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IN THIS ISSUE

Liening under the new *Construction Act*

On July 1, 2018, the Construction Lien Act (the "CLA") will become the Construction Act (the "Act"). With that change comes the modernization of lien rules, among other things. Further amendments to the Act will come into force on October 1, 2019, which will also affect liens on municipal projects and preservation and perfection of liens where adjudications have been commenced. However, while these changes come into force on specified dates, lien claimants and their counsel should be mindful that the new rules may not automatically apply after those dates have passed. The transition rules of section 87.3 of the Act will need to be reviewed prior to determining whether to lien in accordance with the CLA or the new Act.

To assist parties in understanding how lien preservation and perfection will change in the future, the following chart is a summary of amendments under the Act to the sections governing liens of contractors and other persons which come into effect on July 1, 2018:

31(2) – expiration of contractor's lien

A contractor will have 60 days, as opposed to the former 45 days, from the earlier of the date of publication of a certificate of substantial performance (CSP) and the date the contract is completed, abandoned or terminated to preserve its lien.

31(3) – expiration of liens of other persons

Any lien claimant other than the contractor will have 60 days, as opposed to the former 45 days, to preserve its lien from the earlier of (i) the date of the publication of a CSP, (ii) the date of last supply of services or materials to the improvement, (ii.1) the date the contract is completed, abandoned or terminated, and (iii) the date a subcontract is certified complete under section 33.

36(2) – perfection of liens

The new Act provides lien claimants with 90 days, as opposed to the former 45 days, from the last day under section 31 to perfect their liens. Lien claimants are still required to set the action down for trial within two years from perfection.

Of note, a new event which triggers the time for liening has been added to the Act: termination of contract. Under the new section 31(6) of the Act, an owner, contractor, or other person whose lien is subject to expiry must publish a notice of termination as prescribed by the Regulations. Section 8 of O. Reg. 304/18 requires that a notice of termination (Form 8) be published in a construction trade newspaper. This new notice requirement should be of benefit to parties who are not privy to disputes occurring at other contractual levels.

32(2) – content of CSP

The new Act requires CSPs to include a legal description of the premises, including all property identifier numbers (PIN) and addresses for the premises, and if the lien does not attach to the premises, the name and address of the person or body to whom a claim for lien must be given. Previously, the CLA required CSPs to include a description containing a reference to lot and plan or instrument registration number sufficiently to identify the premises.

35 – exaggerated liens

Under the new Act, a person is liable if he knew or ought to know the amount of the lien preserved is "wilfully exaggerated". The court may order that the lien amount be reduced by the exaggerated portion if it finds that the person has acted in good faith. Under the CLA, a person is liable if he knows or ought to know the lien is "grossly in excess" of the amount he is owed.

Municipalities

Under the current CLA, lien claimants who perform work on premises owned by municipalities which are not public streets or highways must register their liens on title. On October 1, 2019, section 16(1) of the Act will come into effect and liens will no longer attach to a municipality's interest in any premises. Liens for improvements made to premises in which a municipality has an interest will need to be given, instead of registered electronically on title.

The following sections of the Act relevant to liening municipal projects come into force on October 1, 2019:

16, 34(2), and 34(3.1) – Giving liens to municipalities

Where a municipality is the owner of any premises, the claim for lien shall be given to the clerk of the municipality.

Condominiums

Section 33.1 of the CLA currently requires a notice of intention to register a condominium to be published in a construction trade newspaper at least 5 and not more than 15 days, excluding Saturdays and holidays, before the condominium declaration is registered. This notice serves as a warning to suppliers of materials and services that the condominium will soon be divided into a number of units. Following the registration of a condominium, a lien claimant who improves the common elements of the condominium must conduct searches and register a lien against each unit in the condominium, which can be a costly process.

The report by the Expert Review commissioned by Ontario's Ministry of the Attorney General, "Striking the Balance: Expert Review of Ontario's Construction Lien Act", recommended that after the registration of a condominium, the common elements in the condominium should have a single PIN which would be subject to a lien. A lien claimant would only have to register its lien against this single PIN, rather than all the units in the building, which would reduce the burden on the lien claimant. However, this recommendation did not appear to be accepted as the Act is silent on the creation of a single PIN for condominiums.

The following sections of the Act which affect liening condominium projects come into force on July 1, 2018:

34(9) – notice of preservation of lien re common elements of condominium

When preserving a lien that relates to an improvement to the common elements of a corporation under the *Condominium Act, 1998*, notice must be given to owners as set out in s. 34(9) and defined in the *Condominium Act, 1998*.

This requirement to give notice of preservation of lien did not exist under the CLA.

33.1(2) – publication of notice of intention to register in accordance with the Condominiums Act

The CLA requires publication of a notice of intended registration of condominium at least five and not more than 15 days before the description of lands is submitted for approval. However, the new Act deleted the manner and timing for publication of this notice, and only provides that the owner must publish a notice "in the manner set out in the regulations." The Regulations are silent on timing, only requiring the notice to be published in a construction trade newspaper in accordance with Form 11.

The effect of the new provisions is that lien claimants must still register any liens in respect of improvements to the common elements of a corporation against each unit of the condominium. In addition, after July 1, 2018, subsection 34(9) of the Act will require the lien claimant to also give notice of the preservation of lien (Form 13) to the corporation and to each person who is: (a) in the case of a corporation that is not a common elements condominium corporation, an owner of a unit in the corporation; and (b) in the case of a common elements condominium corporation, an owner of a parcel of land to which a common interest is attached and which is described in the declaration of the corporation.

