

# What you need to know about Ontario's *Construction Lien Act* reform

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November 2, 2017

# The *Construction Lien Act*

- Sets out special remedies, rights and obligations of the participants in a construction project.
- No party can contract out of the CLA.
- Any contract or subcontract that contradicts the CLA will be deemed to be amended to conform to it. (CLA, s.5)

# Bill 142 – *An Act to Amend the Construction Lien Act*

On May 31, 2017 the Legislative Assembly of Ontario introduced Bill 142. The amendments are expected to become law by 2018, subject to any revisions by the legislature.

- Key Amendments:
  - *Introducing Prompt Payment*
  - *Introducing Construction Dispute Interim Adjudication*
  - *Greater Lien Rights*
  - *Mandatory Holdback Release*
  - *Trust Provisions*

# Prompt Payment

# Prompt Payment Background

- “A need to level the playing field in the industry” .
- Recommendation for legislation:
  - Application to public and private sectors.
  - Prompt payment terms **implied by law in all construction contracts** that do not contain equivalent terms.
  - Applies to all levels of the construction pyramid.
    - Owner – General Contractor
    - General Contractor – Subcontractors
    - Subcontractor – Subcontractor

# Prompt Payment

## Mechanisms for Non-Payment

- Provides a mechanism for a contractor to notify subcontractors of non-payment by owners.
- Payment is triggered upon delivery of a “proper invoice”.

# Prompt Payment

## What is a 'Proper Invoice'?

- Section 6.1 defines proper invoices as:
  - A written bill or other request for payment for service/materials in respect of an improvement under a contract, if it contains specific information as set out in this section and **meets any other requirements that the contract specifies.**
- Subject to (s.6.(2)):
  - Provisions that make the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval are **of no force or effect.**

# Prompt Payment

## What is a 'Proper Invoice'?

- **Minimum requirements** for a proper invoice:
  - Name and address of a contractor.
  - Invoice date and the period during which the services/materials were supplied
  - Information identifying the authority under which the services/materials were provided (e.g. in the contract), approved extras (etc.).
  - A description of the services/materials that were supplied, including quantity where appropriate.
  - The amount payable for services/materials supplied and payment terms.
  - Name, title, telephone number and mailing address of person to whom the payment is to be sent.
  - Any other information that may be prescribed.
    - **Note: The Regulations have not been released.**

# Prompt Payment

## Owner to Contractor

- Payment Deadline (s.6.3):
  - No later than **28 days** after receiving the “proper invoice”.
- **Exception** – If owner disputes a proper invoice, the owner may refuse to pay some or all of the amount payable under the proper invoice if:
  - The owner gives the contractor notice of non payment no later than **14 days** after receiving the proper invoice from the contractor. The notice must:
    - i. Specify the amount of proper invoice that they are not paying; and
    - ii. Detail the reason for non-payment.

# Prompt Payment

## Contractor to Subcontractor

- Payment Deadline (s.6.4):
  - If a contractor receives full payment of a proper invoice within 28 days, the contractor shall pay each subcontractor who supplied services/materials under a subcontract **no later than 7 days after receiving payment.**
- Non or Partial Payment, Unpaid Amount (s.6.4(4)):
  - If a contractor **does not** receive full payment of a proper invoice within 28 days, the contractor shall pay each subcontractor **no later than 35 days** *unless* the contractor has delivered a notice of non-payment within the requisite time.

# Prompt Payment

## Contractor to Subcontractor: Exceptions

- If an owner does not pay the contractor must deliver a notice of non-payment. The notice must:
  - State that some, or all, of the amount payable to the subcontractor will not be paid within the specified time due to non-payment of the owner.
  - State the amount that will not be paid.
  - Provide an **undertaking to refer the matter to adjudication no later than 14 days after giving notice to the subcontractor.**
  - Include a copy of any notice received from the owner regarding non-payment.

# Prompt Payment

## Contractor to Subcontractor: Exceptions

- If contractor disputes some or all of the amounts the subcontractor is claiming, the contractor may refuse to pay if the contractor gives a notice of non-payment within
  - **7 days** of receiving a notice of non-payment from the owner.
  - **35 days** of delivery of a “proper invoice” to the owner if no notice is given by the owner.
- The notice must include:
  - The amount that is not being paid.
  - The reason for non-payment.

# Prompt Payment

## Contractor to Subcontractor: Partial Payment

- Is permitted under certain circumstances:
  - If the contractor receives partial payment from owner, the contractor must pay each subcontractor whose amounts were included in the proper invoice no later than **7 days** after receiving payment.
  - If the owner does not pay amounts owing for specific services or materials supplied by a particular subcontractor,
    - The remaining subcontractors shall be paid with any amounts paid by the owner
    - The subcontractor(s) who are not implicated in the payment dispute shall be paid on a rateable basis.
    - In any other case, the subcontractors should be paid on a rateable basis.

