How Changes to Ontario's Construction Act May Impact Your Next Commercial Lease

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Significant amendments to the Ontario *Construction Act* (formerly the *Construction Lien Act*) have come into force in 2018 and 2019. These changes have important ramifications for commercial leasing. Notably, landlords will need to manage their exposure to liens in a more proactive way, and tenants may find themselves waiting for improvement allowances that are held back due to longer lien periods.

What has changed?

Elimination of the Opt-out Regime

Under section 19 of the previous *Construction Lien Act*, a landlord's potential liability for liens could be restricted. The contractor was required to give the landlord written notice of any construction project prior to commencing work, following which the landlord could disavow itself of any responsibility for the construction.

Under the new regime, this "opt-out" mechanism is no longer available. Landlords, as a result, are at greater risk of their property being subject to liens. Depending on the circumstances, landlords may wish to consider:

- Use of labour and material payment bonds and/or letters of credit to provide additional security for the overall project;
- Positive covenants requiring tenants to remove any construction liens; and/or
- Indemnity provisions in the event of a construction lien.

Landlord's Interest Subject to 10 per cent of its Contribution

Under the amended *Construction Act*, where a landlord agrees to pay for all or part of an improvement (*i.e.*, fit-up agreements, tenant allowances and inducements), 10 per cent of the value of the landlord's contribution may now be subject to a construction lien against the landlord's interest.

The scope of this provision is broad and can apply to credits, allowances, fit-up agreements and inducements. Therefore, it may be prudent to consider:

- If any allowance or credit from the landlord is not tied to leasehold improvements, whether this is clearly indicated in the lease;
- Alternatively, if the landlord financially contributes to improvements, providing for a 10 per cent holdback of the landlord's contribution, payable following the expiry of the lien period; and/or
- Use of holdback repayment bonds and/or letters of credit to provide additional security.

Longer Lien Expiry Periods

Under the previous *Construction Lien Act*, lien claimants had 45 days from the specified triggers to register liens. The amendments to the new *Construction Act* extend this period to 60 days.

Tenants should note that if the landlord is holding back allowances until liens can no longer be registered, the waiting period until they receive the allowance or credit from the landlord will be increased by 15 days.

Landlord as an “Owner”

The new *Construction Act* confirms that a landlord can be considered an "owner" under the Act, meaning that it may be held liable for any deficiency in the holdback retained by a tenant (and possibly, notice holdback). As a reminder, when landlords request improvements, they may be deemed to be owners, depending on whether they benefit from or consent to the improvement, and their level of monitoring and involvement within the construction project.

As a result, landlords may wish to consider including an indemnity from tenants in respect of any costs associated with construction liens (including legal fees).

Increased Security for Costs

In the previous Act, when a party had liened a property, and the landlord or tenant wished to vacate the lien, the party vacating the lien had to post security equal to the value of the lien plus 25 per cent of the value of the lien, up to a maximum of $50,000. Under the new Act, this amount has been increased to the value of the lien plus 25 per cent of the lien, up to a maximum of $250,000.

Landlords and tenants should therefore note that vacating liens has become much more expensive for larger projects under the Act and should take into account more significant security for costs.

Other Notable Changes to the Act

- **Prompt payment:** Owners, contractors, and subcontractors are required to abide by the new prompt payment regime, which is triggered by the delivery of a “proper invoice” (as defined in section 6.1 of the Act) by the contractor to the owner.
- **Adjudication**: For construction disputes related to payment and valuation, a party can compel participation in real-time dispute resolution with an adjudicator.

This means a landlord can force a tenant (and vice-versa) to engage in the adjudication process.

How do I know if these changes apply?

If the lease agreement was entered into…	…and the contract, or if applicable, the procurement process was commenced…	…then the following applies
before July 1, 2018	prior to December 6, 2018	The old *Construction Lien Act* applies in its entirety.
	on or after December 6, 2018 and prior to October 1, 2019	The new *Construction Act* applies except for prompt payment and adjudication.
	on or after October 1, 2019	The new *Construction Act* applies in its entirety.
on or after July 1, 2018	prior to October 1, 2019	The new *Construction Act* applies except for prompt payment and adjudication.
	on or after October 1, 2019	The new *Construction Act* applies in its entirety.

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