

Modernization of the Lien Act in Ontario

SPIAO Workshop

February 22, 2019

Highlights

- Now called “The Construction Act”
- Changes regarding release of Statutory Holdback
 - mandatory release of holdback after lien period expires
- Prompt Payment
 - protect contractors, subcontractors and suppliers from payment delays
- Dispute Resolution and Adjudication
 - Limit conflict and litigation due to non or late payment
 - Increase speed and certainty in resolving disputes
 - Level playing field within the construction industry
 - Reduce construction costs

- **July 1, 2018**, the first round of amendments to the Ontario *Construction Lien Act* came into force, including:
- **October 1, 2019**, the second set of amendments will come into force.
 - Prompt Payment
 - Mandatory Adjudication

- *Construction Lien Act* still applies if:
 - the Contract for the improvement was entered into before July 1, 2018
 - any procurement process for the improvement (including Requests for Quotations, Proposals and Tenders) commenced before July 1, 2018
 - the premises is subject to a leasehold interest and the lease was entered into before July 1, 2018

- Get help

KEY AMENDMENTS THAT CAME INTO EFFECT JULY 1, 2018

- “Improvement”
 - Distinguish between Repairs that extend “normal economic life” and Maintenance to prevent normal deterioration

- “Price”
 - Include in lienable amount any direct costs incurred by the contractor as a result of delay not caused by the contractor

“Substantial Performance”

- Improvement ready for its intended use and cost to complete or correct any known deficiency is not more than:
 - 3% of first \$1MM of Contract price (incr from \$500K);
 - 2 % of next \$1MM of Contract price (incr from \$500K); and
 - 1% of the balance of the Contract price
- Final Completion when price of completion not more than the lesser of
 - 1% of Contract price
 - \$5,000 (increased from \$1,000)

- *Construction Act* allows for holdback to be retained in one or more of:
 - Letter of credit in prescribed form;
 - Demand-worded holdback repayment bond in prescribed form;
 - Any other form that may be prescribed in Regulations

- *Construction Act* provides that holdbacks may be partially released on a phased or annual basis as long as:
 - the completion schedule is longer than one year;
 - the contract price is \$10 million or greater; and
 - no liens have been registered that have not been vacated or discharged
- Contract provides for it

Mandatory Release of Holdback

- Mandatory for an owner to release the holdback once the lien period has expired (60 days after substantial performance)
- **EXCEPTION:** the owner publishes a notice of non-payment of holdback in the prescribed form within 40 days of the publication of the certificate of substantial performance (or termination), and notifies the contractor of the publication within 3 days

- Construction liens can no longer attach to municipal lands
- Liens are not registered on title to the lands but instead a Claim for Lien is served on the clerk of the municipality

Preservation and Perfection of Liens

- Lien Created when work performed
- Must both “preserve” lien by registering a lien on title to the lands and “perfect” lien by commencing a court action
- Time period for lien Preservation increased from 45 days to 60 days from trigger date (i.e. register a construction lien)
- The time period for lien Perfection increased from 45 days to 90 days following the last day to Preserve (i.e. commence a court action)
- Trigger Date
 - Substantial Completion, Termination, Abandonment
 - For subs, last day worked

Access to Small Claims Court

- Lien must be perfected by commencing lawsuit
- Under *Construction Act*, lien claims under \$25,000 in value may be referred to the Small Claims Court

Surety Bonds for Public Contracts

- All Public Contracts must have Performance and Labour and Material bonds
- Minimum limit of 50% of the Contract price for contracts valued at \$100 million or less
- Maximum coverage of \$50 million if the Contract value is \$100 million or more

KEY AMENDMENTS THAT COME INTO EFFECT ON OCTOBER 1, 2019

Prompt Payment

- New section dealing specifically with issues pertaining to prompt payment.
- Trigger for payment:
 - Delivery of a Proper Invoice
 - Not certification for payment

- **Payment Deadline**
 - For owner to general contractor: 28 days from delivery of proper invoice
 - General contractor to subcontractor: 7 days from receipt of payment from owner
 - Subcontractor to Sub-subcontractor: 7 days from receipt of payment from general contractor

