Toronto Law Journal

The New *Construction Act*: Opportunity and Risk for Lawyers in Ontario

Ivan Merrow, Glaholt LLP[1]

As of October 1, 2019, the prompt payment and adjudication provisions of the new *Construction Act* (the "*Act*") came into force across Ontario. Different aspects of the *Act* have come into force gradually since its introduction on July 1, 2018. Although the new *Act* has created opportunities, it has also brought uncertainty for lawyers and construction clients across the province.

Lawyers in particular should beware the transition provision of the *Act*. The longer deadlines to preserve and perfect liens promised by the new *Act* do not necessarily apply to every contract. Every lawyer who deals with construction-related issues ought to be aware of how the *Act* applies and be prepared to advise clients accordingly. No lawyer wants to contribute to the expiry of a client's lien rights, or expiry of the ability to dispute an invoice under the new rules, due to a failure to understand the mechanics of the new *Act*.

Major changes introduced by the new *Construction Act*

Ontario's former *Construction Lien Act* was revised extensively. A full review of every modified provision is beyond the scope of this article, but every lawyer should be aware of at least three major changes introduced by the new *Act*.

(1) ***Lien reform including lengthened deadlines to preserve and perfect liens***

The 45 day deadline to preserve a lien was extended to 60 days, and the 60 day deadline to perfect a lien was extended to 90 days. The failure to preserve or perfect lien rights in a timely manner continues to be fatal for a lien claim.

For construction liens with a face value of $200,000.00 or more, the monetary security required to vacate those liens from title has increased. Under the former *Construction Lien Act*, parties seeking to vacate a lien from title were required to post security in an amount equal to the lesser of 25% of the lien amount or $50,000.00. Now the required security is the lesser of 25% of the lien amount or $250,000.00. Failure to prepare proper security may delay parties seeking

[1] Ivan Merrow is a construction lawyer and litigator at Glaholt LLP and a member of the Toronto Lawyers Association. Ivan's practice focuses on providing exceptional legal service to organizations and individuals in the construction industry. He represents clients at every level of the construction supply chain, including developers, owners, general contractors, subcontractors, sureties, engineers, and architects. Ivan most frequently acts in disputes involving contracts, liens, trusts, bonds, delay claims, deficiencies and professional negligence.

to vacate a lien from title, causing an interruption in financing or title transactions on a live construction project.

(2) ***Legislated "prompt payment" timelines to pay and dispute invoices***

A new legislated deadline was introduced to requires property owners to pay construction contractors 28 days after receipt of a "proper invoice." A further deadline was introduced for contractors to pay their subcontractors 35 days after delivering a "proper invoice" to the owner. Subcontractors of those subcontractors are to be paid in a further seven days (*e.g.*, 42 days after the "proper invoice" was delivered), with a further seven days added for each sub-level. These deadlines are incredibly short, especially in an industry used to 60-day, 90-day, 120-day, or even lengthier payment terms.

The *Act* defines what needs to be included in a "proper invoice," but additional requirements can be agreed upon by the parties to a construction contract. Importantly, a "proper invoice" cannot be made conditional on the approval of the owner or certification by a payment certifier. Owners may seek to build onerous requirements into the definition of a "proper invoice" in an effort to avoid being bombarded by monthly invoices. In the absence of contractual terms that require advance notice, subcontractors and suppliers at lower levels may have difficulty determining relevant deadlines under the *Act*, as they may not know when a "proper invoice" was delivered by a contractor to an owner. Nor will sub-contractors necessarily know whether their invoice was included in the contractor's "proper invoice." All of these issues will arise over the coming months and years as construction stakeholders grapple with the new *Act*.

If an owner does not intend to pay a contractor's "proper invoice" in whole or in part, there is a legislated deadline to issue a "notice of non-payment" in 14 days. Contractors must similarly issue a "notice of non-payment" seven days after receiving a notice of non-payment from the owner, or prior to the seven-day deadline to pay a subcontractor in the event an owner never issued a notice.

New forms have been added in the regulations to the new *Act*. Lawyers ought to be mindful of the new deadlines and timelines in play for prompt payment, as they may impact clients' rights to dispute payment of an invoice.

(3) ***Adjudication, a new fast-track dispute resolution process to resolve construction-related disputes***

The *Act*'s October 1, 2019 provisions in force introduced a new interim dispute resolution process called "adjudication". Similar in many respects to an arbitration, adjudication contemplates the resolution of a dispute by a single adjudicator. The timelines for adjudication are exceptionally short. In the absence of parties' agreement to an extension, adjudicators' decisions are legislatively required to be released no later than 44 days after they receive all documents the claimant intends to rely on. That means all of the interim steps in order to achieve a resolution to the dispute need to occur in a 44-day window.

Notably, adjudicators may not have formal legal education as they may be appointed from all areas of the construction industry. The Authorized Nominating Authority to appoint adjudicators under the new regime is called Ontario Dispute Adjudication for Construction Contracts ("ODACC"). Among other qualifications, adjudicators must have 10 years of relevant experience in the construction industry and complete mandatory training. Adjudicators do not have to be lawyers and may be contractors, architects, engineers, quantity surveyors, or other industry stakeholders.

