SIMPLIFIED GUIDE TO MODERNIZATION OF THE *CONSTRUCTION LIEN* ACT

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1. INTRODUCTION

In 1983, the *Construction Lien Act* came into force, and with the exception of a few minor amendments, it had remained unchanged for 35 years.

In 2015, the Attorney General's office undertook a review of the *Construction Lien Act*, that sought input from stakeholders in the industry and in September 2016 released the report of the review, titled *Striking the Balance, Expert Review of the Construction Lien Act* (the "Review"). The Review identified 101 recommendations organized around three key principles:

1) The modernization of the construction lien, holdback and trust rules;
2) The introduction of a prompt payment regime; and
3) The introduction of an adjudication regime for the quick resolution of construction disputes.

The recommendations related to the modernization principle called for amendments that would align the legislation with current industry realities and practices. First, it was necessary to take into account the new forms of complex contractual arrangements (in particular public-private partnerships and joint ventures) and the increasing size and complexity of the projects. Second, many of the existing definitions, monetary thresholds, timelines and procedural steps were having an effect contrary to that originally desired, with crippling consequences on all stakeholders. Third, the trust provisions were not sufficiently focused on the prevention of breaches and on the enforcement of trust obligations, particularly in the context of the bankruptcy of a trustee.

The recommendations related to prompt payment called for amendments intended to address the long-standing and chronic industry practice of delaying payment. Payment delays occur in the normal course of projects with increasingly drawn out payment periods on progress invoices. They also occur when disputes arise, leading to a freeze on the flow of funds, project delays and litigation. The *Construction Lien Act* does not address late payment, it only provides a remedy for security of (eventual, post-litigation) payment.

The recommendations related to adjudication called for amendments intended to address the disastrous effects of the increasingly complex and costly litigation necessary to give effect to the lien and trust remedies available under the *Construction Lien Act.*

The Attorney General adopted 98 of the 101 recommendations of the Review and on May 31, 2017, introduced Bill 142, "An Act to Amend the *Construction Lien Act*" ("Bill 142") in the Ontario Legislative Assembly. Bill 142 represented the Ministry's efforts to implement the recommendations of the Review with respect to modernization, prompt payment and adjudication. With a few modifications resulting from last minute stakeholder input, on December 12, 2017, Bill 142 received Royal Assent and became law. Upon proclamation by the

Lieutenant Governor, the *Construction Lien Act*, as amended by *The Construction Lien Amendment Act*, became the *Construction Act* (the "*Act*").

The amendments are scheduled to come into effect in two stages. Most of the modernization amendments came into force on July 1, 2018. Initially, the amendments related to the homebuyer definition, liens on municipal projects and prompt payment and adjudication were to come into force on October 1, 2019.

However, due to criticisms related to the transition provisions, the Legislature has started the process of amending the *Construction Act* with the introduction of Bill 57, an Act to enact, amend and repeal various statutes that will be known as *Restoring Trust, Transparency and Accountability Act, 2018*. First Reading of Bill 57 was on November 15, 2018 and it is anticipated that it will be passed before the end of the year. This new legislation provides that the amendments related to municipal lands, prompt payment and adjudication will come into force on the later of the day that the relevant sections in the *Construction Lien Amendment Act, 2017* come into force and the day the *Restoring Trust Transparency and Accountability Act, 2018* receives Royal Assent.

In response to the need for modernization, the *Act* introduces new provisions or amendments regarding public-private partnerships, timelines for the preservation and perfection of liens, holdbacks, construction trusts and surety bonds, to name a few. These amendments are found throughout the *Act* and the new Regulations related to the *Act*. On the whole, the changes are good for the industry. The purpose of this Guide is to collect all the modernization provisions in a single guide and to describe in a simple format each modernization change and where possible, its anticipated implications.

In many cases, this Guide sets out the amendment by striking through the words that have been deleted and underlying the new words inserted by the amendment. This will assist in showing that many of the changes are relatively straightforward. Perhaps the most problematic of all the new provisions is the transition provision. As a result, as described in the Guide, in the case of any uncertainty as to which legislation applies, if you are a lien claimant, use the old timelines for registering a lien and commencing an action (better safe than sorry). If you are an owner, you will retain the holdback, publish a notice of non-payment of holdback, and then release the holdback after the 60th day when the time for registering liens under either the *Construction Lien Act* or the *Act* has expired. All parties should maintain records related to delays and bank accounts consistent with the changes in the *Act*.

Also, where appropriate, we have also referred to the Regulations made under the *Act*. Unlike the *Construction Lien Act* which had only one regulation, there are four regulations under the *Act*:

1. Regulation 302/18: Procedures for actions under the *Act*;

2. Regulation 303/18: The forms used in the *Act*;

3. Regulation 304/18: General regulations; and,

4. Regulation 306/18: Related to adjudication.

The first three regulations came into effect on July 1, 2018 along with the modernization provisions of the *Act*. Presumably the fourth regulation related to adjudication will come into effect sometime around October 1, 2019.

This Simplified Guide to Modernization of the *Construction Lien Act* is one of three guides. The other two guides in the series, that will be prepared in the coming months, are:

- The *Simplified Guide to Prompt Payment;* and,
- The *Simplified Guide to Adjudication*.

Our intention is to update this Guide and the other two as developments occur particularly where the court has provided an interpretation of the amendments where the effect of the amendment is not clear.

2. TRANSITION PROVISIONS

When the province switched over from the *Mechanics' Lien Act* to the *Construction Lien Act*, the transition took place with reference to a fixed date. The *Construction Lien Act* came into force on April 2, 1983 and applied to all contracts entered into on or after that date and to all subcontracts arising under those contracts and to all services and materials supplied under the contract or subcontract. The *Mechanics' Lien Act* would continue to apply to all contracts and related subcontracts entered into before April 2, 1983. The transition was clearly identifiable. This is not the case with the transition provisions that brought into effect the modernization provisions.

To address the concerns of the industry related to the transition provisions, by email dated April 25, 2018, the Attorney General took the opportunity to address the transition rules. The email provided, in part:

> *To ensure predictability and certainty for the industry's contractual arrangements, the transition rule follows the long-standing presumption of statutory interpretation that legislation is not given retroactive effect, unless made so expressly.*

Unfortunately, this paragraph related to the retroactive effect of legislation did not allay the concerns with respect to the transition provisions. The concerns with the transition provisions related to having a clearly identifiable date as to when the amendments apply, on a go forward basis. If the transition provisions were limited to subparagraph 87.3(1)(a), the date the contract is entered into, there would be no uncertainty. The uncertainty principally arises as a result of the language used and the inclusion of subsections 87.3(1)(b) and (c).

Therefore, it is critical to understand when the *Construction Lien Act* will apply and when the provisions of the *Act* will apply. Applying the wrong statute may have grave consequences for a

party such as the expiry of a lien. In addition, the rollout of the amendments is gradual so that prompt payment, adjudication and liens regarding municipal lands will not take effect until October 1, 2019. As it is critical to understand which regime applies, section 87.3 is set out in its entirety below:

> 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.
>
> 87.3(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.
>
> 87.3(3) Parts I.1 [Prompt Payment] and II.1 [Adjudication] apply in respect of contract 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.

The framers of the legislation appear to have approached the transition provisions from the perspective of the traditional construction pyramid and in the context of a traditional infrastructure, institutional, commercial or industrial project.

It is important to note that the transition is in reference to an “improvement”. The improvement is generally identified by the construction called for in the contract. Therefore it is entirely possible to have more than one improvement on a single construction site such that the old regime applies to one improvement and the new regime applies to the second improvement.

Issues will arise from the application of section 87.3(1) where an owner does not engage a general contractor but rather enters into a contract with each trade contractor for the construction of a project. There will be uncertainty as to what constitutes the improvement and whether the improvement is to be defined by each trade contract or whether it will be defined by the entire project. In addition, each contract is the subject of a separate procurement process, each contract reaches substantial performance independently from the other contracts and holdback is released on a contract by contract basis. This model often occurs where the owner acts as its own general contractor or retains a construction manager as its

agent, which means that the construction manager is not a general contractor but is instead more akin to a consultant. The application of section 87.3(1) to this model is open to interpretation, and depending on the interpretation that is adopted, both the *Construction Lien Act* and the *Act* may apply to a single improvement. One possible interpretation would require that the words "a contract" and "a procurement process" be read as meaning "any contract" or "the first contract" and "any procurement process". If that interpretation is adopted, the transition provision will therefore apply on a project by project basis. The other interpretation is that where "a contract" is entered into or "a procurement process" is commenced before July 1, 2018, the *Construction Lien Act* will apply to that contract and to its subcontracts, but not to other contracts that were entered into after to July 1, 2018.

Many other criticisms were raised by the industry with respect to the transition provisions. For example, the subcontractors could not know when the contract between the owner or contractor was entered into or when the procurement process for the improvement commenced. The transition provisions also referred to the commencement of a procurement process and provided that a procurement process included three specific methods of procurement. The transition provisions failed to take into account that a procurement process starts with the identification of a need for a good or service followed by validating the need and understanding its requirements as set out, for example, in *The Broader Public Sector Procurement Directive Implementation Guidebook* or the *Procurement Guideline for Publicly Funded Organizations in Ontario* published by the Ministry of Finance to assist publicly funded organizations with procurement. Both of these *Guides* noted that the issuance of the request for tenders or proposals is the fourth step in a procurement process. The uncertainty in the transition provisions would have created significant issues such that parties would have adopted strategies to protect themselves. Lien claimants would have preserved liens under the old 45 day timeline, and owners would have held on to the holdback until the time to preserve a lien under the old or new regimes had expired. In addition, with respect to leases, it would be entirely possible to have a long term lease that was entered into prior to July 1, 2018 so that when a renovation of the leased premises is undertaken by the tenant, the *Construction Lien Act* would have still applied.

As a result of the criticisms regarding the transition provisions, the Legislature has started the process of amending the transition provisions with the introduction of Bill 57, An Act to enact, amend and repeal various statutes known as *Restoring Trust, Transparency and Accountability Act, 2018.* First reading of Bill 57 occurred on November 15, 2018.

One of the amendments proposed in Bill 57 relates to section 39 of the *Act*. A party will be permitted to request information from an owner and a contractor regarding the date the contract was entered into and the date on which any applicable procurement process was commenced. In addition, parties will be able to request from a subcontractor the date the subcontract was entered into. The amendment to the *Act* proposed in Bill 57 reads as follows:

39(1)1(i) the names of the parties to the contract, the date on which the contract was entered into and the date on which any applicable procurement process was commenced.

39(1)2(i) the names of the parties to a subcontract and the date on which the subcontract was entered into.

Bill 57 also proposes an additional amendments to address the ambiguities caused by the transition provisions in the *Act*. Under the *Act*, the transition provision indicated that 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. Bill 57 proposes new subsection 1(4) to address when a procurement process is commenced and reads as follows:

1(4) For the purposes of this Act, a procurement process is commenced on the earliest of the making of,

(a) a request for qualifications;
(b) a request for quotation;
(c) a request for proposals; or
(d) a call for tenders.

Only four methods of procurement set out in proposed subsection 1(4) will be used to determine the commencement of a procurement process. The procurement process is deemed to commence on the earlier of any one of the four set out procurement methods. Presumably, if some other process is used, it is not a procurement process and the date on which the contract was entered into will determine which regime applies.

Bill 57 also proposes to amend the transition provision itself so that section 87.3 will read as follows:

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~~ and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,

(a) a contract for the improvement was entered into before July 1, 2018 ~~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 July 1, 2018 ~~that day~~ by the owner of the premises; or
(c) in the case of a ~~the~~ premises that is subject to a leasehold interest that ~~and the lease~~ was first entered into before July 1, 2018 ~~that day~~, a contract for the improvement was entered into or a procurement process for the improvement commenced on or after July 1, 2018 and

before the day subsection 19(1) of Schedule 8 to the *Restoring Trust, Transparency and Accountability Act, 2018* came into force.

87.3(2) For greater certainty, clauses (1)(a) and (c) apply regardless of when any subcontract under the contract was entered into ~~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.~~

87.3(3) Despite subsection (1), the amendments made to this Act by subsections 13(4), 14(4) and 29(2) and (4) of the *Construction Lien Amendment Act, 2017* apply with respect to an improvement to a premises in which a municipality has an interest, even if a contract for the improvement was entered into or a procurement process for the improvement was commenced before July 1, 2018. ~~Parts I.1 [Prompt Payment] and II.1 [Adjudication] apply in respect of contract 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~~.

87.3(4) Parts I.1 [prompt payment] and II.1 [adjudication] do not apply with respect to the following contracts and subcontracts:

1. A contract entered into before the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* came into force.

2. A contract entered into on or after the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.

3. A subcontract made under a contract referred to in paragraph 1 or 2.

As amended, subsection 87.3(3) dealing with liens on municipal lands and subsection 87.3(4) relating to prompt payment and adjudication do not come into effect until the later of the day that relevant subsections under the *Construction Lien Amendment Act, 2017* come into force or the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent.

As a result of these proposed amendments, the transition provisions have been simplified and some of the ambiguities removed. If the contract is entered into prior to July 1, 2018, or if one of the four procurement methods started prior to July 1, 2018, then the old regime applies. The uncertainty related to the interpretation of section 87.3(1) where there is no general contractor but rather there are multiple contracts between the owner and the trades on a single project remains as we described above,

With respect to leases, the old regime will apply if the lease was entered into prior to July 1, 2018 and the contract was entered into or the procurement process commenced after July 1, 2018 but before the date that the amended provision comes into effect. As a result, once the amended provision comes into effect, the new regime will apply to all leases, irrespective of when the lease was entered into.

Once the proposed amendment to the transition provision comes into force, its effect will be retroactive as a result of the wording used in 87.3(1). Therefore, irrespective of when Bill 57 receives Royal Assent, once it does receive Royal Assent, it will apply so that the parties will be either under the old or new regime. As a result, once Bill 57 receives Royal Assent, subcontractors and suppliers should make a demand for information regarding the date the contract was entered into and the date on which any applicable procurement process commenced.

