



Construction Projects – New Criteria

By J. Robert Gardiner, BA, LLB, ACCI, FCCI

A new regime affecting condo construction projects will arise as a result of modernizing amendments to the *Construction Lien Act*. Bill 142 (the *Construction Lien Amendment Act*) was enacted by the Ontario legislature on December 12, 2017. The existing *Construction Lien Act* will hereafter be known as the *Construction Act*. The revisions will not come into effect until they are proclaimed, awaiting implementation of various regulations.

Condo managers will need to function within the new construction lien regime when most of the substantive changes, regulations and forms will be proclaimed into force on July 1, 2018. Other provisions

applicable to the prompt payment system and the adjudication process and their respective regulations and forms will be proclaimed into force on October 1, 2019.

Many amendments are applicable. The following selected highlights assume that an RCM has a basic knowledge of construction lien criteria:

a) Proper Invoice – As of October 1, 2019 prompt payment rules will establish automatic deadlines for payment to contractors and subcontractors once an authorized payee submits a proper invoice requesting payment for services or materials applicable to a construction improvement under a construction contract. A “proper invoice” must identify particulars applicable to the type, quantity and period when services or

materials were supplied, identification of the contractual authorization for the invoice, together with the amount payable, payment terms, and contact particulars for the payee. Proper invoices will be issued on a monthly basis unless the parties have agreed to payments falling due upon fulfillment of milestones or other specified criteria.

b) Payment Period – Owners must pay the general contractor within 28 days after receiving a proper invoice. The contractor must then pay each subcontractor within seven days. Each such subcontractor must similarly pay persons who supplied materials or services to it within a further seven days. Interest runs from the date payment fell due.

c) Notice of Non-Payment – An



owner, contractor or subcontractor can dispute payment by submitting a Notice of Non-Payment stating any amount in dispute and the reason why payment will not be made, within 14 days after receiving a proper invoice. The dispute must be referred to adjudication within 14 days. In the event of non-payment of all or part of any proper invoice, the contractor must submit a Notice of Non-Payment to applicable subcontractors within 35 days after submitting its

proper invoice to the unit owner.

d) Preserving Lien – A contractor or subcontractor must preserve its construction lien rights by filing a Notice of Lien against the condo’s common elements within 60 days (previously 45 days) after substantial completion or default.

e) Perfection Timing – A contractor or subcontractor must perfect its lien rights by commencing legal proceedings within 90 days after the 60th day the lien could have been preserved (150 days

after substantial completion or default).

f) Holdback Releases – An owner who pays a contractor in full without holding back from each instalment 10% of the value of the work and materials actually provided can be forced to pay subcontractors the holdback a second time. Holdback amounts must be released in accordance with the criteria set out in the Act or as may be agreed on a phased or segmented basis. Holdbacks must be released once the deadline to register a lien has passed, but the payor may withhold some or all of the holdback if the payor publishes the form of prescribed notice in accordance with the prescribed criteria. Your lawyer must sub-search title prior to each holdback release to confirm that no contractor’s or subcontractor’s construction lien has been registered against the property. Government claims supersede subcontractor’s claims against an insolvent contractor. Holdbacks may be kept in the form of bonds, credit letters or other securities (rather than cash in a bank account).

g) Record Keeping – Each party in the payment pyramid in control of trust funds must maintain more detailed record keeping than previously. A separate or mingled trust account is permitted, subject to prescribed record-keeping criteria.

h) Improvements – An “improvement” can now include a capital repair to an existing component. A special P3 or Alternative Financing and Procurement Process is applicable to large public/private infrastructure projects.

i) Court Jurisdiction – Construction claims up to \$25,000 will be decided in the Small Claims Court; larger claims would be decided in the Superior Court of Justice, if not resolved by dispute adjudication.

j) Dispute Adjudication – A mandatory dispute resolution scheme will become applicable by October 1, 2019 when the Authorized Nominating Authority is expected to be up and running, and the prompt payment scheme will be in effect. That adjudication process is intended to allow construction projects to continue with minimal disruption. Dispute resolution will govern topics such as payment criteria, non-payment, changes in services, the value of services or materials, set-off claims and holdback disputes arising under the construction contract, as well as any other matter mutually agreed to. Parties cannot set-off outstanding debts, claims or damages for unrelated work. The Authorized Nominating Authority will

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select the adjudicator if the parties do not agree on the choice of its listed adjudicators once a dispute arises. The adjudicator will have a broad set of powers to investigate and conduct the adjudication. The party initiating the adjudication process must deliver a form of Notice of Adjudication identifying the remedy sought and the proposed adjudicator. The prescribed adjudication procedures

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supersede any court action or arbitration on an adjudication topic, provided that the parties may choose their own adjudication rules, subject to compliance with the Act. Parties may be required to provide any contracts and relevant documents within five days after the appointment of the adjudicator. The parties bear their own legal costs, but the adjudication fees are borne equally by the parties, regardless of the outcome, unless greater costs are imposed upon a party acting improperly. A written decision must be delivered

within 30 days of receiving the prescribed documents, subject to a permitted extension. The adjudicator's decision cannot be appealed, except for exceptional reasons, upon appeal to the Divisional Court,

within 30 days of communication of the adjudicator's decision.

k) Act Applies – The existing *Condominium Lien Act* continues to apply to existing improvements, projects and contracts if a procurement or bidding processes, a leasehold interest or a construction contract was entered into before the new proclamation dates.

This is a simplistic summary of some key amendments which may affect condos, assuming an underlying understanding of the pre-existing *Construction Lien Act*.

Upon request, we can forward an article summarizing pre-existing construction lien criteria. Numerous draft regulations and prescribed forms will be available for review on Ontario's Regulatory Registry website. These new construction amendments are just one of many protections condos should ask their lawyers to negotiate in any construction contract. A standard CCDC contract should be subject to an additional 30-50 revisions having regard to the condo's circumstances and the nature of the construction project. ■

J. Robert Gardiner is senior partner of Gardiner Miller Arnold LLP. Bob co-authored CCI/ACMO's Brief to the Ministry requesting many new improvements to the current Act. He has massively updated GMA's condo precedents, including meeting documents, rules, by-laws and policies to reflect those amendments. gmalaw.ca



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