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The *Construction Act*  
How Bill 142 has changed the  
*Construction Lien Act* – what you  
need to know

March 2018

McMillan LLP

Vancouver  
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# The Major Changes

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- Prompt Payment
- Adjudication
- Liens
- Holdback
- P3s
- Trust Accounting
- Set-off

# Why overhaul the CLA?

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- Last significant changes to the CLA took place in 1983
- Construction industry has changed in the last 34 years:
  - P3 projects
  - Condominiums
  - Change in economy (\$ values have risen)

# Why overhaul the CLA?

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- Review of the Act began in February 2015
- **“Striking the Balance: Expert Review of Ontario’s Construction Lien Act”**
- Core issues:
  - Modernizing the Act
  - Prompt Payment
  - Dispute Resolution/Adjudication

# Status of Bill 142

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- Bill 142 is now law
- Royal Assent was received December 12, 2017
- However, substantive changes come into effect as follows:
  - July 1, 2018 – lien and holdback modernizations
  - October 1, 2019 – prompt payment and adjudication

# Grandfathering

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- The old CLA will continue to apply to improvement if:
  - Contract entered into before s.2(2) of Bill 142 **comes into force (“Triggering Date”)**
  - Procurement process commenced before Triggering Date
  - Premises subject to leasehold interest and lease entered into before Triggering Date
  - Prompt payment and adjudication apply only to contracts entered into/after day the adjudication provisions comes into force

# Prompt Payment (ss.6.1-6.8)

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- Trigger for payment = “delivery of a proper invoice” in a prescribed form
- Proper invoices submitted monthly unless the contract provides otherwise
- Restriction on contract conditions



# Prompt Payment – Payment Deadlines

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- Owner to Contractor (s.6.3)
  - 28 days from the delivery of the proper invoice, UNLESS the owner delivers a notice of non-payment within 14 days after receiving the proper invoice
- Contractor to Subcontractor (s.6.4)
  - 7 days from the receipt of payment from the owner or, if the owner has not paid the contractor, within 35 **days of the contractor's delivery of a proper invoice** UNLESS the contractor delivers a notice of non-payment



# Prompt Payment – Non-Payment

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## **Remedies for Non-Payment:**

- Interest on late payment
- Dispute can be referred to adjudication
- Outcome of adjudication is binding – at least on an interim basis

# Adjudication – History and Rationale

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- Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination on an interim basis
- Construction adjudication used in the U.K. since 1970
- Aims of adjudication:
  - Remove dispute gridlock
  - Eliminate late payment and non-performance
  - Free up cash flow and resources

# Adjudication - Adjudicators & Disputes

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## **Adjudicators (s. 13.1)**

- Adjudicator: person who is qualified by the Authorized Nominating Authority designated under the Act

## **Adjudicable Disputes (s.13.5)**

- Any party to a contract or subcontract may refer dispute
- Only available for disputes relating to matters prescribed by statute

# Adjudication – Procedure

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- Notice of Adjudication (s.13.7)
- Appointment of Adjudicator (s.13.7, s.13.9)
- Adjudicator receives documents (s.13.11)
- Adjudicator has powers to design the adjudication process (s.13.12)

# Adjudication - Decisions/Enforcement

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- Decision rendered in 30 days (s.13.13)
- **Party who is required by the adjudicator's** determination to make a payment must do so within ten days of receiving the decision (s. 13.9)
- Decision is enforceable in court (s.13.20)
- Decision is subject to subsequent court or arbitration proceedings

# Liens – Preservation and Perfection

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## **Preservation**

- Deadline to preserve a lien will increase from 45 days to 60 days from the applicable trigger date

## **Perfection**

- Deadline to perfect a lien by commencing an action will increase from 45 days after the last date the lien could have been preserved to 90 days

# Liens - Adjudication

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## **Extension of Time (s.34(10))**

- The lien regime will work in parallel with adjudication
- Extension of lien expiry date for matters that are the subject of a lien and an adjudication (only for the purposes of this section)
- This provision encourages parties to proceed with adjudication in the face of lien expiry



# Liens – Condominium Properties

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## **Preserving Liens (s.34(9))**

- Notice of preservation of lien to be given to the condominium corporation and unit owners in a prescribed form

## **Vacating Liens (s.44(2.1))**

- Condominium owner can vacate a lien registered against the common elements by posting their proportionate share based on their common interest.

