

Credit Research Foundation Education Brief



Broad Changes Ahead for Ontario's Construction Act with Implementation of New Legislation

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Background & Introduction

The review of Ontario's Construction Lien Act (Act) began in February 2015, and in August 2016 the review committee presented its recommendations for improving the Act, which we discussed in the NCS white paper, [Highlights of the Recent Review of Ontario's Construction Lien Act](#).

The committee reviewed the Act for lienability, preservation & perfection of liens, holdbacks, legal procedure, construction trusts, prompt payment, adjudication, surety bonds, etc. In this article, we will review the broad changes being made to the [Act](#), through Bill 142, as well as anticipated implementation dates.

While some housekeeping changes took place on December 12, 2017, the substantive amendments will become effective as follows:

- ***July 1, 2018:**
 - Modernization of the Statute
 - Updates to the Holdback Rules

**As of this writing, it appears the Construction Act will apply to projects where the procurement process was commenced and where general contracts were entered, on or after July 1, 2018 (See 87.3(1)). Additionally, if the property is subject to a leasehold interest, the new statute regarding the owner's responsibility will apply if the date of the lease is on or after July 1, 2018.*

- **October 1, 2019:**
 - Prompt Payment
 - Adjudication, Regulations and Forms
 - Liens Against Municipalities

The “finishing touches” have yet to be determined, but the following provides a general summary of the legislation.

Changes Effective July 1, 2018: Modernization of Statute & Updates to Holdback Rules

Construction Lien & Suit to Enforce Lien - Deadline Extended

The deadlines for the filing of a lien and suit to enforce a lien have both been extended.

The deadline for filing a lien has been extended to 60 days from last furnishing or services, but within 60 days from the earlier of publication of the certificate or declaration of substantial performance, completion, abandonment or termination of the contract. Currently, a claimant has 45 days.

The deadline for filing suit to enforce a lien has been extended to 90 days from the period in which the lien must be filed. This extension has doubled the time currently available to claimants (45 days).

It’s important to mention that the date of termination, as noted in the notice of termination, has been added as a trigger in the calculation of the lien deadline, and subsequently the suit deadline.

Completion Redefined

A contract will be deemed completed and services and materials deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of 1% and/or \$5,000. This is an increase to the dollar amount, as it was previously 1% and/or \$1,000.

Holdback aka Retainage

Holdback is defined as 10% of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment.

The new legislation calls for a mandatory holdback release (subject to specific set-off notices) and provides for annual, phased or segmented releases of holdback on lengthy projects. It will no longer be required that holdback be retained in cash. Instead, a letter of credit, a holdback repayment bond or other form may be prescribed.

Multiple Improvements under a Contract

If more than one improvement is made under a contract, and each improvement is made to lands that are not contiguous, if the contract so provides, each improvement is deemed to be a separate contract for the purposes of determining substantial performance of the contract.

The release of holdback would also be based on the separate contracts.

Lien on Leasehold Interest

Currently, where the lien attaches to a leasehold interest, a claimant may serve notice upon the fee owner at least 15 days prior to first furnishing materials or services. This notice will allow a lien against the fee interest unless the fee owner responds with a notice of non-responsibility within 15 days from receipt of the claimant's notice.

Under the new legislation, the claimant's written notice of improvements is repealed, and the landlord/fee owner will no longer be able to disclaim responsibility upon receipt of the notice.

Instead, if the interest of the owner to which a lien attaches is leasehold, and if payment for all or part of the improvement is accounted for under the terms of the lease or any renewal of it, or under any agreement to which the landlord is a party that is connected to the lease, the landlord's interest is also subject to the lien, to the extent of 10% of the amount of such payment.

Vacating Liens with Alternative Security

Upon the motion of any person, the court shall order the lien vacated when security, in the full amount claimed, and the lesser of \$250,000 or 25% of the amount of the lien, is posted.

Currently the threshold is \$50,000 or 25% of the amount of the lien.

Surety Bonds - Labor & Material Payment Bond and Performance Bond

On public contracts, a Labor & Material Payment Bond and Performance Bond will be required from contractors. The surety must be licensed under the Insurance Act and the bond must cover at least 50% of the contract price or other percentage of the contract price as may be prescribed. Further, the bond must extend protection to subcontractors and persons supplying labor or material to the project.

Claims against the bond must be made in accordance with the terms of the bond. A best practice would be to obtain a copy of the payment bond at the start of a public project.

