Seismic Change Comes Yet Again to Construction in Ontario:
A Series of Articles and Seminars on the Good, the Bad and the Ugly of Soon to be Implemented *Construction Act* Changes

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February 26, 2025

Bill 216 - An Act to implement Budget measures and to enact and amend various statutes was passed into law on November 7, 2024, as part of an "omnibus" bill which contained amendments to 17 pieces of Ontario legislation. It will change Ontario's *Construction Act* in significant ways and of the changes will be controversial. They were made further to recommendations made by Duncan Glaholt, a very well-known construction lawyer, arbitrator and author, in his 110 page Report, *The 2024 Independent Review: Updating the Construction Act*. While the Report most often summarized the views of various stakeholders Mr. Glaholt had consulted with, it did not propose actual legislative language for the changes.

The changes will come into force on a future date "to be named by proclamation". In the meantime, Mr. Glaholt and others are also working on changes to the Regulations passed under the *Act,* which will introduce even further changes.

To put the changes in context, by way of the *Construction Lien Act Amendment Act, 2017* [1], the name of the *Construction Lien Act* was changed to the *Construction Act,* lien expiry triggers and time-frames were changed, holdback provisions were significantly altered and sweeping new prompt payment and adjudication provisions were introduced. The changes were made further to recommendations made by Bruce Reynolds and Sharon Vogel in their Report, *Striking the Balance: Expert Review of Ontario's Construction Lien Act* [2]. It was

[1] SO 2017, C24

[2] Report Prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, Delivered April 30, 2016)

further to a Reynolds and Vogel recommendation that Mr. Glaholt was retained to further review the *Act*.

Curiously, Bill 216 passed first reading in Ontario's Legislative Assembly without debate on the same day Mr. Glaholt released his Report. Within a week, it had passed second and third reading and received Royal Assent, all without comment or debate about the *Construction Act* portions. The *Act*'s amendments were thus presented to the Legislature and passed into law before stakeholders had any opportunity to review or comment on whether the Report or the actual wording of the legislative changes. In addition, it does not appear that some of the more significant changes were discussed with stakeholders.

A brief summary of the Bill 216 changes follows. Many are, without question, welcome. Others are simply technical corrections to resolve difficulties with the 2017 changes. We suggest that at least three of Mr. Glaholt's recommended changes, however, will have substantial impacts: expanded rights of adjudication, the mandatory release of holdback on an annual basis and the deletion of s.27.1 of the *Act,* which currently allows Owners to give a 'Notice of Non-Payment of Holdback' to apply a set-off (or backcharge) against holdback at the end of the lien expiry period. The latter of these two changes will, we believe, impose significant administrative burdens, lead to increased lien activity on many multi-year projects and cause many owners and contractors to alter the way they push risk down to those below in the construction pyramid (regardless of the duration of their projects).

While we will comment on the three changes in some detail as part of our summary, below, we note that the deletion of s.27.1 goes against what Reynolds and Vogel had said were the express interests of owner/contractor stakeholder groups in *Striking the Balance*. It is also not clear that Mr. Glaholt consulted with these same groups before recommending the deletion.

In the end, the wisdom of some of the more the significant changes will be debated. There will be arguments on both sides. Regardless, industry participants need to understand the changes if they are to adjust their operations and risk management strategies to prepare for them. In a series of forthcoming articles, we will be reviewing the more significant changes, along with what industry participants can do to prepare for what is, and isn't, changing. In addition, we will be offering virtual seminars on all of the above, along with targeted seminars for various industry associations across the province. To subscribe to our blog, register for a seminar or inquire about seminars for your group or association, please contact us at inquiries@kennaley.ca.

The various Bill 216 changes are summarized below. Again, these will be discussed in more detail in forthcoming articles and seminars:

- **The** "**Proper Invoice**": what must be included for an invoice to be considered a "proper invoice" so as to start the clock ticking on the owner's prompt payment obligations has been clarified, eliminating confusion. In addition, an owner will now have to give the contractor notice if it believes an invoice it has been given is not "proper". In this way, the contractor will know if the owner is taking the position that the clock has not yet started on its prompt payment obligations. These are very welcome changes;

- **The Release of Holdback**: as above, the release of holdback on an annual basis is now mandatory. This means that the administrative burden of registering notices, performing lien searches and releasing funds will have to occur yearly on multi-year projects, even in a project management model where the owner contracts with many (perhaps dozens) of trade contractors. Also, the liens of contractors and subcontractors will expiry not less than yearly for work done in that year, such that those with overdue accounts will now have to 'make the call' every year on whether or not to lien, rather than once (as is now the case) when substantial performance is published, when their contracts are complete or when their subcontracts are last performed. Increased lien activity should be anticipated, overall. There is also uncertainty as to what happens if the owner and contractor disagree over how much holdback should be released in any particular circumstance or how a subcontractor is to know what portion of the holdback relates to its work. The new lien expiry processes and holdback release processes will certainly need to be understood by all concerned;

- **The Elimination of the Notice of Non-Payment of Holdback**: Prior to the 2017 changes, the holdback would cease to be holdback once all of the liens that might be claimed against it had expired, been discharged or vacated. At that point, the holdback funds became mere contract funds which might, or might not, be owed to the contractor – because the owner could apply set-offs for back charges or deficiencies. The 2017 changes, however, made the payment of the holdback mandatory (and therefore not subject to set-off) unless the payer gave a "Notice of Non-Payment of Holdback" in accordance with s.27.1 of the *Act*. In recommending the section 27.1 right of set-off, Reynolds and Vogel expressly confirmed that the ability to apply a set-off in good faith, upon proper notice being given, was important for many stakeholders.

