

# Modernization of the Lien Act in Ontario

## SPIAO Workshop

February 22, 2019

# Modernization of the Lien Act

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## 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

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# 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

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- 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

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- 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

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- 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

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- 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

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# KEY AMENDMENTS THAT COME INTO EFFECT ON OCTOBER 1, 2019

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# 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.

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# 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

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- 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

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- 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

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- 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

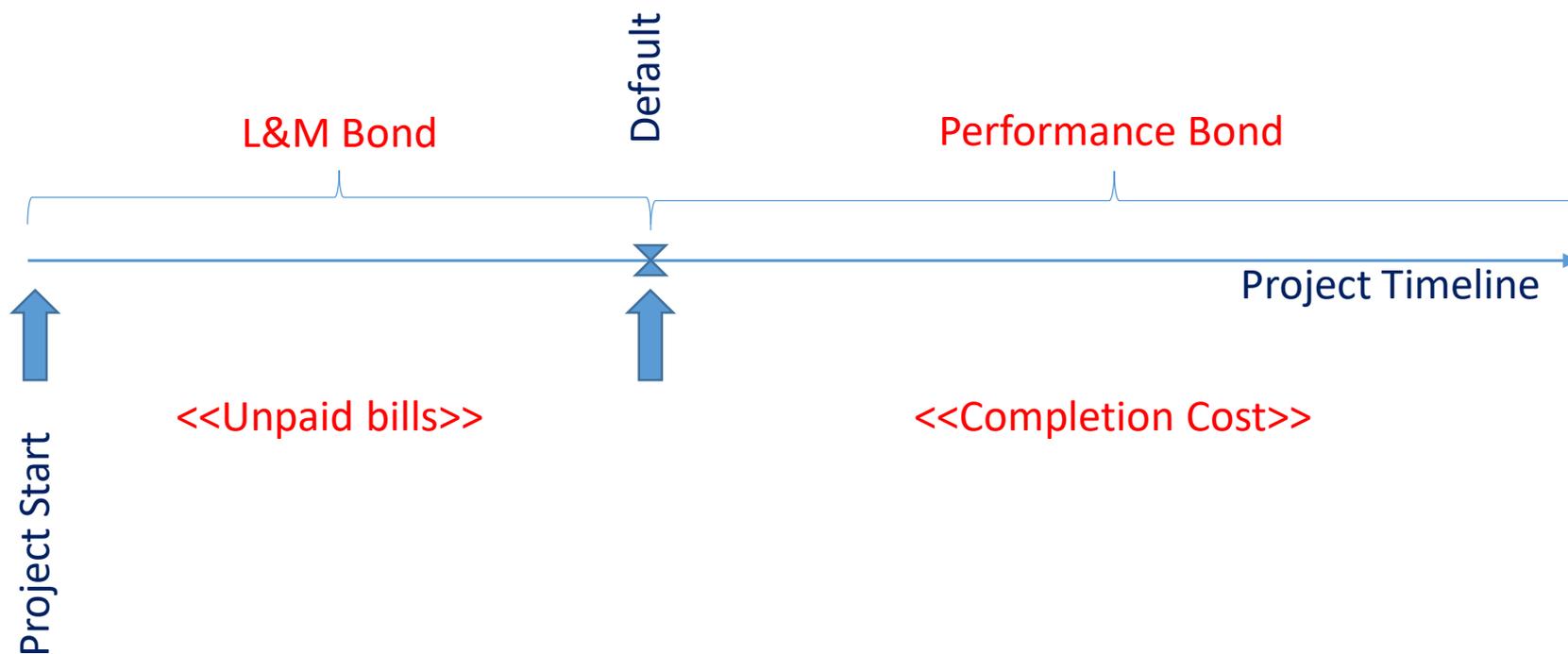


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# Mandatory Bonds

# 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

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- 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

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# ***Form 5***

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



# Holdback Repayment Bond

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- 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

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- 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”.



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# Operational Readiness Issues



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**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?



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# 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.



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# “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.**

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# Questions?