# Prompt Payment

## Subcontractor to Sub-subcontractor/Supplier

- Payment Deadlines
  - A subcontractor who receives full payment shall pay each sub-subcontractor or supplier within **7 days**.
- Partial Payment:
  - Upon receiving partial payment from a contractor a subcontractor shall pay each sub-subcontractor/supplier no later than **7 days** after receipt of payment.
  - **BUT** if more than one sub-subcontractor/supplier is entitled to payment the following payment rules must be followed:
    - 1) If the amount not paid by the contractor is specific to a sub-subcontractor/supplier the remaining sub-subcontractors/suppliers shall be paid from the amount paid by the contractor on a rateable basis.
    - 2) The sub-subcontractors/suppliers whose payments are in dispute remain unpaid, provided that the contractor has delivered the notice of non-payment with the requisite time.
    - 3) In any other case, sub-subcontractors/suppliers shall be paid on a rateable basis.

# Prompt Payment

## Subcontractor to Sub-subcontractor/Supplier

- Non-payment by Contractor
  - The subcontractor shall pay the sub-subcontractors/suppliers the amounts carried in the “proper invoice” no later than **42 days** after the proper invoices were given to the owner.
- **Exception** - If the subcontractor provides the sub-subcontractors/suppliers with:
  - A notice of non-payment which,
    - States that some or all of the amount payable is not being paid within the time specified due to non-payment by the contractor.
    - States the amount not being paid.
    - States (if applicable) reasons for non payment as a result of a dispute.
  - A copy of any notice of non-payment received by the subcontractor from the contractor in relation to the proper invoice.

# Prompt Payment

## Subcontractor to Sub-subcontractor/Supplier

- Timing of Notice
  - 7 days after receiving notice of non-payment from the contractor
  - If no notice was given by the contractor, no later than 42 days after the proper invoice was given to the owner

# Prompt Payment

## Interest on Late Payments

- Now prescribed
  - At the Court Rate, or
  - As specified in the Contract/Subcontract
- Applicable to any contract entered into on or after the date the *Construction Lien Amendment Act, 2017* comes into force.

# Billing Stage

**Monthly** as per the *Act* or as otherwise set out in the contract (i.e. after completion of certain phases of the work)

**Proper Invoice**

**Contractual Invoice Term** (i.e. phase 1 complete)  
 Note: While the giving of a proper invoice cannot be conditional on prior certification of a payment certifier or owner approval, this does not affect a contract term requiring certification from a payment certifier or owner approval after a proper invoice is given.

# Payment Stage

## FULL PAYMENT

## NOTICE OF NON-PAYMENT

## PARTIAL PAYMENT

## LATE PAYMENT

Full payment by owner to GC within **28 Days**.

Owner to advise GC in writing within **14 days** of receipt of proper invoice.

Owner pays GC a portion of proper invoice and provides a notice of non-payment for remaining amount.

If any payment is not paid when due, interest shall be paid on the outstanding balance at the prejudgment interest rate under section 127 of the of the *CJA*.  
 If the contract or subcontract specifies a different interest rate, the greater of the prejudgment interest rate and contract interest rate shall be paid.

Full payment by GC to subcontractor within **7 days** of receipt.

GC to advise subcontractor within **7 days** of non receipt of notice of non-payment

GC must pay subcontractor within **7 days** of receipt of partial payment from GC, on a rateable basis

Full payment by subcontractor to their subcontractor within **7 days** of receipt.

Subcontractor to advise their subcontractor within **7 days**.

**Note: On the request of a subcontractor who is required to make payment to their subcontractor, the GC shall advise as soon as possible confirmation of the date on which the GC gave a proper invoice to the owner.**

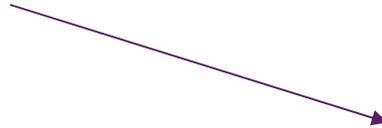
# Payment Stage cont'd

## Unpaid Amount (if notice of non-payment or partial payment)

Where the owner does not pay some or all of a proper invoice, the GC shall pay each subcontractor within 35 days of receipt of proper invoice by the owner (unless subcontractor was paid on rateable basis where partial payment).

## Where Multiple Subcontractors (paid amount)

If services/materials provided by (1) subcontractor are the reason for the dispute (i.e. mechanical contractor work), the remaining subcontractors shall be paid on a rateable basis. Where no subcontractors can be implicated as reason for dispute the GC must pay subcontractors on a rateable basis.



## **Exception** – Owner Does Not Pay

If GC provides a notice of non-payment within 7 days to subcontractor together with a copy of the notice of non-payment given by the owner.

Note: Notice of non-payment must include:

- Stating some or all of the amount claimed is not being paid due to non-payment by owner,
- Specify amount not being paid, and
- Include **undertaking** to refer matter to adjudication no later than 14 days after giving the notice to the subcontractor.

