

HEALTH LAW BULLETIN

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HOSPITAL CONSTRUCTION – THE DEVIL IS IN THE LEGISLATIVE DETAIL

Construction or renovation projects are notorious for causing headaches for all parties involved. Seldom do they come in ‘under budget’ or ‘on schedule’. Additional and unique challenges arise when the construction or renovation project relates to a hospital. Hospitals face serious budget and financing constraints, the public scrutinizes the board’s choices and decisions, and the construction process itself, is often quite political.

Hospitals face further challenges because they must comply with a myriad of statutes, regulations and standards like the *Building Code Act*, the *Fire Protection and Prevention Act*, the *Electricity Act*, the *Public Hospitals Act*, the *Environmental Protection Act*, the *Construction Lien Act*, the *Occupational Health and Safety Act* and many more.

Unfortunately, those parties most typically involved in construction projects, such as construction managers, general contractors and architects, are unfamiliar with the legal requirements imposed by these statutes. Failure to comply with the provisions in these statutes could result in hospitals, including their directors and officers, incurring hefty fines. Even worse, a hospital’s failure to comply could result in the construction project being brought to a halt indefinitely or in substantial change orders being issued to bring the project ‘up to code’.

Below, we briefly outline three statutes that significantly affect hospital construction projects: The *Public Hospitals Act*, the *Building Code Act* and the *Construction Lien Act*.

PUBLIC HOSPITALS ACT

The *Public Hospitals Act* is the primary statute governing public hospitals in Ontario and its provisions *directly* impact hospital construction projects. The *Act* is administered and enforced by the Minister of Health and Long-Term Care, who is given broad discretionary powers to provide approvals to and financial assistance for hospital construction projects.

The *Act* provides that hospitals are not permitted to embark on construction projects until and unless the Minister approves the hospital’s construction plans. Even after approval has been granted, the *Act* gives the Minister the power to revoke or suspend the approval if it is in the “public interest to do so”.

The *Act* also authorizes the Minister to provide financial assistance, by way of grant or loan, in respect of hospital construction projects. Under the regulations, the Minister is permitted to authorize payment of up to two-thirds of the costs of the hospital construction project.¹ Again, the Minister is given the discretionary power to revoke or suspend financial assistance and further, may reduce the grant or loan if it is “in the public interest to do so”.

Every person (which includes directors and officers) who contravenes any provision of the *Act* or its corresponding regulations is guilty of an offence and could be liable to a fine of up to \$1,000. Further and more significantly, the Minister has the power to cease construction altogether.

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¹ Note that there may be exceptional circumstances where the Minister is able to provide even further financial assistance.

BUILDING CODE ACT

The *Building Code Act* is essentially a set of minimum provisions for the safety of buildings with reference to public health, fire protection and structural sufficiency. Its primary purpose is the promotion of public safety through the application of building standards throughout Ontario.

The *Act* contains several complex provisions dealing *specifically* with hospitals. Under the *Act*, hospitals are categorized as “Group B, Division 2” buildings. As part of this category, hospitals must use specific types of insulation, piping, fire alarms, ventilation systems and electrical wiring throughout the hospital facility. Hospitals are also required to construct its walls, stairs, sleeping areas, elevators, washrooms and wards in very precise ways. For example:

- Corridors serving patients must be at least 2400 mm wide
- The floor area containing patients’ or residents’ sleeping rooms must be divided into not less than two fire compartments
- There must be minimum regular lighting of 50 lx and minimum emergency lighting of 10 lx in corridors serving patients or residents
- Doors that divide a corridor must swing on a vertical axis in the direction of travel to the exit
- The maximum vertical rise of stairs between floors is 2400 mm

Hospitals must also comply with several “standards” which are set out under the *Act*. For example:

- CSA Standard CAN/CSA-Z317.1-99: “Special requirements for plumbing installations in health care facilities”
- CSA Standard CAN/CSA-Z317.2-01: “Special requirements for heating, ventilation and air conditioning (HVAC) systems in health care facilities”
- CSA Standard CAN/CSA-Z317.10-01: “Handling of waste materials in health care facilities and veterinary health care facilities”
- CSA Standard CAN/CSA-Z32.4-M: “Essential Electrical Systems for Hospitals”
- CSA Standard CSA Z32.1: “Code for Prevention of Explosions or Electrical Shock in Hospital Operating Rooms”

The contravention of any provision of the *Building Code Act* or the regulations constitutes an offence and a *person* (which includes directors and officers) could be liable for a fine of up to \$50,000, while a corporation could be liable for a fine of up to \$100,000. Again, and possibly more disastrous, the hospital’s building permit could be revoked and construction brought to a halt indefinitely.

CONSTRUCTION LIEN ACT

The *Construction Lien Act* is complex legislation established to provide financial protection for those parties who have supplied services or materials to a construction project, thereby improving the land. The *Act* provides financial protection to those parties who have not been paid for such services or materials and who are not entitled to assert a direct claim against the owner of the construction project because they do not have a contract with the owner. There are two separate kinds of protection established by the *Act* – the “holdback” and the “trust fund”.

During hospital construction projects, a hospital is an “owner” as defined under the *Construction Lien Act* and as such, has specific legal obligations to its contractors and the sub-contractors involved. Specifically, hospitals are required to hold back 10% of the value of the services or materials actually supplied for a period specified by the *Act*. In Ontario, this is 45 days from the last date services or materials were supplied. The *Act* provides guidance as to the proper procedure for the release of holdback funds. A person who supplies services or materials to an “improvement” has a lien for the price of those services or materials upon the interest of the hospital in the premises improved. The lien is also a charge against the holdback. So long as a hospital holds back 10%, the sub-contractors’ (or “lien claimants”) claims will be limited to the amount of such holdback.

Under the *Construction Lien Act*, all monies received by a hospital for financing of the improvement constitute a trust fund for the benefit of the contractor. The hospital's trust obligation is limited to the amounts owed to its contractor. Until all amounts owing to the contractor are paid, the hospital cannot appropriate the funds or use them for some purpose that is inconsistent with the trust. Notably, the *Construction Lien Act* imposes *personal* liability on directors, officers, employees or agents of the hospital for breach of trust. All that need be proved is that the person participated in, assented to or acquiesced in the breach of trust.

CONCLUSIONS

When it comes to hospital construction or renovation, the devil is, indeed, in the legislative detail. Hospitals face enough challenges and barriers without having to worry about the numerous complicated legal requirements that govern every construction project. Using knowledgeable legal counsel before, during and after the construction process will simplify the construction process for all those involved and assist in avoiding potential legal pitfalls.

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At McMillan Binch LLP, our construction law group is often retained to put together experienced, hardworking and cost-effective teams to provide required legal services in all aspects of construction. For additional information on how our construction law group can assist you as you embark upon your hospital construction or expansion, please contact one of the following individuals:

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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