gowling Newsletter, Betts, et al.

“*Construction Lien Act Reform, November 2017*”, Osler Newsletter, Wong and St. Aubin

“*Ontario’s New Construction Act: Its Here!*”, Heal & Co. Newsletter, Winter 2017, Andrew Heal

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