## **Exception** – Notice of Non-Payment if Dispute

If GC disputes in whole or in part the entitlement of a subcontractor to payment under the subcontract, the GC shall within 7 days provide the subcontractor with a notice of non payment in the proper form, specifying the amount not being paid and reason for non-payment

# Contractor's Trust Provisions

# Contractor's Trust Provisions

## Duties Regarding Contractor Trust Funds

- Names on the Bank Accounts
- Written Records
- Separate Trusts in a Single Bank Account

## Set-Off Rights

- Set-Off Related to the Improvement

# Contractor's Trust Provisions

## Section 8: Currently

8. (1) All amounts,

- a) owing to a contractor or subcontractor, whether or not due or payable;  
or
- b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

# Contractor's Trust Provisions

## Section 8.1(1)(b): Maintaining Written Records

- New requirement to maintain written records detailing:
  - Amounts received into and paid out of funds.
  - Any transfers.
  - Any other prescribed information.
- Previously not required.
- Regulations defining “prescribed information” have yet to be enacted.

# Contractor's Trust Provisions

## Section 8.1(1)(c): Trustee of Multiple Trusts

- A trustee of multiple trusts may deposit separate trust funds into a single bank account.
  - **But** must ensure written records of each trust fund are maintained regarding amounts going in and coming out.
- Previously not required.

# Contractor's Trust Provisions

## Section 8.1(2): Separate Trusts, Single Bank Accounts

- Separate Trusts deposited into the same account are **deemed to be traceable**.
  - Presumably included to ensure that the beneficiaries of a contractor's or subcontractor's trust, do not lose out to competing claims of other creditors in a bankruptcy situation where the funds at issue are determined not to meet the requirements of a "trust" in accordance with the common law case authorities.

# Contractor's Trust Provisions

## Section 8.1(2): Separate Trusts, Single Bank Accounts

- Applies only to subcontractors and contractors. **Not to owners** (as defined by section 7).
- The requirement that there be proper accounting records for a mixed bank account, should also apply to Owners under section but currently is not included in the proposed amendments to the *Act*.

# Contractor's Trust Provisions

## Section 8.1(2): Separate Trusts, Single Bank Accounts

- This provision was drafted so as to ensure that, provided that the records required to maintain separate trust funds are maintained, that the trust funds are identifiable and protected from the claims of other creditors in the event of a bankruptcy.
- Clients will no doubt have to be educated on what they can and cannot do with trust funds.
- Concerns have been expressed about the “complexity” of this requirement and the efforts associated with additional record keeping requirements.

# Contractor's Trust Provisions

## Section 8.1(1)(c) & (2): Conflict with Common Law

- The *Atlas Block Case*
  - The Court held the deemed trust provisions of the *Construction Lien Act* did not apply to carve out of the estate of the bankrupt trust funds **unless** the trust at issue met the common law test for a trust.
  - **Common Law Test**: certainty of intention, of subject matter, and of object.

## Section 13: Liability for Breach of Trust

- Consider amending section 13 by adding a new subparagraph (5) to deal with the burden of proof to prove a breach of trust.
- The provisions should follow the general provisions of the case law:
  - The onus is on the beneficiary of the trust to prove that the trust has been breached or that the records maintained by the trustee are not adequate.
  - The Court may infer a breach of trust by the trustee where no records are maintained or the beneficiary establishes that the trustee's records are inadequate.

# Contractor's Trust Provisions

## Section 12: Set-Off with Funds in Trust

- To set-off money owed as a result of outstanding debt claims or damages from the trust fund the claims or damages **must be related to the improvement.**
  - Currently allows a trustee to set-off money owed for any outstanding debt claims or damages “whether or not related to the improvement”.
  - Set-off of amounts only in relation to the specific Project not other Projects.

# Contractor's Trust Provisions

## Section 12: Set-Off with Funds in Trust

- Query whether a valid set-off under section 12 related to the improvement could be made where the payer has not delivered the notice of non-payment in accordance with sections 6.3(2) and 6.4(6).

# Holdback

Release, Non-payment &  
Permissible forms of Holdback

# Holdback

- Background
- Quantum of Holdback & Permissible Forms of Holdback
- Release of Holdback
- Non Payment of Holdback
- Annual Release of Holdback
- Phased Release of Holdback & Release of Design Phase

# The “Holdback”

- Any person obligated to make a payment under the general contract or a subcontract is obliged to retain 10% of the value of the services or materials actually supplied until the lien expiry period has lapsed.

# Types of Holdback

## #1 – Basic Holdback

- 10% of the price of services or materials supplied under a contract or subcontract before the date of certification or declaration of substantial performance.

## #2 – Finishing Holdback

- A separate holdback equal to 10% of the price of the remaining services or materials which must be retained until the project is completed or abandoned.

## #3 – Notice Holdback

- An additional amount equal to the value of any lien in respect of which a party lower in the chain gives the payer written notice.