Implications of the transition provisions:

The Construction Lien Masters at Toronto have advised the profession that when bringing motions for certain relief, the motion material will have to include evidence as to which regime applies, the old or the new regime. For example, if a party brings a motion to declare a lien expired as it was not preserved in time, the motion material should include evidence as to which regime applies, such as a copy of the contract that predates July 1, 2018.

If in doubt about which regime applies, the *Construction Lien Act* or the *Construction Act*, always take the more conservative approach. So for example:

- If a lien needs to be perfected, err on the side of caution and:
    - Preserve the lien by registration within 45 days under the *Construction Lien Act*, and
    - Perfect the lien by issuing the statement the claim and certificate of action and registering the certificate of action within the next 45 day period under the *Construction Lien Act*.
- If the holdback needs to be paid, use the 60 day period for payment of holdback after publication of the certificate of substantial performance.
- If your organization does not already do so, start maintaining records to comply with the amendment to the trust provisions.
- In the event of a delay, if your organization does not already do so, start maintaining detailed records in order to prove the delay and the direct costs of the delay so that the price can be proven.

- If a written notice of lien is to be given, use Form 1, include that you intend to disrupt the flow of funds on the project, have the form signed by the lien claimant and ensure that it is given by the lien claimant and not by their lawyer.

3. MODERNIZATION OF THE DEFINITIONS

Several definitions in the *Act* have been amended and a couple of definitions are new. The amendments to modernize the definitions are addressed in this section.

A. Price and direct costs

"Price" and "direct costs" are addressed together as the amended definition of price incorporates the use of direct costs. The amended provision related to price reads as follows:

> "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 the improvement for which the contractor or subcontractor, as the case may be, is not responsible;

It is important to note that where no specific price has been agreed upon, then the price will be determined by the actual market value of the services or materials. The insertion of the word "market" is a significant change as parties will be required to provide evidence, expert or other evidence, on the "market" value of the services and materials supplied where the price has not been agreed. In addition, market value may vary from area to area within the province and may also be affected by such considerations as union versus non-union labour or the remoteness of the location of the project.

While lien claimants have for years included the value of the costs incurred as a result of a schedule extension in the calculation of price, the addition of "direct costs" now makes it clear that those costs can be included in the determination of the price and therefore be included in the calculation of a lien but that the costs are limited to direct costs. In order to include in the contract price the direct costs of the extension of the time, the extension of time cannot be the responsibility of the contractor or subcontractor. This will no doubt lead to issues where the owner is liable for some of the delay and the contractor is liable for other periods of delay. Where there is a "true" concurrent delay, the contractor would not be entitled to include the direct costs of a schedule extension in the calculation of price. However, the issues regarding responsibility for the schedule extension will likely not be resolved until trial or adjudication, when in place.

The calculation of the direct costs incurred as a result of a schedule extension is limited by the new definition of "direct costs", which reads as follows:

> 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 loss of profit, productivity or opportunity, or any head office overhead costs.

The direct costs for an extension of time must be the reasonable costs of performing the contract or subcontract during the extension of time. What can be included or excluded as reasonable costs is not exhaustively set out in the definition. However, based on the new definition it is likely that home office costs are excluded while all costs to perform the work can be included. It will be critical to maintain proper records to prove these costs and the fact that they are the reasonable direct costs of performing the contract.

Depending on the complexity of a claim, parties will need to have recourse to expert evidence to prove they are not responsible for the delay and to prove the reasonable direct costs related to the delay. In addition, as disputes arise, the courts will likely have to establish the types of expenses that should be permitted or that should be excluded from the definition of "direct costs" in order to provide certainty to potential lien claimants.

B. Improvement and capital repair

The definition of improvement has been amended by adding the word "capital" in clause (a) of the definition. The new definition reads as follows:

> "improvement" means, in respect of any land,
> (a) any alteration, addition or <u>capital</u> repair to the land,
> (b) any construction, erection or installation on the land, 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, or
> (c) the complete or partial demolition or removal of any building, structure or works on the land;

The amendments also include a new definition for "capital repair" as follows:

> 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.

The definition of capital repair draws a line between a capital repair and maintenance. The repair must extend the normal economic life of, for example, the building or improve the value of the building, or the productivity of the building. While the definition may be clear, it will no doubt lead to litigation regarding the interpretation of the concepts used in the definition. One method to address the line between a capital repair and maintenance is to determine how the work is treated in the financial statements of the owner. Where an owner treats work as a capital repair, the repair is treated as an asset and depreciated over the life of the asset. Maintenance work is treated as an expense and recorded as such in the books of the company. So for example, a seasonal snow plowing contract will constitute maintenance work whereas installing a snow melting system in a driveway or road bed will be a capital repair. The cost of hiring a trade to remove snow from a concrete slab so that construction on a project can continue (forms and rebar) will constitute part of the construction costs.

C. Written notices of lien, vacating, expiry and withdrawal

While the *Construction Lien Act* allowed for written notices of lien to be given, and provided for the requirements of a written notice of lien, no standard form was prescribed to ensure that a written notice of lien would be easily recognizable. In addition, under the old regime, there were no provisions for vacating the written notice of lien which resulted in lenders refusing to advance and owners freezing payment until the written notice of lien was withdrawn. The amendments modernize the use of the written notice of lien by addressing these gaps in the legislation.

First, a written notice of lien must now be in the mandated form, Form 1, and be given by the person having a lien. The new definition reads as follows:

> "written notice of a lien" means a written notice of a lien in the prescribed form, given by a person having a lien.

The recent case law regarding a written notice of lien suggested that in some instances, there was uncertainty around the validity of a document as a written notice of lien. The case law also suggested that the written notice of lien is required to include clear language indicating that the party intends to disrupt the flow of funds on the project. In order to avoid any confusion about the formal requirements, a written notice of lien must now be in the prescribed form, Form 1. This should make it easier for the person receiving the written notice of lien to know that it is in fact a written notice of lien and act accordingly. Also, the mandated form should streamline the process for industry participants who can now prepare their own written notice of lien by using the form. It is also worth mentioning that Form 1 requires the signature of the person having a lien (the lien claimant or someone with signing authority on behalf of the company), not their lawyer. The definition also requires that the written notice of lien be given by the person having a lien. Presumably a lawyer giving a written notice of lien on behalf of a client may not meet

this requirement, unless the lawyer is acting as an agent on behalf of the lien claimant. This will require an interpretation by the court.

Second, the amendments provide that a written notice of lien may be vacated by posting security in the usual way, in the full amount of the lien plus 25% of the value of the lien up to a maximum now of $250,000 for security for costs, or in an amount that the court determines to be reasonable in the circumstances.

Third, under the court's general powers, on a motion, where a written notice of lien has been given, the court may declare that the lien has expired or that the written notice of lien shall no longer bind the person to whom it was given. Presumably this would occur where the party who gave the written notice of lien has been paid in full but has not delivered a withdrawal of the written notice of lien. For more on the modernization of the court's general powers, see Section 11 – Modernization of the General Powers of the Court.

Fourth, the amendments now prescribe a form to be used for withdrawing a written notice of lien, Form 18. The withdrawal of a written notice of lien is also to be signed by the person having a lien.

D. Contractor and subcontractor

A joint venture entered into for the purpose of an improvement or improvements is now included in the definition of contractor and subcontractor. This amendment could have problematic implications. A joint venture is not a legal person and does not have standing to commence a legal action in its own name, unlike a company or partnership. Therefore, when preserving a lien or commencing an action, naming the joint venture alone will most likely not be sufficient. Until this issue is addressed by the courts, where the joint venture is a lien claimant, the claim for lien and the statement of claim should name the joint venture and the corporate entities that make up the joint venture as the lien claimant. Where a lien claimant has supplied services or materials to a joint venture, the lien claimant should name the joint venture and the corporate entities that make up the joint venture as the party to whom they supplied services or materials. Note that the definition of "owner" has not been amended to include a joint venture.

E. Alternative financing and procurement arrangements

Section 1.1 stipulates a new approach to address P3 projects. For those industry participants that undertake any work on alternatively financed projects, a working knowledge of this section and its effects on the *Act* is imperative. Generally, it sets out when section 1.1 applies, deems the project company to be the "owner" for certain sections of the *Act* and also sets out what sections in the *Act* are modified with respect to these types of projects or arrangements.

Section 1.1 also appears to create two separate regimes. The first regime relates to the application of the *Act* and Regulations as between the special purpose entity and the owner and the second regime relates to the application of the *Act* and Regulations as between the special purpose entity and the balance of the construction pyramid below it.

i. When does this section apply

The new section 1.1 applies where:

a. The Crown, a municipality or a broader public sector organization is the owner of the land or a tenant (leasehold owner);
b. Either one of them enters into a project agreement with a special purpose entity;
c. The project agreement requires the special purpose entity to finance and undertake an improvement;
d. The special purpose entity enters into a contract with a contractor for the construction of the improvement.

Note that for this section to apply, there is no requirement that the agreement contain an obligation to maintain the improvement once built. It is also worth noting that the *Act* does not provide a definition of a "special purpose entity". Also, the *Act* does not permit a party to enquire if there is a special purpose entity and project agreement in place. The *Act* only permits a party to ask for the names of the parties to the contract, the date the contract was entered into and the date of the commencement of the relevant procurement process (once amended by Bill 57).

ii. Application of certain provisions

Except as provided by section 1.1, the general rule is that the *Act* and Regulations apply with the modifications set out in this section and any other necessary modifications:

a. To a project agreement between the authority and a special purpose entity as if the project agreement was a contract and the special purpose entity is a contractor;
b. To the agreement between the special purpose entity and the contractor as if the agreement was a subcontract made under the contract.

Put simply, unless specifically modified, the *Act* and the Regulations apply as though the authority is the owner, the special purpose entity is the contractor and any one that contracts with the special purpose entity is a subcontractor. The project agreement then would be the contract and the agreement for the construction would be the subcontract.

iii. Modification of certain provisions

This part modifies the operation of some sections of the *Act*. First it modifies the application of prompt payment such that the prompt payment provisions do not apply to any portion of the project agreement related to operation and maintenance of the improvement. Second, under the prompt payment provisions, any contract provision that made the giving of an invoice conditional on the prior certification of the payment certifier or on the owner's prior approval is of no force and effect. However, alternatively financed projects are expressly excluded from the application of this provision and the contractor on such a project will be required to have the approvals in place from the owner or payment certifier prior to delivery of a proper invoice.

This part also modifies the application of adjudication to alternatively financed projects. It specifically excludes the use of adjudication to determine:

- when a project agreement is "substantially completed";
- when the agreement between a special purpose entity and the contractor is substantially performed;
- whether a milestone has been reached if reaching the milestone requires an amount to be paid; and
- any matters that may be prescribed. The *Simplified Guide to Adjudication* will address whether any other matters have been prescribed to which adjudication will not apply in respect of an alternatively financed project.

This part also requires the parties to use the independent certifier as their adjudicator where the project agreement specifies the use of an independent certifier. This requirement only applies so long as a representative of the independent certifier is on the registry of adjudicators. Under a P3 project, the independent certifier may be required to provide a determination in respect of a dispute between the parties. It is not clear whether the adjudication under the *Act* is in lieu of the determination by the independent certifier under the project agreement.

Section 1.1(3) clarifies that the holdback that is retained under the *Act* is the holdback amount determined by reference to the agreement between the special purpose entity and the contractor. Subsection 1.1(6) further provides that a reference to substantial performance in the *Act* or Regulations in respect of a project agreement is in reference to substantial performance of the agreement between the special purpose entity and the contractor.

Section 1.1(4) modifies the bonding requirements (see Section 13 – Modernization of Surety Bonds, below) that are set out in new section 85.1 related to alternatively financed projects. The requirement to provide bonds applies to the contract between the special purpose entity and the contractor. The Crown, municipality or the broader public sector organization may require a coverage limit other than prescribed by section 85.1 and the Regulations so long as it meets or exceeds the prescribed amounts. This new section provides a further exception related to bonding, namely that the requirement to provide the coverage limit prescribed by the *Act* and Regulations may not apply so long as all the security that is in place reflects an appropriate balance between the security required to ensure payment to those supplying services and materials and the cost of the security.

iv. Effect on other sections

Section 1.1(5) provides that for certain provisions of the *Act*, or any portion of them, or as may be prescribed by the Regulations, the special purpose entity is deemed to be the owner in the place of the Crown, municipality or the broader public sector organization and the agreement between the special purpose entity and the contractor is deemed to be the contract. The sections are:

- Subsections 2(1) and 2(2) that address substantial performance. Substantial performance is to be calculated and determined based on the contract between the special purpose entity and the contractor;
- Subsection 31 that addresses the preservation of liens. This section means that the person who contracts with the special purpose entity is a contractor whose lien expires as set out in subsection 31(2) and other persons are subcontractors whose liens expire as set out in subsection 31(3).
- Subsection 32 that addresses the rules governing certification or declaration of substantial performance. The certification of substantial performance and the corresponding certificate relate to the contract between the special purpose entity and the contractor.
- Subsection 33 that addresses the certification of a subcontract. The subcontract is in reference to the agreement between the contractor and the subcontractor. Other than identifying what the subcontract is, the rules of certification of a subcontract remain unchanged with respect to alternatively financed projects.
- Subsection 39 that addresses the request for information. For the purposes of alternatively financed projects, the owner is the special purpose entity and the contractor is the party that contracted with the special purpose entity.

Absent from this list are section 14(1) which creates the lien and section 34 regarding the preservation of liens. As these two sections are absent, in order to preserve a lien, the lien claimant must give a lien to the relevant Crown office or municipality. However, consider also the effect of subsection 16(2) where the Crown or municipality is not an owner of the premises where the improvement is made, the lien may attach to the interest of any other person in the premises. As the special purpose entity is deemed the owner, the lien claimant should also register their lien.