Further, as noted in the table above, the manner and timing of publication of a notice of intention to register has been deleted and replaced with "in the manner set out in the regulations". However, there is no Regulation dealing with the timing of publication of a notice of intention to register (Form 11). Form 11 itself is also silent as to those points. It is unclear at the time of this article what warning of registration will be given to those performing improvements at condominium projects.

Adjudication

On October 1, 2019, the adjudication sections of the Act will come into force and will affect liening as follows:

34(10) – expiry of lien when adjudication underway

If the subject of a subsisting lien is also the subject of an adjudication under Part II.1, the lien is deemed to have expired on the later of the date on which it would expire under section 31 and 45 days after the adjudicator receives documents under section 13.11.

Section 13.11 requires the party who gave the notice of adjudication to provide the adjudicator with any documents it intends to rely on during adjudication no later than 5 days after the parties agree to an adjudicator or one is appointed. The selection of an adjudicator may take place immediately after the notice of adjudication is given but must take place within 11 days after notice is given (section 13.9).

The Act provides that the notice of adjudication shall be given to the other party to a contract or subcontract. It also states that if the Regulations so provide, then the party shall give a copy of the notice to the prescribed persons or entities. The Regulations require the party giving notice to provide a copy of the notice to the Authority, however there is no provision permitting or requiring the Authority to provide the notice to any other party. It remains to be seen how a supplier down the chain will know when the contractor has initiated an adjudication with the owner. It is also unclear how the deadline to lien will be affected if separate adjudications are consolidated and documents are delivered to the adjudicator at different times.

Regulations

On April 25, 2018, the Ministry Attorney General released Regulations under the new Act. The new Regulations will take effect at the same time as the amendments they support. Below is a non-exhaustive list of Regulations of which to be mindful when preserving and perfecting liens under the new Act:

General, s. 1

"Construction trade newspaper" is defined as a newspaper,

> (a) That is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario,
>
> (b) That is published at least daily on all days other than Saturdays and holidays,
>
> (c) In which calls for tender on construction contracts are customarily published, and
>
> (d) That is primarily devoted to the publication of matters of concern to the construction industry.

In accordance with this definition, it appears that the Daily Commercial News continues to be the online newspaper in which notices will be published. Parties should still check the DCN to investigate whether any notices, including any notices of termination, have been posted in respect of their improvement.

General, s. 11

The Regulation requires that claims for lien given to the Crown be addressed as follows:

> 1. If Ministry of the Crown, to the office of the Director of Legal Services of that Ministry;
>
> 2. If Ontario Mortgage and Housing Corporation, the office of the Director of Legal Services of the Ministry responsible for the administration of *the Ontario Mortgage and Housing Corporation* Act;
>
> 3. If a college of applied arts and technology, the office of the president of the college;
>
> 4. If any other office of the Crown, the office of the chief executive officer of that office.

Parties who are giving liens must ensure that they address their liens to the proper office, or risk losing their liens. See *Dirm Inc. v. Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479 (Master), in which a lien was found to be not properly preserved as it was given to "the Board of Governors of the College" and not the "office of the president of the college" as required.

Forms, Form 8

Form 8 prescribes the form of notice of termination which is to be published pursuant to s. 31(6) of the Act. If this form is published, the lien preservation and perfection period may be triggered.

Forms, Form 9

Form 9 prescribes the form of notice for a CSP. The new form requires the party publishing the certificate to identify the premises for preservation of liens or the office to which the lien must be given. This helpful distinction and information should assist parties in better understanding how to preserve their liens. Form 9 must be published in a construction trade newspaper.

Procedures, s. 1

An action must be commenced by issuing a statement of claim in a court office in the county in which the premises or part of the premises are situate. Note that Ontario has recently implemented electronic filing of statements of claim for certain actions. If a lien has been vacated prior to the issuance of the statement of claim so that no certificate of action is required, statements of claim in construction lien actions can also be filed electronically.

A statement of claim must be served within 90 days after its issuance, although the court may extend the time for service on a motion made before or after the 90 day period has expired. Note that a lien action must still be set down for trial within 2 years of its commencement.

Uncertainties for lien claimants and their lawyers

The new Act appears to give lien claimants additional time to preserve and perfect their liens. However, as set out above, a lien claimant and its counsel cannot automatically assume that, after July 1, 2018, or October 1, 2019, the Act applies to the preservation and perfection of liens. There may be uncertainty around which rules to follow, particularly during the transition period from the CLA to the new Act.

The transition provisions set out at section 87.3 of the Act come into force on July 1, 2018:

> 87.3 (1) This Act, as it read immediately before the day subsection 2 (2) of the Construction Lien Amendment Act, 2017 came into force, continues to apply with respect to an improvement if,
>
> (a) a contract for the improvement was entered into before that day, regardless of when any subcontract under the contract was entered into;
>
> (b) a procurement process, if any, for the improvement was commenced before that day by the owner of the premises; or
>
> (c) the premises is subject to a leasehold interest, and the lease was first entered into before that day.
>
> Examples, procurement process
>
> (2) For the purposes of clause (1) (b), examples of the commencement of a procurement process include the making of a request for qualifications, a request for proposals or a call for tenders.