The surety's liability can be reduced to the extent of any payments made in good faith by the surety.

Alternative Financing and Procurement (P3) projects are considered public contracts, so the bond requirement will apply.

Clarification of Alternative Financing and Procurement Arrangements

If the crown, a municipality or a broader public-sector organization enters into an agreement with a special purpose entity that requires the entity to finance and undertake an improvement on behalf of the crown, municipality or broader public-sector organization (i.e., P3), the special purpose entity will be deemed to be the owner of the improvement, in place of the public entity.

The special purpose entity (as owner) and contractor will be subject to the holdback provisions of the statute.

Trust Provisions

The Construction Act amends the requirements for contractors and subcontractors to include:

- The funds shall be deposited into a bank account in all of the trustees' names
- Written records by the trustee will detail the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information
- If the person is a trustee of more than one trust, the trust funds may be in a single account, as long as written records are maintained for each trust

Changes Effective October 1, 2019: Prompt Payment, Adjudication & Liens Against Municipalities

Lien on Municipally Owned Property

If the property is owned by a municipality, a lien will no longer be filed/recorded, but will instead be served upon the clerk of the municipality. The lien will attach to the holdback, rather than to the property.

Prompt Payment

In 2013, Bill 69 - Prompt Payment Act debuted, though it struggled to get beyond a standard review. Fortunately, under Ontario's changes, Bill 69 can rest easy.

Applying to both private and public projects, prompt payment rules will require payment to be made by the owner within 28 days from submission of a proper invoice.

A proper invoice is a written bill or other request for payment in respect to an improvement under a contract between the owner and the contractor, and it is to contain specific information as outlined by the Act or as required by the contract. Failure to pay the invoice within the stated period will result in an automatic accrual of interest from the date the invoice was to have been paid.

The general contractor must pay the subcontractor within 7 days from receipt of payment from the owner, and all parties in the contractual chain below the general contractor must make payment within 7 days from receipt of payment.

If the owner is not going to make payment within 28 days from receipt of a proper invoice, the owner must submit a notice of non-payment to the general contractor. Similarly, parties below the owner in the contractual chain must submit a notice of non-payment within 7 days from receipt of a notice of non-payment. The notice of non-payment must provide the reason for non-payment and the amount of any dispute.

Adjudication - Rapid Dispute Resolution

Adjudication is a rapid construction dispute interim resolution process to avoid payment issues that may otherwise result in project delay.

Unless otherwise agreed to by both parties, the adjudication period expires once the contract or subcontract is complete. Adjudication is subject to the procedures set out in the contract or subcontract, if they are in compliance with the statute. The party who wishes to refer a dispute to adjudication must serve a written notice of adjudication on the other party, and then request adjudication from the Authorized Nominating Authority. The legislation defines the matters that may be adjudicated as:

- The valuation of services or materials provided under the contract
- Payment under the contract, including a proposed change order
- Disputes that are the subject of a notice of non-payment
- Amounts retained/set-off
- Non-payment of holdback
- Any other matter that the parties to the adjudication agree to or that may be prescribed

If adjudication has been requested, it will extend the lien deadline to whichever is later, the standard lien filing period or 45 days from the date the required documentation is provided to the adjudicator.

The adjudicator must make a determination no later than 30 days from receipt of the required documentation, although the legislation outlines circumstances where the deadline may be extended. The determination by an adjudicator is enforceable by court order.

It's Only the Beginning

Once Ontario's changes are in effect, other provinces may follow suit and modernize their own statute. Some provinces, such as [New Brunswick](#), have already begun a review of their statutes.

It's important to understand that any time a statute changes, there is an adjustment period. Some adjustments will happen during initial implementation, while others may not surface until a dispute reaches the courts a few years from now.

While there may be additional changes as we move forward, it is likely these changes will be minor. If you have questions regarding the changes in Ontario or how your rights may be impacted, please don't hesitate to contact NCS.

The information provided is for discussion purposes only and is not a legal treatment of the statutes, case law or their ramifications. You should contact an attorney for legal advice or NCS can retain an attorney on your behalf.

About the Author: Nancy Kennerly, NCS Executive Director, assists credit professionals throughout the U.S. and Canada to secure their receivables through the mechanic's lien and bond claim process. NCS is an industry leader in collections, mechanic's lien laws and UCC filings. NCS offers proactive solutions to minimize credit risk and improve profitability.