On December 12, 2017, Bill 142, Construction Lien Amendment Act, 2017 received Royal Assent and became law, changing the Construction Lien Act to the Construction Act. Some minor and translation changes became effective immediately, but the balance of the changes will be proclaimed and in force very soon: most of the changes will come into force on July 1, 2018, and the prompt payment and adjudication changes will come into force on October 1, 2019.

These changes will have a profound impact on every part of the construction industry. From liens, to holdbacks, to payment timing, to dispute resolution, the new Act will alter all of them dramatically. So much so that the amendments virtually create a new Act. In fact, Bill 142 will change even the name of the Construction Lien Act to the Construction Act.

Our suggestion? Get ready now!

The stated goals of the new law is to (1) modernize and update the Construction Lien Act, which has not undergone significant revision in 35 years, (2) introduce a mandatory prompt payment regime to make cash flow more quickly, and (3) implement a mandatory fast-track dispute resolution process called adjudication to also get cash flowing more quickly but also to reduce the cost of large and lengthy disputes.

Here are some of the key takeaways and highlights:
Prompt Payment Regime (s.6.1)

Bill 142 introduces a strict prompt payment regime in Ontario. It will be applied to both private and public sector projects, to all parties in the construction pyramid, and to all sizes and types of improvements.

The new bottom line: owners will have 28 days to pay a contractor after delivery of a proper invoice, and contractors will have 7 days to pay a sub-contractor (after getting paid by the owner).

Prompt payment will be mandatory for all contracts. Parties will be permitted to establish milestones, payment schedules, or other payment structures that are not based on monthly progress payments if it is set out clearly in their contract, but the 28 day clock will start once an invoice is submitted in accordance with that payment structure. The owner and general contractor will be able to agree on some details for the submittal of an invoice but if they do not agree, they will be required to submit invoices on a monthly basis.

Owners will be permitted to dispute all or parts of an invoice; however, they will now be required to deliver a notice of non-payment within 14 days of receiving the proper invoice from the contractor. The notice of non-payment must set out all of the owner’s reasons for not paying. Any undisputed amounts will have to be paid.

Similarly, contractors must also deliver a notice of non-payment to subcontractors (and subcontractors to sub-subcontractors) if they do not intend to pay the full amount of the invoice. If an owner pays all or a part of the contractor’s invoice, the contractor will need to deliver the notice of non-payment to that subcontractor within 7 days of receiving the payment from the owner. If the owner does not pay any part of the contractor’s proper invoice, the contractor has 35 days after its proper invoice to deliver the notice of non-payment to its subcontractors.

It is very important for contractors to understand that the prompt payment rules do not create a true “pay when paid” protection for contractors. While s.6.4(1) provides that a contractor must pay subcontractors within 7 days of getting paid by the owner, s.6.4(4) provides that, if an owner has not paid, then within 35 days of sending in the proper invoice a contractor must either (1) commence an adjudication against the owner, or (2) pay the subcontractor (unless it has delivered a notice of non-payment). So if the contractor does not wish to commence a dispute with the owner, it will have to pay the subcontractor out of its own pocket.

If a party fails to pay when due under the prompt payment rules, statutory interest will accrue and become due on the payment. The rate of interest will be the greater of the amount set out
under the Courts of Justice Act and the amount agreed to in the contract.

If a party fails to pay when due after the non-payment is adjudicated, the party entitled to be paid can suspend work or terminate their contract.

The prompt payment provisions will apply to payments made under contracts entered into on or after the date the amendments come into force on October 1, 2019.

**Cheap & Quick Interim Adjudication: Targeted Interim Binding Dispute Resolution (Part II.1; ss.13.1 to 13.24)**

Parties to a construction contract will be entitled to refer disputes to adjudication (based on the UK model) that flow from a proper invoice under a contract, including claims for valuation of work, services and materials and other monetary claims made in accordance with the contract, as well as set-offs, deductions and delay claims.

This dispute resolution method will be mandatory on all construction projects, public and private, and all sizes and types. Parties will be free to draft their own provisions so long as the provisions are consistent with the Act.

The party with the issue will deliver a notice of adjudication to the party with whom they have a contract. The receiving party will have two days to determine if it agrees with the proposed adjudicator. Five days later, there will be a referral notice, a notice of adjudication and back-up documents from the claimant to be provided to the adjudicator. Ideally, within 30 days, the adjudicator delivers a written decision.