On October 1, 2019, section 87.3 of the Act will be amended by adding the following subsection:

> (3) Parts I.1 and II.1 apply in respect of contracts entered into on or after the day subsection 11 (1) of the Construction Lien Amendment Act, 2017 comes into force, and in respect of subcontracts made under those contracts.

Part I.1 relates to prompt payment and Part II.1 deals with adjudication.

The effect of the transition rules is that if a contract for an improvement is entered into before the amendments come into effect on July 1, 2018, but a subcontract is entered into after the amendments are in force, the improvement will be governed by the current CLA. In addition, if an owner begins a procurement process before July 1, 2018, or, where applicable, a lease is first entered into before the amendments come into effect, the improvement will be governed by the current CLA.

The transition rules from the CLA to the Act will likely be subject to scrutiny and court interpretation in the years to come. It is foreseeable that there will be disputes as to when the new "60-90" day rule, as opposed to the former "45-45" day time frame, applies.

For example, contractors with contracts dated July 1, 2018 or later cannot safely assume the new, extended timelines under the Act govern for preserving and perfecting a lien if they are performing tenant improvements on premises leased prior to July 1, 2018. In another example, with respect to municipal projects, if the municipality issues its request for proposals prior to July 1, 2018, a lien claimant's rights and obligations are still governed by the CLA and that lien claimant should register instead of give its lien.

As a practical matter, when it comes to preserving and perfecting liens, if there is any doubt as to which provisions of the Act applies, it is prudent to follow the stricter timelines and to both give and register liens in respect of certain projects to reduce the risk that a lien will be challenged for being out of time. As is well established by the courts, once a lien expires or is found to have been preserved incorrectly, there is very little that can be done to save it.

In conclusion, the following are recommended when preserving and perfecting construction liens:

a) When in doubt, follow shorter timelines;

b) Always check for publication of any notices or certificates relevant to the project, including certificates of substantial performance or notices of termination;

c) Check to see whether liens must be given or registered on title. When in doubt, do both;

d) When giving liens, ensure they are being addressed to the correct individuals and offices;

e) Check whether notice of registration of a preserved lien must be given to any party when dealing with condominiums;

f) Review invoices and statements of accounts with clients and ensure they understand what can be included in the lien amount and what should be excluded;

g) Complete liens or notices with all information required by the new Act and Regulations; and

h) Diarize relevant deadlines in calendars and advise clients to be mindful of the timelines under sections 31, 36 and 37(1).

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Ontario Superior Court Provides Helpful Summary of Consequences of Breaches of Construction Contracts

D & M Steel Ltd. v. 51 Construction Ltd., 2018 ONSC 2171 (S.C.J.)

The Ontario Superior Court decision in *D & M Steel Ltd. v 51 Construction Ltd.* is of general interest on at least two important topics: (a) the standard of review to be applied by a Superior Court Judge on a motion to oppose confirmation of a master's report; and, on the legal consequences for both owners and contractors if they are found to be in breach of contract.

In respect of the standard of review on appeal, in jurisdictions where a reference to a master for the trial of a lien action is possible, a motion to oppose confirmation of the master's report is in effect the appeal of the trial decision at first instance. Justice Perrell confirmed that the applicable standard of review on such a motion is consistent with the standard of review of an appellate court on an appeal from a trial judgment, namely "palpable and overriding error". This requires a deferential approach such that the master's conclusions on matters of fact should not be readily interfered with by the judge hearing the motion to oppose confirmation of the master's report.

The case itself involves many of the elements of a "classic" construction project dispute where an owner and contractor are arguing over a litany of construction issues: deficiencies; alleged extra work; project delay; and, ultimately whether a contract was improperly terminated by the owner or abandoned by the contractor. In the case at hand the disputes had caused the relationship between contractor and owner to deteriorate to a point of crisis whereby the contractor refused to continue with work unless their demands for payment were met. This sort of "stand-off" is all too common a situation in construction projects, and the stakes for clients and the lawyers advising them through such crises are high. It is useful in such situations to return to first principles, and Justice Perrell has provided in his reasons for decision a helpful summary of the relevant law from the perspective of both the contractor and owner.

Ultimately, the actual facts of this case and the court's disposition thereof are of less interest beyond the interests of the immediately affected parties. That being said, it is worth if for counsel to read this case not just for the helpful statements of law on both the standard of appellate review of a master's trial decision and on the consequences of breach of contract, but also as a cautionary tale for clients about the risks of embarking on a full determination on the merits of a "project in crisis" through litigation. Both contractor and owner had claims against each other for approximately $150,000. Ultimately the contractor was found to have breached its contract by refusing to work unless it received payments that the court found were not yet due. Justice Perrell affirmed that a party found to be in fundamental breach of a contract was not entitled to an award of damages, and the contractor was therefore only entitled to a judgment of only $1,130.00 consisting of previously approved extras to be paid out of the holdback. The owner, although almost entirely successful in defending the lien action, similarly failed to establish an entitlement to damages for almost all of the counterclaim, and was left with a judgment on the counterclaim for only $560 in inspection costs. Both levels of decision left the issue of legal costs to be resolved by the parties. It is difficult to characterize this result as having been very successful for either side, and no doubt both sides must have incurred significant unrecoverable legal costs, plus wasted time and resources. Again, counsel looking for an example to present clients with a real-world example of how litigation can go horribly wrong for both sides in a construction dispute need look no further.

In reaching this result, Justice Perrell carefully reviewed the law pertaining to breaches by both contractor and owner. The court first dealt with the consequences of an owner's breach of the construction contract. If the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached the contract and it has no claim for damages. In this event the contractor is justified in abandoning the work and is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time. The court may also award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract.