# Holdback Provisions

## Current

- Currently payer may release the 10% Holdback when the period for preserving liens expires.
  - Owners frequently retain the Holdback in order to assert set off rights (subject to there being no liens registered against the premises).
- Currently no provision for phased or annual release of holdback.

# Holdback Provisions

## Section 22 (1) & 22(4): Basic Holdback Provisions

- The Quantum of Holdback remains at 10% (s.22(1)).
  - No deficiency holdback added.
- Holdbacks may now be retained using security(s.22(4)):
  1. A letter of credit in the prescribed form.
  2. A demand-worded holdback repayment bond in the prescribed form.
  3. Any other form that may be prescribed.

# Holdback Provisions

## Mandatory Release of Holdback

- Payment of Basic Holdback (s.26.1)
  - Each payer (contractor, subcontractor or owner) is required to pay the basic holdback (s.22(1)) to discharge all claims against the holdback where all liens that may have been claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.
- Previously not required merely permitted.

# Holdback Provisions

## Section 26.1(2): Annual Release of Holdback

- Payer may make a payment of the accrued holdback for services or materials if:
  1. The contract provides for a **completion schedule** that is longer than **one year**;
  2. The contract provides for the **payment of accrued holdback on an annual basis**;
  3. The contract price **at the time the contract is entered into exceeds the prescribed amount**; and
  4. As of the applicable payment date,
    - a. There are **no preserved or perfected liens** in respect of the contract, or
    - b. **All liens** in respect of the contract have **expired** or been satisfied, discharged or otherwise provided for under this Act.

The proposed subsections should be amended to **delete** reference to expiry of liens.

# Holdback Provisions

## Section 26.2(1): Phased Release of Holdback

- Payer may make a payment of the accrued holdback on the completion of phases of an improvement if:
  1. The contract provides for the payment of accrued holdback on a phased basis and identifies each phase.
  2. The contract price at the time the contract is entered into exceeds the prescribed amount; and
  3. As of the applicable payment date:
    - i. there are no preserved or perfected liens in respect of the contract, or
    - ii. all liens in respect of the contract have expired or been satisfied, discharged or otherwise provided for under this Act.

# Holdback Provisions

## Section 26.2(1): Phased Release of Holdback

- Query whether the legislation should provide that liens may expire on a phase by phase basis if the contract so provides:
  - At the conclusion of the 60 day period following the completion of the phase **OR**
  - Following publication of the certificate of substantial performance of the phase (and that substantial performance of the phase is permitted).

# Holdback Provisions

## Section 26.2 (3): Release of Holdback for Design Phase

- Payment on completion of design phase in a phased contract:
  1. the contract provides for the payment of accrued holdback on a phased basis with respect to a specified design phase
  2. as of the applicable payment date: (i) there are no preserved or perfected liens in respect of the contract, or (ii) all liens in respect of the contract have expired or been satisfied, discharged or otherwise provided for under this Act.
- It is **not required** that the contract exceed the prescribed amount.

# Holdback Provisions

## Mandatory Release of Holdback

- Payment of Finishing Holdback (s.27)
  - Each payer (contractor, subcontractor or owner) is required to pay the basic holdback (s.22(2)) to discharge all claims against the holdback where all liens that may have been claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.
- Previously not required merely permitted.

# Holdback Provisions

## Section 27.1: Non Payment of Holdback

- Must **publish a notice** in a manner set out by the regulations:
  - Specifying the **amount** of the holdback the payer refuses to pay.
  - **No later than 40 days** after publication of the certification or declaration of substantial performance as prescribed by section 32.
- How does this section work with notice of nonpayment in the new section 6.4(5) or 6.5(5)?
- Should this section be amended to provide for consequences of **not** publishing non-payment of a holdback?

# Substantial Performance

# Substantial Performance Provisions

- Definition of “price”
- Definition of “Substantial Performance”
- Multiple Improvements
- Deferral Agreements

# Substantial Performance

## Section 1: Definition of Price

“**price**” means

- a. the contract or subcontract price
  - i. agreed on between the parties or
  - ii. if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and
- b. **any direct costs** incurred as a result of an **extension** of the duration of the supply of services or materials to the improvement **for which the contractor** or subcontractor, as the case may be, **is not responsible**.

# Substantial Performance

## Section 1: Definition of Price

- Significantly expanded to include:
  - Any **direct costs** incurred as a result of an extension of time of the supply of services or materials for which the contractor is not responsible.
- Essentially confirms standard industry agreement that “delay claims” based on lost productivity claims are **not** “lienable”.

# Substantial Performance

## Section 1.2: Definition of Direction Cost

(1.2) For the purposes of clause (b) of the definition of “price” in subsection (1), the direct costs incurred are the “reasonable costs” of performing the contract or subcontract during the extended period of time, including:

- Costs related to the additional supply of services or materials (including equipment rentals);
- Insurance and surety bond premiums; and
- Costs resulting from seasonal conditions;

that, but for the extension, would not have been incurred, but **do not include** indirect damages suffered as a result, such as loss of profit, productivity or opportunity, or any head office overhead costs.

