

PROMPT PAYMENT, ADJUDICATION AND MORE – NEW ONTARIO LAW GOVERNS THE CONSTRUCTION INDUSTRY

By Andrea Lee, Glaholt LLP

On July 1, 2018, Ontario's construction industry welcomed the new *Construction Act* (the "Act"). The name change from the 35-year old *Construction Lien Act* recognizes that the new statute goes well beyond liens. The Act introduces prompt payment and adjudication to Ontario and modernizes liens, trusts and holdback rules. These significant changes are the result of expert review and months of consultation with the construction industry, which contributes about \$58 billion to the province's GDP.

The first wave of changes which came into force on July 1, 2018, are the modernizing provisions. The deadlines for preserving and perfecting liens have been lengthened to 60 days and 90 days, respectively, to give parties more time to reach a negotiated settlement. A trustee of project trust funds must now deposit those funds into a bank account and maintain written records detailing the amounts received into and paid out of the account. Release of holdback is now mandatory, subject to a notice of non-payment by the owner. The new Act also allows for annual or phased holdback for certain contracts. The monetary threshold for achieving substantial performance has been increased and the extent to which a landlord's interest may be subject to a lien is now limited. Finally, with respect to alternative financing and procurement (AFP) projects, the new Act clarifies that the special purpose entity which enters into a project agreement with a public sector organization to finance and undertake a project is deemed to be the owner for the purposes of the Act.

The prompt payment and adjudication amendments which are expected to have the most impact will come into force on October 1, 2019.

Prompt payment will be mandatory on all projects, with the exception of the operation and maintenance portions of AFP projects. Once a contractor delivers a "proper invoice" to an owner, the owner must pay within 28 days, unless the owner has issued a notice of non-payment to the contractor within 14 days of receiving the proper invoice. A contractor must flow an owner's payment down to its subcontractors within seven days of receiving payment, unless the contractor has issued a notice of non-payment. The process is repeated down the chain such that a subcontractor must pay a sub-subcontractor within seven days of receiving payment unless the subcontractor has issued a notice for non-payment, and so on.

The 2019 amendments will also usher in a mandatory adjudication process on all projects, with the exception of limited AFP project issues. Adjudication will provide binding decisions on an interim basis within compressed timeframes. The process is to take between one and two months, maximum, to reach a decision. If the adjudicator determines that an amount should be paid to a party, the payment must be made promptly, failing which the party entitled to payment may suspend work and receive reasonable suspension costs. An adjudicator's decision may be judicially reviewed in narrow circumstances with leave of the court, but this process will not stay a party's payment obligations.

Importantly, adjudication does not negate lien rights. If the matter that is the subject of a lien is also the subject of an adjudica-

tion, the lien timeframes will be triggered by the delivery of documents to an adjudicator.

The Act attempts to provide for a gradual transition into the new regime to allow the industry to adjust. The new amendments will not apply if: (1) the contract for the improvement was entered into before July 1, 2018, regardless of the date of any subcontract; (2) the owner's procurement process was commenced before July 1, 2018; or (3) the premises are subject to a lease that was first entered into before July 1, 2018. Therefore, although the first phase of amendments are now in force, parties should not assume they apply to every current project. Going forward, it would be prudent for parties to clearly categorize their projects into those which fall under the former *Construction Lien Act*, those under the current Act, and those to which the post-October 1, 2019, version of the Act will apply.

Impacts of the legislative changes in force since July 1, 2018, should be considered in any construction or design contract negotiations currently underway. For example, parties embarking on multi-year, high-value projects may add contractual clauses to permit phased or annual holdback release and owners could arrange for financing accordingly. Those who receive payments in trust for others should prepare to maintain more detailed accounting records. Suppliers or sub-subcontractors may require notices or information about the dates of prime contracts, procurement processes or leases, if any, to be provided to them.

In years to come, construction firms will likely improve project record systems and practices and increase investment in their contract administration and claims departments. Payment certifiers will need to stay abreast of the value of supplied labour and materials, deficiencies, changes and contractual payment cycles so they are able to review applications for payment in a timely way. Owners will likely implement more efficient invoice processing methods and tickler systems and provide training for project management teams on statutory notice or payment obligations.

The goal of the new Act is to bring the law governing construction in Ontario up to date, to allow funds to flow promptly, and to resolve disputes with the least disruption to projects. It may take effort and cost to bring parties up to speed and in compliance with the new Act, however these changes have been driven by the industry and will be of benefit to stakeholders in the future.



Andrea Lee

Glaholt LLP
al@glaholt.com