In a *quantum meruit* claim, deficiencies in the work actually performed are deducted from the value of the work done, but no account is taken of the owner's costs to complete in calculating the contractor's damages.

The court then reviewed several examples of contractor breach and the resulting consequences. Merely bad or defective work, or insignificant non-completion will not, in itself, entitle an owner to terminate a contract, but the owner will have an obligation to pay for the work and make a claim for damages for the defective work. Nor will an owner be able to terminate the contract because of some minor or inconsequential failure to complete, although the owner may have a claim against the contractor for damages for non-completion or for defective workmanship, which will generally be the cost of completing the non-completed items or remedying any defects. If the contractor breaches the contract, an owner who alleges that the work performed or the materials supplied are defective must provide proper evidence on the basis of which his or her damages can be assessed.

If there are defects in a contractor's workmanship, but not enough to amount to a fundamental breach entitling the owner to terminate the contract, the contractor should be permitted to remedy the defects, and failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim to remedy the defects as a result of its failure to mitigate.

If a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed.

It is clear from the foregoing that the stakes can be very high indeed when a contractor and owner are at a point of crisis where the contractor refuses to proceed unless paid. Both sides must proceed with caution, and the foregoing legal principles are full of traps whereby each side can find themselves without remedy. In *D & M Steel*, the contractor was trapped in that the terms of the contract did not permit them to demand the payments at issue and the decision to cease work therefore constituted abandonment. For the owner, the main trap was that they failed to adduce evidence of their damages. In the end, neither side could have been left happy with the result of this "zero sum game". Of course each case turns on its unique facts, but counsel would be well advised to review both the result and the summary of principles contained in this decision with their clients, particularly when advising either a contractor or an owner on a "project in crisis" as to the risks and consequences they respectively face when both the work and payments have stopped.

AUTHOR:

Changes to Ontario's New Home Warranties Regime

Introduction

Change is coming to the regulation of builders and vendors of new homes in Ontario.

Tarion came into being in 1976, with the enactment of the *Ontario New Homes Warranties Plan Act* (the "*Warranties Act*"). Since its conception, Tarion has had a dual mandate – to provide warranty protection to Ontario's new home owners, and to regulate new home builders and vendors.

However, the *Warranties Act* is scheduled to be repealed on a date to be determined by proclamation, and will be replaced with two separate pieces of legislation: the *New Home Construction Licensing Act, 2017* (the "*Licensing Act*") and the *Protection for Owners and Purchasers of New Homes Act, 2017* (the "*Protection Act*"). Essentially, Tarion's existing mandate is being divided, with an entirely new not-for-profit corporation becoming responsible for oversight of the regulation of new home builders and vendors in Ontario. It is unclear when the new legislation will come into force, but until such time, Tarion will maintain its existing operations and responsibilities.

Background to Bill 166

In recent years, Tarion's multiple roles and responsibilities has given rise to a perceived, or real, conflict of interest. In November of 2015, the Minister of Government and Consumer Services initiated an independent review of the *Warranties Act*, and appointed the Honourable Justice Douglas Cunningham, Q.C. to conduct the review. On March 28, 2017, Tracy MacCharles, Ontario's Minister of Government and Consumer Services, released Justice Cunningham's final report, which contained 37 recommendations, 17 of which were directly related to Tarion and/or the recommended regulatory body. These recommendations laid the groundwork for Bill 166, also known as *The Strengthening Protection for Ontario Consumers Act, 2017,* which received Royal Assent on December 14, 2017.

What Builders Need to Know

The new legislation is certain to affect Ontario's builders once in force. The most significant changes include: (1) newly defined licensing criteria; (2) greater compliance and enforcement tools; and (3) changes to the dispute resolution process for warranty claims, including a lower onus of proof for homeowners.

Newly Defined Licensing Criteria

The registration requirements under the *Licensing Act* will be considerably more extensive than the those contained in the existing provisions of the *Warranties Act*. This change was a response to Justice Cunningham's recommendation that "the legislation should include minimum requirements for registration as a new home builder or vendor."

Under the *Warranties Act,* builder and vendor eligibility requirements are not clearly defined, and allow for broad consideration of the financial position and past conduct of persons applying for registration, as well technical competence to consistently satisfy the warranty obligations.

In an effort to implement Justice Cunningham's recommendation, the *Licensing Act* will provide expended eligibility criteria to be applied to both the applicant and all interested persons, which will include individuals who may play or have an active or key role in a builder's business, including shareholders, employees, agents, and subcontractors. Builders seeking to renew their licenses will also be subject to the expanded requirements.

Under section 38, eligibility will be determined in consideration of:

1. the financial position of the applic*ant and all interested pers*ons in respect of the applicant;

2. the past and present conduct of the appl*icant and all interested p*ersons in respect of the applicant;

3. whether the applicant, or any employee or agent of the applicant, has made any false statement with respect to the conduct of the applicant's business;

4. whether the *applicant, or any inte*rested person, has carried on or is carrying on activities in contravention of the Act and regulations;

5. the applicant's competence;

6. whether the applicant is in breach of a condition of the licence (if applying for renewal);

7. the tax compliance of the applicant, or, if the applicant is a corporation, the tax compliance of its directors, officers, and other prescribed persons; and

> 8. whether granting or renewing the license would be contrary to public interest.

