

Update on Amendments to *Construction Lien Act*



Just before the Holidays, the *Construction Lien Amendment Act, 2017* received Royal Assent. Many of the housekeeping and non-substantive amendments came into force on December 12, the day of Royal Assent. Thus, for example, many of the amended French definitions and a number of minor linguistic changes are in force. However, all substantive amendments have to await proclamation by the Lieutenant Governor. That has not happened yet, so it is important to note that as of today, the *Act* as we know it remains in force pretty much unchanged. Proclamation will likely happen in a staggered fashion, as outlined below.

The passing of this piece of legislation occurred in what must have been record speed. To recap the final steps alone:

- Carried into its second reading on September 12, 2017
- Referred to the Standing Committee on October 4, 2017
- Passed Committee on November 22, 2017 and ordered for third reading
- Third Reading – Debated, vote deferred – December 4, 2017
- Carried on Division – December 5, 2017
- Royal assent received December 12, 2017

Transition

Of the substantive amendments to come into force on proclamation, amendments to modernize the lien and holdback process will come into effect first. Prompt payment and adjudication provisions will take effect once the adjudicative body is established. The Government will provide notice to industry stakeholders prior to any changes taking effect. Draft regulations will be very important and are still to come.

Parts I.1, Prompt Payment, and II.1, Construction Dispute Interim Adjudication, will apply in respect of contracts and subcontracts entered into on or after the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* comes into force.

Deadline to Preserve and Perfect Liens

Sections 31 and 36 of the *Act* will be amended to extend the time to preserve and perfect liens. The time to preserve will be extended from 45 to 60 days, the time to perfect from 45 to 90 days.

Holdback

Release of holdback will be mandatory once the lien period has expired and no liens are left on title. The owner may claim set-off, but this must be done via a “Notice of Non-Payment due to Set-Off”, listing claims and amounts of claimed set-off.

Phased, annual or segmented release of holdback are to be permitted: the former on large, multi-year projects, the latter on projects with clearly separable improvements (e.g. AFP/P3 projects).

Deferral agreements may be entered into to exclude portions of work from the calculation of substantial performance so as to allow for early holdback release.

Prompt Payment

The *Act* will provide for a prompt payment regime, applying to all public and private sector construction contracts and requiring payment within 28 days between the owner and general contractor upon submission of a “proper invoice”, i.e. a “properly documented invoice”.

Payment will have to be made by the general contractor to its subcontractor within 7 days from the general contractor’s receipt of payment. However, the owner/GC/other payer will be allowed to set off against invoices by submitting a “Notice of Intention to Withhold Payment” within 7 days of receipt of a “proper invoice”.

Enforcement of Prompt Payment Provisions

The *Act* will also provide for adjudication to enforce the prompt payment regime. The contractor or subcontractor can legally suspend work until paid. Mandatory interest rules apply, and reasonable costs incurred during the delayed payment must be reimbursed. The adjudicator's determination, with reasons, is filed with the court and is subject to the same enforcement as any court order. Parties who disregard the adjudicator's determination will be subject to garnishment, seizure of property, invasive examinations in aid of execution, etc.

Mandatory Adjudication

Mandatory adjudication will be read into all Ontario construction contracts. The parties are free to create contractual adjudication regimes, subject to contractual regime being consistent with the *Act*. If the agreement falls below the requirements of the *Act*, the *Act* governs.

Any party to a construction contract or subcontract will have the right to refer disputes to adjudication. Authorized nominating authorities will be established to create and maintain a roster of qualified adjudicators.

Lien rights are to be maintained during the adjudication.

Adjudication Process

Adjudication will follow a streamlined process:

1. Submission of a notice of adjudication;
2. 4 days to choose an adjudicator / 7 days for nominating body to choose one should an agreement not be reached;
3. 5 days to prepare a “referral notice” including the notice of adjudication and any relevant documents to the dispute to the adjudicator; and
4. 30 calendar days for the adjudicator to investigate, gather evidence, retain experts as needed, interview individuals involved and render a decision.

Significantly, the adjudicator’s decision will be binding on an interim basis.

The next edition of Glaholt LLP’s quarterly newsletter, to be released in Winter 2018, will discuss these important developments and changes to the *Construction Lien Act* in greater detail.

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