- Notice of Non-Payment
 - Payer can deliver notice of intention to withhold payment within 14 days of receipt of Proper Invoice
 - Notice of non-payment must set out amount being withheld and reason for the withholding
 - Payer required to pay remaining amount
 - If contractor receives partial payment and notice of non-payment specific to one subcontractor, must pay remaining subcontractors.
 - In any other case, subcontractors are paid on rateable basis

- What happens if you miss the deadline?
 - Don't miss the deadline!
 - Mandatory payment of interest - greater of the amount set out in the Courts of Justice Act or interest rate set out in Contract
 - Possible harsh consequences if court determines that non payment was willful.

Adjudication

- Any party to a construction Contract or Subcontract has right to adjudicate disputes arising from the Contract
- Can adjudicate any dispute that arises from a Proper Invoice under a construction Contract or Subcontract

- Qualified by the Authorized Nominating Authority to be an Adjudicator
- Criteria to be an Adjudicator not set out in Bill 142 but Report recommends the following:
 - By a natural person
 - Not a party nor have a conflict of interest
 - Professional in good standing
 - At least 7 years relevant working experience in the construction industry in Ontario
 - Completed standardized Ontario adjudication training course
 - Not be disqualified by bankruptcy, criminal conviction or any other prescribed unsuitability

When is Adjudicator Nominated

- Not nominated until a dispute has arisen
- Party will name an Adjudicator in its Notice of Adjudication
- If other party does not agree with choice and agreement can not be reached as to Adjudicator, Adjudicator Nominating Committee will appoint one
- Parties can either agree on fees or designated third party will determine reasonable fee
- Fees to be apportioned equally and each party bear own cost unless a party has acted in bad faith or been frivolous or vexatious, then Adjudicator can decide otherwise

Adjudication Process

- Notice of Adjudication: dispute and nature of redress being sought
- 5 business days after appointment of Adjudicator is confirmed, referral notice is served, which includes Notice of Adjudication and copies of documents or excerpts of documents being relied upon
- 30 calendar days thereafter, Adjudicator sets and executes his or her process including: addressing evidence, experts, submissions, inspection of the work and providing directions, and making a determination on the matter
- The deadline for the Adjudicator's determination may be extended at his or her request and on the written consent of the parties for up to 14 additional days

- Adjudicator can hire experts to enable him or her to determine better any matter of fact in question
- If Adjudicator obtains assistance from one of the above, the Adjudicator can fix the remuneration and direct payment by either or both parties
- Adjudicator gives a written decision with reasons
- Decision is binding on an interim basis

Enforcement of Adjudication Decisions

- Decision of the Adjudicator is binding on parties to the Adjudication until either:
 - a determination of the matter by a court (including lien action)
 - a determination by way of Arbitration, or
 - a written agreement between the parties
- If necessary, decision enforced by way of application to Superior Court