While the number of criteria to be considered by the registrar has increased, it remains to be seen whether they will actually provide builders with a better understanding of the requirements to be satisfied, and/or result in increased transparency. Should a builder be refused registration or renewal of its registration, it is entitled to a hearing before the Licensing Appeal Tribunal under the same process as is currently in effect under the *Warranties Act.*

Greater Compliance and Enforcement Tools

The Licensing Act will equip the regulator with a number of compliance and enforcement tools not currently available to Tarion under the existing legislation.

(1) Immediate Suspension

The Licensing Act introduces a new concept of "immediate suspension". While the registrar may suspend or revoke a license at any time for any reason that would cause the licensee to be disentitled to a license under section 40(2), the registrar is required to give notice of the proposal under section 43(1)(b). This largely mirrors the procedure set *out in section 9* of the Warranties Act. However, section 45(1) goes on to dispense with the notice obligation if the registrar considers it to be in the public interest. This change is concerning in that it denies a builder an opportunity to provide a defence prior to being suspended, and may unnecessarily impact the flow of funds through the construction pyramid on active projects.

(2) Discipline Proceedings

*Section 57(*1) of the Licensing Act establishes a new Discipline Committee that is granted the power to hear cases where registrants have breached the Code of Ethics. The Code of Ethics is also a significant new regulatory tool. If the Discipline Committee determines that the licensee has failed to comply with the Code of Ethics, it may order the licensee to take further educational courses, or impose a fine to a maximum of $25,000. Determinations made by the Discipline Committee can be appealed to the Appeals Committee established under section 57(2).

(3) Administrative Penalties and Compliance Orders

The Licensing Act allows the Registrar to appoint assessors who are authorized to impose an administrative penalty, not to exceed $10,000, on a person who has contravened or is contravening a prescribed provision of the Act or Regulations, or a condition of a license, if the person is the licensee, or if the person *is contrav*ening the Protection Act or Regulations. Administrative penalties will be an alternative to prosecution or revocation of registration and were not previously *available u*nder *the Warranties* Act.

The Licensing Act also allows the Director, as appointed by the Board of the Regulatory Authority, to make compliance orders where there are reasonable grounds to believe that a builder has failed to comply with any of the *requirements* under the Licensing Act. Unless an immediate compliance order is made under section 68, a builder may elect, within 15 days upon receiving notice of the proposed order, to request a hearing before the License Appeal Trib*unal and the Director.*

New Onus of Proof for Warranty Claims

The Protection Act clearly delineates the burden of proof on the homeowner in respect of the homeowner making a claim on his/her warranty, which was ambiguous under the current legislation. *In his revie*w of the Warranties Act, Justice Cunningham found there to be considerable ambiguity as to "who must prove what*"*. *Section 52(*3) of the Protection Act attempts to address this ambiguity:

> **Evidence required of claimant**
>
> 52(3) Subject to subsection (4), a claimant making a claim,
>
> (a) shall explain, in accordance with the regulations, the reasons for the concern giving rise to the claim;
>
> (b) if the claim does not relate to an entitlement to receive compensation out of the guarantee fund under subsection 50 (2) or is not a prescribed claim, shall include in the reasons for the concern giving rise to the claim a description of the symptoms of the concern that have been observed or experienced, unless the regulations pro*vide otherwise; and*
>
> *(c) is not required to prove* the cause of the concern giving rise to the claim if the claimant has complied wi*th clauses (a) and (b), unless the regula*tions *provide othe*rwise.

The Protection Act clarifies that the homeowner is not obligated to prove the cause of the deficiency in his/her claim, unless the regulations

provide otherwise. If not addressed by the regulations, this lower onus may result in an increased number of homeowner claims, and a corresponding increase in the time and costs incurred by builders in responding to such claims.

Conclusion

Tarion's role as Ontario's new home warrantor and new home building regulator is coming to an end. Ontario homebuilders will soon be subject to newly defined licensing criteria, greater compliance and enforcement tools, and a potential increase in homeowner warranty claims.

While it may be too early to tell whether these changes will make any significant impact on the problems they are intended to rectify, it is evident that the new legislation fails to address a number of existing concerns.

In particular, the Protection Act fails to include a statutory mechanism to appeal a decision of a breach of warranty, which is surprising in light of Justice Cunningham's indication that builder's remedies, such as the Builder Arbitration Forum, should be addressed and improved. It is disappointing that builders and homeowners alike were not provided with a statutory right to appeal decisions to the Tribunal.

With new legislation also come new concerns. The consequences of the division of authority between the Discipline Committee and the Licensing Appeal Tribunal remains unknown. There is also a potential for conflict between adjudication under the new Construction Act and the warranty obligations and complaints investigations undertaken under the Protection Act.

While the new legislation may not solve all of the problems currently impacting Ontario's builders under the Warranty Act, increased accountability of the regulatory body is sure to be a welcomed change.

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Case Comment - *Valard Construction Ltd. v. Bird Construction Company*

In *Valard Construction Ltd. v. Bird Construction Company*, 2018 SCC 8, the Supreme Court of Canada considered the duties of an obligee-trustee to potential claimant-beneficiaries under a labour and material payment bond. Valard, an unpaid sub-subcontractor, missed its opportunity to claim on the bond because it wasn't made aware of its existence in time, and commenced an action against Bird, the obligee contractor. While the lower courts dismissed Valard's claim, the Supreme Court allowed its appeal.

