

## Ontario's New Construction Act Has Arrived

*Bill 142, Construction Lien Amendment Act, 2017* received Royal Assent on December 12, 2017. It amends the Construction Lien Act which will be renamed the Construction Act (the "Act").

The Act has not yet come in to force and the regulations have not been finalized. The effective dates will be:

July 1, 2018 – Amendments to liens and holdback rules

October 1, 2019 – Amendments dealing with prompt payment, adjudication and municipalities

The Act represents a complete overhaul of the existing *Construction Lien Act* (the "Former Act") which was enacted in 1983, with only minimal amendments having been made since then. Prompt payment and adjudication are brand new substantive regimes introduced for the first time in the Act.

### How We Got Here - Background

In 2016, the Ministry of the Attorney General released a report named, *'Striking the Balance: Expert Review of Ontario's Construction Lien Act'*. The Report made 100 recommendations for reforming and modernizing Ontario's *Construction Lien Act*. On May 31, 2017, Bill 142, *'Construction Lien Amendment Act, 2017'* was introduced. The Bill adopted almost all of the recommendations made in the Report.

### The Big Changes

The new Act is ground-breaking. Most notably, it includes new provisions for prompt payment, a new statutory default scheme for adjudication, extends the timelines for preservation and perfection of liens, and otherwise modernizes the Former Act. The following are some of the key changes.

#### (1) Preservation and Perfection of Liens

The timelines for preservation of liens under the Former Act were often not workable given the average age of receivables in the construction industry. The New Act extends the deadlines for preservation of a lien to 60 days (from 45 days) and for perfection of a lien to 90 days (from 45 days) from the preservation deadline. This allows more time for parties to negotiate and utilize the new interim adjudication process in the Act.

#### (2) Payment of Holdback

The Former Act did not mandate that the holdback be paid when all liens that could be claimed against it expired, were discharged or satisfied. The Act now *requires* payment of the basic and

finishing holdback, unless a notice of non-payment is delivered setting out the reason for non-payment, and the issue is referred to adjudication.

The Act now allows payment of accrued holdback on an annual or phased basis.

### Trust Obligations

The Act imposes new duties on contractors and subcontractors who are trustees of trust funds. Specifically, trustees are required to deposit funds received on account of their contract/subcontract price into a bank account in the trustee's name. They must maintain written records which detail the amounts received into and paid out of the trust funds, any transfer made for the purposes of the trust and other prescribed information. If more than one trust is involved, the trust funds may be deposited into a single account; however, the trustee must maintain separate records for each trust.

In addition to enhanced record keeping requirements, the Act has limited the trustee's right to set-off. The Former Act allowed a trustee to set-off money owed for any outstanding debt claim or damages *whether or not* related to the improvement. The Act now restricts the right to set off to claims or damages related to the specific improvement.

### (3) Jurisdiction and Procedure

Most of the provisions of the Former Act dealing with jurisdiction and procedure were repealed and the revised rules will be in the Regulations. Notably, leave for interlocutory steps will no longer be required, lien and trust claims may now be brought in one action and the requirement to commence a lien action in the jurisdiction where the land is located has been removed.

### (4) Prompt Payment

The Act tries to address the many concerns about timely payment. It provides mandatory minimum time periods for payment and a procedure for disputing/withholding payment. A contract or subcontract is permitted to have more favourable (but not a less favourable) payment terms. The regime is intended to operate as follows, with the triggering point being the delivery of a 'proper invoice' by a contractor to an owner.

## Between Owner and Contractor

- (a) An owner must pay the contractor within 28 days from receipt of a proper invoice. If the owner disputes a proper invoice, the owner must deliver a 'notice of non-payment' to the contractor within 14 days of receipt of the proper invoice. If only part of the proper invoice is disputed, the undisputed portion must be paid.

## Between Contractor and Subcontractor

- (b) A contractor, who receives payment of a proper invoice, must pay the subcontractors that were included in the proper invoice no later than 7 days after receiving payment from the owner. If, notwithstanding payment by the owner, the contractor disputes a subcontractor's entitlement to payment, the contractor may withhold payment by giving notice of non-payment in the prescribed form.

If the owner fails to pay any part of the proper invoice within 28 days, the contractor must nonetheless pay each subcontractor the amount that was included in the proper invoice, unless the contractor delivers a notice of non-payment to each subcontractor. The notice of non-payment includes an undertaking to refer the matter to adjudication.

If the contractor receives partial payment which is specific to the work of the subcontractors, those subcontractors must be paid within 7 days, and, if not, the payment to subcontractors must be made rateably.

The provisions with respect to prompt payment between subcontractors are the same as the provisions for prompt payment between a contractor and a subcontractor except for certain necessary adjustments regarding timelines for payment and delivery of notices of non-payment.

## (5) Adjudication

The Act introduces a default scheme for quick dispute resolution in the form of interim adjudication during the project. The Act makes adjudication available to all parties in both the public and

private sectors. Parties are free to agree on the adjudication terms to be included in their agreement. However, where the provisions are incomplete or inconsistent with the Act, this new statutory default scheme is deemed to apply. Adjudication works alongside the lien provisions in the Act; a party may preserve and perfect a lien while at the same time pursuing adjudication. The costs of the adjudication are shared equally between the parties.

The various types of disputes that may be referred to adjudication include delays, set-offs/deductions, security, proper invoices and the valuation of work, services, and materials supplied and claimed as well as 'any other matter that the parties to the adjudication agree to'.

An Authorized Nominating Authority (the "Authority") will be responsible for establishing a registry of adjudicators. An adjudicator is nominated only when a dispute has arisen and a contract or subcontract cannot appoint an adjudicator in advance.

The adjudication provisions have strict timelines to ensure the timely resolution of disputes, including the selection or appointment of an adjudicator from the registry. A Notice of Adjudication initiates the process. The adjudicator must make a written determination, with reasons, within 30 days of receiving the documents from the party who requested the adjudication. A decision rendered late is of no force or effect.

The determination is binding on an interim basis and enforceable. The Act requires that payment be made from one party to another pursuant to an adjudicator's determination no later than 10 days after the decision is communicated to the parties and imposes mandatory, non-waivable interest on all late payments. Further, the Act allows a party to suspend work if payment is not made pursuant to an adjudicator's determination, but there is no right to suspend work during the adjudication process. The decision is only binding on the parties until there is a determination by the Courts, an arbitrator or there is a written agreement between the parties concerning the matter.

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## Contact Members of our Construction Practice:

### Anna Esposito

aesposito@pallettvalo.com • (905) 273.3022 ext. 260

### Scott Price

sprice@pallettvalo.com • (905) 273.3022 ext. 221

### Neeta Sandhu

nsandhu@pallettvalo.com • (905) 273.3022 ext. 210

### Jeffrey Percival

jpercival@pallettvalo.com • (905) 273.3022 ext. 254

### Maria Ruberto

mruberto@pallettvalo.com • (905) 273.3022 ext. 206

### Jill Snelgrove

jsnelgrove@pallettvalo.com • (905) 273.3022 ext. 281

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**PALLETT VALO LLP**  
Lawyers & Trade-Mark Agents

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Pallett Valo LLP will, upon request, provide this information in an accessible format.

77 City Centre Drive, West Tower, Suite 300, Mississauga, Ontario L5B 1M5 • 1.800.323.3781