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 agreed 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*.

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By

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