# Substantial Performance

## Section 2: The 3-2-1 Rule

- The financial benchmark or test against which substantial performance of a contract is to be determined has increased to \$1,000,000 (s.2(1)):
  - 3% of the **first** \$1,000,000 of the contract price,
  - 2% of the **next** \$1,000,000 of the contract price, and
  - 1% of the balance of the contract price.
- Deemed completion has increased to the lesser of 1% of the contract price and \$5,000 (s.2(3)).

# Substantial Performance

## Section 2(2): Deferral Agreements

- Parties can agree to defer part of the work and delete it from the calculation of substantial performance to allow for early release of holdback.
- Parties no longer have to show that the work can not be completed expeditiously for reasons beyond the control of the parties.
- Parties still have to show that a substantial part thereof is ready for use or is being used for the purposes intended.

# Substantial Performance

## New Section 2(4): Multiple Improvements

- If more than one improvement is made under a contract to lands that are **not contiguous** (i.e. multiple locations under the same contract), then, if the contract so provides, each improvement will be deemed to be under a **separate contract**.

It has been suggested that the use of the term “contiguous”, instead of “abutting, could cause confusion in terminology, re: *The Planning Act*.

The word “abutting” should be used instead of “contiguous”

# Substantial Performance

## Section 2(4): Multiple Improvements

- Section 2(4) should not exclude “contiguous” or “abutting”. This could have serious consequences for developers.
- It is not unusual for developers to have abutting properties on separate legal titles which are to be built in different phases.

# Substantial Performance

## Section 32(1): Contents of Certificates/Declarations

- Currently a certificate must contain:
  - A legal description of the premises **only** if a lien attaches to the premises.
  - The street address, if any, of the premises.
- With the proposed amendments a certificate must contain:
  - A legal description of the premises **regardless** of whether a lien attaches.
  - The name and address of the person or body to whom a copy of the claim for lien must be given under section 34 **if** the **lien does not attach** to the premises.

# Substantial Performance

## Section 32(5): Publication of Certificates/Declarations

- No longer required to be published in a construction trade newspaper.
- Publications will be required to be in a manner set out by the regulations.
- It has been suggested that as definition of “construction trade newspaper” is to be repealed the references to a construction trade newspaper at section 32(1)(5) and 32(1)(9) should be deleted and replaced with “in the manner set out in the regulations.

# Landlord's Liability

## Liens on Leasehold Improvements

# Landlord's Liability

## Section 19(1): Leasehold Interest

**19 (1)** If the interest of the owner to which a lien attaches is leasehold, and if payment for all or part of the improvement is accounted for under the terms of the lease or any renewal of it, or under any agreement to which the landlord is a party that is connected to the lease, the landlord's interest is also subject to the lien, to the extent of 10 percent of the amount of such Payment.

- Landlord is liable for the holdback of any improvement that the Owner will pay the tenant to complete.
- **Should be altered to require landlords to follow the same steps of other payers under the Act.**



# Landlord's Liability

## New Section 19(5): Landlord as Owner

**19(5)** Nothing in this section prevents a determination in respect of a premises that the landlord is instead its owner, if he or she meets the criteria set out in the definition of “owner” in subsection 1 (1).

- Landlords are ‘payers’ not ‘owners’.
- ‘Owners’ who are not payers should be responsible for any deficiency in the amount of the holdback not maintained by any other person who is an owner and payer.
- Suggest that section 19(5) should be reworded so that landlords will not become ‘owners’ by taking normal prudent steps to insure the work is done as requested or that the work be approved in advance.
  - Landlord should not be made liable as an owner of a leasehold premises for taking usual steps to ensure the safety of their building.

# Preservation & Perfection of Liens

# Preservation of Liens

## Contractor's & Subcontractor's Liens

- Now expire **60 days** after the earlier of the date the contract is (s.31(2)(a)):
  - Completed, abandoned, or terminated.
    - The date of termination shall be published in the prescribed form (s.31(6)).
    - Any person can contest the published date (s.31(7)).
- **Why do abandoned or completed contracts not require publication?**

# Preservation of Liens

## Expiry of Liens for Worker's Trust Funds

- Identical to contractor's & subcontractor's liens provisions (s.31(2.1)).
- **Except** liens also expire 60 days after:
  - The final worker is the beneficiary of the worker's trust fund last supplies services or materials to the improvement (s.31(2.1)(a)(ii) & s.31(2.1)(b)(i)).
- There is a 'general lien' for unions.
- **Overall:**
  - **No right to demand payment of holdback on a subcontract certified as complete.**
  - **No right to extend preservation of subcontracts until after the certificate of substantial performance is published.**

# Perfection of Liens

- Date to perfect is now **90 days** after the last day on which a lien could have been preserved (s.36(2)).
- As liens can now be preserved until 60 days after a specified event (e.g. abandonment, completion etc.) the maximum date to obtain perfection is now **150 days**.
- **60 days allows time for the prompt payment regime to filter down.**
- **90 days allows for mandatory interim adjudication to operate.**

# Adjudication

# Adjudication

## Background

- Recommendation:
  - “Adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts and subcontractors in both the public and private sectors in Ontario.”