Enforcement of Adjudication Decisions

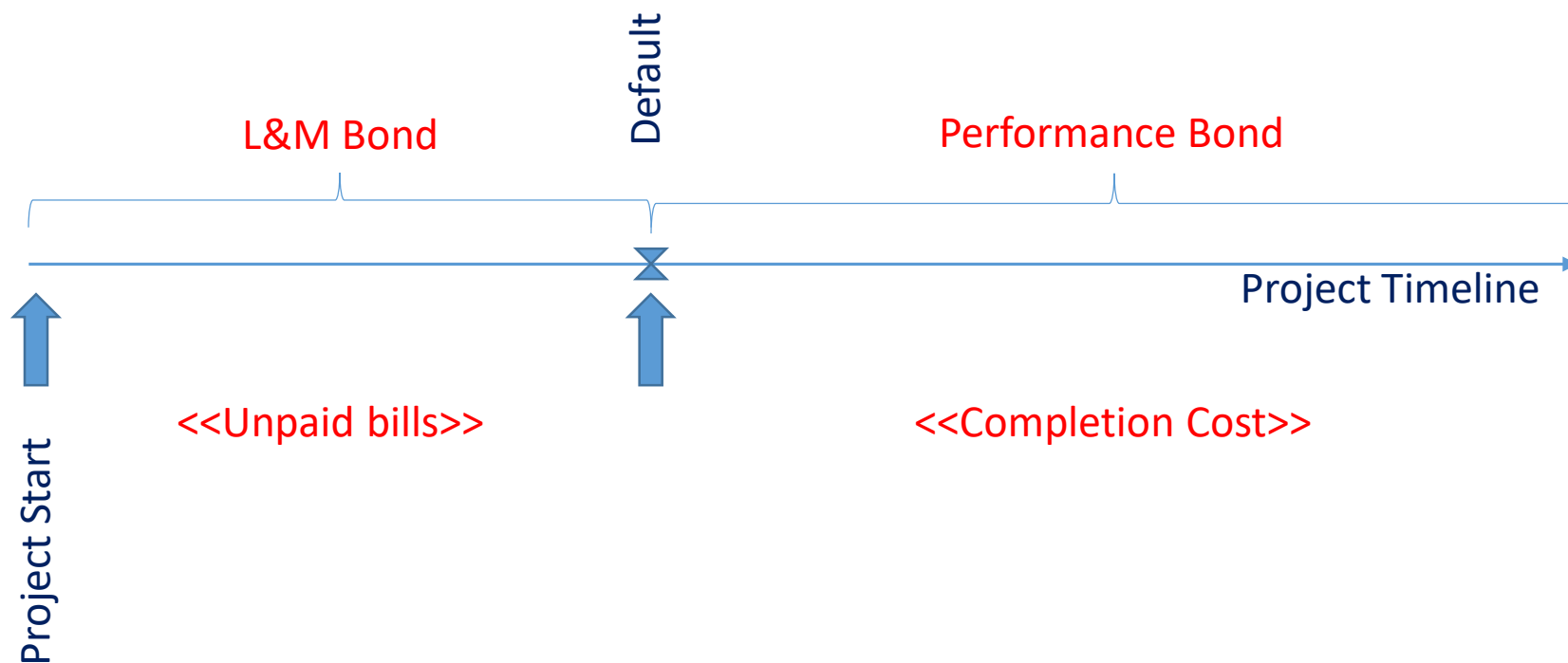
- If Adjudicator orders payment to one party, payment must be made within 10 days after determination
- If payment not made within 10 days,
 - Interest
 - Contractor or subcontractor can suspend further work until the other party pays the amount determined by the Adjudicator plus interest plus costs from suspension of work



Mandatory Bonds

Performance and Labour and Material Payment Bonds

Relative nature of coverage



- What do I need to know about the new Performance Bond?
 - It's mandatory together with Labour and Material Payment Bonds for all public projects over \$500,000 in contract price
 - 50% of contract price
 - It's a better tool for owners
 - It likely won't cost any more than it used to
 - Complex transition rules

Notable features:

- Pre-Notice Meeting
 - Surety undertakes to within 7 days of request coordinate meeting with surety, principal, and obligee
 - Opportunity to resolve issues
- Surety's Acknowledgement 4 business days
- Surety's Response in 20 business days

- **Necessary Interim Work**

 - Public safety and protection of work

 - Let surety know within 3 bus days of starting this work

- **Mitigation Work**

 - Post Notice Meeting within 5 business days, surety initiates.

 - Work that needs to be done while surety is investigating

 - Keep good records

- **Defined Owner's Direct Expense coverage**
Clarification of costs, fees and expenses of owner arising from default
- **Specific exclusion – No Liquidated Damages, indirect or consequential damages**
- **Mandated Forms**
 - Form of Notice
 - Surety's Acknowledgement of Notice
 - Surety's Position

Bill 142 Labour and Material Payment Bond

- What do I need to know about the new Labour and Material Payment Bond?
 - It's mandatory together with Performance Bonds for all public projects over \$500,000 in contract price
 - 50% of contract price
 - It is designed to support and operate in harmony with the Prompt Payment provisions of the Construction Act
 - It likely won't cost any more than it used to
 - Complex transition rules

- Claims process is embedded in the bond language with statutory forms and timelines for response
 - Notice of Claim
 - Acknowledgement from surety
 - Response and position of surety
 - Payment timing
 - Obligation to pay undisputed amounts

How does this work with Adjudication?

