



Transitioning to the new *Construction Act*

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On December 12, 2017, the *Construction Lien Amendment Act, 2017* (“**Bill 142**”) received Royal Assent. What has been known for 35 years as the *Construction Lien Act* (the “**CLA**”) will become the *Construction Act* (the “**Act**”) on July 1, 2018, setting in motion a new era in Ontario’s construction industry. Broadly speaking, the Act will introduce prompt payment and adjudication to Ontario and modernize provisions relating to liens, trusts and holdback. These significant amendments will impact all members of the construction industry and projects in the province.

Whenever changes are introduced, the immediate questions are typically: what are they and when do they take place? Broadly speaking, the substantive amendments of the Act are to be rolled out in two stages: the modernized construction lien and holdback rules will come into effect on July 1, 2018, and the amendments related to prompt payment, adjudications, and liens

against municipalities will be in force on October 1, 2019.

While much has been said and written about the nature of the substantive changes, less attention has been paid to the manner in which the transition into the Act will be effected, and a closer examination of the transition section of the Act reveals some questions which might require clarification.

In 1983, Ontario transitioned from the *Mechanics’ Lien Act*, R.S.O. 1980, c. 261 (the “**MLA**”), to the CLA. Section 91 of the *Construction Lien Act, 1983*, repealed the MLA, while section 92 provided that the CLA would come into force on April 2, 1983, and apply to all contracts entered into on or after that date, and to the subcontracts arising and services or materials supplied under those contracts. Subsection 92(2) further provided that the MLA would continue to apply to contracts entered into

before April 2, 1983, and to the subcontracts and services or materials supplied thereunder, and subsection 92(3) provided that where a contract entered into before April 2, 1983 was subsequently amended the MLA still applied to that amendment. These transition rules were straightforward. During the years which followed the transition from the MLA to the CLA, there was not a significant body of case law arising out of the transition provisions, as the courts simply examined the contract date to determine which statute governed. In *A. Gorgi Masonry (1976) Ltd. v. Canadian Imperial Bank of Commerce*,¹ the court considered whether the MLA or the CLA applied to the case and found:

4. At the time the contract was executed in March of 1983 the Mechanics' Lien Act was in force. The plaintiff contends that the contract was amended to provide that the new legislation which was to come into force in April 1983 should apply.

5. After receiving the evidence of Simonetta Volpi, Ralph Gorgi, David Bryer and Victor Benson, I am satisfied that the plaintiff attempted unilaterally to amend the contract after it was executed on behalf of Muer Construction and that Muer Construction never agreed to the amendment... The provisions of the

Mechanics' Lien Act therefore apply in this action.

Under the new Act, the transition rules are set out under section 87.3, part of which comes into force on July 1, 2018. Subsections 87.3(1) and (2) of the Act provide as follows:

(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.

(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.

It is unclear why the coming into force of subsection 2(2) of the *Construction Lien Amendment Act, 2017*, which provides for the repeal of the definition of “construction trade newspaper” in subsection 1(1) of the CLA, was chosen as a trigger date. It is,

¹ 1985 CarswellOnt 1529 (H.C.J.)

however, clear that that definition is to be repealed on July 1, 2018, and that the words “as it read immediately before the day subsection 2(2) of the *Construction Lien Amendment Act, 2017* came into force” can be translated to “as it read immediately before July 1, 2018”.

Therefore, the new Act will apply if the contract for the improvement, the procurement process or the lease concerning the premises is commenced or entered into on or after July 1, 2018, but the CLA will still apply if the contract, procurement process or lease predates July 1, 2018.

On October 1, 2019, a subsection 87.3(3) will be added to the Act, and prompt payment (Part I.1) and adjudication (Part II.1) rules will apply to contracts entered into after that date:

(3) Parts I.1 and II.1 apply in respect of contracts entered into on or after the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* comes into force, and in respect of subcontracts made under those contracts.²

Like the transition provisions from the MLA to the CLA, subsection 87.3(3) of the Act also pinpoints a fixed date and a single defining event, the entering of a contract, and makes it clear that the prompt payment and adjudication rules will apply to contracts made after October 1, 2019, and subcontracts thereunder.

However, subsection 87.3(1) of the Act is less clear, given the three possible defining events: the entering of a contract, the commencement of a procurement process, or the date of an applicable lease. For example, despite a contract date of July 2020, a contractor may not be certain that the Act applies to the improvement and should enquire as to the commencement of the owner’s procurement process or whether there are any leases relevant to the improvement. Subsection 87.3(2) of the Act also leaves open to interpretation what acts by an owner can be considered to commence a procurement process (e.g. obtaining construction financing or issuing a request for proposals from design professionals). The intention of the Act is to give effect to most of the “modernization” amendments as of July 1, 2018. It is likely a common perception that as of that date, for

² Subsection 11(1) of Bill 142 adds Part II.1, Construction Dispute Interim Adjudication.

example, the period to preserve a lien will be 60 days, not 45, and the time to perfect will be extended from a further 45 days to 90. However, given the wording of subsection 87.3(1), it should continue to be 45 days to preserve and 45 days to perfect where contracts, procurement processes or leases were entered into or commenced before July 1, 2018.