# Adjudication

## Section 13: Definitions

- “Adjudication”
  - Means construction dispute interim adjudication under this Part with respect to a matter referred to in section 13.5.
- “Adjudicator”
  - Person who is qualified by the Authority as an adjudicator
- “Authority”
  - Authorized Nominating Authority designated under section 13.2
- “Notice of Adjudication”
  - Notice that meets the requirements of s.13.7

# Adjudication

## The Authority

- Duties of the Authority:
  - Develop and oversee programs for training of adjudicators
  - Establish & maintain public registry of adjudicators
  - Appoint adjudicators; and
  - Perform any other duties of the Authority set out in the *Act*.
- Powers of the Authority:
  - Set fees for training and qualifications of adjudicators and appointment of adjudicators, and require their payment.
  - Exercise any power prescribed in the *Act*.

# Adjudication

## Who will the Adjudicators be?

- A natural person who:
  - Is not a party to the disputed construction contract and have no legal conflict of interest.
  - Is a member in good standing of a self-governing professional body.
    - i.e. engineer, architect, accountant, lawyer or quantity surveyor
  - Has at least 7 years of relevant experience servicing the Ontario construction industry.
  - Has successfully completed a standardized Ontario training course and received a certificate of authorization to adjudicate.
    - Periodic renewal upon proof of continuing education & clear record.
  - Has not been otherwise disqualified.
    - Bankruptcy, criminal conviction etc.

# Adjudication

## Section 13.5: Availability of Adjudication

### (1) Contract

- Either party to a contract can refer a dispute to adjudication.
- Disputes that may be referred to adjudication:
  - Valuation of services/materials provided under the contract.
  - Payment disputes.
    - Including change orders (approved/not approved) or proposed change orders.
  - Disputes regarding notices of non-payment (Part I.1).
  - Amounts retained under set-off by trustee (s.12) or lien set-off (s.17(3)).
  - Non-payment of a holdback (s.27.1).
  - Others (as agreed by the parties or prescribed).

# Adjudication

## Section 13.5: Availability of Adjudication

### (2) Subcontract

- Any party to a subcontract can refer a dispute to adjudication.
- Disputes that may be referred same as those listed for contractors.

### (3) Expiry of Adjudication Period

- Notice of Adjudication must be given before the contract/subcontract is completed.
- May not be commenced if notice is given after completion.

# Adjudication

## Availability of Adjudication: Multiple Matters

- Parties can agree to a single adjudication where there are multiple disputes regarding the same matter or related matters
- If parties do not agree, the Contractor can make the ultimate decision to have the disputes adjudicated consecutively by a single adjudicator.
- A contract/subcontract **cannot** name a potential adjudicator.
  - Such clauses would be of no force or effect.

# Adjudication

## Notice of Adjudication

- Parties who want to refer a dispute to adjudication shall give notice in writing (s.13.7). It must include:
  - Name and address of the parties.
  - Nature and brief description of the dispute.
  - Nature of redress sought.
  - Name of proposed adjudicator.
    - If the adjudicator named does not consent within 4 days the party shall request the Authority appoint an adjudicator.
    - Authority must appoint within 7 days after receiving the request to appoint.

# Adjudication

## Adjudicator Fee & Next Steps

- Adjudicator fee is determined by agreement of the parties. If the parties cannot agree, by the Authority.
  - If adjudicator determines that a party acted in a frivolous, vexatious manner which is an abuse of process or acted not in good faith **then** the adjudicator can order one party to pay full or part costs.
- **5 days** after the adjudicator is appointed the party who gave notice must give the adjudicator
  - The notice of adjudication
  - A copy of the contract/subcontract
  - Any documents the party intends to rely on during the adjudication

# Adjudication

## Powers of the Adjudicator

- Issue directions regarding the conduct of adjudication.
- Take initiative in ascertain the relevant facts and law.
- Draw inferences based on the conduct of the parties to adjudication.
- Conduct an on-site inspection of the Project, subject to:
  - The consent of the Owner (if not a party).
  - Any other person who has the legal right to exclude others from the property.
- Get assistance from 'others':
  - Merchant, accountant, actuary, building contractor, architect, engineer or other person as the adjudicator sees fit to help determine facts.
  - **Adjudicators should be able to fix costs of any such person by either/both parties to the adjudication.**
- Any other power that is prescribed.