The Court held that a trustee has a duty to disclose the existence of a trust to a potential beneficiary wherever it would be to the unreasonable disadvantage of the beneficiary to not be so informed. This duty applies in the context of a labour and material payment bond, where a trustee holds the right to claim on the bond in trust for potential beneficiaries. The Supreme Court found

that Bird had failed to discharge their duty to inform potential beneficiaries of the trust, to the standard of an honest and reasonably skillful and prudent trustee.

Facts

Bird was the general contractor for an oil sands construction project for Suncor near Fort McMurray. Bird subcontracted some electrical work to Langford Electric Ltd., which was required by the subcontract to obtain a labour and material payment bond in the amount of $659,671. The bond, a standard form CCDC 222-2002 issued by Guarantee Company of North America as surety, allowed for a provider of work/labour or materials who did not receive payment from Langford to sue on the bond, on the condition that the claimant provide notice within 120 days of its last provision of work/labour or materials.

Langford sub-subcontracted directional drilling work to Valard, and Valard completed its work on May 20, 2009. Some of Valard's invoices went unpaid and Valard sued Langford, obtaining default judgment for $660,000.17 in March 2010, by which time Langford was insolvent.

In April 2010, Valard learned that Bird had recently required a labour and material payment bond from a subcontractor on a different project, and Valard asked Bird if it had also required Langford to obtain one on the Suncor project. Bird answered yes, and provided Valard information regarding the bond. Valard immediately gave notice of its claim on the bond, but Valard's claim was rejected by the surety for Valard's failure to give timely notice within 120 days of its last provision of work/labour or materials. Valard then commenced an action against Bird for breach of trust – Valard claimed that Bird had breached its duty as a trustee to fully inform the bond beneficiaries of its existence.

Lower Courts

The trial judge in the Court of Queen's Bench of Alberta found Bird owed no duty to inform Valard of the bond. He found that the use of trust language in the bond was for the limited purpose of overcoming the third-party beneficiary rule – to permit then-unknown beneficiaries to sue on the bond if necessary. Importantly though, as a matter of fact, the trial judge found that labour and material payment bonds were uncommon on private oil sands construction projects like the Suncor project.

In a majority decision, the Alberta Court of Appeal dismissed Valard's appeal. The Court observed the statutory rights for parties on construction projects to request information about the existence of labour and material payment bonds. The Court therefore found that Bird had no duty to disclose the bond, "unless and until a clear and unequivocal request for information about the bond is made." Justice Wakeling, in dissent, found that if potential beneficiaries would benefit from learning of the existence of a trust, the trustee must take reasonable steps to disclose the trust's existence to a sufficiently large portion of the class of potential beneficiaries.

Supreme Court

In a majority decision written by Justice Brown, the Supreme Court allowed Valard's appeal, and directed that the quantum of damages be remitted to the trial judge. First, Justice Brown found that Bird did owe Valard a duty to disclose the bond's existence. Beginning from trust law first principles, Brown found general duties of trustees as fiduciaries, including the duty to account to beneficiaries, were applicable in the case of surety bonds. In considering the case of an unknowing beneficiary, Brown found that "wherever it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed of the trust's existence, the trustee's fiduciary duty includes an obligation to disclose the existence of the trust". Valard would have been (and in fact was) unreasonably disadvantaged by only learning of its rights under the bond after expiry of the period during which those rights could be enforced.

Second, Justice Brown considered whether Bird had done enough to discharge its duty to inform potential beneficiaries of the trust, to the standard of an honest and reasonably skillful and prudent trustee. Justice Brown observed that "what a trustee must do … is highly sensitive to the context in which the particular trust relationship arises." He relied upon the finding at trial that labour and material payment bonds were uncommon on private oilsands construction projects as a basis for determining that Bird had to do more than just answer a question if asked. While Bird could not have known of all potential beneficiaries when the bond was obtained, Bird ought to have taken reasonable steps to disclose the existence of the trust. Justice Brown noted a point made by the dissenting Justice Wakeling from the Court of Appeal, that Bird had an on-site trailer where notices were posted, and where a significant portion of potential beneficiaries (sub and sub-subcontractors) attended meetings. He agreed with Justice Wakeling that posting notice of the bond in the trailer would have been enough for Bird to satisfy its duty. By doing nothing, Bird committed a breach of trust.

In a concurring opinion, Justice Côté found that a trustee under a bond has no pro-active duty to inform potential claimants of the bond's existence, but nevertheless found in favour of Valard. Justice Côté found that

when Bird became aware of Valard's problems obtaining payment from Langford during the project, Bird's duty to disclose the existence of the bond was triggered – without requiring a specific request from Valard as to whether a bond existed.

Justice Karakatsanis wrote a dissenting opinion, arguing that labour and material payment bonds were so common that unpaid potential claimants could be expected to enquire as to their existence, and trustees did not have a pro-active obligation to give notice.

Conclusion

Owners, contractors, and other trustees under surety bonds should carefully consider obligations they may have to inform potential claimants of the existence of trusts for their benefit. In at least the case of Bird, there was an obligation to do "something", and Bird's failure to do anything made it liable to Valard.