In another example, if the premises on which a leasehold improvement is located is subject to a 20-year lease entered into in June 2018 and a contractor enters into an agreement with the tenant to supply to the improvement in June 2030, the contractor may still be required to look to the CLA for guidance as to the proper notice to be given to a landlord and a landlord's interest may still be subject to the same extent as the interest of the leasehold owner rather than limited to 10% as set out in the new Act.³

Further, if a lease is entered into on June 1, 2018, but the construction contract for leasehold improvements is entered into on November 1, 2019, the transition provisions in subsections 87.3(1)(c) and 87.3(3) of the Act could result in an odd scenario where adjudication and prompt payment under

the Act are to apply but the lien and holdback rules from the CLA also apply. This could be clarified if it was expressly stated that after October 1, 2019, all contracts and any subcontracts thereunder are to be governed by the Act as a whole, including all the new rules related to liens, holdback, prompt payment and adjudication.

Outside of the transition rules in subsection 87.3, there are other provisions of the Act that will come into effect at different dates and sections which have different effective dates amongst subsections themselves. This may have unanticipated results. For example, under the new holdback rules set out in subsection 27.1, as of July 1, 2018, the owner will have the ability to refuse to pay some or all of the holdback if it publishes a notice of non-payment, Form 6, in a construction trade newspaper.

However, the provisions allowing the contractor and the subcontractor to do the same will not come into force until October 1, 2019, because those provisions are tied to the adjudication rules, again leading to a somewhat peculiar scenario in which a contractor may be compelled to pay the holdback even if the owner withholds it.

³ Section 19 of the Act.

Generally speaking, the changes affecting municipalities are to come into force on October 1, 2019. While that will be the case with the majority of changes governing the lienability of municipal premises and the preservation of liens against them, the new bonding requirements for public contracts, which includes contracts with municipalities, will take effect on July 1, 2018.

Navigating the effective dates of different sections of the Act may be challenging. Not only will one need to examine the transition rules and consider whether the Act or the CLA governs, one must also review specific subsections to understand if they apply. A table setting out the amendments and their respective effective dates is appended for reference. At the date of this article, there are only two related subsections, s. 1(1) Definitions – “home buyer” and ss. 39(1)(3)(ii), which have not yet been given an in-force date as they hinge on regulations to be made under the *Protection for Owners and Purchasers of New Homes Act, 2017*.

Throughout Canada, other jurisdictions are currently in the process of examining their

respective statutes and debating whether changes to the status quo are required. As examples, the British Columbia Law Institute initiated a comprehensive review and overhaul of the Builders Lien Act, with an expert committee as part of its Reform Project, and the Manitoba Law Reform Commission published its report *The Builders’ Liens Act: A Modernized Approach*. As Ontario is the first jurisdiction to pass wide sweeping amendments, there will no doubt be those outside of the province waiting to see what effects the changes will have on the industry and how the transition will be made.

The intent set out in the report, *Striking the Balance*, prepared for Ontario’s Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure is clear: there have been significant changes in the industry since 1983 and there is a “collective desire to move forward with a modernized piece of legislation”. The Expert Review put forth many recommendations, the vast majority of which were accepted, with the goal of meeting a policy objective to bring promptness of payment and efficiency of adjudication to Ontario. It is unlikely that

the Expert Review and the government intended that in 2030, certain projects could still be governed by the CLA.

The application of the transition provisions has already drawn the attention of the Construction Lien Masters in Toronto. The Masters circulated a notice to the construction bar, advising that the court will require evidence concerning the transition provisions on all motions and proceedings where the transition provisions are relevant. Affidavit evidence must include the facts relied upon when asserting whether the CLA or the Act applies. While the Construction Lien Masters stated that this requirement will apply in particular to motions to vacate liens by payment into court under section 44, motions to declare a preserved lien expired under section 45, and motions to discharge liens under section 47, it is foreseeable that any motions involving other provisions amended by the Act will also require evidence concerning the transition provisions.

In order to make the transition clearer and to reduce uncertainty as to when the CLA or the Act will apply, the industry and the bar

may require further guidance from the Ministry. Otherwise, it can be expected that litigation will arise over the transition provisions and parties may cautiously take steps under both the CLA and the Act, where possible, to avoid the risk of running afoul of either set of rules.