Adjudication is available to resolve a number of disputes related to a contract between an owner and a contractor to supply services or materials to an improvement. Adjudication is however only available prior to the completion of a contract. Pursuant to section 13.5 of the *Act*, adjudication may be used to resolve disputes related to valuation of services or materials provided, payment under the contract, change orders, disputes that are subject to a notice of non-payment, set-off, holdback, or any other matter that may be agreed upon by the parties or set out in the regulations.

Based on information available from the Authorized Nominating Authority for adjudicators, now known as ODACC, adjudications will likely be subject to pre-determined processes and/or fee schedules depending on the monetary value of the dispute. Most adjudication processes will be in writing only. Limited oral submissions may be available by teleconference or videoconference. Adjudicators may also determine a custom process more akin to an *ad hoc* arbitration.

Importantly, adjudicators' decisions may be enforced as binding court orders. The decisions are however still considered "interim" as they may be re-litigated in a lien proceeding or arbitration process. Rights to appeal from an adjudicator's decision are very limited. The potential for multiple interim adjudicators' orders to be enforced as binding judgments, and limited rights of appeal, may cause problems for parties who fail to respond to adjudications in a timely fashion.

Lawyers in particular need to be aware that lien rights still exist and may expire while a client's focus is on resolving the rushed deadlines created by the prompt payment regime.

The transition provisions under the new *Act*

Despite the importance and significance of the *Act*'s changes, it is essential for lawyers to remember that not every construction project or contract will be subject to the new *Act*. Whether individual provisions of the *Act* apply to a given contract is governed by the transition provision of the *Act* in section 87.3.

The only contract that matters is the "prime contract" between owner and contractor. Many clients further down the construction supply chain will insist that the date of their particular subcontract or supply contract matters, but that is incorrect. The governing contract is the one between the owner and the contractor, even if your subcontractor client has never received a copy. If an owner contracts directly with multiple contractors, then different provisions of the

Act may apply to each of those different contracts. This makes it critical to ask clients early and up front for the contract between owner and contractor. Most importantly, lien rights should be preserved and perfected under the old *Construction Lien Act*'s timelines whenever possible.

In addition to the date the "prime contract" was entered into, the gradual transition provisions of the *Act* make it important to know whether the contract was subject to a procurement process, specifically, whether the owner commenced a procurement process prior to entering into the governing contract with the contractor. If so, it is important to know when that procurement process started. The *Act* defines a procurement process as (a) a request for qualifications, (b) a request for quotation, (c) a request for proposals, or (d) a call for tenders. Lawyers should have an awareness of this information prior to providing advice on lien deadlines and the application of the *Act*.

Given the gradual nature of the transition provisions, and the fact that different provisions apply to separate contracts, up to three different versions of the *Act* may apply in any particular case:

(1) **Old *Construction Lien Act*:** For improvements on non-leasehold interests, the old *Construction Lien Act* applies to a contract where its procurement process occurred prior to July 1, 2018. For non-leasehold projects without a procurement process, the old *Construction Lien Act* applies if the date the parties entered into the contract pre-dates July 1, 2018. Alternatively, for projects being done on leasehold interests where the lease pre-dates July 1, 2018, the contract for the improvement was entered into or the procurement process was commenced between July 1, 2018 and December 5, 2018.

(2) **New *Construction Act*, Phase 1:** Nearly all of the changes in the *Act* came into force after July 1, 2018 except for the prompt payment and adjudication provisions. The most critical change for lawyers to be aware of is the extension of lien deadlines. The *Act* should be carefully reviewed in each case to confirm which provisions are applicable. In summary, the "phase 1" post-July 1, 2018 changes are in play for:

   (a) non-leasehold improvement contracts where the procurement process commenced between July 1, 2018 and September 30, 2019;

   (b) non-leasehold improvement contracts where there was no procurement process, where the contract was entered into between July 1, 2018 and September 30, 2019; or

   (c) leasehold improvement contracts where the contract was entered into between December 6, 2018 and September 30, 2019.

(3) **New *Construction Act*, Phase 2:** All of the *Act*'s provisions are now in force as of October 1, 2019, including the prompt payment and adjudication provisions. The entire *Act* is in force for contracts where the procurement process was started on or after

> October 1, 2019, or contracts without procurement processes that are entered into on or after October 1, 2019. These dates apply for contracts relating to both leasehold and non-leasehold improvements.

The transition provisions of the *Act* creates risks for lawyers who are asked for urgent advice without the benefit of a full appreciation of the underlying facts of a given situation. Lien deadlines will continue to run and expire in accordance with the *Act* during the course of a project. Although the new *Act* has created opportunities to achieve faster outcomes for clients seeking orders for interim payment, it has also provided additional areas where mistakes can be made. Lawyers serving the construction industry would be wise to have conversations up front with clients and colleagues about the new *Act* and its requirements. All lawyers would be wise to avoid traps and pitfalls created by the new *Act*, especially as its strict deadlines are interpreted and enforced over the coming years.