

*Highlights
of the
Recent Review of*
**Ontario's
Construction Lien Act**

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Highlights of the Recent Review of Ontario's Construction Lien Act

Ontario's Construction Lien Act ("Act") has been under review since February 2015, and the experts leading the review ("Committee") released (August 2016) their recommendations for improving the Act in the publication [Striking the Balance: Expert Review of Ontario's Construction Lien Act](#).

The Committee reviewed the Act for lienability, preservation & perfection of liens, holdbacks, legal procedure, construction trusts, prompt payment, adjudication, surety bonds etc. This paper will provide a high-level overview of the Committee's review and recommendations for the preservation & perfection of liens, surety bonds and prompt payment and will also include information regarding the Act's current provisions.

Ontario's Current [Construction Lien Act](#)

Generally, if you are furnishing to a private project in Ontario, you could serve an optional notice followed by the mechanic's lien and then suit. Ontario has a notoriously short time frame in which to file the mechanic's lien.

Notice

- A claimant may serve a written request upon the owner, prime contractor, or subcontractor for project information and a copy of any payment bond. A request must be replied to within 21 days.
- Tenant Improvements: Where the lien attaches to a leasehold interest, a claimant may serve notice upon the fee owner at least 15 days prior to first furnishing materials or services. This notice will allow a lien against the fee interest unless the fee owner responds with a notice of non-responsibility within 15 days from receipt of the claimant's notice.
- Notice of Intent: A Notice of Lien may be served upon the payer (the owner, prime contractor and subcontractor), requiring them to retain, in addition to the 10% holdback, an amount sufficient to satisfy a lien.

Lien

- File the lien within 45 days from last furnishing materials or services, but within 45 days from the earlier of publication of the certificate or declaration of substantial performance, or completion or abandonment of the contract.

Suit

- File suit to enforce the lien within 45 days from the period in which the lien must be filed.

- This information is courtesy of The National Lien Digest©

A lien filing deadline of 45 days is quite short compared to many of the deadlines in the U.S., which typically allow 90 days or more.



Ontario's Current Construction Lien Act (Continued)

If furnishing to a public project in Ontario, there is no statutory provision requiring a payment bond, though public projects are frequently bonded. If the project is bonded, the terms of the bond dictate the deadlines for claim actions.

Notice

- Generally, there is no statutory provision requiring a preliminary notice. Serving a non-statutory notice is recommended.

Bond Claim

- Generally, there is no statutory provision requiring a bond claim notice.
- Serve bond claim notice in accordance with the terms and conditions of the payment bond.
- Frequently, a bond claim notice is required within 120 days from last furnishing materials or services.

Suit

- Generally, there is no statutory provision regarding suit to enforce a claim against a payment bond.
- File suit to enforce the bond claim in accordance with the terms and conditions of the payment bond.
- Frequently, suit is required within 1 year from last furnishing materials or services.

- This information is courtesy of The National Lien Digest©

In some cases, a lien on funds may be available on a project owned by the Crown, or on a public street or highway project owned by a municipality. There is no preliminary notice requirement, and the deadline for the lien on funds is the same as for the mechanic's lien: 45 days from last furnishing.

Lien on Funds

- Serve the lien upon the public entity within 45 days from last furnishing materials or services, but within 45 days from the earlier of publication of the certificate or declaration of substantial performance, or completion or abandonment of the contract.
- Depending on the specific project, it may be possible to record a Construction Lien against the property, in lieu of a lien against the funds.

- This information is courtesy of The National Lien Digest©

Recommended Changes to Ontario's Construction Lien Act: Liens

While the full report is quite extensive and lengthy, here are a few of the suggested changes to the lien & suit phases.

- An extension of the lien filing period from 45 days to 60 days: *"The time period for preservation of a lien under section 31 of the Act should be extended to 60 calendar days, commencing as currently stipulated by the Act (p 38)."*
- Add "termination" as an event that would trigger the lien deadline clock: *"Termination should be added to the list of events that triggers the commencement of the time limit for preservation of liens under subsections 31(2)(a)(ii), 31(2)(b), 31(3)(a), and 31(3)(b) of the Act (p 40)."*
- An extension of the suit filing period from 45 days from the lien filing period to 90 days: *"The time period for perfection under section 36(2) of the Act should be increased to 90 days from the last day upon which that lien could have been preserved (p 46)."*



Regarding Inflated or Exaggerated Claims

Another recommendation under the section [“Preservation, Perfection and Expiry of Liens”](#) is the imposition of penalties for inflated lien claims, up to and including the discharge of a lien. Knowing you could potentially lose security, because you “willfully exaggerated” your lien, should reinforce the importance of maintaining an accurate statement of account.

“the court should be given the discretion to discharge a claim for lien in whole or in part if on a balance of probabilities, it is established that the claim is frivolous, vexatious, or an abuse of process (p 50).