If a decision to pay is not obeyed, the party expecting the payment would be entitled to suspend work under the contract or terminate.

In the experience of the UK, only a small number of cases typically go from the adjudication to litigation or arbitration.

The adjudication procedures will apply to contracts entered into on or after the day the amendments come into force on October 1, 2019.

**Greater Lien Rights**
The timeline for contractors and subcontractors to register a lien is extended from 45 days to 60 days.

The subsequent timeline to perfect a lien by commencing an action is also extended from 45 days to 90 days.

Frivolous, vexatious or abusive liens will be discharged in whole or in part.

Minor errors to liens will not automatically mean a lien invalidation.

Lien claims under $25,000 are to be referred to the Small Claims Court.

Time limit to register liens would be extended to encourage parties to first attempt adjudication.

**Holdbacks and Better Cash Flow**

Holdback will remain at 10% of the value of the improvement, but security can be offered in lieu of cash holdbacks in the form of a holdback bond or letter of credit.

The release of holdback will be mandatory at the end of the applicable lien period (i.e., the 61st day after substantial performance for the basic holdback). The owner will be allowed to set-off or withhold, but to do so, it will be required to publish a notice of non-payment/set-off by no later than the 40th day after substantial performance.

Release of holdbacks will be permitted on a phased basis for projects with different phases or stages, and on an annual basis for longer term projects, if the project is over $20 million and the early release of holdback is set out in the contract.

**Substantial Performance and Completion**

Substantial performance financial threshold tiers will increase from $500,000 to $1,000,000.

Total completion will be increased to lesser of 1% or $5,000.

**Updated Definitions**

The definition of “improvements” is expanded to include capital repairs that extend the normal economic life of a structure. This means that lien rights are also expanded. A definition of “capital repairs” has been added which helps clarify the line between true construction repairs which attract lien rights, and maintenance, which do not.
The Amendment Act introduces many other new, updated or replacement definitions to take into account modern project structures, including “owner”, “contractor”, “subcontractor”, “broader public sector organization”, “municipality”, and “price” among others.

**New Trust Fund rules (s.8.1)**

The Act will not implement a requirement for project-specific bank accounts, but there are some new rules relating to the deposit, administration, recording and traceability of project trust funds. On all new projects after July 1, 2018, trust funds will need to be held in a separate trust account. Further, the party holding those trust funds must keep books and records for those funds as though they were segregated. Set offs against trust funds will be permitted, but only for amounts owed and liabilities on the same improvement.

**Multiple Improvements (s.2(4))**

If a contract includes work on multiple, separate improvements or projects, the parties will be allowed to treat each improvement as a separate contract if the improvements are on non-contiguous lands and the contract expressly allows for it. This will have an impact on when lien periods and lien rights expire, the date of substantial performance and completion and the holdback release dates.

**New Bonding Requirements for Public Sector**

The new Act will require a mandatory 50% performance bond and 50% labour and material payment bond on “public contracts” with the Crown, a municipality or a broader public sector organization. The current draft Regulations (as at April 2, 2018) provide that this applies for all public contracts where the contract price is above $250,000. It does not limit other or additional security from being required.

**Recognizes the PPP/ AFP delivery model and practice**

The PPP/ AFP delivery model, the primary delivery model for large infrastructure projects in Ontario, does not properly fit within the structure of the existing Act. The new Act will fix this and treat the private sector special purpose entity/consortium as an owner for the purposes of the Act.
If a public sector entity (the Crown, a municipality or a broader public sector organization), as the actual owner of a premises, enters into an agreement with a special purpose entity (SPE) that requires the SPE to finance and undertake an improvement on behalf of that public sector entity, and to enter into an agreement with a contractor in respect of the improvement, then the SPE is considered an “owner”, as well as the public sector entity.

This has an impact on calculating lien periods, determining rights, holdback release dates, and so on. Also as a result, the prompt payment and adjudication provisions will apply to the SPE as an owner instead of as a contractor.