F. Broader public sector organization and municipalities

This is a new definition added to the *Act*. It is used in the context of alternatively financed projects and mandatory bonding for alternative financing and procurement arrangements where the owner is a broader public sector organization. As set out above under alternatively financed projects, section 1.1 will apply to an agreement to finance and build an improvement where the premises are owned by a broader public sector organization. In addition, under section 85.1, where the contractor enters into a contract with a broader public sector organization, the contractor will be required to provide a labour and material payment bond and a performance bond.

The *Act* provides that a broader public sector organization for the purpose of the *Act* has the same meaning as in the *Broader Public Sector Accountability Act, 2010*. The definition provided in several steps in that legislation is very comprehensive:

> "broader public sector organization" means,
> (a) a designated broader public sector organization, and
> (b) a publicly funded organization;

A designated public sector organization is defined as follows:

> "designated broader public sector organization" means,
> (a) every hospital,
> (b) every school board,
> (c) every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements,
> (d) every agency designated as a children's aid society under subsection 34 (1) of Part III of the *Child, Youth and Family Services Act, 2017*,
> (e) Repealed: 2016, c. 30, s. 31 (2).
> (f) every corporation controlled by one or more designated broader public sector organizations that exists solely or primarily for the purpose of purchasing goods or services for the designated broader public sector organization or organizations,
> (g) every publicly funded organization that received public funds of 10 million dollars or more in the previous fiscal year of the Government of Ontario, and
> (h) every organization that is prescribed for the purposes of this definition;

A publicly funded organization means every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year of the Government of Ontario.

It is therefore important to know who you are contracting with or if you are a trade, who the owner is as the project may be an alternatively financed project to which section 1.1 applies.

Also, presumably the mandatory bond requirements would apply whether or not the tender documents expressly require that bonds be provided as every contract is deemed to be amended to conform to the *Act* (section 5). Therefore, where bidders are invited to bid and the tender documents are silent on bond requirements, contractors should enquire whether the owner is a broader public sector organization and whether bonds will be required on entering into the contract so they can include the cost of the bonds in their bids.

G. Monetary supplementary benefits

This is a new definition in the *Act*. It reads as follows:

> "monetary supplementary benefit" includes any contributions, remittance, union dues, deduction, payment or other additional compensation of any kind

It is worth noting that the words "monetary supplementary benefit" appeared in three places under the *Construction Lien Act*. Of significance is that it is used in the definition of wages, which is carried through in the *Act* and reads as follows:

> "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

The added definition of "monetary supplementary benefit" is not the subject of one of the recommendations in the *Review,* nor is the need for the definition discussed in the *Review*. Consequently, it is difficult to understand what mischief the inclusion of this definition is intended to address. It may be argued that the definition of a monetary supplementary benefit is overly broad as first it set out specific items but then includes "other additional compensation of any kind". It remains to be seen how the courts will interpret this section as it may affect the priorities set out in section 81 of the *Act*.

H. Construction trade newspaper

The old regime included a definition of a construction trade newspaper. This definition is now repealed, and when a party publishes a certificate of substantial performance, it is required to do so "in the manner set out in the regulations" (s. 32(1)5, Form 9). The publication of a Notice of Intention to Register a Condominium (s. 33.1, Form 11) is also affected by this amendment. The regulations (Ontario Regulation 304/18) set out the definition of a "construction trade newspaper", which remains consistent with the old definition except that the newspaper may now be published in electronic format only. This would permit the Daily Commercial News to adopt an all electronic format.

I. Home buyer

Although the change related to the definition of "homebuyer" has not come into effect, under the *Act*, the changes to the definition of homebuyer read as follows:

> "home buyer" means a person who buys the interest of an owner in a premises that is a home, whether built or not at the time the agreement of purchase and sale in respect thereof is entered into, provided,
>
> (a) not more than 30 per cent of the purchase price, excluding money held in trust under section 81 of the *Condominium Act, 1998*, is paid prior to the conveyance, and

(b) the home is not conveyed until it is ready for occupancy, evidenced in the case of a new home by the issuance of a municipal permit authorizing occupancy or ~~the issuance under the Ontario New Home Warranties Plan Act of a certificate of completion and possession~~ the issuance of material prescribed for the purpose of this clause by the regulations made under the Protection for Owners and Purchasers of New Homes Act, 2017.

The Protection for Owners and Purchasers of New Homes Act, 2017 is one of the two successor statutes to the Ontario New Home Warranties Plan Act. The other new companion legislation is the New Home Construction Licensing Act, 2017. As of the date of publication of this Guide, the Protection for Owners and Purchasers of New Homes Act, 2017 has not been proclaimed in force.

4. MODERNIZATION OF SUBSTANTIAL PERFORMANCE AND COMPLETION

A. Increase in the monetary amounts

The monetary amounts regarding substantial performance and completion have been increased, specifically the amounts set out in 2(1) in respect of the monetary portion of the test for substantial performance and 2(3) in respect of the monetary test for completion. The changes read as follows:

> 2 (1) For the purposes of this Act, a contract is substantially performed,
> (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
> (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
> (i) 3 per cent of the first ~~$500,000~~ $1,000,000 of the contract price,
> (ii) 2 per cent of the next ~~$500,000~~ $1,000,000 of the contract price, and
> (iii) 1 per cent of the balance of the contract price.

Under the *Construction Lien Act*, on a $3 million contract, substantial performance can be attained when the improvement to be made under the contract is capable of completion, or where there is a known defect, correction, at a cost of not more than $45,000. Under the *Act*, the monetary portion of the test is attained where the cost is not more than $60,000.

With respect to completion, the amendment reads as follows:

> 2(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,
> (a) 1 per cent of the contract price; and
> (b) ~~$1,000~~ $5,000.

Where no certificate of substantial performance is published, with an increase in the amount from $1,000 to $5,000, contractors who want to preserve a lien will need to be mindful of the value of work left to complete and make sure to register their lien before the contract is deemed complete at the new higher amount.

B. Agreement to not complete work expeditiously

Under section 2(2) of the *Construction Lien Act*, two situations were contemplated. The first was where the improvement or a substantial part of the improvement was ready for use or was being used for the purpose intended and the remainder of the improvement could not be completed expeditiously for reasons beyond the control of the contractor. The second situation was where the owner and contractor agreed not to complete the improvement expeditiously but the improvement or a substantial part of it was ready for use or was being used by the owner. In either case, the remaining price of the work to complete the improvement was deducted from the contract price in determining substantial performance.

Generally, the use of these provisions was limited to situations where an owner and a contractor could make such an agreement. For instance, where both parties agreed, for any reason that a portion of the improvement should be completed at a later date. The amendment removes the contractor's ability to apply for substantial performance where the balance of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor even though a substantial part of the improvement is ready for use or is being used for the purpose intended by the owner. The amendment under the *Act* reads as follows:

> 2(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and ~~the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or,~~ where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Therefore, where the circumstances of a project change in mid-project and it makes sense not to complete the balance of the project at the time, or at all, unless the owner and contractor agree, the contractor cannot apply for the release of the holdback for the portion of the project completed, even where the completed portion of the project is ready for use or is being used for the purpose intended by the owner.

C. Multiple improvements

The *Act* now recognizes that a single contract may relate to more than one improvement, then each improvement for the purposes of determining substantial performance is deemed to be governed by a separate contract. This only applies so long as the contract expressly provides for it and so long as the lands where the improvements are being made are not contiguous. The new subsection 2(4) reads as follows:

> 2(4) If more than one improvement is to be made under a contract and each of the improvements is to lands that are not contiguous, then, if the contract so provides, each improvement is deemed for the purposes of this section to be under a separate contract.

It is important to bear in mind that the contract which provides for multiple improvements must provide for the certification of substantial performance of each improvement, separately. In addition, the improvements cannot be contiguous. So for example, a contractor who enters into a contract with a school board to replace windows in ten schools, would be permitted to apply for substantial performance where the contract so provides as the improvements are not contiguous. However, and this occurs with condominium projects where the intent is that the underground parking garage and the commercial podium constitute a single improvement and the residential tower constitutes the second improvement, if substantial performance of each improvement is to be certified for each improvement respectively, multiple contracts will remain necessary. This is because the underground parking and the commercial podium are contiguous to the tower. As a result, if parties want to certify substantial performance of multiple improvements under a single contract, they must comply with the new requirements of the *Act*.

5. MODERNIZATION OF THE CURATIVE PROVISION

Under the old *Mechanics' Lien Act*, the statute merely required substantial compliance with the requirements for a lien and certain procedures under that statute. With the *Construction Lien Act*, it took years for the interpretation of the curative provision to be determined by the courts such that the general rule was that a certificate, declaration or claim for lien could be invalidated if they did not strictly comply with the *Construction Lien Act*. Only minor errors or irregularities were permitted. Under the *Act*, the curative provision has been slightly amended, but the principal test, strict compliance, remains intact.

The amendment in the *Act* sets out examples of minor errors or irregularities that include, for example, the legal description of a premises or the address for service. The changes in the *Act* read as follows:

> 6(1) No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32(2) ~~or (5)~~, ~~subsection~~ 33(1) or ~~subsection~~ 34(5), unless in the opinion of the court a person has been prejudiced ~~thereby~~ as a result, and then only to the extent of the prejudice suffered.
>
> 6(2) Minor errors or irregularities to which subsection (1) applies include,
> (a) a minor error or irregularity in,
> (i) the name of an owner, a person for whom services or materials were supplied or a payment certifier,
> (ii) the legal description of a premises, or
> (iii) the address for service; and
> (b) including an owner's name in the wrong portion of a claim for lien.

Section 6 still applies to subsection 32(2) – the contents of the certificate of substantial performance; subsection 33(1) – the contents of the subcontract certificate of completion and subsection 34(5) – the contents of a claim for lien. Section 6 no longer applies to subsection 32(5) under the *Act*. Subsection 32(5) required a construction trade newspaper to publish upon commercially reasonable terms copies of the certificates of substantial performance. As subsection 32(5) has been repealed, reference to it has been removed from section 6.

The addition of subsection 6(2) helps clarify what is a minor error or irregularity so that parties are not needlessly litigating over whether the issue is a minor error or irregularity. The list of minor errors or irregularities is not exhaustive. Where the minor error or irregularity is one of the examples in subsection 6(2), the only issue should be what, if any, prejudice has been caused by the failure to strictly comply. So for example, if the name of the owner in the claim for lien or the certificate of substantial performance is identified as "Inc." instead of "Limited." presumably this is a minor error or irregularity that does not invalidate the lien or the certificate of substantial performance. How far the examples in subsection 6(2) will be taken and what will be added to the list remains to be determined by the courts.

6. MODERNIZATION OF THE TRUST PROVISIONS

A. Requirements respecting trust funds

The *Act* introduces new bookkeeping requirements for trust funds. Trust funds for different projects may be deposited into the same bank account or separate bank accounts by the applicable contractor or subcontractor, who is owed or received the funds and is therefore a trustee under the *Act*. New section 8.1(1) reads as follows:

> 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 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.
>
> 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.

Essentially, there are three requirements that a trustee must follow with respect to the trust funds:

1. The bank account must be in the name of the trustee and if there is more than one trustee, then the bank account must be in the name of all trustees. Presumably then, a

joint venture would have to open an account in the name of at least the joint venture and perhaps in the name of each of the members of the joint venture. Contractors and subcontractors that operate under multiple corporate names will have to ensure that funds for each project are deposited into the account of the correct corporate entity.

2. In all cases, the trustee must maintain detailed written records of all amounts received, paid or transferred into or out of the trust funds. Additional bookkeeping requirements may be added by the Regulations. The current version of the Regulations under the *Act* do not provide any additional requirements.

3. Contractors and subcontractors must maintain the records with respect to each trust fund on a project by project basis. Where the contractor or subcontractor is the trustee of more than one trust (for example a contractor that is undertaking numerous projects at the same time), the trust funds from all the projects may be deposited into a single account, that is in the name of the contractor, so long as the contractor maintains the records required under subparagraph 8.1(1)2 separately in respect of each trust. Simply, the contractor must maintain, and be able to produce, a running account for each trust (for each project) that shows the amounts received, paid or transferred into or out of the trust funds for each project. The effect of subparagraphs 2 and 3 is that the *Act* requires the records to be maintained contemporaneously with the payments in and out in respect of each trust fund and not created when litigation arises.

If the contractor or subcontractor, as trustee, fails to follow these additional bookkeeping requirements, the courts may make an inference that the party breached its trust obligations and absent evidence to the contrary, find the party liable. The provision was intended to shift the evidentiary burden to the trustee where the trustee fails to comply with the bookkeeping requirements in the *Act*. With these enhanced bookkeeping requirements, it may be easier for a contractor or subcontractor to comply by setting up separate bank accounts for each project.

Where the contractor or subcontractor is a company, there is a slight change with respect to the liability of directors and officers and other persons in control of the relevant activities of the company and when they may still be found to be personally liable. It will likely be held by the courts that the failure of the directors and officers to take steps to ensure that the company is complying with the new bookkeeping requirements will amount to a breach of trust for which they are personally liable.

B. Deemed Trust

Subsection 8.1(2) is new and it is intended to address the effect of comingling of the trust funds into a single account. It reads as follows:

> 8.1(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.

Essentially, funds that are deposited together in the manner set out in subsection 8.1(1) are deemed traceable and the comingling of funds, where the detailed accounting records are maintained, does not constitute a breach of trust.

Therefore, where funds from more than one trust are commingled in a single account, the failure to maintain the records set out above will result in liability for breach of trust. The evidentiary burden on a claimant to show that a breach of trust has been committed is evidenced by the contractor's failure to maintain the records as required by subsection 8.1(1). Therefore, where a single account is used, contractors and subcontractors must maintain separate ledgers for each project in order to easily demonstrate that there has been no breach of trust.