# Adjudication

## Section 13(3): Decisions

- Decision must be made within **30 days** of receiving documents
  - Decision time can be extended before the expiration of 30 days
    - On the adjudicator's request, with written consent of the parties to the adjudication for a period of no more than **14 days**, or
    - On written agreement of the parties, subject to the consent of the adjudicator, for a period specified in the agreement.
- Decisions rendered after these deadlines are of **no force or effect.**
- Reasons must be in writing.

# Adjudication

## Section 13(3): Decisions

- Decisions are binding until:
  - A dispute is determined by legal proceedings (including lien proceedings) or arbitration
  - The parties agree that the decision is final and binding
- Decisions are enforceable by application to Superior Court of Justice and can be set aside on certain grounds (s.13.18). For example:
  - Party did not have legal capacity to participate.
  - The contract/subcontract is invalid or ceased to exist.
  - Failure to comply with procedures.
  - Not conducted by an adjudicator.
  - Reasonable apprehension of bias of adjudicator.
  - Decision made as a result of fraud

# Adjudication

## Enforcement & Termination

- Enforcement of Payment Orders
  - Payment must be made 10 days after the determination is communicated to the parties.
  - In consecutive adjudications payment must be made 10 days after the determination of the last adjudication is communicated to the parties.
  - Interest payable if not paid on time.
  - If there is non payment there is a right to suspend work until payment is received, including:
    - Interest and reasonable costs resulting from suspension of work.
    - Once paid, parties are entitled to reasonable costs to resume work.
- Termination of the adjudication can occur upon mutual agreement, if:
  - Notice is given to the adjudicator before the decision is made
  - Parties pay the adjudicator's fee

# Procedure

# Procedure

- Bill 142 has deleted many parts of the *CLA*, leaving them to be picked up in the Regulations. For Example:
  - Section 53 [How to Commence an Action]
  - Section 54 [Time for Delivery of Pleadings]
  - Section 55 [Joinder of Claims]
  - Section 56 [Third Party Claims]
  - Section 57 [Parties Generally]
  - Section 59 [Carriage of Action]
  - Section 50 [Application to Fix date for Trial/Settlement meeting]
  - Section 61 [Settlement Meeting]
  - Section 66 [Application to Court for Directions]
  - Section 67 [Summary Procedure Section]
- **Are all deleted!**

# Summary Procedure

## Part VII Jurisdiction & Procedure & Part X Appeals

- Procedure in an action shall be of a summary character having regard to the amount and nature of the liens in question (s.50(3)).
- Rules apply to the *Act* unless there is conflict between the *Act* unless there is conflict between the *Act* and the Rules then the *Act* applies (s.50(2)).

# Summary Procedure

## Part VII Jurisdiction & Procedure & Part X Appeals

- A Judge can refer the whole action or any part of the action for trial to a master, case management master and any other person agreed to by the parties, or if within monetary jurisdiction of the Small Claims Court (i.e. under \$ 25,000) to Small Claims Court Judge.
- Powers of Master provided to Small Claims Court Judge if referenced directed to him/her (s.58(4.2)).

# Summary Procedure

## Jurisdiction, Procedure & Appeals

Sections that are proposed to be revoked from the *Act*, include:

- **Section 50:** Trust claims cannot be joined with a lien action.
  - Proposed Change: Allows them to be joined.
- **Section 53(1):** Actions must be commenced with the court where the land is located
  - Proposed Change: The Rules and the action can be started in another jurisdiction e.g. if the parties are in Toronto the action can be brought in Toronto.

# Summary Procedure

## Jurisdiction, Procedure & Appeals

Sections that are proposed to be revoked from the *Act*, include:

- **Section 53(2):** Claim must be served within 90 days after issued
  - Proposed Change: The Rules apply and you have six months to serve
- **Section 56:** Rules regarding third party claims
  - Proposed Change: The Rules apply.
- **Section 59(2):** Application to fix trial date, notice of settlement meeting etc.
  - Proposed Change: Many of the procedural steps have been removed to be dealt with in the regulations.

# Summary Procedure

## Jurisdiction, Procedure & Appeals

Sections that are proposed to be revoked from the *Act*, include:

- **Section 67(2):** Leave requirement for interlocutory steps (i.e. motions, discovery, third party claims)
  - Proposed change: The Rules apply and no leave is required.
- **Section 71(3):** No right of appeal of interlocutory orders.
  - Proposed Change: Appeal of interlocutory order with leave of the Divisional Court. No appeal for order less than \$10,000. No appeal from court under Part II.1 (Adjudication).

# Informational Disclosure

## Section 39(4.1): State of Accounts

- Any person who has a lien, is a beneficiary, or who is a mortgagee has a right to information by written request.
  - From the owner or contractor.
  - From the contractor or subcontractor.
  - From the owner who is selling their interest in a home.
  - (Newly) From a landlord.
- Sections 39(1)(1-4) have been amended to include the right to a “state of accounts” in this disclosure.

