

CHANGE IS COMING TO ONTARIO'S *CONSTRUCTION LIEN ACT* – WHAT DO YOU NEED TO KNOW FOR 2018?

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As detailed in past McMillan Bulletins from [December 2017](#) and [February 2018](#), on December 12, 2017, Bill 142, the *Construction Lien Amendment Act, 2017* (“**Bill 142**”), received Royal Assent and became law in Ontario. Bill 142 represents a thorough and intensive modernization of the *Construction Lien Act* (the “**CLA**”) including amendments to the lien and holdback rules and the introduction of prompt payment and adjudication.

The substantive amendments to the CLA, however, have not yet come into force: the amendments respecting the modernization of the lien and holdback rules will come into effect July 1, 2018 and the amendments respecting prompt payment and adjudication will come into effect October 1, 2019. So, in light of this phased introduction of changes to the CLA, let us now consider the question many people in the industry are asking – “What do I need to know about the changes coming into effect on July 1, 2018?”.

The following is a summary of the key changes coming into effect on July 1, 2018 and what you need to know:

- 1. Name Change:** First and foremost, beginning July 1st you’ll want to make sure you use the correct name when referencing your favourite piece of legislation – the *Construction Lien Act* will become the *Construction Act* (the “**Act**”).
- 2. Multiple Improvements:** As of July 1st, for contracts relating to more than one improvement, parties will be able by contract to deem each improvement to be under a separate contract for the purposes of the Act, provided that the improvements are to lands that are not contiguous. (s.2(4) of the Act)
- 3. Monetary Thresholds:** The monetary thresholds for substantial performance, completion, and for the posting of costs upon the vacating of a lien will all be increased as of July 1st.
 - **Substantial Performance:** A contract will be substantially performed when the improvement is ready for use or is being used for the purposes intended and if it is capable of completion at a cost of no more than 3 percent of the first \$1,000,000 of the contract price, 2 percent of the next \$1,000,000 of the contract price, and 1 percent of the balance. The \$1,000,000 thresholds will have been increased from \$500,000. (s.2(1) of the Act)

- **Completion:** A contract will now be deemed to be completed when the price of completion, correction of a known defect or last supply is not more than the lesser of 1 percent of the contract price and \$5,000. The \$5,000 threshold was increased from \$1,000. (s.2(3) of the Act)
- **Security for Costs:** The maximum amount required for security for costs in support of vacating a lien will increase from \$50,000 to \$250,000. (s.44(1) of the Act)

4. **Holdback Form:** As of July 1st parties will be able to contract to allow the holdback to be maintained in the form of a letter of credit or demand-worded holdback repayment bond instead of in the form of funds. (s.22(4) of the Act)

5. **Holdback Release:** Several changes will be introduced on July 1st impacting holdback release.

- **Mandatory Release:** Once the lien period has expired, a payer will be obligated to release the holdback funds (provided that all liens have expired, been discharged or otherwise satisfied under the Act). This mandatory obligation will, however, be subject to an owner's right to publish a prescribed notice of non-payment no later than 40 days after publication of the certificate of substantial performance. In addition, contractors and subcontractors will not be mandated to release holdback funds following the expiry of the lien period where they have not been paid their holdbacks due, referred such non-payment to adjudication, and provided notice of such non-payment to their payees. (s.27 and s.27.1 of the Act)
- **Annual or Phased Release:** For projects with a duration longer than one year or for phased projects, as of July 1st parties will be able to contract to allow release of the holdback on an annual basis or on the completion of phases, respectively. In order to make use of the annual or phased release of holdback, however, the contract price must exceed the prescribed amount which is currently set at \$20,000,000 in the draft regulations. (s.26.1 and s.26.2 of the Act)

6. **Extension of Time for Liens:** Beginning July 1st, the deadline to "preserve" a lien will be extended from 45 to 60 days from the applicable triggering event for the expiry of liens. The list of applicable triggering events, which includes completion and abandonment of contracts and subcontracts, will also be expanded to include contract and subcontract "termination". The deadline to "perfect" a lien will also be extended from 45 to 90 days after the last date that a lien could have been preserved. The two year expiry period for perfected liens remains unchanged. (s.31 and s.36(2) of the Act)

