

MINIMIZING RISKS ARISING FROM THE NEW CONSTRUCTION LIEN AMENDMENTS

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On July 1, 2018, the first set of amendments to the *Construction Lien Act*^[1] (the "CLA") will come into effect. Although there are transition provisions in the new CLA that state when the new or old version of the CLA applies, there is ample room for confusion about whether the old or new CLA applies to a particular dispute. As set out below, it is best to comply with the strictest time limits and obligations in both the old and the new CLA to minimize the risk of being caught offside of the provisions in either version of the CLA.

Is Your Project Governed By the New or Old CLA?

The old CLA continues to apply to projects where the prime contract was entered into before July 1, 2018, the owner commenced the procurement process before July 1, 2018, or the lease was first entered into before July 1, 2018.^[2] In these circumstances, the old CLA continues to apply even if the dispute does not arise until months or years after the new amendments take effect.

However, it can be difficult to determine based on these rules whether the new or old CLA applies. For example, lien claimants other than contractors may not have access to the prime contract and may not be aware of the date when the prime contract was entered into. Although lien claimants have a right to request certain information about the prime contract under section 39 of the CLA, the date that the contract was entered into is not included in that information. As a result, subcontractors and material suppliers may not know whether the old or new CLA applies.

Further, the date when the procurement process "commences" is unclear. Does it "commence" on June 10, 2018 if the owner had an internal meeting to set the rules of the bidding process on that date? Or does it not "commence" until it made an external communication to potential bidders on July 2, 2018? In this example, if an internal communication is enough to "commence" the procurement, then the old CLA would apply. If an external communication is required, then the new CLA would apply. This uncertainty could have a significant effect on lien rights and other obligations.

Even if it is clear what communications or activities qualify as "commencing" the procurement process, lien claimants may not have immediate access to the documents needed to determine when that communication

or activity took place. An owner may have thousands of emails related to the procurement process. It could take weeks to sort through those communications and establish a commencement date. It will likely take much longer to arrange for production of those documents. During that delay, lien rights could expire or contractors could be failing to discharge their obligations under the new *CLA*.

The Toronto Construction Lien Masters have recognized that determining whether the old or new *CLA* applies will not always be a simple matter. The Masters have issued a notice reminding members of the construction bar that evidence will be required if the issue of whether the new or old *CLA* applies is relevant to an issue in dispute.^[3]

Minimize Risk By Perfecting Your Lien Under the Old *CLA* Deadlines

In light of the uncertainty surrounding whether the new or old *CLA* applies, it is prudent to comply with your obligations under both the new and old *CLA*. This is particularly important for lien deadlines.

Lien claimants should always comply with the shorter deadlines in the old *CLA*. Under the old *CLA*, the deadline to preserve a lien was 45 days from the applicable triggering event. The deadline to perfect a lien was 45 days after the last date on which a lien could have been preserved. Under the new *CLA*, the deadline to preserve a lien is now 60 (not 45) days and the deadline to perfect is 90 (not 45) days after the last date on which one could have perfected the lien.

Even if a lien claimant believes that the project is governed by the new longer deadlines, it should comply with the shorter deadlines in the old *CLA*. If the lien claimant waits until the 46th day to preserve on the basis that the new *CLA* applies, the lien will be out of time if it turns out that the old *CLA* actually applied.

Payers Should Use New Lien Deadlines When Releasing Holdback

The new *CLA* imposes mandatory payment of holdback. A payer is required to release all holdback funds once the lien period has expired and all liens have expired, were discharged, or were otherwise satisfied under the *CLA*. The requirement to pay is subject to some exceptions (e.g. where the owner publishes a "notice of non-payment" or a contractor has not yet received its holdback funds, etc.).

The key question for payers is determining when the lien period has expired. If a payer believes that the old *CLA* applies and releases holdback after the expiration of the shorter lien period in the old *CLA*, it could be liable if a lien is subsequently registered in accordance with the longer deadlines in the new *CLA* and it turns out that the new *CLA* applies. The safest approach is to always wait until the expiration of the lien periods in the new *CLA* before releasing any holdback.

Contractors and Subcontractors Should Uphold Trust Duties in the New *CLA*

The new *CLA* introduces additional record-keeping and banking rules for trust funds. Trust funds held by a contractor or subcontractor must be deposited into a bank account in the name of the trustee or trustees. The trustee must keep written records for the trust funds, including detailing the amounts that are received into and paid out of the funds and any transfers made for the purposes of the trust. If the trustee deposits the trust funds for more than one trust into a single account, the trustee must keep separate written records for funds held under each trust.^[4] Construction companies should comply with these obligations where practicable to ensure they do not run afoul of the new rules, even if they believe that the old *CLA* likely applies.

Stayed Tuned for the Next Set of Amendments

Other significant changes will come into force October 1, 2019. Those new provisions will also be governed by the same transition provisions as are described above. As such, owners would again be wise to limit their risk by ensuring that they comply with the most stringent requirements in both the old and new *CLA*.

by Laura Brazil and Glen Grenier

[1] *Construction Lien Act*, R.S.O. 1990, c. C.30. As of July 1, 2018, the act will be renamed the "Construction Act." For ease of reference, we use the term *CLA* to refer to both the new and old versions of the act in this bulletin.

[2] *Construction Lien Amendment Act*, 2017 ("CLAA"), S.O. 2017, c. 24, s. 61 (1).

[3] Notice from the OBA Construction and Infrastructure Law Section Executive sent May 18, 2017.

[4] *Construction Lien Act*, R.S.O. 1990, c. C.30, s. 8.1(1).

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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