A more interesting issue is whether subsection 8.1(2) is sufficient to address the paramountcy of federal insolvency legislation. Whenever claimants are involved in the insolvency of a contractor, the trust provisions under the *Construction Lien Act* have proven to be of no effect as the courts have held that the trust created by section 8 is not a true common law trust and the funds form part of the estate of the insolvent company for distribution to all secured and unsecured creditors in accordance with the priorities under the insolvency legislation. The comingling of funds in a single account makes it difficult to identify the beneficiary. The addition of subsection 8.1(2), by deeming the funds to be traceable, appears to be an attempt to overcome the harsh decisions of the court. It remains to be seen how the courts will receive new section 8.1 in an insolvency and whether it will create a true trust.

C. Set-off against trust funds

The broad set-off permitted under the *Construction Lien Act* has been curtailed and will only be permitted under the *Act* where the person that the trustee is liable to pay becomes insolvent. Otherwise, the set-off under the *Act* is only permitted where it relates to the same improvement.

Section 12 of the *Act* reads as follows:

> **12** Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of ~~all outstanding debts, claims or damages, whether or not related to the improvement~~ <u>all outstanding debts, claims or damages related to the improvement or, if the contractor or subcontractor, as the case may be, becomes insolvent, all outstanding debts claims or damages whether or not related to the improvement</u>.

This change in section 12 is consistent with the change related to the amount of a lien under section 17(3) as set out under Section 7 – Modernization of Liens, below. In either case, the broad set off is maintained where the contractor or subcontractor becomes insolvent. The difficulty arises in determining when a party becomes insolvent. Insolvency is generally determined by a party's ability to meet its on-going obligations as they arise. Therefore, the

amount that a trustee retains may be insufficient to address other debts unrelated to the improvement where the contractor or subcontractor becomes insolvent.

Perhaps, all that a trustee can do is maintain an amount sufficient to address any debt, claim or damage that may occur on a project, such as the correction of deficient work by including a contract clause that permits the trustee to retain an amount to correct deficiencies at twice the estimated cost of the deficiency.

7. MODERNIZATION OF LIENS

A. Lien does not attach to interest in premises of municipality

Lien claimants will no longer be able to register liens against lands owned by a municipality, which word is defined in the *Act*. Municipality is defined as:

(a) A municipality within the meaning of the Municipal Act, 2001, and

(b) A local board within the meaning of the Municipal Act, 2001 or the City of Toronto Act, 2006.

While it will be relatively easy to identify a municipality, local boards have an extended definition that means "a municipal services board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee body or local authority established or exercising any power under any Act with respect to the affairs or purposes of a municipality, excluding a school board or conservation authority." Where a party enters into a contract, it should check to see whether the owner is a local board.

Where a lien arises from the supply of services and materials to an improvement for a municipal owner, the lien will not attach to the lands but rather, will constitute a charge against the holdbacks required to be retained on the project, in the same manner as liens relating to projects on Crown lands. As a result, lien claimants will be required to "give" a copy of the lien to the clerk of the municipality. This amendment however does not come into effect until October 1, 2019 or until Bill 57 receives Royal Assent, whichever is later.

B. Set-off against liens

Similarly to the manner in which the broad set-off with respect to trust funds has been curtailed, the set-off against liens has also been curtailed so that the broad set-off is only permitted where the party to be paid becomes insolvent. Otherwise, the set-off against liens is only permitted with respect to claims related to the improvement. The amendment reads as follows:

> 17(3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person the payer is liable to pay, equal to the balance in the payer's favour of ~~all outstanding debts, claims or damages, whether or not related to the~~

~~improvement~~ all outstanding debts, claims or damages related to the improvement or, if the contractor or subcontractor, as the case may be, becomes insolvent, all outstanding debts, claims or damages whether or not related to the improvement.

C. Leasehold interest and liens

Contractors will no longer be required to deliver a written notice of an improvement to a landlord to ensure that liens arising from the improvement will attach to the landlord's interest in the premises. Conversely, a landlord will no longer be allowed to reject any responsibility for the improvement. The transition provision as drafted indicated that the *Act* would only apply to leases entered into on or after July 1, 2018. This however created situations where under long term leases that were entered into prior to July 1, 2018, the old regime would apply even where the tenant improvement is performed ten or twenty years later. To address this odd outcome, the Legislature is moving forward with an amendment to the transition provision as it applies to leases.

The application of the *Act* to leases and improvements under a leasehold interest will be amended by Bill 57. Under the proposed amendment to the transition provision, the old regime will apply if the lease was first entered into before July 1, 2018 and the contract for the leasehold improvement was entered into or the procurement process for the improvement commenced after July 1, 2018 but before the day that Bill 57 receives Royal Assent.

The *Act* provides that where a tenant and a landlord agree that the landlord will pay for all or part of an improvement to the leasehold (a tenant inducement) under the terms of a lease or a lease renewal, the landlord's interest in the premises will be liable to any liens, but only to a maximum of 10% of the landlord's payment or inducement. The amendment applicable to leases entered into on or after July 1, 2018 reads as follows:

19(1) ~~Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.~~
If the interest of the owner to which a lien attaches is leasehold, and if payment for all or part of the improvement is accounted for under the terms of the lease or any renewal of it, or under any agreement to which the landlord is a party that is connected to the lease, the landlord's interest is also subject to the lien, to the extent of 10 percent of the amount of such payment.

(2) No forfeiture of a lease to, or termination of a lease by, a landlord, except for non-payment of rent, deprives any person having a lien against the leasehold of the benefit of the person's lien.

> (3) Where a landlord intends to enforce forfeiture or terminate a lease of the premises because of non-payment of rent, and there is a claim for lien registered against the premises in the proper land registry office, the landlord shall give notice in writing of the intention to enforce forfeiture or terminate the lease and of the amount of the unpaid rent to each person who has registered a claim for lien against the premises.
>
> (4) A person receiving notice under subsection (3) may, within ten days thereafter, pay to the landlord the amount of the unpaid rent, and the amount so paid may be added by that person to the person's claim for lien.
>
> (5) Nothing in this section prevents a determination in respect of a premises that the landlord is instead its owner, if he or she meets the criteria set out in the definition of "owner" in subsection 1 (1).

Therefore, where a landlord provides a tenant inducement that is to be used towards the renovation of the rented space, the landlord will be liable for 10% of that payment. Landlords will therefore have to be cautious to retain 10% of the tenant inducement until all liens that could have been preserved have expired or have been resolved. In order to ensure certainty for the landlord owner, the landlord owner should require, as a condition of entitlement to a tenant inducement, that the tenant's contractor publish a certificate of substantial performance. It also appears that a landlord may set out in the lease agreement that the inducement is not to be used towards any improvement by the tenant, or that it is provided for a different use, to avoid any liability for the holdback.

Subsection 19(5) is also new. It merely affirms the case law that stands for the proposition that where a landlord has conducted itself beyond what a landlord might do (such as review drawings to ensure they are consistent with the building systems), the landlord will be found to have made a "request" for the work and therefore be liable for the work as a statutory owner. Bear in mind that the request may be implied. Landlords therefore should ensure that their conduct does not elevate them to the level of a statutory owner which would make them liable for the full amount owing to a contractor with a lien.

8. MODERNIZATION OF HOLDBACKS

A. Release of holdback instruments

The holdback is no longer required to be in the form of funds. Section 22 of the *Construction Lien Act* set out the requirement for an owner to retain holdback. The *Act* adds subsection (4) which identifies the permissible forms of holdback so that the holdback may be retained in the form of a letter of credit prescribed by the Regulations (Form 4), a demand worded holdback repayment bond in the prescribed form (Form 5) and any other form prescribed by the regulations. At present, Regulation 303/18 does not prescribe any other form.

i. Letters of Credit

The Form 4 letter of credit also provides the manner in which a demand for payment is to be made under the letter of credit. Essentially, the party is required to provide a certificate to the financial institution that provided the letter of credit certifying that the contractor or subcontractor, as appropriate, is in default of its contractual obligation having failed to make a holdback reimbursement and that the party is entitled to draw down on this letter of credit. The other requirement is to present the original of the letter of credit.

The certification requires that the party certify that the contractor is in default of its "contractual obligation" to make a holdback reimbursement. As the letter of credit refers to the failure to pay as a default of the "contractual obligation", the contracts should be amended to include a provision that where a letter of credit is provided for the holdback, the failure to repay the holdback within 2 business days of demand is a default under the contract.

As such, it appears that the party is required to write to the contractor or subcontractor demanding repayment of the holdback as set out in the contract obligation. When the holdback is not repaid following the demand, the party is then permitted to draw down on the letter of credit.

ii. Holdback Repayment Bonds

There are a couple of issues that need to be identified with the prescribed form of bond. The bond provides that payment will be made within 10 business days of receipt of the demand by the surety, however the demand letter form indicates that payment should be made within 20 business days of receipt of the demand.

Another potential issue relates to the bond amount. The bond amount is defined as "the amount of 10% of the price of the Original Contract (defined below), or, as such price is adjusted in accordance with the terms of the Original Contract and Performance Bond No. _____, hereinafter called the "Bond Amount"". The form of holdback repayment bond contemplates that the price of the Original Contract may be adjusted. However, there does not appear to be an equivalent provision in the performance bond. The performance bond (Form 32) sets out the Bond Amount, and provides that the surety shall not be liable for a greater sum than the Bond Amount under any circumstances, but provides no mechanism that the price under the Original Contract may be adjusted. As such, until there is some clarity on this issue, once the original contract price is paid, but there were adjustments in the original contract price, owners should retain cash holdback on any amount over and above the original contract price that is to be paid.

Form 5, the holdback repayment bond form, also includes a form of demand letter as part of the form. The only defence available to the surety under this form of bond is that the demand has not been delivered in accordance with the bond. The right to send the demand arises whenever a lien is preserved. The demand is to be sent by facsimile or registered mail. Sending the demand by email does not comply with the bond form even though the surety is required to provide an email address in the bond. Form 5 also stipulates that the demand must be

addressed to the surety and copied to the contractor. In addition, the demand to the surety must be received within 120 calendar days from the last day on which a lien arising under the contract could have been preserved. In many cases, this date will be obvious – 120 calendar days following the 60 day period for claimants to preserve liens. The only person entitled to make a claim under this bond is the owner.

B. Payment of basic holdback and finishing holdback

After years of trying to amend the *Construction Lien Act* to provide for a trust account into which holdback is to be paid by an owner, the *Act* now provides for the mandatory payment of holdback subject to an owner publishing and giving to the contractor a notice of the amount of holdback that the owner refuses to pay. Section 26 of the *Act* regarding the mandatory payment of basic holdback now provides:

> **26** Subject to section 27.1, each payer upon the contract or a subcontract ~~may, without jeopardy,~~ shall make payment of the holdback the payer is required to retain by subsection 22(1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

The word "shall" indicates that the payment is mandatory. Therefore, once all liens that may be claimed against the holdback have expired or have been satisfied, discharged or otherwise provided for, the owner must pay the holdback. A good practice for contractors would be to always publish a certificate of substantial performance as it provides an easy marker to determine whether all liens that may be claimed against the holdback have expired.

The only exception to the mandatory scheme of the payment of holdback is a notice provided under new section 27.1 of the *Act*, described in the next section below.

Section 27 relates to finishing holdback, which is the holdback retained by an owner related to the work performed by the contractor after the date of substantial performance. Section 27 has been amended in identical terms to section 26. Therefore, the payment of the finishing holdback is also mandatory but for the exception to provide a notice set out in new section 27.1.

C. Non-payment of holdback and adjudication

The days when owners and contractors try to avoid payment of holdback will slowly become a memory of the past. As set out above, changes to sections 26 and 27 make payment of the basic and finishing holdback mandatory. However, section 27.1 of the *Act* provides an exception where an owner refuses to pay some or all of the holdback. Where this is the case, section 27.1 of the *Act* requires the owner to publish a notice specifying the amount of the holdback that the owner refuses to pay. A similar exception is also found with respect to section 27 regarding the finishing holdback.

New section 27.1 reads follows:

> 27.1 An owner may refuse to pay some or all of the amount the owner is required to pay to a contractor under section 26 or 27, as the case may be, if,
>
> (a) no later than 40 days after publication of the applicable certification or declaration of substantial performance under section 32, the owner publishes, in the manner set out in the regulations, a notice in the prescribed form, specifying the amount of the holdback that the owner refuses to pay; and
>
> (b) the owner notifies, in accordance with the regulations if any, the contractor of the publication of the notice.

There are several features to section 27.1. It applies to basic holdback (section 26 holdback) and finishing holdback (section 27 holdback). The publication of the notice in a construction trade newspaper by the owner must be done within 40 days of the publication of the certificate of substantial performance. Again the need for publication of the certificate of substantial performance is critical as it marks the start of the 40 day period that an owner has to publish its notice. The notice by the owner must be in the prescribed form, Form 6.

Form 6 does not require the owner to set out the reasons why the holdback, in whole or in part, is not being paid. The owner is also required to notify the contractor of the publication of the notice, as set out in the Regulations. Section 7 of Regulation 304/18 requires the owner, within 3 business days of the publication of the notice of non-payment, to notify the contractor of the publication. The regulation further provides that the notice to the contractor must be provided in writing and may be provided in electronic or paper format. Presumably, an email from the owner providing a copy of the notice of non-payment will be sufficient to comply with the tight timeline as this notice is not required to be "given".

The failure of the owner to comply with the requirements of section 27.1 and the Regulation will likely result in the obligation to pay the holdback. The outcome is not clear where there is imperfect compliance, where, for example, the owner publishes the notice on day 41 or 42 after the date of publication of the certificate of substantial performance. The language in section 27.1 is not mandatory, although the language in the Regulation is mandatory. The requirement to provide notice to the contractor of the publication of the owner's published notice within three days is mandatory, as set out in the Regulation, however the requirement for the owner to publish its notice in the construction trade newspaper within 40 days is not mandatory. Situations of imperfect compliance will need to be addressed by the courts. In order to maintain the spirit of this new provision, imperfect compliance should not be permitted.