The provision should further be amended to allow the court to find, where there is wilful exaggeration, that the lien claimant is liable for any damages incurred as a result of the exaggerated claim, including bond premiums, costs, and, where the court considers it just, the lien amount should be reduced by an amount up to the amount of the difference between the wilfully exaggerated amount and the actual amount of the lien claim; provided that a defence of good faith should be available to the lien claimant (p 50).”

This is in line with statute in several of our states. For example, in a case before the New York court, [LMF-RS CONTR., INC. v. KALJIC, 2013 NY Slip Op 32352 - NY: Supreme Court 2013](#), the claimant’s lien was vacated by the court due to a “willful exaggeration” of the claim amount.

The claimant moved to foreclose their lien with a claim of \$295,000 and the owners contested. When the owners contested the amount, they provided the court with sufficient evidence that the claimant’s claim should have been \$243,623.84. The claimant was unable to support its claim of \$295,000, which, in turn, voided the lien.

In New York, “willful exaggeration” cannot be used as a defense until the lien becomes a suit action. Once “willful exaggeration” is at play, the burden of proof then lies with the party contesting the claim amount. There are several recent cases where the owner has contested the claimant’s lien based on an inflated claim amount, but in most cases reviewed, the owner couldn’t prove deceit and / or the lien was not yet in foreclosure action (see [NY Cons. Laws, LIE, Article 2, Chpt 39 & 39A](#)).

Regarding Tenant Improvements

Lastly, as noted above, Ontario’s current statute does afford mechanic’s lien rights to those furnishing to tenant improvements, however the Committee provides additional thoughts regarding a claimant’s right to obtain information about the lease.

“For improvements to leasehold properties, claims for lien should attach to the interests of the tenant named in the lease and to the interest of the landlord if the landlord funded the improvement through a cash allowance or otherwise required the improvement; provided that the landlord’s liability should be limited to an amount equal to any deficiency in the holdback (p 61).

Section 39 of the Act should be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, the lender’s security, the funding available from the landlord and lender, and the state of accounts (p 61).”



Recommended Changes to Ontario's Construction Lien Act: [Surety Bonds](#)

In the U.S., each state has its own statutes requiring payment bonds on construction projects. Some statutes may require that the general contractor obtain a payment bond on every construction project, and other states may only require a payment bond when the total value of the construction project exceeds a certain threshold. Additionally, the states vary in their requirements for the penal sum of the bond.

“Currently, statutory mandatory bond regimes for public projects only exist in the U.S. but the use of payment bonds for the protection of subcontractors and suppliers is common in Canada. Fundamentally, payment bonds are currently a North American phenomenon. However, mandatory payment bonds have been considered in some other jurisdictions.” – [Chapter 10: Surety Bonds, 2.2 Mandatory Surety Bonds](#)

The Committee partnered with the Surety Association of Canada and after an analysis of the U.S. Miller Act and stakeholder input, recommended a requirement for bonds on all public projects. (Though, it's interesting to note, stakeholders were not wholly onboard with the requirement. Statistics provided in the review indicate 32% were in favor of mandatory bonds, 37% were not in favor and 32% opted to not respond.)

From the review:

- *“The Act should be amended to require broad form surety bonds to be issued for all public-sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the Act.*
- *The Act should be amended to require sureties to pay all undisputed amounts within a reasonable time from the receipt of a payment bond claim.*
- *A Regulation to the Act should be promulgated to embody a surety claims handling protocol, and that such surety claims handling protocol be developed in consultation with the Surety Association of Canada.”*

The core of their recommendation stems from the belief that subcontractors and suppliers would be best protected through the adoption of bonds on public projects because a payment bond is “*the most reliable solution to the insolvency problem*”, especially given economic uncertainties and the likelihood of increased interest rates.



Recommended Changes to Ontario's Construction Lien Act: Prompt Payment

Lien waivers and contingent payment clauses – these are the only two issues that may be hotter than prompt payment. Prompt payment, much like it sounds, is ensuring the owner pays the general contractor and the general contractor pays the subcontractors in a timely manner. Unfortunately, there is very little in the construction industry that is prompt.

“While late payment is not unique to the construction industry, it has also been argued that the nature of the construction industry requires greater protection of vulnerable parties. Commentators point out that late payment practices affect employment, cause the reduction of investment in apprenticeships, and force contractors and subcontractors to bid strategically so as to limit the number of projects they take on, resulting in reduced bidding pools. In addition, the direct costs of late payment and associated risks are said to be incorporated into contract and subcontract prices.” – [Chapter 8: Promptness of Payment, 2. Context](#)

If you furnish to projects in Canada, you have likely heard of “Bill 69” which was originally introduced to the legislature in 2013.

