

New Developments for the New Construction Act

September 10, 2019

On December 12, 2017, the new Construction Act (the new Act) became law, overhauling the former Construction Lien Act (the former Act). The new Act brings **major changes to Ontario's construction industry**, including prompt payment and adjudication rules which take effect on October 1, 2019.

Since the Ontario election in June 2018, a number of amendments have been made to the new Act, which are summarized below.

NEW DEVELOPMENTS IN DECEMBER 2018

On December 6, 2018, the Ontario government passed the Restoring Trust, Transparency and Accountability Act, 2018 (Bill 57). Bill 57 introduced a number of changes to the new Act, including the following:

Transition rules

- **Clarified that the former regulations apply** in cases where the former Act applies.
- **Restricted the transition provision for leasehold interests** by adding a requirement that the applicable procurement process must have commenced or the contract must have been entered into between July 1, 2018 and December 5, 2018, inclusive, for the former Act to apply.
- **Carved out municipal interests from the transition rules** by adding that certain rules under the new Act will apply to improvements on premises in which a municipality has an interest even if the procurement process was commenced or the contract was entered into before July 1, 2018.
- **Expanded the definition of "procurement" process, which is used in the transition rules**, by adding that a "request for quotation" qualifies as a "procurement" process.

Adjudication rules

- **Restricted the application of contractual adjudication procedures** by adding that procedures in a contract or subcontract are subject to the adjudicator's powers, such as its power to issue directions for the conduct of the adjudication.
- **Expanded the disclosure obligations** by adding that the party who initiates the adjudication must give the required information to both the adjudicator and the other parties within five days after the adjudicator agreed or was appointed to conduct the adjudication.
- **Addressed responses to notices of adjudication** by adding that the response must be in writing and comply with the regulations, including any deadlines imposed by the adjudicator.

Other rules

- **Expanded the Authorized Nominating Authority's (ANA) power to set fees, costs or other charges** by adding that these may be set by the ANA as long as they relate to the administration of adjudication under the new Act.
- **Clarified what property details are required in the certificate/declaration of substantial performance** by requiring a legal description if the lien attaches to the property and otherwise a concise description of the property.

NEW DEVELOPMENTS IN JULY 2019

On July 18, 2019, the Ontario government announced that **ADR Chambers is the ANA** under the new Act. While appointed by the government, the ANA is self-funded and operates independently of government.

The ANA has the broad power to administer the adjudication regime under the new Act, which takes effect on October 1, 2019 in accordance with the transition rules. Some of the ANA's powers include:

- **Training and qualifying adjudicators**, and setting fees for the same.
- Maintaining a publicly available **adjudicator registry** on the ANA's website.
- **Appointing adjudicators** if the parties are unable to agree upon available adjudicators.
- Maintaining a schedule of **fees payable to the adjudicator** if the parties and the adjudicator do not otherwise agree on an amount.
- Developing a code of conduct for adjudicators and **a process for complaints** against adjudicators.
- **Publish an annual report** to provide information about adjudications in Ontario.

It is critically important for all construction industry participants to understand the new rules, including the recent amendments, under the new Act, and ensure that they are well prepared for the significant changes which will take effect in October 2019. Contract provisions, template documents and internal processes and procedures should be carefully reviewed and updated, as needed, to ensure compliance with the new Act.

[Laura Delemere](#) and [Bruno Savoie](#) are lawyers in the [Construction Group](#) in our Toronto office.

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By

[Laura Delemere](#)

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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