Although, subsections 27.1(2), (3) and (4) will not come into force until October 1, 2019, they permit contractors and subcontractors to provide similar notices to those below them in the construction pyramid and to refer the matter to adjudication. Since these subsections do not come into force until October 1, 2019, it left a gap where the owner sent the requisite notice to

the contractor under subsection 27.1(1) (as it is properly numbered under Bill 57). It was not clear whether the contractor would be liable to pay the holdback to the subcontractors without having received it from the owner. As a result, Bill 57 proposes that 27.1(2), (3) and (4) apply as drafted when it receives Royal Assent, but without the requirement that the non-payment of holdback issue be referred to adjudication, until Part II.1 comes into force on October 1, 2019. Therefore, a contractor who receives a notice from the owner, can refuse to pay the holdback to the subcontractors so long as the contractor, in turn, provides a notice to every subcontractor that the holdback is not being paid. There are also a corresponding provisions that require subcontractors to provide a similar notice to the subcontractors below them. Therefore, if a contractor receives a notice of non-payment of holdback from the owner, the contractor and the subcontractors should all provide corresponding notices to those below them in the pyramid. Out of an abundance of caution, these notices should be provided even though these provisions have not yet come into force.

D. Payment of holdback on an annual basis

The *Act* recognizes that construction projects have become more complex and projects may last for years, resulting in holdback being retained for several years before it is paid. The new section 26.1 under the *Act* therefore permits the payment of holdback on an annual basis. The new section reads as follows:

> 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 an annual basis, in relation to the services or materials supplied during the applicable annual period.

All four requirements in subsection 26.1(2) must be met for the release of the accrued holdback on an annual basis. The four requirements are:

(a) the contract provides for a completion schedule that is longer than one year;
(b) the contract provides for the payment of accrued holdback on an annual basis;
(c) the contract price at the time the contract is entered into exceeds the prescribed amount; and
(d) as of the applicable payment date,
    i. there are no preserved or perfected liens in respect of the contract, or
    ii. all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the Act.

There are several features to these requirements. Only the holdback accrued in the previous year can be released. The project schedule must be longer than a year and must relate to the completion of the work, not to substantial performance of the work. So where the completion schedule has the work being completed within a year, this provision cannot be used. The terms of the contract between owner and contractor must provide for the release of the accrued holdback on an annual basis. If there is no contract term for the release of the accrued holdback on an annual basis, then this provision cannot be used. The contract price is at the time of contract award, not the effective price after a year, which may include the value of

change orders. The contract price must meet a certain threshold before this new section will apply. Section 5 of Regulation 304/18 currently fixes the contract price threshold at $10 million or more. This monetary requirement will certainly limit the projects to which the section will apply.

It is important to note that this section is permissive, not mandatory. Therefore, even if the four conditions are satisfied, the owner is not required to release the accrued holdback. The notice of non-payment of holdback provisions do not apply where the owner does not release the holdback on an annual basis. However, the failure to do so may amount to a breach of contract, which may result in a claim by the contractor. On such large projects, contactors may prefer to use of a Form 4 letter of credit or a Form 5 bond instead so that the holdback is released on an on-going basis.

E. Payment of holdback on a phased basis

The *Act* also recognizes that work on a project may be phased and now permits an owner to release holdbacks on the completion of a phase of the improvement in respect of the services or materials supplied during each phase. New subsection 26.2(1) reads as follows:

> 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.

Three conditions must be met before subsection 26.2(2) can apply:

(a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;
(b) the contract price at the time the contract is entered into exceeds the prescribed amount; and
(c) as of the applicable payment date,
    i. there are no preserved or perfected liens in respect of the contract, or
    ii. all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this Act.

Again the language is permissive, so that an owner does not have to release the holdback on the completion of a phase of an improvement. If this provision is to be used successfully, the completion of a phase must be sufficiently described so that the parties can easily determine whether a phase is complete. In addition, the contract price means the price at the time of contract award and does not include the value of change orders. The contract price threshold for payment of holdback on a phased basis is $10 million or more as prescribed by section 6 of Regulation 304/18.

The contract price threshold however will not apply if a contact provides for payment of accrued holdback on a phased basis but only with respect to a specified design phase. For example, where the contract relates to the supply of design services only, the monetary

threshold for the contract price does not apply, but the parties will have to comply with the other two conditions. In addition, if a contract relates to both a design phase and a construction phase, and provides for the release of holdback following the completion of the design phase, the contract price threshold of $10 million will not apply and therefore only two of the conditions need to be met before this new section may be relied on. If however, the parties want to release holdback on the completion of phases under a design and construction contract, then the monetary threshold will apply.

9. MODERNIZATION OF THE EXPIRY, PRESERVATION AND PERFECTION OF LIENS

When preserving liens, it is always important to know whether the party is a contractor (a party who contracts directly with the owner) or a subcontractor (a party who has a subcontract with a contractor) as this affects the timeline for the preservation of a lien. The most significant change is the extension of the 45 day period for the preservation of a lien to 60 days, and the next 45 day period for issuing a statement of claim to 90 days. In addition, termination has been introduced as a trigger of the lien period and includes a requirement for the publication of a termination notice in the Daily Commercial News.

A. Preservation and perfection

i. Timelines

Under the *Act*, a claimant will have 60 calendar days to preserve its lien, starting, as is currently the case under the *Construction Lien Act*, on a date to be determined based on the lien claimant's role on the project (contractor, subcontractor, or worker), on the status of the contract or subcontract and on the existence – or the absence – of a published certificate of substantial performance. Simply, a claimant will now have 60 days to preserve a lien instead of 45 days.

The deadline to commence an action to enforce a lien (to "perfect" a lien) is also extended from 45 to 90 calendar days from the last day on which a lien could have been preserved (or 150 days from the triggering date for the commencement of the 60 day period to preserve a lien).

ii. Termination

Termination of a contract or subcontract, whether it is contested or not, is now a triggering event for the 60 day lien period, in addition to the existing triggering events of completion and abandonment under the *Construction Lien Act*. Given the effect of a termination on the lien rights of persons who are not parties to the terminated contract, the *Act* requires the owner, the contractor or other person whose lien is subject to expiration, to publish a notice of termination in a manner and in a form prescribed in the Regulations. Form 8 is the relevant form under Regulation 303/18 and it is required to be published in a construction trade newspaper under section 8 of Regulation 304/18. The publication of the notice of termination does not prevent the party whose contract was terminated from contesting the termination. The new subsections 31(6) and (7) read follows:

> 31(6) If a contract is terminated, either the owner or the contractor or other person whose lien is subject to expiry shall publish, in the manner set out in the regulations, a notice of the termination in the prescribed form and, for the purposes of this section, the date on which the contract is terminated is the termination date specified in the notice for the contract.
>
> 31(7) Subsection (6) does not prevent a person from contesting the validity of a termination.

Note that the termination date in the notice is the relevant date, not the date the termination notice is published. This is to be contrasted with a certificate of substantial performance as the *Construction Lien Act* and the *Act* continue to use the date of publication of the certificate of substantial performance as the relevant date for the preservation of liens and not the date the contract is certified substantially performed.

As a result, the short coming of this provision is that there is no requirement for any party to publish the notice of termination within a specified number of days from the date of termination. So for example, a notice of termination may be published on day 59 of the period to preserve a lien, perhaps leaving parties to scramble to preserve their lien rights. However, under a termination notice, the reality is that parties find out quickly when the party they are supplying to or working under has been terminated.

What is not clear from 31(6) is who bears the responsibility to publish the notice of termination. The language used – either the owner or the contractor or other person whose lien is subject to expiry shall publish – is not very clear. So where there is a termination of the contract between owner and contractor, either one may publish the notice of termination. Where there is a termination of a subcontract, either the contractor or other person whose lien is subject to expiry is required to publish the termination notice. As it is not clear who is responsible for the publication of the termination notice, if the termination is as between owner and contractor, the owner will likely want to publish the certificate in order to achieve certainty regarding the expiry of subtrade liens. The same may be said for a contractor. It is not clear what happens if no one publishes the notice of termination. If that is the case, any lien claimant whose lien was affected by the termination will argue that the termination is not effective with respect to the timing of the preservation of their lien. In which case, the party trying to declare a lien expired as a result of a termination will likely not be able to rely on the termination as no notice was published.

One final note on termination. The reference to termination, for consistency, is carried through into section 72. Section 72 permits a claimant to enforce their lien despite the non-completion or abandonment of the contract or subcontract by any other person. Termination is now included in section 72 and reads as follows:

> 72 A person who has supplied services or materials in respect of an improvement may enforce a lien despite the non-completion, ~~or~~ abandonment or termination of the contract or a subcontract by any other person.

iii. Contents of the Certificate of Substantial Performance

Lien claimants will no longer be required to guess the particulars of the premises to ensure the proper preservation of their liens. Where liens may be registered against the premises, the *Act* requires the payment certifier, owner, and contractor to provide the specific property identifier numbers (PIN) and address for the premises in the certificate of substantial performance. Where liens may not be registered against the premises but rather must be given, (if the improvement is located on Crown land, municipal land or a railway-right-of-way), the certificate of substantial performance is required to include the name and address of the person to whom a lien is to be given to ensure that lien claimants know who to give their lien to in order to properly preserve their lien.

B. Posting of security to vacate the registration of a lien

The modernization of the provisions with respect to posting security relates to the amount of security for costs that must be posted when the registration of the claim for lien is vacated. Under the old statute, the requisite security for costs amounted to 25% of the value of the lien up to a maximum of $50,000. Under the amended provisions, the requisite security for costs amounts to 25% of the value of the lien up to a maximum of $250,000.

This substantial increase may have significant implications for a party who posts security for costs to vacate a lien. Where a lien in the amount of $300,000 is sought to be vacated, under the new regime the security for costs will be $75,000, whereas under the old regime, the security for costs was capped at $50,000. To vacate a lien in the amount of $1 million, under the new regime the security for costs to be posted will now be $250,000, five times the amount required under the old regime.

As outlined under 3.C above, security may be posted to vacate a written notice of lien and the same rules regarding security for costs will apply where a written notice of lien is vacated.

C. Expiry of liens and adjudication

The new provision subsection 34(10) relates to adjudication and the expiry of liens. This new provision will not come into effect until October 1, 2019, but it is worth mentioning so that parties can become accustomed to the new adjudication regime. Subsection 34(10) reads as follows:

> 34(10) If the matter that is the subject of a lien that has not expired is also a matter that is subject of an adjudication under Part II.!, then the lien is deemed for the purposes of this section only, to have expired on the later of the date on which the lien would expire under section 31 and the conclusion of the 45-day period next following the receipt by the adjudicator of documents under section 13.11.

Simply put, where a party refers a matter to adjudication, its lien expires 45 days after the party sends a copy of the contract or subcontract to the adjudicator along with the documents it intends to rely on.

By way of example, using the maximum timeline permitted under the *Act*, if the contractor refers to adjudication the non-payment of holdback by the owner:

- the owner would have published the notice of non-payment of holdback on the 40th day after publication of the certificate of substantial performance.

- The contractor is required to provide a notice of non-payment to its trades within 7 days of receipt of the owner's notice of non-payment of the holdback.

- The contractor's notice provides that the contractor will refer the matter to adjudication within 21 days after giving the trades the notice of non-payment. At this point, the total outside timeline is 68 (40 + 7 + 21) days from the date of publication of the certificate of substantial performance.

- If on the 21st day, the contractor refers the matter to adjudication by delivering its notice of adjudication that names the proposed adjudicator, the adjudicator has 4 days to accept the appointment.

- If the adjudicator does not accept the appointment, the Authority shall appoint an adjudicator within 7 days. Therefore, another 11 days are added to the timeline for a total of 80 days.

- Within 5 days of the appointment of the adjudicator, the contractor is required to provide a copy of the contract and documents to be relied upon to the adjudicator. The total number of days is now 85 days.

- The lien of the contractor therefore does not expire until 45 days after the 85th day, for a total of 130 days.

- The contractor therefore has a maximum of 130 days to preserve its lien where the issue being adjudicated is the same as the issue that is the subject matter of the lien (in this example, payment of holdback).

The intention of this provision appears to be to allow parties to hold off on preserving liens until after the issue has been referred to adjudication. It will remain to be seen how the courts will interpret this section and whether the matter that is the subject of the lien must be identical to a matter that is being referred to adjudication.

It also appears that there is an unintended consequence related to completion. At the time of substantial performance, there will be a limited amount of work left to complete. If the contractor were to complete all the work within a 68 day period, taken from the example above, the contractor would be precluded from commencing the adjudication as section 13.5(3) provides that an adjudication cannot be commenced if the notice of adjudication is given after the date the contract is completed, unless the parties agree otherwise. Bear in mind that deemed completion would also apply.

The courts will have to balance the expiry of the lien and the parties recourse to adjudication so that it is consistent with the expressed intention of this provision. If a party fears that its lien will expire, it should preserve it to avoid a dispute regarding its timeliness.

D. Expiry of a workers' trust fund lien

The *Construction Lien Act* provided for rules governing the expiry and the preservation of a contractor's lien and the liens of "other persons". The "other persons" wording was intended to capture the liens of individual workers, subcontractors and suppliers alike. The *Act* is more specific now and provides for specific rules governing the expiry and the preservation of a workers' trust fund lien, on behalf of a single worker or multiple workers. In effect, the *Act* provides for a triggering event applicable only to workers being the date on which the final worker who is a beneficiary of the workers' trust fund last supplied services or materials to the project will now trigger the commencement of the 60 day lien period applicable to the workers' trust fund. The existing possible triggering events such as substantial performance (if applicable, completion, abandonment or termination) will also apply to a worker's trust fund lien.

E. Premises owned by municipalities

Under the *Construction Lien Act*, if the property was owned by a municipality, a claimant had to register a claim for lien in order to preserve the lien. Public streets and highways owned by municipalities were an exception and the lien in respect of public streets and highways had to be given to the clerk of the municipality.

