

The Advocates' Society Construction Law Practice Group

Town Hall on Bill 142:

An Act to amend the Construction Lien Act

On May 31, 2017, the Ontario Government introduced Bill 142: An Act to amend the *Construction Lien Act*. The Bill includes many sweeping changes to the *Construction Lien Act*, R.S.O. 1990, c. C.30, that will result in a new *Construction Act*.

The new *Construction Act* is based upon recommendations contained in the April 30, 2016 Report prepared by Bruce Reynolds and Sharon Vogel entitled *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. The Advocates' Society was one of the stakeholders that was consulted by, and made submissions to, the authors of the Report. Members of The Advocates' Society Construction Law Practice Group also met with The Honourable Yasir Naqvi, Attorney General of Ontario, to discuss the Report.

Now that Bill 142 has received First Reading, The Advocates' Society's Construction Law Practice Group is seeking its members' input on the proposed amendments in anticipation of presenting its members' comments to the Ontario Government. The Advocates' Society Construction Law Practice Group is therefore planning a feedback session for any and all members of The Advocates' Society who are interested in the new legislation on **August 24, 2017 from 5:30 to 7:00pm at The Advocates' Society Education Centre, 250 Yonge Street, Suite 2700, Toronto.**

Bill 142 may be found at:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4957

Bill 142 proposes the following significant changes that may be of interest to our members:

Liens

- The timeline for contractors and subcontractors to preserve a claim for lien is to be extended from 45 days to 60 days from the usual triggering event (which will not change);
- The timeline to perfect a lien is to be extended from 90 days to 150 days (from the same triggering event);
- The definition of "improvement" will be clarified to include "capital repairs" that extend the normal economic life of a structure as opposed to maintenance;
- The definition of "owner" is to be amended to apply more properly to P# projects;
- Liens will no longer attach to premises owned by a municipality;
- Delay claims will be explicitly recognized as lienable;
- Minor errors to a lien will not automatically mean its invalidation;
- There will be new and clarified penalties for registering a "wilfully exaggerated" lien;

- There will be new provisions dealing with leasehold interests and condominiums;
- Many new forms will be prescribed in the Regulations, including for Written Notices of Lien.

Prompt Payment

- A general contractor will have 28 days to pay a contractor who issues a “Proper Invoice” (as defined by the Act), and a contractor will have seven days to pay a sub-contractor after being paid;
- Payments are required unless the payor delivers a notice of non-payment within 14 days of receiving the invoice. Any undisputed amounts will have to be paid;
- Disputes over invoices are to proceed to a new Adjudication Regime.

Construction Dispute Interim Adjudication

- This dispute resolution method will be mandatory on all construction projects, public and private;
- Parties to a construction contract will be entitled to refer disputes to adjudication (based on the UK model) that flow from a proper invoice under a contract, including claims for valuation of work, services and materials and other monetary claims made in accordance with the contract, as well as set-offs, deductions and delay claims;
- Parties may contract out of this provision so long as their contract includes provisions that are consistent with the Act;
- A Roster of Adjudicators will be approved by an “Authorized Nominating Authority”: initially the Ministry of the Attorney General and later an administrative body formed with its approval;
- To commence an adjudication, a party shall deliver a Notice of Adjudication. The receiving party will have two days to determine if s/he agrees with the proposed Adjudicator. Five days later, there will be a referral notice, a notice of adjudication and backup documents from the claimant to be provided to the adjudicator;
- An Adjudicator must decide the issue within 30 days in a written decision;
- Adjudication is to be binding on an interim basis and an Adjudicator’s order to pay must be followed. But the decision does not affect lien rights and can be reversed in a subsequent Arbitration or in litigation.

Surety Bonds

- Surety Bonds are mandated for contracts with public bodies;
- A new section establishes a right of action on a Performance Bond and a Labour and Material Payment Bond.

Procedural Changes

- Unlike the *Construction Lien Act*, the *Construction Act* will not be a complete code of procedure. Sections 53 to 57, 59 to 61, 66 and 67, and 69 are proposed to be repealed. The Ontario *Rules of Civil Procedure* will apply to all construction lien proceedings;
- Construction lien proceedings that qualify will now be litigated under the Simplified Rules and in Small Claims Court;
- Section 60 Settlement Conferences will be abolished;
- Production and discovery rights will be the same as in a regular proceedings under the *Rules of Civil Procedure*;
- The amount to be posted for costs to bond off a claim for lien from title to lands will increase;
- A Letter of Credit posted to bond off a lien will be allowed to comply with International Conventions on Letters of Credit.