Construction Litigants Beware: Unresolved Gaps, Confusion and Inconsistencies in the *Construction Act*, R.S.O. 1990, c.C30. **October, 2019**

The many individuals, stakeholders and legislative entities responsible for shepherding Ontario's new *Construction Act* provisions through should be commended. It was a monumental task. Still, the new *Act*'s provisions contain gaps and inconsistencies which will in our view lead to confusion and potential problems going forward. We have identified some of them, below. Many will no doubt be addressed in due course, although many most likely will not. Our thoughts in this regard follow, in no particular order.

Notice of Termination of a Contract

The *Act* provides that lien expiry timeframes will commence from (among other potential events) the date the contract is terminated (s.31). Curiously, (and unlike the approach taken with Certificates of Substantial Performance) the date of termination is deemed to be the date set out in the applicable Notice of Termination and not the date of the Notice's publication. This is problematic, because the date of publication could be days, weeks or even months after the date set out in the Notice. Indeed, if the Notice is published more than 60 days after the date set out in same, a lien claimants' lien may be expired by the time it sees the Notice. The solution, we believe, is to have the timeframe for lien expiry commence on the date of publication, as is the case with Certificates of Substantial Performance.

There is also no requirement that a Notice of Termination of a contract be given or provided *to anyone*. The *publication* of the Notice is the only notice required under the *Act*. We submit that, at a minimum, it would be more efficient for Notices of Termination to be both published and then provided, as is the case for Notices of Non-Payment of Holdback.

In addition, any "person whose lien is subject to expiry" is entitled to publish a Notice of Termination of a Contract, so as to trigger the expiry of the lien claims from the date set out in the Notice (s.31(6)). As the liens of a subcontractor will expire relative to contract termination (s.31(b)), this means that a subcontractor can effectively terminate (at least for the purposes of lien expiry) the contract. We are not sure why this was necessary or desirable.

Finally, the prescribed form for a Notice of Termination contemplates that a *subcontract* can be terminated using same. Under the *Act*, however, no Notice of Termination of a subcontract is contemplated: under s.31, all liens expire from the date of termination of a *contract*. The form will no doubt lead to confusion where a Notice of Termination of a subcontract is published.

"Matters" to Be Adjudicated and the Notice of Adjudication

Section 13.5(4) of the *Act* provides that an adjudication may only address a "single matter", unless the parties to the adjudication and the adjudicator agree otherwise. No guidance is offered as to what this means. If a claimant gives a Notice of Adjudication seeking payment for a proposed change, for example, the respondent might respond that the claimant should not be paid because the respondent has a back-charge for numerous deficiency items. The question then becomes, what is the "single matter" at issue? If the "matter" is whether or not the proposed change should be approved and paid, then the back-charge claims are arguably separate matters. If the issue is what amount, if any, the claimant is entitled to be paid, the alleged back-charges may need to be assessed. In addition, as we understand it, Adjudicators may in many cases be appointed and paid based on the dollar value of the claim as it is set out by the claimant before the respondent has a chance to raise the backcharges.

Section 13.7 of the *Act* provides that the Notice of Adjudication, which must be given to commence the adjudication processes under Part II.1, must contain the following information:

(a) the names and addresses of the parties;

(b) the nature and a brief description of the dispute, including details respecting how and when it arose;

(c) the nature of the redress sought; and

(d) the name of a proposed adjudicator to conduct the adjudication.

There is no prescribed form for the Notice of Adjudication and the above requirements do not require the person giving the Notice to set out what amount of compensation, if any, it is looking for in the Adjudication. This will lead to confusion, to the extent that claimants (many of whom will be self-represented) elaborate on the "nature of the dispute" in a way that makes it difficult to determine what is actually at issue, at times without specifying an amount claimed. Again, as we understand Adjudicators will at times be appointed and paid based on the dollar value of the claim, such confusion will have consequences. We suggest that a prescribed form of the Notice of Adjudication .which dovetails back to the list of items that can be adjudicated (at s.13.5) and includes the amount, if any, claimed by the person giving the Notice, would be an efficient approach to the issue.

Bonding on Public Contracts

The *Act* makes mandatory the provision labour and material payment bonds, in prescribed form and "extending protection to ***subcontractors and persons supplying labour or materials to the improvement***" on public contracts with a contract price of $500,000.00 or more. The definition of subcontractor, of course, includes sub-subcontractors and suppliers all the way to the bottom of the pyramid. Accordingly, the *Act* calls for coverage to be provided to every level of subcontractor and supplier. This notwithstanding, the Attorney General and the Surety Association of Canada negotiated a prescribed form of L&M Bond (Form 31 under Regulation 303/18) that:

a) introduces a new definition of "Sub-subcontractor";

b) limits protection to "Subcontractors" and "Sub-subcontractors";

c) limits the recovery of sub-subcontractors to "such amounts as the Contractor would have been obligated to pay to the Sub-subcontractor"; and

d) ignores the contractor's statutory obligation to provide a bond that provides coverage to all subcontractors and persons supplying labour or materials to the improvement.

While we fully understand why surety companies would be unwilling to underwrite the payment obligations of subtrades further down the pyramid, we don't believe the bond form should have been used to change the scope of the mandatory coverage. Doing so puts the contractor in the position of having to do the impossible: provide an L&M bond extending protection to the bottom of the pyramid. We also suggest that, from a regulatory perspective, it is not proper to use a prescribed form to the alter the scope and intention of underlying legislation. What is required, we suggest, is an amendment to the *Act*.