Starting on October 1, 2019, liens in respect of any property owned by a municipality will have to be given to the clerk of the municipality. Until then, the old regime under the *Construction Lien Act* continues to apply.

F. Liens against common elements of condominiums

Subsection 34(9) is a new provision added to the *Act* to address the preservation of liens with respect to work performed that is in whole or in part related to the common elements of a "common elements condominium corporation" and those that are not common elements condominium corporations. The latter would normally arise after the condominium declaration has been registered on title. In addition a new provision has also been added with respect to posting of security to vacate the lien in respect of the common elements where a unit owner is permitted to pay their proportionate share into court, plus security for costs, to vacate the lien.

It is important to put these two new provisions in context. With respect to condominium corporations, the Review made three recommendations. The first recommendation related to notice of a lien being given to the condominium corporation and the unit owners by way of a prescribed form. The second was to permit unit owners to post security proportionate to their share of the lien to have the lien vacated. The third recommendation related to a single property identifier number ("PIN") for the common elements of the condominium building that is used after registration of the condominium declaration and that is subject to liens related to

the common elements. The first and second recommendations were adopted. The third was not. As a result, there is still no PIN related to the common elements of a condominium corporation to which a lien attaches where the work performed is in whole or in part in respect of the common elements.

The new provision in the *Act* reads as follows:

> 34(9) A person who preserves a lien under this section that relates, in whole or in part, to an improvement to the common elements of a corporation under the *Condominium Act, 1998* shall give notice of the lien's preservation, in the prescribed form, to the corporation and to each person who is,
>
> (a) in the case of a corporation that is not a common elements condominium corporation, as defined in that Act, 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 mentioned in subsection 139 (1) of that Act to which a common interest is attached and which is described in the declaration of the corporation.

In order to understand new subsection 34(9), set out below are certain definitions and sections from the *Condominium Act, 1998*, as follows:

> "common elements" means all the property except the units;
>
> "common elements condominium corporation" means a common elements condominium corporation described in subsection 138 (2);
>
> 138 (1) Subject to the regulations, a declarant may register a declaration and description that create common elements but do not divide the land into units.
>
> 138(2) The type of corporation created by the registration of a declaration and description under subsection (1) shall be known as a common elements condominium corporation.
>
> 139(1) A declaration for a common elements condominium corporation shall not be registered unless each of the owners of a common interest in the corporation,
> (a) also owns the freehold estate in a parcel of land,
> (i) that is not included in the land described in the description,
> (ii) that, subject to the regulations, is situated within the boundaries of the land titles and registry divisions of the land registry office in which the description of the corporation is registered, and
> (iii) to which the *Land Titles Act* applies or for which a certificate of title has been registered under the *Certification of Titles Act* as that Act read immediately

> before subsection 2(1) of Schedule 17 to the *Good Government Act, 2009* came into force; and
> (b) has signed a certificate in a form prescribed by the Minister stating the owner consents to the registration of the declaration and the notice described in subclause (2)(b)(i).
>
> 139(2) Upon the registration of a declaration and description for a common elements condominium corporation,
> (a) the common interest of an owner in the corporation attaches to the owner's parcel of land; and
> (b) the declarant shall register against each owner's parcel of land,
> (i) a notice in the form prescribed by the Minister that sets out the information contained in clause (a), and
> (ii) a copy of the certificate described in clause (1) (b).

A common elements condominium corporation is one where the condominium declaration has been registered on title, however it has not been divided into units. Consequently, a corporation that is not a common elements condominium corporation is one where the declaration has been registered on title and that has been divided into the common elements and units.

Therefore, where a contractor works on a condominium that includes in whole or in part work in respect of the common elements of the corporation, aside from preserving the lien by registration, the lien claimant is required to provide notice of the preservation of the lien in Form 13 to the corporation and:

a) Every owner of a unit in the case of a corporation that is not a common elements condominium corporation; or

b) To an owner of a parcel of land to which a common interest is attached in the case of a common elements condominium corporation.

However, when the lien claimant is required to give notice is not clear. Based on the language in subsection 34(9), it may be after the lien is preserved, however no indication is provided how long after the lien is preserved that the notice is to be given. In addition, it appears that there is no penalty for failing to give notice of a preserved lien.

G. Exaggerated and false lien claims

Section 35 has been redrafted so that with respect to the exaggerated lien, the test is now where the claimant knew or ought to have known that the amount of the lien has been wilfully exaggerated. Under the *Construction Lien Act*, it was difficult for a party to prove that the claimant knew or ought to have known that the lien was for an amount "grossly in excess" of the amount which is owed to the claimant. This provision in the *Construction Lien Act* was difficult to enforce except in some obvious circumstances where the lien claimant was only able to prove 50% or less of the registered value of the lien. Presumably it will be easier for a party

to demonstrate that the claimant "willfully" exaggerated the amount of the lien. The changes in the *Act* reads as follows:

> 35(1) In addition to any other ground on which the person may be liable, any person who preserves a claim for lien or who gives written notice of a lien in the following circumstances is liable to any person who suffers damages as a result:
>
> 1. ~~for an amount which~~ the person knows or ought to know ~~is grossly in excess of the amount which the person is owed~~ that the amount of the lien has been willfully exaggerated; or
> 2. ~~where~~ the person knows or ought to know that ~~the person~~ he or she does not have a lien,
>
> ~~is liable to any person who suffers damages as a result~~.
>
> 35(2) In the circumstances described in paragraph 1 of subsection (1), the court may, on motion, order that the lien amount be reduced by the exaggerated portion, as determined in accordance with section 17, if it finds that the person has acted in good faith.

Subsection 35(2) is new and enacts severe consequences where a lien is found to be willfully exaggerated. In addition to any damages that may be awarded, the amendment in the *Act* permits the court to reduce the lien amount as determined in accordance with section 17 by the exaggerated portion. For example, a lien is preserved for $750,000 and on a motion it is found to be willfully exaggerated by $250,000 and is reduced by the court to $500,000. The parties then proceed to trial, and at trial it is determined that the value of the lien is no more than $300,000 based on determinations by the court of the issues in dispute between the parties. It appears that subsection 2 permits a party to ask the court to reduce the value of the lien as determined at trial by the exaggerated amount so that the lien is ultimately valued at $50,000. Whether this example is a correct analysis of subsection 2 will require clarification from the courts.

The reference to good faith is not clear. As drafted, it suggests that the lien was willfully exaggerated in good faith. This appears to be a drafting error as the provision would make more sense if it read that the court is permitted to reduce the lien by the exaggerated portion "unless" the court finds that the person acted in good faith. Such wording would mean that good faith may be a defence to the severe consequences of subsection 35(2).

H. Use of letters of credit to post security

Letters of credit typically make reference to international commercial conventions. The Lien Masters who sit in Toronto have refused letters of credit that refer to international commercial conventions when they are used to post security to vacate the registration of a claim for lien. The fear was that by referring to the conventions, the letter of credit could be revoked or that it was conditional. Subsection 44(5.1) has been added to the *Act* to address these concerns and the *Act* permits the use of letters of credit containing a reference to these conventions:

> 44(5.1) A letter of credit containing reference to an international commercial convention is acceptable as security for the purposes of this section, as long as the convention text is written into the terms of the credit and the letter of credit is unconditional and accepted by a bank listed in Schedule I to the *Bank Act* (Canada) that is operating in Ontario.

The language used in this new section mirrors the recommendation from the Review. However, whether or not a letter of credit will be accepted remains to be seen. There are three essential requirements in the new subsection before a letter of credit that refers to an international commercial convention can be accepted:

(a) The convention text is written into the terms of the credit. It is not clear if this requires that the convention text be actually set out in the letter of credit, or an appendix attached to it. Presumably if the letter of credit incorporates the text of the convention by reference to an appendix will be sufficient to comply;

(b) The letter of credit must be unconditional; and

(c) The letter of credit must be accepted by a bank listed in Schedule I to the *Bank Act* that is operating in Ontario. It is not altogether clear how a party is to determine whether the letter of credit is accepted by a Schedule I bank operating in Ontario. The letter of credit is issued by the bank and it will be presented to that same bank to be drawn on. It is therefore difficult to understand how that letter of credit would not be accepted by the bank.

10. MODERNIZATION OF THE S. 39 DEMAND FOR INFORMATION

Several changes have been made to modernize the section 39 demand for information rules. For example, a claimant can now request certain information from a landlord, including the amount of any tenant inducement in the lease. In addition, a claimant will be entitled to ask whether the contract provides for payment based on completion of phases or milestones.

A. Information Additional to the Names of the Parties

Bill 57 introduces two amendments to the *Act*. In addition to requesting information regarding the names of the parties to the contract, a party will also be entitled to ask for the date on which the contract was entered into and the date on which any applicable procurement process was commenced. Also, a party is entitled to request the date on which a subcontract was entered into. It is anticipated that Bill 57 will receive Royal Assent by the end of 2018 and these provisions will be in force.

B. State of accounts

The most significant part of the modernization of section 39 relates to the required response regarding the state of accounts. Under the *Construction Lien Act*, the responses received from parties regarding the state of accounts varied in detail and completeness. The *Act* now sets out

in new subsection 39(4.1) that the state of accounts shall contain the following information as of a date presumably specified by the claimant in the demand for information:

a) The price of services or materials that have been supplied under the contract or subcontract;
b) The amounts paid under the contract or subcontract;
c) The amount of the applicable holdback;
d) The balance owed under the contractor or subcontract;
e) The amount retained as a set-off;
f) Any other information prescribed by the Regulations.

C. Information from Lenders

The information claimants most commonly seek from mortgagees generally relates to the purpose of the mortgage and whether it was taken to finance the improvement, as well as a statement showing the amounts advanced under the mortgage, the dates of the advances, and any arrears in payments including arrears in interest. Where a mortgage was taken for several purposes, most commonly to purchase the property and to finance the construction, lenders typically responded accordingly but did not break out what portion related to the purchase and what portion related to the construction. New subsection 39(4.2) addresses this issue and reads as follows:

> 39(4.2) For the purposes of clause (2)(b) [that addresses the statement of the advances], if amounts have been advanced under the mortgage for the purposes of financing both the purchase price of the land and the making of the improvement, the statement must show the amount advanced under the mortgage for each of those purposes.

As a result, the lender is required to identify on the statement of advances the amounts that relate to the purchase price and the amounts that relate to financing the improvement.

D. Information from Landlords

The last substantive change to section 39 relates to the information that can be requested from a landlord. The new provision reads as follows:

> 39(1)4 By a landlord whose interest in the premises is subject to a lien under section 19(1), with,
>
> iv. the names of the parties to the lease; and
> v. the amount of the payment referred to in subsection 19(1); and
> vi. the state of accounts between the landlord and the tenant containing the information listed in subsection (4.1). [Note, (iii) does not come into effect until October 1, 2019]

Therefore landlords will also have to respond to section 39 demands regarding the amount of any tenant inducement. When (iii) comes into effect, presumably it will relate to the amount of

the tenant inducement and how much has been paid and when, and the amount of holdback being retained by the landlord with respect to the tenant inducement.

11. MODERNIZATION OF THE GENERAL POWERS OF THE COURT

Under section 47 the *Construction Lien Act*, there were four remedies available to the court:

a) order the discharge of the lien;

b) order that the registration of the claim for lien or certificate of action or both be vacated;

c) declare the lien expired where a written notice of lien was given and that it no longer binds the person to whom it was given; or

d) dismiss an action.

The jurisdiction of the court to apply one of the four remedies was founded upon any proper ground and subject to the terms that the court considered appropriate in the circumstances. However, courts were reluctant to discharge a lien except in the clearest of circumstances. As a result, new section 47(1) permitting a court to discharge a lien in certain circumstances has been introduced and much of the old section 47(1) has found its way into new subsection 47(1.1)

Consistent with the language in new section 47(1), section 86(1) of the *Construction Lien Act* dealing with the court's jurisdiction over costs has also been amended to incorporate the new language in 47(1).

A. Jurisdiction to discharge

The new subsection 47(1) now permits a court to discharge a lien on the basis that the claim for lien is frivolous, vexatious or an abuse of process or to discharge the lien on any other proper ground. The reference to "frivolous, vexatious or an abuse of process" is language that is familiar to lawyers and generally used to describe claims that are not brought in good faith. A frivolous claim is a trivial, meritless claim, that is not worth the resources of the court (and other resources) necessary to litigate the claim. A vexatious claim is often a frivolous claim brought for the specific purpose of causing a nuisance, financial or otherwise. An abuse of process is an attempt to re-litigate a dispute previously litigated or otherwise adjudicated, which cannot be permitted as it would bring the adjudicative process as a whole into disrepute.

New section 47(1) of the *Act* reads as follows:

47(1) The court may, on motion, order the discharge of a lien,
(a) on the basis that the claim for lien is frivolous, vexatious or an abuse of process; or
(b) any other proper ground.

47(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing an action.

47(1.2) An order under subsection (1) or (1.1) may include any terms or conditions that the court considers appropriate in the circumstances.

B. Jurisdiction to award costs

The court's jurisdiction related to costs has been expanded to include any step in a construction lien action. A restrictive interpretation would limits the court's jurisdiction related to costs to only those steps permitted under the *Act*. However, the intention appears to be to permit the court a wide jurisdiction with respect to any step that is taken in a construction lien action, whether the step is specifically permitted under the *Act* or not.

The extension of the court's jurisdiction to discharge a lien where the claim for lien is frivolous, vexatious or an abuse of process has been replicated in extending the court's jurisdiction to award costs against a lawyer to include situations where it is clear that the claim for lien is frivolous, vexatious or an abuse of process.