Bill 69 - Prompt Payment Act, 2013 has yet to make it beyond a standard of review and has unofficially been put on hold until a complete review of the Act has been completed. But, per the experts, there are two significant aspects to the bill:

1. A mandatory time period in which payment must be made
2. The right to suspend / terminate work if payments are not made timely

Ontario Looked to the U.S. (among others)

In its review of prompt pay for Ontario, the committee looked to the individual state statute and U.S. Code Chapter 39 (aka the Prompt Payment Act), which governs prompt pay for federal projects, specifically reviewing the types of contracts, payment triggers, payment periods and penalties for non-payment.

Although many states have enacted prompt pay statutes, Ontario doesn't appear to be wowed by the overall effectiveness of U.S. prompt pay legislation.

“The efficacy of prompt payment legislation has been questioned in the U.S. Among other criticisms, American prompt payment legislation has been criticized for its failure to include provisions that provide an environment for the expeditious resolution of disputes during the life of the project. There is no dispute resolution mechanism provided for in the U.S. prompt payment legislation, therefore payment disputes are resolved through litigation, which is costly and time consuming.”



Concerns Regarding Contingent Clauses

There also appears to be apprehension with payment clauses (the “ifs” and “whens”), in which they cite U.S. cases where pay if / when paid have been ruled as prohibitive.

“In certain jurisdictions considered, the legislation provides that when prompt payment is imposed on the general contractor, there may be an ability on that general contractor to advise its subcontractors that it is not paying them if it has not been paid by the owner. Some have referred to such provisions as, in effect, a statutory pay-when-paid clause.

A pay-when-paid clause is a form of contingent payment clause. Such contractual clauses have been the subject of debate within the construction industry internationally. In fact, in respect of contractual pay-when-paid clauses, various jurisdictions have prohibited or substantially limited the use of such clauses, including the U.K., Australia, New Zealand and several U.S. states, including Massachusetts, Maryland, South Carolina, Illinois, Wisconsin, Missouri and North Carolina.”

The Committee’s recommendations for prompt pay include a statutory requirement with specific pay periods and penalties for tardiness.

- Prompt payment should be statutory: *“We recommend that a prompt payment regime be legislated in Ontario and that it be applied to both the public and private sectors. Prompt payment should be implemented by creating a statutory scheme to be implied into all construction contracts that do not contain equivalent terms.”*
- Prompt payment should begin with the owner: *“We recommend that the prompt payment regime should apply at the level of the owner-general contractor, general contractor-subcontractor, and downwards, and that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations.”*
- There’s a penalty for not paying timely: *“Mandatory non-waivable interest should be required to be paid on late payments at a rate of the greater of the pre-judgment interest rate in the Court of Justice Act or the contractual rate of interest. A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator’s determination.”*
- Prompt payment period should begin at time of invoice and then be applied within a set period: *“We recommend that the trigger for payment should be the delivery of a proper invoice; provided that certification for payment (if there is certification for payment provided in the contract) must follow submission.”*
 - *As between owner and general contractor a 28 day payment period be applied, that is triggered by the submission of a proper invoice.*
 - *As between general contractor and subcontractor, a further 7 days from receipt of payment from the owner would be required, and so on down the contractual chain.”*



Concerns Regarding Contingent Clauses (Continued)

Here are a few examples of prompt pay time frames for private projects in the U.S.:

- Arizona ([Ariz. Rev. Stat. 32-1129.01 & 32-1129.02](#))—The owner to pay general contractor within 7 days after invoice has been approved. The general contractor to pay the subcontractors and / or material suppliers within 7 days from receipt of payment from the owner.
- Georgia ([Ga. Code. 13-11-4](#))—The owner to pay general contractor within 15 days after receipt of payment request. The general contractor to pay the subcontractors and / or material suppliers within 10 days from receipt of payment from the owner.
- South Carolina ([S.C. Code 29-6-30](#))—The owner to pay general contractor within 21 days after invoice has been approved. The general contractor to pay the subcontractors and / or material suppliers within 7 days from receipt of payment from the owner.

There are a plethora of concerns regarding prompt payment within this review, but a particularly interesting concern was the idea that prompt pay could be too rigid or inflexible. It's about "maintaining the freedom to agree on payment terms adapted to the project at hand." The concern is valid – not all projects are created equal so how can prompt payment statutes be formulated to accommodate these various projects without impeding sufficient cash flow?

These are Merely Recommendations

Bear in mind, these are only recommendations from the review committee and only apply to Ontario. [Some speculate](#) there could be new legislation introduced in Ontario in spring 2017. It is possible (likely) that if legislation is introduced and passed in Ontario, the other provinces may follow their lead and enact similar changes.

For now, all eyes are on Ontario! Please follow NCS for alerts regarding any upcoming changes.

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