The Construction Lien Act
Big Changes for 2017

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"It's never the changes we want that change everything."

— Junot Díaz, The Brief Wondrous Life of Oscar Wao

Presentation Path

- Overview of what has happened over the last two years
- Briefly, the three recommendations - or areas (out of 101) not accepted by the government
- Focus on the three key areas where recommendations will significantly impact a project (and thus all of us)
    - Prompt Payment, Adjudication, Release of Holdback
- Highlight a few other key changes

Procedure – How Suggested Changes Came About

- Review started spring of 2015

- Bruce Reynolds and Sharon Vogel of BLG

- 60 "Stakeholder" submissions and meetings

- 100 enumerated recommended changes (plus one)

The Report

- 600+ page report submitted spring of 2016
  - Released to the public in the fall
- Following a period of reflection, series of mini meetings with the stakeholders to get their reactions

- Government has accepted all but three recommendations (and retained Reynolds and Vogel to help draft the new act)

What Was Not Included in Recommendations

- Doing away with lien remedy

- Doing away with trust remedy

The New Act

- The *Construction Act: An Act Respecting Security of Payment and Efficient Dispute Resolution*

- Currently (as of early-May, 2017) on draft #10

- Hope is to have the law drafted, debated and proclaimed by the end of 2017

What Was Rejected?

- Recommendation to remove the provision allowing for liens to expire on a lot-by-lot basis
- Require condo buildings to have a single PIN for the common elements
- Pilot project for trust accounts for two years

Prompt Payment

- Owner must pay within 28 days of receipt of a proper invoice from the contractor
- If Owner has basis for not paying in full, must provide notice as to why paying lesser amount

- Contractor must pay subcontractors within 7 days of receipt of funds from Owner (cascading 7-days-to-pay obligations)

Prompt Payment cont'd

- Pay when paid clauses not outlawed, but new act will require contractor to give notice to subs of the payment being withheld, the reason, *and an undertaking to commence a proceeding to enforce payment*

Prompt Payment cont'd
practical considerations and unresolved issues

- Because of tight deadlines, will need infrastructure in place to evaluate submissions

- What is a "proper invoice"?

- How to square the circle of "prompt payment" given that the enforcement mechanism (court action), which is the opposite of "prompt"?

    ……………..adjudication?

Adjudication

- Speedy mechanism to enforce prompt payment
- Unlike project mediator – not intended to be one size fits all
- Adjudicator and adjudication process should be tailored to the issue
- May not require an in-person hearing

Adjudication cont'd

- Will likely be to determine valuation of work/changes and set-offs

- Also delay issues regarding claims for compensation

- How about negligence/fee claims for design professionals?

- Result will be an "interim, binding" decision, that can be enforced by the courts

Adjudication cont'd

- Following interim, binding decision, can still raise the issue fresh in litigation

- Lien claims can run parallel to adjudication
  - owners may have to pay twice; once on interim basis, and a second time to post security

- Adjudication is only for one issue at a time; no stacking of issues unless the parties consent
  - will likely lead to cascading adjudications

Adjudication cont'd

- Adjudicators will be screened for qualifications, and will receive training on procedure
- Will not necessarily have legal training
- Based on recommended timelines, will likely have a decision within 42 days of notice of dispute being given

Adjudication cont'd – practical problems

- UK has had similar scheme for 18 years.
  - Rough and Ready Justice
- Ambush tactics; 6 months to compile evidence for dispute, but in 42 days have to reply and determine the issue
  - natural justice issues deal with this?
- Lawyers may not be retained to attend; shadow/review retainer

Adjudication cont'd – The Good

- Practically, UK experience is much fewer disputes end up in litigation after adjudication
- Especially in construction, people move over time. Adjudication is contemporaneous dispute resolution
- See the problem before it gets covered up

Holdback

- Right now – once liens have expired or have been dealt with, permissive release of holdback

- Release will be mandatory, subject to set-off

- Right now – set off can be as against any debt

- Set-off will be narrowed to any debt owed on the project

Holdback cont'd

- Right now – only one holdback period
- Changes will allow for phased/annual/segmented release of holdback
- Design Phase Holdback (if agreed)
  - design professionals won't have to wait for completion

Holdback cont'd

- An owner seeking to set-off must "publish" a notice of the intention

- Details as to basis for set-off

- Where is it published?

The Other Changes

- Time to preserve will be 60 days (now 45)

- Time to perfect will be 90 days (now 45)

- Liens over all Municipal Lands will now be "given", not registered, to exempt them from sale

- Contractor's liens will have "termination" as a trigger date

- Prescribed form for notice of abandonment and notice of termination (get that clock running)

Others, cont'd

- S.39 will allow demand for information from landlords, tenants, secured lenders

- Procedural changes
  - Lien Actions will be case managed
  - Prohibition on appealing interlocutory orders will be lifted
  - Small liens (<$25k) will be referred to Small Claims Court for a report on liability, amount owing, and allocation of holdback

A Word on Trusts

- Recommendation was to amend and implement the New York model, a more onerous trust fund bookkeeping requirement

- No separate accounts, but:
  - Separate books for each trust
  - Books and records must articulate particulars of accounts receivable/payable, trust funds received/paid

- Two year pilot project before implementing across the board rejected; unclear if entire recommendation is rejected

**END
Questions?**