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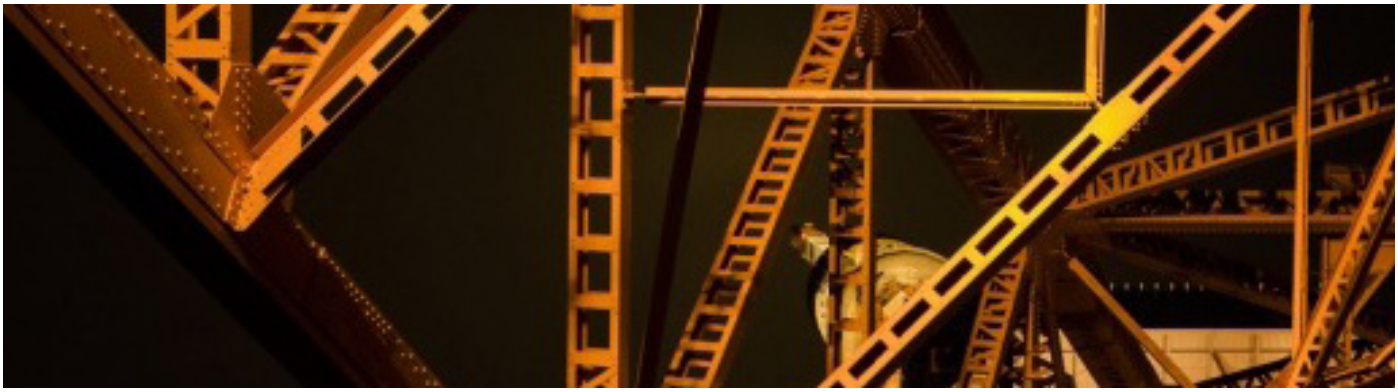
Prompt Payment in Federal Construction Contracts: Status of Bill S-224

Purpose of the *Canada Prompt Payment Act*

On April 13, 2016, Senator Donald Plett sponsored Bill S-224, the *Canada Prompt Payment Act*, to enact a prompt payment regime for federal construction projects. The was introduced to address two major issues affecting federal construction projects: delays by federal authorities in processing valid invoices, and delays by general contractors in remitting payments down the subcontractor chain. According to Senator Plett, these payment delays had become systemic in federal projects and were only increasing. In 2007 the duration of a receivable in the construction industry was nearly 9 weeks, with an average duration of 62.8 days. By 2012, the delay for payment of receivables had increased to almost 10 weeks, with an average duration of 71.1 days (*Debates of the Senate*, 42nd Parl, 1st Session, No. 150 (19 April 2016) at 1700 (Hon. Donald Neil Plett).

With small and medium sized contractors and subcontractors required to pay substantial construction costs such as employee wages, Canada Revenue Agency Fees and Workers' Compensation fees up front, delayed payments can put them in a liquidity squeeze that has the potential to derail federal construction projects. With the federal government announcing its plan on November 1, 2016, to invest $80 billion in infrastructure over the next 12 years, the *Canada Prompt Payment Act* is meant to eliminate payment delays that could jeopardize upcoming federal projects.



Features of the Proposed *Act*

While Bill S-224 is yet to proceed through the House of Commons, after passing its third reading before the Senate on May 4, 2017, the *Canada Prompt Payment Act* includes, amongst others, the below features meant to reduce payment delays:

Application: The Act applies to all construction contracts made between a federal government ministry or department, any body or office listed in Schedule I to the *Access to Information Act*, or any Crown corporation within section 83 of the *Financial Administration Act*, and a general contractor. Likewise, it applies to all subcontractors and suppliers in the construction pyramid on federal projects. The *Canada Prompt Payment Act* is mandatory and cannot be contracted out of by the parties.

Owner Payment: The Act establishes a timeframe for delivery of monthly payment applications by a general contractor and for monthly payment by the federal government of the payment applications. Unless a shorter period is provided for under the contract, the general contractor must submit a monthly payment application on the last day of the month, and the federal owner is required to pay the contractor within 20 days after receipt of the payment application.

Subcontractor Payment: Payment from the general contractor to the subcontractor, and as between the subcontractor and its sub-subcontractors/suppliers mirrors that of the payment regime established between the federal owner and the contractor. The subcontractor must submit a payment application on the 25th day of the month, with the contractor required to pay the subcontractor on its payment application within 30 days of receipt of the payment application.

Deemed Approval: A payment application is deemed approved on the 10th day after its receipt unless the payer or the payment certifier provides written notice disputing the amount of the payment application.

Dispute Resolution: A dispute arising under the Act may be referred to adjudication by any party. The decision of an adjudicator is binding on the parties and is enforceable as a judgment of a court.

Right to Suspend Work: Where a payer fails to make payment as required under the Act, the contractor or subcontractor my provide notice that it intends to suspend its work, and then cease all work seven days after providing written notice. If the unpaid payee is a contractor or subcontractor with parties below it in the construction pyramid, it may suspend payment to its respective subcontractors below it.

Concerns with the Proposed Legislation

On November 9, 2017, the Canadian Bar Association delivered an open letter to the Honourable Carla Qualtrough, Minister of Public Services and Procurement, setting out the Canadian Bar Association's concerns with Bill S-244 as currently drafted (https://www.cba.org). Amongst other concerns, the Canadian Bar Association criticized Bill S-244 for being drafted prior to adequate consultation, and for the potential for the prompt payment regime to unduly impact parties' freedom of contract on construction projects.