Section 86(1) under the *Act* reads as follows:

86(1) subject to subsection (2), any order as to costs in an action, application, motion or ~~settlement meeting~~ <u>any other step in a proceeding under this Act</u> is in the discretion of the court, and an order may be made against,

(a) a party to the action or motion; or

(b) a person who represented a party to the action, application or motion, where the person.

i. knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for a lien is without foundation, <u>is frivolous, vexatious or an abuse of process,</u> or is for a ~~grossly excessive~~ <u>wilfully exaggerated</u> amount, or that the lien has expired, or

ii. prejudiced or delayed the conduct of the action,

and the order may be made on a substantial indemnity basis, including where the motion is heard by, or the action has been referred under section 58 to, a master, case management master or commissioner.

> 86(2) Where the least expensive course is not taken by a party, the costs allowed to the party shall not exceed what would have been incurred had the least expensive course been taken.

The *Act* has been amended so that the court's jurisdiction in respect of costs extends essentially to the action and any step in the action. The reference to a willfully exaggerated amount in (i) is consistent with the change in section 35 of the *Act* regarding exaggerated liens.

The reference to the claim for a lien being frivolous, vexatious or an abuse of process is the same new language introduced in section 47 extending the court's jurisdiction to discharge a lien. As this language extends to those who represent the party, lien claimants should make sure they have the paperwork that supports their lien and provide it to their lawyer. A lawyer may want to review a copy of a contract, subcontract or purchase order, invoices, a statement of account, and out of an abundance of caution, any relevant correspondence between the parties addressing payment before agreeing to register any lien on behalf of a client.

12. MODERNIZATION OF PROCEDURE

A. Procedure generally

The procedure under the *Construction Lien Act* is set out in Part VIII, sections 50 to 67. Most of these sections have been repealed, three of them remain unchanged and the balance have been, with some minor modifications, set out in Regulation 302/18 that specifically addresses the procedures for actions under Part VIII of the *Act*. It appears that those sections that generally address jurisdiction of the court have remained in the *Act* and those provisions that relate to procedure are now found in Regulation 302/18. This permits the legislature to easily adjust and amend the procedure in respect of lien actions and to address new situations that may arise regarding the conduct of lien actions without resorting to passing amendments to the legislation.

Section 63 – personal judgment, section 64 – the right to share in proceeds, and section 65 – orders for the completion of a sale remain unchanged and are still found in the *Act*.

Below, three charts are set out. The first chart addresses the sections of the *Construction Lien Act* that were found under Part VIII and that remain in the *Act* but that have been amended. The second chart addresses those sections in the *Construction Lien Act* that have been repealed and replaced with a corresponding provision in Regulation 302/18. The third chart addresses sections of the *Construction Lien Act* that have been repealed and that are not included in the Regulation.

Chart 1: sections that remain in the *Act* but have been amended

Section	Sections Amended under the *Act*
50	Lien claims and procedures – this section also includes the provision that was found under 67(3) of the *Construction Lien Act* regarding the application of the *Courts of Justice Act* and the rules of court to lien actions, so long as they are not inconsistent with the *Act*. The amended section 50 reads as follows: 50 (1) A lien claim is enforceable in an action in the Superior Court of Justice ~~in accordance with the procedure set out in this Part~~. ~~(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.~~ [deleted entirely from the *Act* and the Regulations] (2) Except to the extent that they are inconsistent with this Act and the procedures prescribed for the purposes of this Part, the *Courts of Justice Act* and the rules of court apply to actions under this Part. [formerly section 67(3) of the *Construction Lien Act*] (3) ~~Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.~~ (3) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question. [formerly section 67(1) of the *Construction Lien Act*]
51	Court to dispose completely of action – the amendments do not affect the substance of section 51. Amended section 51 reads as follows: 51 The court, whether the action is being tried by a judge or ~~on a reference by a master, a case management master or a person agreed on by the parties~~ on a reference under section 58, (a) shall try the action, including any set-off, crossclaim, counterclaim and~~, subject to section 56,~~ third party claim, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served; and (b) shall take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action.
52	Where exclusive jurisdiction not acquired - this section was amended to remove the reference to a holding of a settlement meeting. The effect of this amendment is to allow the judge who made the order for a settlement meeting to acquire jurisdiction over the trial of the action, and perhaps even exclusive jurisdiction over all motions and other steps in the action. Amended section 52 reads as follows:

Section	Sections Amended under the *Act*
	52 A judge, master or case management master does not acquire exclusive jurisdiction over the trial of an action or reference by reason only of appointing the time and place for the trial of the action or reference~~, or for holding a settlement meeting~~.
58	Reference to a master, etc. – this section was amended to permit a reference of a lien action within the monetary jurisdiction of the Small Claims Court to a deputy judge or to an Administrative Judge. This is a significant change as it permits liens under $25,000 to be referred to the Small Claims Court for trial. In order to effect this change, several paragraphs of section 58 were amended and a new provision was added as follows: 58 (1) On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge may refer the whole action or any part of it for trial, (a) to a master assigned to the area in which the premises or part of the premises are situate; (a.1) to a case management master; ~~or~~ (b) to a person agreed on by the parties, or (c) if the action is for an amount that is within the monetary jurisdiction of the Small Claims Court, as set out in section 23 of the *Courts of Justice Act*, to a deputy judge of that Court or to the Small Claims Court Administrative Judge. (1.1) Notice of a motion for a reference under clause (1) (b) or (c) shall be given to every person ~~who is or would be entitled to a notice of settlement meeting under subsection 60 (2)~~ specified by the procedures prescribed for the purposes of this Part. (1.2) A reference under clause (1) (b) shall not be made unless the persons entitled to notice under subsection (1.1) consent to the reference. (1.3) A person given notice under subsection (1.1) who does not oppose the motion or does not appear at the hearing of the motion shall be deemed to consent to the reference under clause (1) (b). (2) A master or a case management master shall not hear or dispose of a motion made under subsection (1). (3) At the trial, a judge may direct a reference to a master assigned to the area in which the premises or part of the premises are situate, to a case management master ~~or~~, to a person agreed on by the parties or, if the action is for an amount that is within the monetary

Section	Sections Amended under the *Act*
	jurisdiction of the Small Claims Court, as set out in section 23 of the *Courts of Justice Act*, to a deputy judge of that Court or to the Small Claims Court Administrative Judge. (4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court. (4.1) Subsection (4) also applies to a person who is agreed on by the parties and to whom a reference has been directed. 1994, c. 27, s. 42 (7). (4.2) Subsection (4) also applies to a deputy judge of the Small Claims Court or to the Small Claims Court Administrative Judge, if a reference is directed to him or her. (5) ~~Where under subsection (1) the action has been referred to a master, to a case management master or to a person agreed on by the parties for trial~~ If all or part of an action is referred for trail under subsection (1), any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action, make a motion to a judge of the court that directed the reference to set aside the judgment directing the reference. (6) Where no motion is made under subsection (5), or where the motion is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if the person had been a party to the action at the time the reference was directed. R.S.O. 1990, c. C.30, s. 58 (6).
62	Judgment or report – this section was amended to make it consistent with the change in section 58. **62** (1) The results of the trial shall be embodied, (a) in a judgment in the prescribed form, where the trial is conducted by a judge of the court; or (b) in a report in the prescribed form, where the trial is conducted ~~on a reference by a master, by a case management master, or by a person agreed on by the parties~~ on a reference under section 58.

Chart 2: Repealed sections of the *Construction Lien Act* now in Regulation 302/18

The left column in the second chart below sets out the section from the *Construction Lien Act* that addressed the procedure. The middle column sets out the corresponding provision in regulation 302/18. The column on the right sets out the substance of the provision and whether there was a change to this provision from what appeared in the *Construction Lien Act*.

Section of CLA	Regulation Section	Corresponding Section in the Procedure Regulation 302/18
53(1)	1(1)	How an action is commenced – There are some minor adjustments to the language but the provision essentially remains the same.
53(2)	1(2), 1(3)	Service of the statement of claim – the statement of claim must still be served within 90 days and the motion can be brought to extend the time for service before or after the time for service has expired.
55(2)	2(1)	Counterclaims and crossclaims – there is no change in the Regulation from that found in 55(2) of the *Construction Lien Act*.
53(3)	2(2)	Counterclaims and crossclaims – the opening words of section 53(3) – "the counterclaim or crossclaim shall accompany the person's statement of defence" – are now set out in section 2(2) of the Regulation. It is important to note that having a counterclaim or crossclaim accompany a statement of defence is subject to section 2(3) of the Regulation, which is addressed below.
53(3)	2(3), 2(4)	Counterclaims and crossclaims – section 53(3) dealt with delivering crossclaims and counterclaims with the statement of defence. It also permitted the court to grant leave, on terms, to the defendant to deliver a crossclaim or counterclaim after the statement of defence had been delivered where leave was granted on terms. This provision is now found in section 2(3) and 2(4) of the Regulation with a significant change that appears to be a result of a drafting error in the Regulation. Under the *Construction Lien Act*, a party as of right could deliver a counterclaim or crossclaim with their statement of defence. Where a party wanted to deliver a counterclaim or crossclaim later in the litigation, it had to seek leave of the court to do so. Under the Regulation, it appears that a party must seek leave of the court to deliver a crossclaim or counterclaim and that leave must be sought before the date that the statement of defence is delivered. There appears to have been an attempt to mirror the language in 53(3) but the drafters did not do it accurately, which results in the requirement to serve and file a motion "before" the statement of defence is delivered and not after. If it is not corrected, it will have the effect of forcing defendants to seek leave before they can make a counterclaim or a crossclaim, therefore significantly increasing litigation costs and the number of procedural motions before the court.

Section of CLA	Regulation Section	Corresponding Section in the Procedure Regulation 302/18
54(1)	2(5)	Time for delivery of pleadings – the provision, to deliver the statement of defence, crossclaim, counterclaim or third party claim within 20 days, is unchanged.
50(3)	3	Joinder in an action – this provision, permitting any number of lien claimants whose liens are in respect of the same owner and same premises to join in the same action, is unchanged.
56	4	Third party claims – despite the recommendation to permit third party claims as of right, section 4 of the Regulation essentially mirrors section 56 of the *Construction Lien Act* with insignificant tinkering in the language. Therefore the requirement to seek leave to add a third party, or subsequent parties, remains unchanged in the Regulation.
54(2) to (4)	5	Noting in default – The wording remains relatively unchanged and a defendant who has been noted in default is still required to satisfy the court that there is evidence to support a defence in order to set aside the noting in default. The slight change in wording relates to judgment. Under the *Construction Lien Act*, a party could only obtain "judgment". Under the Regulation, a party can obtain a "default judgment". This is to explicitly recognize that a default judgment may be obtained, including a lien judgment, against a party who has been noted in default where, in the past, judges may have been reluctant to grant a lien judgment on a default basis where the lien judgment is obtained without notice to the defendant. Also, under the *Construction Lien Act*, several provisions did not require notice, to be provided to a defendant that was noted in default, for example notice of the trial. Instead of repeating this throughout the Regulation, section 5(5)2 of the Regulation makes it clear that a party noted in default is not entitled to notice of the trial of the action or of any step in the action, or to participate in the trial or any step in the action. Simply the party noted in default has no standing before the court.
57	6	Parties – the corresponding provision to section 57 is found in section 6 of the Regulation.
59(1)	7	Carriage of action – There has been some minor adjustment by adding "against the premises", but otherwise the substance of the provision remains unchanged.
59(2)	8	Consolidation of actions – The same change as in section 7 of the Regulation is included in section 8 which otherwise remains unchanged.
60	9	Motion to fix date for trial or settlement meeting – There has been

Section of CLA	Regulation Section	Corresponding Section in the Procedure Regulation 302/18
		some minor adjustments to the language but the substance of the provision remains the same such that any party may bring the motion to fix a date for trial or a date for the settlement meeting where all defences have been delivered or the time for delivery of all defences has expired. The balance of section 60 dealing with notice of the settlement meeting and of the trial, albeit with some minor adjustments, have found their way into subsections of section 9 of the Regulation.
61	10	Settlement meeting – this provision relates to the conduct of a settlement meeting ordered by the court. There are some minor changes to the wording found in Section 61, but again the substance of the section remains unchanged in the Regulation.
	11	Reference of actions – as section 58 of the *Construction Lien Act* was not repealed but rather amended, section 11 of the Regulation is to be read in conjunction with section 58 where the party seeks to refer the lien action to be tried by a person agreed on by the parties or to the deputy judge of the Small Claims Court or to a Small Claims Court Administrative Judge.
66	12	Motion for directions – this provision permits a person who is in possession of an amount that may be subject to the trust provisions of the *Act* to bring a motion for directions. This provision is unchanged.
67(2)	13	Procedure generally – subsections 67(1) and (3) are now found in new section 50 of the *Act* addressed in Chart 1 above. What remains of section 67 is found in sections 13 and 14 of the Regulation. Therefore, under section 13 of the Regulation, interlocutory steps, other than those provided for in the *Act*, shall not be taken without leave of the Court. The party that wants to take the interlocutory step will still need to demonstrate that the step is necessary or that the step would expedite the resolution of the issues in dispute. This old test remains intact.
67(4)	14	Technical assistance – this provision addresses the court's power to retain architects, engineers, and other experts to enable the court to determine better any matter of fact in question. The court is also permitted to fix the remuneration of the expert retained and direct the payment of the remuneration by any of the parties. New to the Regulation is the provision that the parties are permitted to make submissions regarding payment of the expert fees before the order fixing the fees or directing any of the parties to pay the fees.

