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What You Need to Know about the New Construction Act

By Kayla Kwinter, Ryan Hauk and Jonathan Goode

The first wave of changes to the *Construction Lien Act* - now called the *Construction Act* - have now come into effect. Here is what you need to know to comply.

The changes do not immediately apply to all projects on July 1. Instead, the changes are being phased in through complex transition provisions. Among other things, the *Construction Act* only applies to projects on which the prime contract is entered into, or where a “procurement process”¹ is commenced, after July 1, 2018. It may not be immediately clear whether your project is subject to the new Act or the old Act, particularly if you are a subcontractor. It is recommended that you consult your lawyer for assistance in determining whether the new *Construction Act* applies.

The lien registration period is extended from 45 days to 60 days. Under the new *Construction Act*, lien claimants have 60 days from the earlier of their last date of work, termination or completion of the contract, or publication of a certificate of substantial performance to preserve a lien by registration or delivery of a claim for lien. Lien claimants will also have a further 90 days to perfect their liens. The new period for registering and perfecting liens is subject to the transition provisions discussed above, which means that the new, extended lien period does not apply to all projects. Adopting a practice of consulting with your lawyer before 45 days have expired will help you to avoid having your lien rights expire.

New rules for payment of holdback. The new *Construction Act* permits holdback to be released on an annual or phased basis on projects where the original contract price exceeds a certain amount (currently set as \$10,000,000), as long as the parties provide for this in the contract.

Trust funds must be recorded. Under both the new and old Act, every owner, contractor or subcontractor who receives funds in relation to a project is deemed to hold those funds in trust for parties with whom they contract directly to perform the work. Under the new *Construction Act*, any contractor or subcontractor who receives trust funds in relation to a project must deposit those funds into a bank account in the trustee’s name and maintain written records detailing the amounts that are received and paid out of the funds. The Act does not specify the form that such records must take. It is likely that contractors and subcontractors will be required to maintain a clear, transparent ledger in order to avoid liability to trades below them in the construction pyramid for breach of trust.

Contracts for public projects now require security in the form of bonds. Any contractor who enters into a contract with the Crown, a municipality, or a broader public sector organization, where the

contract price is \$500,000.00 or greater, will now be required to obtain a labour and material payment bond and a performance bond.

More to Come. Prompt payment and adjudication provisions will come into force in October, 2019. These provisions require contractor and subcontractor invoices to be paid promptly, failing which payees are entitled to invoke an adjudication process that is intended to promptly resolve payment issues without stalling the progress of a project. Stay tuned for further updates on the October, 2019 changes to the *Construction Act*.

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