In response, on January 30, 2018, Toronto lawyers Bruce Reynolds and Sharon Vogel were retained to review the federal prompt payment procedures set out in Bill S-244 and engage in consultation meetings with industry stakeholders to determine whether, and to what extent, Bill S-244 should be amended to address industry concerns. Bruce Reynolds and Sharon Vogel are uniquely qualified to conduct this consultation process and prepare a report on Bill S-244, having already prepared and delivered their *2016 report, Striking* the Balance, on the proposed changes to *the Ontario Construct*ion Lien Act, which included a new provincial prompt payment regime.

On April 10, 2018, Public Services and Procurement Canada announced that it would be extending the delivery date of the Reynolds and Vogel report on Bill S-244 to May 31, 2018, to allow for additional time for industry stakeholders to provide feedback. Stakeholders will have until April 30, 2018 to provide written comments on the draft of Bill S-244.

What's next for the *Canada Prompt Payment Act?*

Once Reynolds and Vogel deliver their report on May 31, 2018, including any recommendations arising out of their consultation meetings with industry stakeholders, Bill S-244 must then proceed through the House of Commons before becoming law. *The Canada Prompt* Payment Act will come into force six months after it receives royal assent.

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Notable Case Law

Heinrichs v. 374427 Ontario Ltd., 2018 ONSC 78 (Div. Ct.)

The Divisional Court set aside an order of a master ordering the release of funds held by a law firm in escrow as security for a release of lien. The agreement between the parties provided as follows:

> IN CONSIDERATION of the Instruments being discharged from the Lands on or before the 21st day of February, 2016, Brattys LLP undertakes to hold the sum of FOUR HUNDRED FIFTY-TWO THOUSAND THREE HUNDRED AND EIGHTY-EIGHT DOLLARS AND SIXTY-TWO CENTS ($452,388.62) in escrow pending receiving a joint direction from Sahar Zomorodi and Allan L. Morrison or in the alternative a Court order directing the payment of the same (emphasis added)

The lien was discharged by way of an Application to Delete Construction Lien. The defendants brought a motion to dismiss the action in its entirety for delay or, in the alternative, to direct that the action proceed as an action in contract under the Rules of Civil Procedure. In respect of both options, the defendants sought an order directing the release of funds held in trust by the law firm. The master granted the motion in part and ordered the release of the funds, holding as follows:

> On the issue of the release of security, I find that it would be inappropriate to allow the plaintiff the benefit of the security contemplated by the *Construction Lien Act* in circumstances where the plaintiff failed to set down the lien action for trial within the two year limitation period required by section 37 of the Act. Had the security for the lien claim been posted in court pursuant to section 44 of the Act, and had the action not been set down for trial within two years as required by section 37 of the Act, then the lien would have expired and the funds would have been ordered released from court.

The Master held that the payment to the law firm was "simply an alternate repository of the security otherwise payable into court to vacate a lien, pursuant to s. 44 of the Act".

The Divisional Court held that since the parties had specifically agreed to a "discharge" of the lien, section 44 had no application, and that the Master's use of that section by analogy was in error. The court also held that the Master misapprehended the evidence and made a palpable and overriding error in interpreting the Undertaking.

Allingham (R.C. Allingham Construction) v. Perrault, 2018 ONCA 92

The Ontario Court of Appeal confirmed that it is unlikely that an entirely fact-driven appeal raising questions of contractual interpretation, credibility and reliability of witnesses, and the admissibility and weighing of expert evidence will succeed. All those issues being within the province of a trial judge, they are entitled to deference on appeal.

Urban Mechanical v. University of Western Ontario, 2018 ONSC 1888 (S.C.J.)

Plaintiff subcontractor installing mechanical systems on university project used particular type of pipe connector which did not meet contract specifications. The subcontractor was required to replace almost all pipes and sought additional compensation for that work. The general contractor's motion for partial summary judgment on this point was allowed. The subcontract provided that the subcontractor would promptly correct defective work that had been rejected by the contractor as failing to comply with terms of parties' agreement. Since the subcontractor had used the connectors in question in areas where the specifications required a different type of connection, any additional work in replacing the pipes was corrective and required by the subcontract.

Campoli Electric Ltd. v. Georgian Clairlea Inc., 2018 ONSC 2008 (Div. Ct.)

The Divisional Court affirmed a decision of Master Short which, among other things, following the Divisional Court decision in *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.* (2008), 71 C.L.R. (3d) 54 (Ont. S.C.J.), had held that the trust claim limitations clock runs from when the default entitling a party to lien a project is discovered.

Ken Tulloch Construction Ltd. v. 1684567 Ontario Inc., 2018 ONSC 2071 (Master)

A contractor building a multi-building waste management facility to receive and compost organic waste designed a brand new odour control system for the facility that had never been built anywhere before. There were no specifications available. In determining the timeliness of the contractor's lien, the master held that a series of adjustments to the odour control system as well as the supply and installation of motors and switches in connection with the redesign of an overhead door were not rectification or warranty work, but rather work that went to the very core of the commissioning process and therefore an integral part of the services and materials the contractor was to perform. The lien was therefore held to be timely.

2349914 Ontario Inc. o/a Antares Construction Group v. Oleg Mazlov, 2018 ONSC 339 (Master)

The plaintiff participated in a joint venture project with two defendants to purchase a property, build a house on it and then sell it and share the profit. The plaintiff withdrew from joint venture prior to completion of the project and registered a lien against the property. The defendants' motion to discharge lien claim was granted. The plaintiff was an owner within the meaning of the *Construction Lien Act* and as such could not lien. The plaintiff's withdrawal from the joint venture prior to completion did not transform it from a partner to a contractor.