Chart 3: What's missing

Section of CLA	Regulation Section	Corresponding Section in the Procedure Regulation 301/18
50(2) 55(1)		Two notable provisions that were in the *Construction Lien Act*, and that have been repealed are as follows: a) Subsection 50(2) prohibited a trust claim from being joined with a lien claim; and, b) Subsection 55(1) only permitted a plaintiff to join a breach of contract claim with its lien claim. Therefore, it appears that the plaintiff lien claimant may now join with its action to enforce its lien, any type of claim including a breach of contract claim, a negligence claim and breach of trust claim. This follows the recommendations to streamline the process and permits the parties to litigate any cause of action and to permit these causes of action to be tried in the same action. Parties will no longer be required to start a separate action and have it connected with the lien action. Note that there are some nuances to this as dictated by the rules regarding whether the claim in a crossclaim or counterclaim must relate to the improvement or not. The change however is a good start to streamlining the process.
67(5)		This subsection in the *Construction Lien Act* permitted a lien claimant whose claim fell within the monetary jurisdiction of the Small Claims Court to represent themselves in the lien action. This provision is deleted as a party may refer the lien action to the Small Claims Court. What is not clear is whether the lien claimant will have to retain a lawyer to bring the motion to have the action referred to the Small Claims Court. It is also important to note that a lien claimant who is a corporation and whose claim is under $25,000 will have to retain a lawyer to issue its statement of claim and certificate of action. In addition, once the Small Claims Court has issued its report, a lawyer will need to be retained to bring the motion to have the report confirmed and presumably, any appeal made from the order confirming the report will also require that a lawyer be retained for that purpose.
67(6)		This subsection in the *Construction Lien Act* related to making motions and specifically that the motion may be made in accordance with the rules of court for making motions, whether or not an action had been commenced at the time the motion was made. This provision is repealed as the new section 50(2) of the *Act* addresses the application of the rules of court.

B. Appeals

There are a couple of changes regarding appeals. The first change relates to the monetary threshold from which no appeal lies. Therefore, if the amount claimed is less than $10,000, there is no right of appeal from the judgment or an order on a motion to oppose the confirmation of a report.

Second, and perhaps the most significant change, relates to appeals from interlocutory orders. Under the *Construction Lien Act*, such appeals were prohibited. Under the *Act*, appeals are now permitted from interlocutory orders but only with leave of the Divisional Court. This is no doubt intended to address a situation where a party brings a motion, for example to declare a lien expired, and loses the motion. The order made on such a motion is interlocutory to the party that brought the motion although it would have been a final order had the party won the motion. Typically, the party who brought the motion feels aggrieved as it must live with decision and carry on with the action. Now that party, with leave of the Divisional Court, would be permitted to appeal from that interlocutory order. The changes to the appeal process are as follows:

> 71 (1) ~~Subject to subsection (3)~~ Except as otherwise provided in this section, an appeal lies to the Divisional Court from a judgment or an order on a motion to oppose confirmation of a report under this Act. R.S.O. 1990, c. C.30, s. 71 (1).
>
> (2) A party wishing to appeal shall file and serve a notice of appeal within fifteen days of the date of the judgment or order, but the time for filing or serving the notice of appeal may be extended by the written consent of all parties, or by a single judge of the Divisional Court where an appropriate case is made out for doing so.
>
> ~~(3) No appeal lies from,~~
> ~~(a) a judgment or an order on a motion to oppose confirmation of a report under this Act, where the amount claimed is $1,000 or less; or~~
> ~~(b) an interlocutory order made by the court~~. R.S.O. 1990, c. C.30, s. 71 (3).
> (3) No appeal lies from an interlocutory order made by the court, except with leave of the Divisional Court.
>
> (4) No appeal lies from a judgment or an order on a motion to oppose confirmation of a report under this Act, if the amount claimed is $10,000 or less.

13. MODERNIZATION OF SURETY BONDS

The *Act* sets out when surety bonds are required and the form of bonds to be used. There are two situations where labour and material payments bonds and performance bonds are required. First, where there is a “public contract”. A “public contract” is defined as a contract entered into between a contractor (other than an engineer or architect) and a public owner (i.e. the Crown, a municipality, or a broader public sector organization).

Second, where the improvement is to be financed and built under an alternative financing and procurement arrangement, essentially P3 projects. A contractor who enters into the construction contract with the special purpose entity (which contracted with the Crown, a municipality or broader public sector organization to finance and build the project) will be required to provide the surety bonds. The *Act* (subsection 1.1(4)) deems the construction contract in this procurement arrangement to be a "public contract".

The *Act* sets out the minimum coverage requirements (whether a 50% or 100%) for the surety bonds and the minimum contract amounts when surety bonds are required. With respect to public contracts, the minimum coverage limit is a 50% labour and material payment bond and a 50% performance bond. Section 12 of Regulation 304/18 prescribes that surety bonds are required for public contracts where the contract price is $500,000 or more.

With respect to the deemed public contracts (the P3 projects), section 3 of Regulation 304/18 sets out the minimum coverage as:

a) 50% of the contract price, if the contract price is $100 million or less; or,

b) $50 million, if the contract price is more than $100 million.

However, it should be noted that with respect to deemed public contracts, the *Act* sets out a benefit to cost analysis that may be taken into account when determining the coverage limits of the bonds. Bonds with the coverage limits set out in the Regulations will not be required unless the bonds required by the *Act* and any other security required taken together reflect a balance between the adequacy of the security required to ensure payment to those who worked on or supplied materials to the project on the one hand and the cost of the security on the other. It will remain to be seen how the courts interpret this benefit to cost analysis and what forms of other security (such as a parental guarantee) will affect the coverage limits to ensure the adequacy of the security required for payment to subcontractors and suppliers.

The *Act* further provides that the requirement to provide bonds with respect to public contracts or deemed public contracts does not limit the owner's ability to require other types of bonds or security. In addition, the *Act* permits the form of bond that is prescribed to set out the claims process applicable to the performance bond or the labour and material payment bond.

A. Performance bonds

Form 32 sets out the form of performance bond that is required to be provided. It sets out a complete code for dealing with performance bond claims. Before a surety is obligated to act, the owner is required to make a written demand on the surety. The owner is required to send a notice to the surety in the prescribed form of notice. The only other instance that the surety is required to act under the performance bond is when it receives a request for a pre-notice conference from the owner. Once a surety receives a pre-notice conference, the surety is to arrange a call or meeting of the owner, contractor and surety. The call or meeting is without prejudice and for the purpose of permitting an owner to express its concerns.

Once the surety has received the notice from the owner in the prescribed form calling on the surety to act in accordance with its performance bond, generally, the surety is permitted to investigate to determine if the conditions precedent set out in the bond have been satisfied and to determine its liability, if any, under the bond. There are four conditions precedent:

(a) The contractor is, and is declared by the owner to be, in default under the contract;

(b) The owner has given such notice to the contractor of a default of the contractor, as may be required under the terms of the contract;

(c) The owner has performed the owner's obligations under the contract; and

(d) The owner has agreed to pay the balance of the contract price to the surety or as directed by the surety.

More specifically, as part of its investigation, within four business days of receipt of the owner's notice, the surety shall provide an acknowledgement to the owner in the form prescribed. In addition, the surety is required within 20 business days of receipt of the owner's notice to provide its position in the prescribed form setting out its acceptance of liability and the option it has selected to carry out its obligations under the performance bond. In the alternative, the surety must advise the owner within 20 business days that it disputes the notice and setting out the reasons for disputing it such as, for example, that the surety is unable to determine whether or not one or more conditions precedent have been satisfied.

Two of the possible options that a surety may exercise where the surety agrees that it is liable under the bond involve the balance of contract price. The balance of the contract price is a defined term in the bond and is required to be used by the owner to mitigate the surety's loss under the performance bond and then under the labour and material payment bond. Generally, the balance of the contract price is the amount payable to the contractor subject to any adjustments under the contract reduced by the owner's direct expenses incurred as a result of the default and all valid payments made to the contractor.

The bond also addresses work that the owner may carry out while the surety is investigating. There is necessary interim work to ensure public or worker safety and there is also mitigation work performed to "effectively mitigate the costs for which the Owner is seeking recovery under the Bond." If the owner undertakes necessary interim work, it is required to give notice to the surety within 3 business days of the commencement of such work. The mitigation work is addressed at a post-notice conference that is convened within five business days of receipt of the owner's notice. The bond sets out specific rules around each type of work.

The form of bond also sets out the types of fees and expenses that may be incurred on the default of a contractor that the surety will pay under its performance bond. These are referred to in the bond as the owner's direct expenses and include professional fees, legal fees and other expenses that are a result of performing the contract during the extended period of time, including costs that arise due to seasonal conditions. In all cases they must be expenses that the

owner would not have incurred but for the default of the contractor. In addition, the owner will be permitted to claim for the necessary interim work and the mitigation work.

The bond specifically provides that the surety shall not be liable for any liquidated damages under the contract, any damages for delay except those other expenses that arise during the extended period of time and any indirect or consequential damages. These exclusions to the surety's liability may be varied by agreement between the surety, the owner and the contractor, however varying these exclusions will no doubt attract a premium on the cost of the bond.

B. Labour and material payment bonds

Form 31 sets out the form of labour and material payment bond. The payment bond identifies claimants under the payment bond as subcontractors (those with a direct subcontract with the contractor) and sub-subcontractors (those with a direct sub-subcontract with a subcontractor). The typical two tier payment bond used on Federal government projects has been adopted by the *Act*. So, while the subcontractor is entitled to full recovery under the payment bond, the sub-subcontractor is only entitled to a claim for the amount that the contractor would have been required to pay to the sub-subcontractor under the *Act*.

The labour and material payment bond, Form 31, also sets out a claims procedure. The Notice of Claim is also a prescribed form and must be sent to the surety, the contractor and the owner. There is a Notice of Claim form for a subcontractor and a different Notice of Claim form for a sub-subcontractor. The Notice of Claim in respect of holdback must be sent within 120 days after the claimant should have been paid in full and the Notice of Claim in respect of all other amounts must be sent within 120 days of last supply. The Notice of Claim may be sent by registered mail, facsimile or email.

Within 3 business days after receipt of the Notice of Claim, the surety is required to acknowledge receipt of the Notice of Claim and send out a letter requesting information that the surety requires to determine the claimant's entitlement under the payment bond. The letter from the surety requesting information is also a prescribed from.

No later than the earlier of 10 business days after the surety receives the information it has requested or 25 business days after the surety has received the Notice of Claim, the surety must provide its position in response to the Notice of Claim. The form of the surety's position is also a prescribed form.

For sub-subcontractor claims, the timeline is the same with respect to the surety's acknowledgement of the Notice of Claim and request for information, however the surety has to provide its position within 15 business days of receiving the information requested or 35 days of receipt of the sub-subcontractor's Notice of Claim.

The surety is required to pay the claimants the undisputed amount of the claim within 10 business days after it has provided its position.

Where the subject matter of an adjudication is substantially the same as that contained in the Notice of Claim, the obligations of the surety are stayed until the surety receives a copy of the adjudicator's interim binding determination. In addition, a surety is permitted to adjudicate a claim with the claimant and if there is an adjudication of the claim, and the surety pays in accordance with the adjudicator's interim binding determination, the surety may bring an action to obtain a final and binding decision in respect of the claimant's entitlement under the payment bond. Presumably, these provisions in the payment bond will not be in effect until after October 1, 2019, when the adjudication provisions come into effect.

The payment bond also has a one year limitation period from the date the contractor last performed work on the contract including work performed under any warranty or guarantee in the contract.

14. MODERNIZATION OF MISCELLANEOUS RULES

A. How documents may be given

The provision remains unchanged except with respect to the manner in which a written notice of lien is given and with respect to giving a copy of a claim for lien to a municipality (which will not come into effect until October 1, 2019).

The *Act* provides that a written notice of lien is to be served in a manner permitted under the rules of court for service of an originating process (ie. a statement of claim). Under the rules of court, an originating process is usually served personally. The rules of court also provide alternatives to personal service, such as email where a party consents or agrees to receiving a document by email.

Under sections 87(1) and 87(1.2), a claim for lien must be given to a municipality in the same manner as under the *Construction Lien Act,* unless the regulations provide that it must be given to the clerk of the municipality electronically. No such provision exists in the regulations at this time, but it might be added before October 1, 2019 when the new provisions applicable to municipal lands come into force.

B. Payment of interest by a ministry

Section 87.1 is a new provision to address the payment of interest by the Crown, a broader public sector organization, an agency of the government or a ministry. Payments by the government need to be authorized, either by the *Financial Administration Act* or the Legislature. Section 11.4.1 under the *Financial Administration Act* provides in part that the Treasury Board may authorize and direct the payment of interest, on such terms and conditions as it may specify, on overdue amounts payable by ministries or by specified public entities. The new section in the *Act* deems that payment of interest is directed to have been made by the Treasury Board. This will become important where a party is permitted to charge interest on amounts owing under a determination of an adjudicator where the payer is the Crown, a broader public sector organization agency or ministry of the government.

C. Regulations

The *Act* defines "prescribed" as prescribed by the regulations. As set out at the start of this Guide, there are now four regulations under the *Act*. Under the *Act*, there are many sections that refer to matters that are prescribed by the regulations. Excluding prompt payment and adjudication, the reference to matters being prescribed by the regulations, whether a contract amount, a form or other requirements appears some forty times in the *Act*. Therefore, parties will need to ensure that they are using the latest version of any one of the four regulations. Section 88 of the *Act* sets out the matters that may be prescribed by regulations. Subsection 88(1)(a) provides the general authority to make regulations respecting anything under the *Act* that may or must be prescribed by regulation. Therefore, matters that will be prescribed by the regulation include:

- Procedure regarding lien actions;
- Additional requirements for a proper invoice;
- Contract amounts related to surety bonds;
- Additional bookkeeping and state of accounts requirements in respect of trust funds;
- Prescribed forms under the *Act*;
- The manner of publication of notices (e.g. termination and non-payment of holdback and certificates of substantial performance);
- Qualification requirements for adjudicators and powers of the adjudicators;
- Adjudication procedures, including powers of the adjudicator; and
- Limits on matters which may be the subject of adjudication and the addition of matters which may be adjudicated.

As set out above, one of the matters that may be addressed by regulation is the procedure with respect to lien actions. Note that under section 88(1.1), in the event of a conflict between the procedures under the regulations and the *Courts of Justice Act* or the rules of court, the regulations will prevail to the extent of any conflict. This reinforces the need to regularly check the regulations.

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