Appendix

July 1, 2018	October 1, 2019
s. 1(1) – Definitions – "broader public sector organization"	s. 1.1 (2.1), (2.2) – Alternative financing and procurement arrangements
s. 1(1) – Definitions – "construction trade newspaper"	s. 2(2.1), (2.2) – Contracts, substantial performance and completion
s. 1(1) – Definitions – "contractor"	Part I.1 (s.6.1 - 6.9) – Prompt payment
s. 1(1) – Definitions – "improvement"	Part II.1 (s. 13.1 - 13.23) – Construction Dispute Interim Adjudication
s. 1(1) – Definitions – "monetary supplementary benefit"	s. 16(1), (2), (3) – Crown, municipal interest in premises
s. 1(1) – Definitions – "municipality"	s. 17(4) – Limitation on value of lien
s. 1(1) – Definitions – "price"	s. 27.1 (2), (3), (4) – Non-payment of holdback – Adjudication
s. 1(1) – Definitions – "subcontractor"	s. 34(2), (3.1), (10) – How lien preserved
s. 1(1) – Definitions – "written notice of a lien"	s.87.3 – Transition, <i>Construction Lien Act</i>
s. 1(1.1) – Definitions – Capital repair	s. 88(1)(c)-(k) – Regulations
s.1(1.2) – Definitions – Direct costs	
s. 1.1(1),(2),(3),(4),(5),(6) – Alternative financing and procurement arrangements	
s. 2(1), (2), (3)(b), (4) – Contracts, substantial performance and completion	
s. 6(1), (2) – Minor errors, irregularities	
s. 8.1(1), (2) – Contractor's, subcontractor's duties re trust funds	
s. 12 – Set-off by trustee	
s. 17(3) – Limitation on value of lien – Set-off	
s. 19(1), (5) – Where owner's interest leasehold	
s. 22(4) – Holdbacks – Permissible forms of holdback	
s. 26 – Payment of basic holdback	
s. 26.1(1), (2) – Payment of holdback on annual basis	
s. 26.2(1), (2), (3) – Payment of holdback on phased basis	
s. 27 – Payment of holdback for finishing work	
s. 27.1 – Non-payment of holdback	
s. 31(2), (2.1), (3), (6), (7) – Expiry of liens	
s. 32(1), (2), (5) – Rules governing certification or declaration of substantial performance	
s. 33.1(2) – Notice of intention to register in accordance with the <i>Condominium Act, 1998</i> – Notice required	
s. 34(5), (9) – How lien preserved	
s. 35(1), (2) – Exaggerated, false claims	
s. 36(2) – What liens may be perfected – Expiry of	

preserved lien	
s. 39(1)(1), (1)(2), (1)(4), (4), (4.1), (4.2) – Right to information	
s. 41(1), (2) – Discharge of lien and withdrawal of written notice of lien	
s. 42 – Discharge of general lien	
s. 44(1), (2.1), (2.2), (3.1), (5.1), (9) – Vacating lien by payment into court	
s. 47(1), (1.1), (1.2), (2) – General powers of the court	
s. 50(1), (2), (3) – Lien claims and trust claims	
s. 51 – Court to dispose completely of action	
s. 52 – Where exclusive jurisdiction not acquired	
s. 53 – Statement of claim and defence	
s. 54 – Time for delivery of pleadings	
s. 55 – Accommodating multiple claims	
s. 56 – Rules re third party claims	
s. 57 – Parties	
s. 58(1), (1.1), (3), (4.2), (5) – Reference to master, etc.	
s. 59 – Carriage of Action	
s. 60 – Application to fix date for trial or settlement meeting	
s. 61 – Conduct of settlement meeting	
s. 62 – Judgement or report	
s. 66 – Application to court for directions	
s. 67 – Procedure generally	
Part IX – Appointment of Trustee	
s. 69 – Labour and material payment bonds	
s. 71(1), (3), (4) – Appeal to Divisional Court	
s. 72 – Enforcement of lien despite default	
Part XI.1 (s. 85.1 - 85.2) – Surety Bonds	
s. 86(1) – Costs	
s. 87(1.1), (1.2) – How documents may be given	
s. 87.1 – <i>Financial Administration Act</i>	
s. 87.2 – <i>Courts of Justice Act</i>	
s. 87.3 (1), (2) – Transition, <i>Construction Lien Amendment Act, 2017</i>	
s. 88(1)(l) - (m), (1.1) – Regulations	

* The following provisions are to come into force on a day to be named by proclamation of the Lieutenant Governor:

- s. 1(1) – Definitions – "home buyer"
- s. 39(1)(3)(ii) – Right to information