7. **Lien Rights:**

- **Lien Against Condo Common Elements:** As of July 1st, lien claimants seeking to preserve liens against the common elements of a condominium will be required give notice of their intention to do so in a prescribed form to the condominium corporation and each condominium unit owner. Unit owners will, in turn, be able to vacate a lien registered against the common elements of their condominium in

respect of their unit by posting security proportionate to their share of the common elements as specified in the applicable declaration registered under the Condominium Act. (s.34(9), s.44(2.1) and (2.2) of the Act)

- **Landlord Liability for Liens:** Beginning July 1st, landlords will no longer be permitted to give written notice to contractors disclaiming responsibility for improvements. Instead, landlords will be liable to lien claimants to the extent of 10% of any payments made to tenants for improvements. In addition, landlords must now give notice to any registered lien claimants when enforcing their rights of forfeiture or termination against tenants for non-payment. In connection with the foregoing, landlords will also become subject to section 39 right of information requests. Within 21 days of a request of any person having a lien or a beneficiary of a construction trust, a landlord must provide the names of the parties to the lease, the amount of payment for all or part of the improvement accounted for under the lease, and the state of accounts between the landlord and tenant. (s.19(1) and s.39(1) of the Act)

8. More Rigorous Accounting: Owners, contractors and subcontractors will need to ensure rigorous accounting for each of their projects. As of July 1st, owners, contractors and subcontractors will be required to deposit funds owing to a contractor or subcontractor or received by a contractor on account of the contract or subcontract price for the project into a bank account in their own names and maintain written records detailing amounts received into and paid out of the account. Where an owner or contractor is a joint venture, the joint venture will need to create a bank account in the names of all its members for the holding of such funds. Single accounts may be maintained for multiple projects so long as written records show the amounts received into and paid out of the account for each project. Funds “comingled” in this way are deemed traceable and a permissible way of maintaining construction trust funds. (s.8.1 of the Act)

9. P3 Projects: Special purpose entities, each commonly known as “Project Co”, that typically design, build, finance, and maintain a P3 project, will be expressly deemed to be “owners” under the Act in place of the authority or public sector organization. Holdback obligations and substantial performance will accordingly be calculated on the basis of the contract between Project Co and the contractor. (s.1.1 of the Act)

10. Bond for Public Contracts: Public contracts that exceed a prescribed amount will require a performance bond and a labour and material payment bond, regardless of other forms of security employed. Presently, the minimum coverage amounts prescribed under the regulations are 50% of the contract price if the contract is \$100,000,000 or less, or \$50,000,000 if the contract price is more than \$100,000,000. (s.85.1 of the Act)

11. Other Clean-ups:

- **Repairs:** To make clear that maintenance work performed to prevent normal deterioration does not constitute an “improvement” under the Act, the definition of “improvement” will be amended to mean

any “capital repair” to the land instead of any “repair” to the land and an explanation of what is meant by “capital repair” will be added. (s.1(1) and (1.1) of the Act)

- **Price:** The definition of “price” will be amended to include any direct costs incurred as a result of an extension of the duration of the services (i.e., delay) not caused by the contractor or subcontractor. An explanation of what is meant by direct costs will also be added to specify that these costs include insurance and surety bond premiums and costs resulting from seasonal conditions that would not have been incurred but for the delay. (s.1(1) and (1.2) of the Act)
- **Municipal Premises:** The Act will be amended to provide municipalities with the same protection as the Crown for their interests in lands they own, such that a lien will not attach to the interest in a premises of either the Crown or a municipality. (s.16 of the Act)

However, pursuant to the grandfathering provision in the Act (section 87.3), the changes listed above will not apply to an improvement (i.e., project) where:

- the contract between the owner and contractor for the improvement was entered into before July 1, 2018 (regardless of when any subcontract is entered into) (s.87.3(1)(a));
- the procurement process for the improvement was started before July 1, 2018 (including a request for qualifications, a request for proposals or a call for tenders) (s.87.3(1)(b)); or
- the premises is subject to a leasehold interest and the lease was first entered into before July 1, 2018 (s.87.3(1)(c)).

Any such improvements will continue to be governed by the terms of the CLA as it exists today.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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