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Ontario Introduces Bill 142, *Construction Lien Amendment Act, 2017* – It's Much More Than Just Liens!

On May 31, 2017, Ontario Attorney-General Yasir Naqvi introduced Bill 142, entitled "*Construction Lien Amendment Act, 2017*".

The Bill follows upon a report commissioned by the Ontario government and prepared by Bruce Reynolds and Sharon Vogel entitled "[Striking the Balance: Expert Review of Ontario's Construction Lien Act](#)". The report is itself the product of a lengthy period of broad consultation with owners, contractors, design professionals and others about matters affecting the financial health of the construction industry. Virtually all of the recommendations contained with the Reynolds/Vogel report have been adopted and are incorporated into the Bill.

While styled as an amendment to the *Construction Lien Act*, the Bill goes far beyond liens. In fact, the Bill proposes that the title "*Construction Lien Act*" be replaced by "*Construction Act*" in recognition of its scope. If enacted, the proposed legislation will introduce what is arguably the most sweeping set of changes that the Canadian construction industry has ever seen. Many commentators, including the author of this bulletin, have maintained that these changes are long overdue.

Included within the proposed legislation are the following:

1. The introduction of a prompt payment regime governing construction accounts.

In overview,

- while parties remain free to contract for whatever invoicing terms they wish (for example, invoicing on a milestone basis), there are positive, non-alterable obligations upon owners who receive proper invoices to pay them within 28 days, coupled with similar obligations on the part of contractors and subcontractors to pay proper invoices from their downstream payees within 7 days of receiving payment from upstream;
- payments may be disputed, but the payer must deliver timely written notice of non-payment specifying the amount withheld and detailing reasons, otherwise the obligation to make timely payment remains;
- in the event of owner non-payment to a contractor, the contractor is effectively granted an extension of its own payment obligation to its subcontractors provided the contractor delivers timely notice and undertakes to refer the matter to adjudication within 14 days;
- interest is payable on late payments at the rate stipulated by contract or as prescribed by the *Courts of Justice Act*, whichever is greater; and
- there is a right to suspend work, but only upon failure to pay in accordance with a determination made upon adjudication. A contractor who suspends and then resumes work upon payment is entitled to reasonable costs of resumption.

2. The introduction of a system for adjudicating construction disputes.

Basically,

- a party may adjudicate any matter involving the valuation of work; payment under the contract (whether approved or not, and including any proposed change order); disputes that are the subject of non-payment notices; set off claims; non-payment of holdback; and any other matter the parties agree to adjudicate or which may otherwise be prescribed;
- parties are free to set out their adjudication procedures by contract, but the procedures otherwise set out in the legislation must be complied with;
- only adjudicators who meet the prescribed requirements and are appointed by a designated Authorized Nominating Authority are eligible to act. The Authority develops and oversees adjudicator training programs, qualifies and appoints persons to act as adjudicators, and establishes and maintains an adjudicator registry;
- an adjudication is commenced by a written notice, with short timelines thereafter prescribed for the appointment of an adjudicator and delivery of documents. The adjudicator must render a decision within 30 days of receiving the documents intended to be relied upon by the party seeking the adjudication. This period is subject to extension but only upon agreement of all parties;
- the adjudicator is given broad powers to conduct the inquiry and must act impartially;
- the dispute covered by an adjudication order is subject to later determination in court or upon arbitration, but unless or until that happens, the order is binding on the parties and enforceable upon application to a court.

3. Various amendments and updates to the *Construction Lien Act* itself, including:

- lands owned by municipalities, local boards within the meaning of the *Municipal Act, 2001* and conservation authorities are proposed to be treated in the same manner as other Crown lands for purposes of enforcement of liens;
- the right to lien for the direct costs resulting from an extension of a project duration is clarified;
- the application of the lien legislation to AFP/P3 projects is clarified;
- the time periods for preserving and perfecting a lien are extended to 60 days and 90 days respectively;
- a new landlord's liability for 10 per cent of any inducement provided by the landlord for tenant improvement work is proposed;
- it is proposed that holdback funds may be kept in the form of a letter of credit or bond, in addition to cash;
- provisions for the annual or phased release of holdbacks are proposed;
- various procedural amendments are proposed, including a right to have liens within the monetary jurisdiction of the Small Claims Court dealt with in that court; and
- mandatory performance and payment bonds on public contracts (Crown, municipality, broader public sector organization) are proposed.

These are just highlights of the numerous changes being proposed, and we can expect that all of them will be reviewed closely in the coming months. Attorney General Naqvi has indicated his intention to push the Bill to enactment before the end of the year.

Our construction team at McMillan has been intimately involved in the issues being addressed by this proposed legislation and in the legislation itself. We will continue to do so, and readers can expect further updates as the Bill moves through the legislature.

by Geza R. Banfai

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a cautionary note

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