Other relevant changes

- Municipalities (s.16): Re-enactment of provision stating liens do not attach to premises of a municipality, as well as Crown. Nor will liens attach to public highways any more (s 34(2)).
- Set-offs (s.17(3)): Set-offs will be allowed, but only if they relate to the same improvement/project.
- Tenant Improvements (s.19): Contractors performing work on tenant improvements that are funded by the landlord will have an automatic lien right against the landlord’s fee simple interest in the land. The amount of the lien will be up to 10% of the amount of the tenant improvement funded by the landlord. The “funding” is defined broadly to include any kind of credit or rent abatement.
- Termination Notice Required (s.31(6)): If an owner or a contractor terminate their contract, the terminating party must publish a notice of termination in a construction trade newspaper, and a copy of the notice must be provided by the contractor to its subcontractors.
- Exaggerated or False Lien Claims (s.35): A lien claimant can be held liable for an exaggerated or false liens claim if the claim is wilfully exaggerated, not just grossly as is the case now. Also, s.47 allows a court to discharge a lien that is frivolous, vexatious or an abuse of process.
- Claims Procedures (Part VIII): There are many changes to the summary procedures in Part VIII of the Act relating to construction dispute and claims process. Many of the procedures have been moved from the Act and into the Regulations to allow more flexibility for easier and more frequent updating. Some of the changes include: allowing a party to combine lien, trust and contract dispute claims without requiring leave of the court; small construction disputes can be brought in small claims court; and construction claims will be subject to case management.
- Technical Amendments: There are also numerous and various technical amendments, including to substantial performance certificates (32(2)), written notices of lien (defined),
vacating lien requirements (44(3.1)), and requests of information (39).

- Use of Forms: Generally, there is a much heavier use of prescribed forms, with altogether 18 entirely new forms.

Timing – When does this all take effect?

Some technical and translation changes of Bill 142 came into force immediately; however most of the substantive changes will be proclaimed and come into force in two stages:

- All of the substantive changes, regulations and forms, other than those relating to prompt payment and adjudication, will be proclaimed and come into force on July 1, 2018; and
- The prompt payment and adjudication provisions, regulations and forms will be proclaimed and come into force on October 1, 2019 in order to allow sufficient time for the Authorized Nominating Authority to be established, to develop a regime for the certification of adjudicators, and to certify adjudicators.

Will my project be affected?

As we have noted previously, the Act will grant grandfathering of existing projects/improvements/contracts. In s.87.3 of Bill 142, the current Construction Lien Act continues to apply with respect to an improvement if:

- A contract for the improvement was entered into before the date of proclamation, regardless of when any subcontract under the contract was entered into;
- A procurement process, if any, for the improvement was commenced before the date of proclamation 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 date of proclamation.

The new prompt payment and adjudication laws will apply in respect of contracts entered into on or after the day ss.11(1) of the Construction Lien Amendment Act, 2017 (i.e. the adjudication provisions) comes into force (October 1, 2019), and in respect of subcontracts made under those contracts.

How Gowling WLG can help

Gowling WLG has been deeply immersed in the reform process for the last 4 years. We have
held several events and published several articles since the first reading of Bill 142, and will continue to monitor its progress as it becomes the new Construction Act.

We are planning several educational events and workshops, and additional analysis of the impact of the amendments introduced by Bill 142 over the coming months to help educate and inform parties about these changes to our industry. This includes a work shop program on adjudication at which some of our UK partners will discuss the UK experience with adjudication.

We would be happy to meet with you or your organization to discuss your questions and concerns about Bill 142 and the Construction Act.

Please visit our Construction Lien Act Reform website “hub” for the announcement of proclamation, and for information and dates about all of our events and activities.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Related  Construction, Ontario Bill 142 and Construction Law Reform

Authors

Neil S. Abbott
Partner - Toronto

Edward (Ted) G. Betts
Partner - Head of Infrastructure and Construction Group, Toronto

Email
neil.abbott@gowlingwlg.com

Phone
+1 416-862-4376

vCard
Neil S. Abbott

Email
ted.betts@gowlingwlg.com

Phone
+1 416-369-7106

vCard
Stay updated

Gowling WLG is an international law firm comprising the members of Gowling WLG International Limited, an English Company Limited by Guarantee, and their respective affiliates. Each member and affiliate is an autonomous and independent entity. Gowling WLG International Limited promotes, facilitates and co-ordinates the activities of its members but does not itself provide services to clients. Our structure is explained in more detail on our Legal Information page.

© 2019 Gowling WLG International Limited. All rights reserved.