- When adjudication is initiated, surety's investigation and obligations are suspended until adjudicator makes a determination
- Decisions are binding on the surety in respect of whether an amount is or is not found to be due and owing to the claimant
- Notice of Adjudication can be issued against Surety

Form 5

Holdback Repayment Bond Under Subsection 22(4) of the Act



Holdback Repayment Bond

- Allows an owner, if required under the contract, to pay the full amount to the contractor on each draw without retaining the statutory holdback.
- The Holdback Repayment Bond is held by the Owner in place of the holdback
- It is irrevocable
- Does not apply to contractual disputes



Holdback Repayment Bond

- If a lien is preserved, the Owner can make demand on the surety to pay enough money to the owner so that the Owner will be in compliance with the Act.
- Surety to pay within 10 business days of demand unconditionally.
- Time limit for demand is within 120 calendar days from the last date on which a “lien arising from the Contract could have been preserved under the Act”.



Operational Readiness Issues



**Contractor sticks you with the bill at
the end of the month.**



Recall that in new system

- Contractor submits Proper Invoice
- Owner must pay within 28 days
- To dispute Owner must issue Notice of Non Payment within 14 days detailing reasons
- Certification by engineer cannot be a pre-condition for submission of invoice



- Where does the engineer's certificate come into play?
 - How does the Owner figure out within 14 days that there is a problem with the Invoice?
 - Engineer's capacity?
- Miss the deadline to issue the Notice of Non-Payment?
 - Interest?
 - Are you relying on the consultant to manage this?
- What if the Owner is late in making the payment?
 - Have arrangements been made administratively to pay promptly?



Scope changes and change orders

Delay impact costs

- These charges may be included in the contractor's Proper Invoice each month?
- Project management procedures and site documentation **MUST** be strong enough to properly deal with these issues in adjudication?
- Are you ready with the project management horsepower to deal with this?



Beware the Smash and Grab

- Referral to Adjudication will come from contractor.
- Owner at risk of finding itself at a time-disadvantage for an evidence-based response
 - Project Management team must be organized and prepared from a documentation standpoint
 - Document-driven process; the evidence produced will drive the outcome.
 - What is your level of preparedness for this new process?

- Key is to be on the offensive, not on the defensive
 - Quality of site reporting and documentation is critical
 - Consultant/Engineer will have a key role with significantly higher accountability than in the past. Keep this in mind.
 - Will you need legal help?
- Is the game-plan to fight every dispute?
 - The economics of disputing a proper invoice will have to be assessed

Things will happen fast. Recall:

- 4 days: Adjudicator appointed.
- 5 days: Adjudicator to receive from the applicant:
 - Copy of the Notice of Adjudication
 - Contract
 - Any supporting documentation
- What about the respondent?
 - When do you get to tell your side of the story?
 - Discretion of the Adjudicator (see Regs)

- Respondent should be ready to submit its position (narrative, supporting documentation) ASAP
- Remember:
 - Adjudicator has 30 days to decide
 - Decision is binding, payment within 10 business days
 - If you have no evidence, you have no case
- Advisable to have a team organized to manage this process.



“Cash is King”?

- Holdback must be released within 60 days of publication of Substantial Performance (unless liens are registered)
- If there is an issue on the job and you want to retain some cash, must Publish Notice of Non Payment of Holdback within 40 days of publication.
- Otherwise **no entitlement to retain money.**

Slow and Steady Loses the Race

After October 2019, will you be able to keep up?

- Proper Invoice assessed within 14 days
- Notice of Non Payment
- Chq 14 days later

This is on every project, every month.

Questions?