  Under Bill 216, however, s.27.1 is deleted. The right to apply a set-off against the payment of holdback, once liens have expired or been resolved or vacated, has been eliminated at each level of the construction pyramid. The obligation to pay the

holdback is accordingly mandatory, even if the payer has a substantial and easily proven backcharge. For example, where the building automation system is fired up at the end of the job but doesn't work such that it must be removed and replaced at a cost which significantly exceeds the holdback, the holdback must nonetheless be paid – even to the contractor or trades responsible for the problem. The only recourse available to those who have to pay is to litigate, arbitrate or adjudicate, in the hope that they will be able to recover some or all of the funds, often from a contractor or trade who may not have the resources to pay.

Although we will discuss the deletion of s.27.1 in more detail in a subsequent article, we are not sure that owners and large contractors were consulted about the change and don't believe that they are generally in favour of it. We also believe that owners and large contractors will almost certainly take contractual steps to manage these risks, such as increased bonding or insurance requirements and the requirement that a warranty or maintenance 'holdback' be retained. In addition, payers will be well advised to not wait until the end of the job to apply back-charges or perform diligent deficiency reviews. This, because approving a monthly invoice will now be tantamount to agreeing that there are no deficiencies, or proper back-charges potentially applicable to that invoice. The deletion of s.27.1 is accordingly significant and its impact should be understood by anyone who has to retain holdback under the *Act;*

- **Adjudication Provisions**: A number of changes have been made, many of which are technical and will not be reviewed here. Significant changes include the following:

    - the right to commence an adjudication will be extended until (for contractors) 90 days following the completion of a contract and (for subcontractors) 90 days following the earlier of the completion of the contract they are working under, the date their subcontract is "deemed" complete through subcontract certification and the date of their last supply of services or materials to the improvement. (Currently, no one has rights of adjudication once the contract or subcontract they are working on is complete, rendering adjudication unavailable in relation to a substantial portion of the disputes that arise during construction);

    - what can be adjudicated will be expanded. Currently, rights of adjudication are limited to a set number of listed types of disputes. Bill 216 deletes this list. A broader description of what can be adjudicated will be set out in the Regulations;

    - parties may be allowed adjudicate against someone they have no privity of contract with (by jumping a rung-or-two in the construction ladder). They may

also, in accordance with the Regulations, have adjudications involving other parties to be consolidated where there are similar or over-lapping issues. Thus, for example, a subcontractor will be able to ensure that an owner who has not approved a change or paid a contractor for the subcontractor's work is "at the table" to respond to the non-payment issues;

- the above three changes will no doubt result in more adjudications being commenced. Participants in the construction industry who are not as yet familiar with these processes should accordingly take steps to better understand and prepare for them;

- adjudications before "private adjudicators" not listed in the ODACC [3] adjudicator registry will be allowed, subject to the Regulations. While the particulars of how this will work are largely unknown, this will allow parties under certain conditions to select adjudicators from a broader range of available persons;

- while only one "matter" can currently be adjudicated at a time, the word "matter" is being replaced with the word "dispute". The change does little to bring clarity to what can (and cannot) be adjudicated in a single adjudication, absent the agreement of the parties. For example, if a claimant wants to adjudicate a simple "scope of work" dispute over a single proposed change, it is not clear whether the respondent raise a complicated and document intensive back-charge against the claim, for unrelated alleged deficiencies or delays;

- currently, an adjudicator can award costs against a party based on the party's conduct in relation *to the improvement*. Bill 216 now also allows costs to be awarded based on conduct taken in the adjudication. It is unclear how, when, or if the adjudicator will be afforded the time to hear submissions and make a determination on such costs after a determination in the merits has been made;

- adjudicators' determinations will now be made publicly available, allowing adjudicators and parties alike to benefit from prior decisions. This will hopefully bring some predictability to the adjudication process;

- the number of days upon which parties must pay a determination award and bring a motion for leave to apply for judicial review have each been extended by 5 days;

[3] the Authorized Nominating Authority empowered under the *Act* to administer adjudications

- the grounds upon which a party can bring a motion for leave to apply for judicial review have been amended to remove the ground that "the contract or subcontract ceased to exist" (which is a ground no construction lawyer we know of really understood) and to confirm that where the ground is that the adjudicator lacked or exceeded jurisdiction in circumstances where the party did not raise the objection before the adjudicator, the Court will only set aside the determination if it finds the failure to make the objection justified;