# Informational Disclosure

## Section 39(4.1): State of Accounts

- State of accounts as of a prescribed date includes:
  1. The **price of the services** or materials that have been supplied under the contract or subcontract.
  2. The **amounts paid** under the contract or subcontract.
  3. Amounts paid where the owner's interest is **leasehold**.
    - a. The state of accounts between landlord/tenant, which of the amounts paid under the contract/subcontract constitute any part of the payment according to section 19.
  4. The **amount** of the applicable **holdbacks**.
  5. The **balance owed** under the contract or subcontract.
  6. Any amount retained for **set-off by trustee** or **lien set-off**.
  7. Any other information that may be prescribed.

# Informational Disclosure

## Section 39(1)(4): Disclosure from a Landlord

- New right to request information from a landlord. The landlord must provide:
  - The names of the parties to the lease.
  - The amount of the payment for all or part of the improvement accounted for under the terms of the lease (s.19(1)).
  - The state of accounts between landlord and tenant.

# Informational Disclosure

## Section 39(4.2): From a Mortgagee

- If amounts have been advanced for financing both the purchase price of the land and making of the improvement, the statement must show the amount advanced under the mortgage for each purpose.

# Informational Disclosure

## Section 39(4): Certificate of Substantial Performance

- As certificates/declarations of substantial performance are no longer required to be published in a construction trade newspaper (s.32(5)) contractors are **no longer required** to provide the **date of publication** and the **name of the newspaper** upon request.

# Vacating Liens

## Section 44(1)(d): Posting Security

- There has been an increase to amount for security for costs to be posted. The amount of security to be posted will be,
  - The lesser of \$250,000 or 25% of the full amount of the lien claim.
    - Currently it is \$50,000.
- Acceptance of International Commercial Convention letters of credit on terms set out in s.44(5.1).

# Vacating Liens

## Section 44(2.1)-(2.2): Condominiums

**(2.1)** The owner of a condominium unit under the *Condominium Act, 1998* may make a motion under clause (1) (a) or subsection (2) regarding a lien respecting an improvement to common elements that include the common interest appurtenant to the owner's unit, and, for the purpose, the full amount claimed as owing in the claim for lien is deemed to be that portion of the lien amount that is attributable to the owner's common interest as specified in the applicable declaration registered under that Act.

**(2.2)** An owner of a parcel of land mentioned in subsection 139 (1) of the *Condominium Act, 1998* to which a common interest is attached, in the case of a common elements condominium corporation, may make a motion under clause (1) (a) or subsection (2) regarding a lien respecting an improvement to common elements that include the common interest appurtenant to the owner's parcel of land, and, for the purpose, the full amount claimed as owing in the claim for lien is deemed to be that portion of the lien amount that is attributable to the owner's common interest as specified in the applicable declaration registered under that Act.

# Vacating Liens

## Section 44(2.1)-(2.2): Condominiums

- Condominium Owners can vacate a lien registered against the common elements of their condominium by **posting** their **proportionate share** based on their common interest.
- Condominiums **do not** have **legal status** to vacate a lien and a written notice of lien.
  - Creating such legal status would direct the lien towards the intended payer, the corporations reserve fund, instead of the owners.
  - The cost to vacate is significant for an owner.

# Vacating Liens

## Section 44(3.1): Vacating Written Notice of Lien

## Section 44(5.1): Letters of Credit

- On a motion the Court will vacate written notice of a lien when (s.44(3.1)):
  - Payment into court, or posting security (s.44(1)).
  - Upon payment of a reasonable amount (s.44(2)).
  - When the lien does not attach to the premises upon payment into court or the posting of security in an amount the court determines to be reasonable in the circumstances to satisfy the lien (s.44(3)).

## Vacating Liens

Section 44(3.1): Vacating Written Notice of Lien

Section 44(5.1): Letters of Credit

- A letter of credit containing a reference to an International Commercial Convention is acceptable as security on terms set out in s.44(5.1), which include that that letter of Credit is unconditional on its face.

# Vacating Liens

## Section 44(9)(Rule 2-3): Pooling Provisions

- Rule 2-3 states that the amount paid into court and the security posted is pooled and will be distributed according to priority provided for in section 80.
- There has been no change proposed. This section still causes practical issues. For example:
  - If one lien claimant has settled but others have not, and another lien claimant has not had its lien vacated the Master will not permit the *ex parte* return of the security held by the Court that was posted in order to vacate the lien claim that has settled.
  - The unsecured lien claimant always has no interest in consenting, meaning that the settlement's purpose in returning security to the payer will be frustrated.

# Vacating Liens

## Section 47(1.1)-(1.2): Power to Vacate

- The Court may make the following orders:
  - An order that the registration of a claim for lien, a certificate of action or both be vacated.
  - If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
  - An order dismissing an action.
- The Court may include any terms or conditions it considers appropriate in the circumstances.

# Changes Coming...