Second, the *Act* contemplates that the contractor will provide the bonding if the contract price exceeds $500,000.00. This, notwithstanding that the Owner will be in the best position to know if it is the Crown, a

municipality or a "broader public sector organization". If a tender package is silent on the issue, of course, the contractor may miss the obligation. It is also unclear whether or not the new bonding requirements will apply if the original contract price is less than $500,000.00 but moves above that threshold following changes in the work. On a strict reading of the *Act*, it would appear that they will.

The lien for "Increasing the Productivity of the Land"

The Act now effectively provides (by virtue of the definition of Capital Repair), that any repair intended to improve the "productivity" of the land gives rise to lien rights. No guidance has been provided as to what "productivity" is intended to mean. It appears, however, that agricultural tasks (for example) that many would have instinctively considered non-lienable will now give rise to lien rights.

The "Giving" of Documents

Under the *Act*, prompt payment timelines are triggered by the "giving" of a Proper Invoice. Tight timeframes are also established for the giving of Notices of Non-Payment. The *Act*, however, provides little guidance on how these documents are to be given. Rather, the *Act* provides (with some expressed exceptions) that documents to be given "may be served in any manner permitted under the rules of court" or sent by certified or registered mail, in which case they will be deemed to be received five days after mailing (absent evidence to the contrary). Given the calendar 7 day window to provide a Notice of Non-Payment, certified or registered mail may not be a realistic option in most cases. In addition, confusion as to when a Proper Invoice is given may lead to confusion over Prompt Payment timelines and unnecessary adjudications/litigation processes where missed limitation periods are alleged. Finally, most construction participants will manage the giving of Invoices and Notices without the help of counsel. Accordingly, clarity as to how documents can be given would be ideal.

The incorporation of the "rules of court", however, is confusing. The "rules of court" in Ontario are established under the *Courts of Justice Act*, however that *Act* says nothing about service. Rather, it is the *Rules of Civil Procedure* established by way of regulation which, of course, must be referenced. Also, the *Rules of Civil Procedure* do not translate well into the *Construction Act* context. On the one hand, the *Act* contemplates that methods of service available for other than originating processes may be used. We say this because the *Act* expressly confirms, by way of exception, that a Written Notice of Lien *must* be given in the manner in which an originating process is served. On the other hand, the *Rules of Civil Procedure* contemplate that non-originating process documents can be served by way regular (and not certified or registered) mail or by email some circumstances.

In the end, it is entirely unclear if parties can consent, for example, to the giving of a Proper Invoice by email. We would suggest that they can. Regardless, we suggest that it makes no sense to expect construction participants, who have no legal training and who are under tight timeframes, to trace through the 'rules of court' to find the *Rules of Civil Procedure* and then try to assess, from the myriad of complicated options set out in *Rule 16*, what they can, and cannot, do to give a Proper Invoice, Notice of Non-Payment or other document under the *Act*. In our view, fairness to the participants dictates that a simple list of options be set out in the *Act* itself.

The "Authority" under which services or materials were supplied

The Act requires Proper Invoices to include the following: "Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied". No guidance has been provided as to what this means. We speculate that what is required is a statement (perhaps relative to line items in the invoice) as why the amounts are owing relative to the agreement between the parties – be it part of the original scope of work or performed pursuant to a change order, proposed change order, change

directive, RFI, SI, etc. This, however, is mere speculation. Some will no doubt argue that a simple reference to the contract or subcontract (which will expressly or by implication be the "authority" under which all contract or subcontract work will be supplied) should be sufficient.

Phased and Annual Release of Holdback

Unfortunately, the process by which holdback will be released on an annual or phased basis is not at all clear. Clearly, the sums involved have the potential to be substantial. However, unlike the process relating to basic holdback under the *Construction Lien Act*, there is no publication requirement. While contractors and subcontractors may make a s.39 request for information about the phased or annual release, they are only entitled to a statement of whether or not the contract provides for same. They are entitled to neither a copy of the contract nor information as to when the phases or annual milestones will be or were met.

In addition, the terms on which the holdback can be released on an annual or phased basis are not clear. Sections 26.1(2) and 26.2(2) of the *Act* provides that the releases can occur when (among other things):

(a) there are no preserved or perfected liens in respect of the contract; or

(b) all liens in respect of the contract have been satisfied, discharged or otherwise provided for under this *Act*.

As strictly worded, this means that if a lien has been preserved or perfected, no payments can be made even if the lien has been vacated under s.44. This, because there will *always* be an unsatisfied lien under a contract, until 60 days after the contract is complete, abandoned or terminated. We imagine that the drafters intended to require, under 26.1(2)(b) and 26.2(2)(b), that all *preserved claims for lien* be satisfied, discharged or otherwise provided for. Unfortunately, that is not what the subsections say.

The Lien Against the Municipality

Under the *Act*, liens will no longer attach to the interest of a Municipality in a Premises. Under section 34(3.1), where the owner of an improvement is a Municipality, a copy of the claim for lien is to be given to the clerk of the Municipality. *Fifty-six sections later*, (at section 87(1.2)), the *Act* then requires that a copy of the claim for lien be given to the clerk of the Municipality electronically in accordance with the Regulations. Section 11.1(1) of Reg. 304(18) then provides that a Municipality may provide for the giving of a copy of a claim for lien to the clerk through one or both of the following methods by publishing on its website a statement to that effect which details the following method or methods:

1. sending a copy of the claim for lien by email to a specified email address; or

2. completing and submitting the claim for lien through a specified web portal.

As the Regulation makes the giving of the claim for lien in accordance with 11.1(1) mandatory, it appears that the failure to abide by the Regulation will be a failure to perfect. The failure is not one of the "minor errors" that may be corrected under s. 6 of the *Act*. It is also not at all clear how prominent the lien giving requirement needs to be on a Municipality's website. Care will need to be taken. We believe it would have been simpler and more efficient to reference the possible requirement that the claim for lien be given electronically at section 34(3.1).

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