- **Design Work where the Improvement does not proceed**: where this occurs, the changes create a presumption that the designer will have lien rights unless the owner can show that the value of the land has not, in fact, been enhanced. The presumption only applies, however, "if an owner retains holdback in respect of the design, plan, drawing or specification". This, in our view is unnecessarily confusing and raises the possibility that an owner can avoid liens for design by not commencing the improvement and simply *not* retaining a holdback in that regard;

- **The Definition of "Price":** currently a lien is for the "price" of the services and materials supplied to an improvement where "price" is either what has been agreed to by the parties or the actual market value of the services or materials supplied. Under Bill 216, the definition of "price" has been amended to allow it to be set by Regulation. Mr. Glaholt has suggested that the change is necessary to address P3 projects where the contract and subcontract prices are not always tied solely to the supply of services and materials in construction (for example where the prices are also a function of maintaining the building for a number of years, post-construction). We are nonetheless confused by a sweeping amendment which appears to give provincial regulators the ability to determine what contractors and subcontractors are going to be paid for their work. We also believe that the actual value of the lienable services and materials supplied on a P3 project can be determined by a Court, as a question of fact, if necessary;

- **The Joinder of Non-Lien Claims**: In *SRK Woodworking Inc. v. Devlan Construction Ltd. et al,* [4] Ontario's Divisional Court held that a construction trust claim under the *Act* could not be joined with a lien claim as it is not a claim under the contract or subcontract. Bill 2016 potentially undoes this by providing that the procedures established by regulation for a lien action may also provide for the joinder of another "claim in an action". The change also confirms that where such a joinder is allowed, the procedures applicable to the lien claim apply to "the other claim". Thus the same rules and restrictions applicable to a lien action will apply to the joined

[4] 2022 ONSC 1038 (CanLII)

claims, including the requirements that the action be as summary as possible, that interlocutory steps require the consent of the Court obtained on evidence that the steps are necessary or will expedite the proceedings, that no appeal of an interlocutory order can be made without leave and that a different standard applies for the setting aside of a noting in default, among others.

It remains to be seen what will be allowed to be joined to a lien claim by way of Regulation in this regard. However, Mr. Glaholt (who is involved in drafting them) has suggested that the Regulations should broaden the type of claims that can be joined. These changes will, in our view, have a potentially significant impact in lien proceedings. First, our over-worked construction lien courts will now have to find the time and resources to address other types of claims which it may previously not had to deal with. Second, the addition of additional parties, documents and issues will inevitably slow down proceedings contrary to s.50(3) of the *Act,* which requires that lien proceedings be tried as expeditiously as possible. In this regard, while it is anticipated that the Regulations will allow parties to move to bifurcate certain issues, these motions themselves will take time and resources which, even if successful, will no doubt delay a lien claimant's resolution of its lien claims and add expense to the litigation of those claims;

- a new section 87.4 deals with transition, and addresses the application of the Bill 216 amendments. Suffice it to say they are not at all straight-forward and will need to be understood, particularly as regards when annual release of holdback becomes mandatory; and

- various other amendments are made to the *Act*, including

    - amendments to subsection 88 (1), respecting the scope of regulation-making authority under the *Act*.

    - the definitions of "written notice of a lien" has been amended to correct a notice issue created by the 2017 changes;

    - the definition of "home buyer" is now tied to whatever mechanism is established for occupancy under the *Protection for Owners and Purchasers of New Homes Act, 2017*;

    - under Bill 216, where a single contract is entered into for multiple improvements where the lands are not "contiguous", the contract can provide that each improvement will treated as if it were under a separate contract for the purposes of the entire *Act* (and not just in relation to substantial performance, as had previously been the case). Section 39 is also amended to

allow subcontractors to ask if more than one improvement is made under a contract and if they are to lands that are not contiguous;

- currently, interest is payable on a prompt a payment obligation at the rate set out in the *Courts of Justice Act* or at a contractual rate "if the contract or subcontract specifies a different rate of interest". Now the contractual rate applies "if *a* contract or subcontract *between the parties* specifies a different rate of interest". Although apparently intended to ensure that interest can't be claimed at the rate set out in someone else's contract, the reason for the change from "**the** contract or subcontract" to "**a** contract or subcontract" is unclear. It may be a typo. (We note in this regard that the interest payable on an outstanding adjudication award remains tied to "**the** contract or subcontract"). The reference to "**a** contract or subcontract" nonetheless allows parties to attempt to claim interest at the rate set out in **a** contract or subcontract they have in relation to the improvement (and not just the one they are owed monies on);

As above, we will be reviewing the more significant changes, along with what industry participants can do to prepare for what is, and isn't, changing, in a series of forthcoming articles and seminars. To subscribe to our blog, register for a seminar or inquire about seminars for your group or association, please contact us at inquiries@kennaley.ca.

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