# Liens - Leasehold Properties

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## **Leasehold Interest (s. 19(1))**

- If the owner's interest is leasehold and payment for the improvement is accounted for under the lease, the landlord's interest is also subject to the lien, to the extent of 10% of the payment

## **Notice to Lien Claimants (ss. 19(3))**

- Landlord must give notice to lien claimants of intention to enforce forfeiture or terminate the lease because of non-payment of rent

# Holdback – Form of Holdback

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## **Permissible Forms of Holdback (s.22(4)):**

- Letter of Credit
- Demand-Worded Holdback Repayment Bond
- Any other form that may be prescribed

# Holdback – Release

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## **Mandatory Release**

- The release of holdback is now mandatory once the requirements for release under the Act are satisfied.
- However, the Owner shall be allowed to assert set-off if they publish a Notice in the prescribed form within 40 days (s.27.1)

## **Annual or Phased Release**

- Holdback may now be released either on an annual or phased basis – for appropriate projects

# Holdback – Substantial Performance

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## **Substantial Performance (s.2(1))**

SP occurs when the improvement is ready for its intended use, and the cost was not more than:

- i. 3% of the first ~~\$500,000~~ \$1,000,000 of the contract price;
- ii. 2% of the next ~~\$500,000~~ \$1,000,000 of the contract price
- iii. 1% of the balance of the contract price

# Holdback – Completion of Contract

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## **Deemed Completion of Contract (s.2(3))**

Contract deemed completed and services/materials deemed to be last supplied when the price of completion, correction of known defect, or last supply is not more than lesser of:

- i. 1% the contract price; and
- ii. ~~\$1,000~~-\$5,000

## **Multiple Improvements (s.2(4))**

Contract can provide that multiple improvements on non-contiguous land is deemed to be under a separate contract

# P3s – Project Co as Owner

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- Project Co entity is deemed to be the “owner” for certain provisions, instead of the Crown, municipality or other “broader public sector organization” that owns the premises (s.1.1)
- This definition of Project Co as owner will affect:
  - Prompt payment/adjudication
  - Calculation of holdback
  - Substantial performance



# P3s – Bonding Requirements (s. 85)

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- All public projects that exceed a certain value will require a performance bond and a labour and material payment bond that:
  - Is of an insurer licensed under the Insurance Act to write surety and fidelity insurance
  - Has a coverage limit of at least 50% of the contract price
  - For L&M bond – must extend protection to subcontractors and suppliers of labour/material

# P3s – Bonding Requirements (con't)

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## **Rights of Action if Default – L&M Bond**

- Claimant (subcontractor/supplier) has right of action to recover the amount of their claim against the surety and principal (contractor)

## **Rights of Action if Default – Performance Bond**

- Owner has a right of action to enforce the bond against the surety and principal (contractor)

# Trust Accounting

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## **Contractor's Trust Provisions (s. 8)**

- Trust funds must be deposited into a bank account in the trustee's name
- Trustee must maintain written records
- Trustee of multiple trusts may deposit separate trust funds into a single bank account but must ensure written records per trust are maintained re: amount going in and coming out

# Set-off

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## **Set-off by trustee (s.12)**

- Set-off by a trustee of an amount from trust funds may only be in respect of debts, claims or damages that are related to the applicable improvement, except in the event of a contractor or subcontractor's insolvency

## **Lien set-off (s.17(3))**

- Set-off by a payer may only be in respect of debts, claims or damages that are related to the applicable improvement, except in the event of a payee's insolvency

A tall yellow tower crane stands against a cloudy sky. The crane's lattice structure is prominent, and it has several operator cabins at different heights. The background shows a building under construction with visible rebar and scaffolding.

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Materials from today's seminar can be found at; [www.ConstructionAct.ca](http://www.ConstructionAct.ca)



The image features a dark, low-angle photograph of a construction site. A large yellow tower crane is the central focus, extending from the bottom left towards the top center. In the background, a multi-story building is under construction, with its concrete frame and some glass panels visible. The sky is a uniform, overcast grey. The 'mcmillan' logo is overlaid in the top left corner in a white, lowercase, sans-serif font.

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### Hong Kong

3502 Tower 2 Lippo Centre  
89 Queensway  
Hong Kong, China  
t 852.3101.0213

### Vancouver

Royal Centre, 1055 West Georgia Street  
Suite 1500, PO Box 11117  
Vancouver, British Columbia  
Canada V6E 4N7  
t 1.604.689.9111

### Montréal

1000 Sherbrooke Street West  
Suite 2700  
Montréal, Québec  
Canada H3A 3G4  
t 1.514.987.5000

### Toronto

Brookfield Place, Suite 4400  
181 Bay Street  
Toronto, Ontario  
Canada M5J 2T3  
t 1.416.865.7000

### Ottawa

World Exchange Plaza, Suite 2000  
45 O'Connor Street  
Ottawa, Ontario  
Canada K1P 1A4  
t 1.613.232.7171

### Calgary

TD Canada Trust Tower, Suite 1700  
421 7th Avenue S.W.  
Calgary, Alberta  
Canada T2P 4K9  
t 1.403.531.4700