

# The New *Construction Act*: Let's Get Ready!

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It's been a year since the first set of amendments to Ontario's *Construction Lien Act* (renamed *Construction Act*) came into effect. Prompt payment and adjudication are scheduled to come into force this fall.

Momentum is building.

On July 18, 2019, the Attorney General of Ontario, Doug Downey, announced that ADR Chambers has been chosen to serve as the Authorized Nominating Authority to oversee the adjudication process.

Here are highlights of what's in force today and what's to come later this year.

## Key Dates

There are two key dates, with transition rules:

**July 1, 2018:** amendments came into force, except for prompt payment and adjudication

**October 1, 2019:** prompt payment and adjudication scheduled to come into force

## Transition Rules: What Amendments Apply?

**Contracts entered into before July 1, 2018:** The old *Construction Lien Act* applies

**Contracts entered into on or after July 1, 2018:** the July 1, 2018 amendments apply, except if:

- the procurement process began before July 1, 2018
- a lease, where a contract for improvement was entered into or "procurement process" began between July 1, 2018, and December 5, 2018

**Contracts entered into on or after October 1, 2019:** prompt payment and adjudication will apply, except if:

- the procurement process began before October 1, 2019

## **Highlights of the July 1, 2018 Amendments: Longer Deadlines, Higher Thresholds, New Forms**

### **1. Longer lien periods:**

- a. 60 days to preserve a lien (up from 45)
- b. 90 days to perfect a lien (up from 45)
- c. Must publish notice of contract termination (using a prescribed form).

### **2. Holdbacks**

- a. Mandatory release, unless the payor publishes notice disputing payment (using a prescribed form)
- b. Annual or phased holdbacks for certain contracts of \$10 million or more
- c. Holdback can be a letter of credit or holdback release bond (using a prescribed form)
- d. Landlord required to hold back 10% from payment for an “improvement accounted for” in a lease, renewal, or other agreement with the landlord as a party.
- e. The landlord notice and disclaimer process under the old Act are gone; there will no longer be anything to prevent a landlord from being an “owner” if it meets the definition

### **3. Right to Information**

- a. Landlords must respond within 21 days to a written request for information including “state of accounts” between the landlord and the tenant

### **4. Higher Substantial Performance and Completion Thresholds**

- a. “Substantial performance” threshold increased to \$1 million from \$500,000:
  - i. 3% of the first \$1 million of the contract price
  - ii. 2% of the next \$1 million, and
  - iii. 1% of the balance
- b. Completion is deemed achieved when the cost to complete is the lesser of 1% of the contract price and \$5,000

### **5. Multiple Improvements**

- a. Multiple improvements in a contract can be deemed under separate contracts if the contract so provides and the improvements are on non-contiguous lands

### **6. Bonds**

- a. Public contracts of \$500,000 or more require a labour & material payment bond and a performance bond with coverage of at least 50% of the contract price.

## 7. Condominiums

- a. Unit owners can vacate a lien registered against the common elements of a condominium by paying into court or posting security in the amount of the proportionate share of the unit owner's interest in the common elements.

## 8. Capital Repairs are now an “improvement”

- a. Clarifies when a repair is construction vs maintenance:
  - i. Definition now includes a repair intended to extend the normal economic life or to improve the value or productivity.
  - ii. Specifically excludes maintenance work to prevent deterioration or to maintain in a normal, functional state.

# October 1, 2019: Prompt Payment and Adjudication

## 1. Prompt Payment<sup>1</sup>

Payment deadlines are short, either pay or give notice of dispute. This applies along the construction chain. You cannot contract out of prompt payment deadlines.

### Owner:

- Upon receipt of “proper invoice”:
  - must pay (within 28 days) or give notice it is disputing invoice (within 14 days)
  - must pay all undisputed amounts

### Contractor:

- Must pay subcontractor (within 7 days) or give subcontractor notice of non-payment (notice deadline will depend on whether Owner paid Contractor in full, in part, or not at all)
  - in certain cases, obliged to undertake to refer the matter to adjudication

### Subcontractors:

- Similar deadlines for the subcontractor to pay the sub-subcontractors and so on down the construction chain

### Invoices:

- Cannot be conditional on pre-certification or owner approval (some exceptions)
- Monthly invoicing: parties can agree to a different schedule
- Act sets out the minimum requirements of a “proper invoice”. Parties can supplement with their own requirements so long as they don't conflict with the Act

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<sup>1</sup> Recourse should be to the Act for complete deadline details.

## 2. Adjudication

Adjudication is the new dispute resolution process for the Ontario construction industry. Disputes during a construction project will be decided quickly to help reduce project delays and allow funds to continue to flow. It is mandatory for prescribed disputes. You cannot contract out of adjudication.

As the new Authorized Nominating Authority, ADR Chambers' duties will include the selection and training of adjudicators. Candidates must have a minimum of 10 years' relevant industry experience (such as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator, or lawyer) and have successfully completed the Authorized Nominating Authority's training program.

Parties cannot pre-select an adjudicator in their contract. The selection takes place at the start of the adjudication process.

Tight Deadlines:

- Adjudicator agrees within 4 days or the Authorized Nominating Authority appoints one within 7 days
- Initiating party then has 5 calendar days to provide the documents it will rely upon
- Adjudicator must render decision within 30 days; can be extended by agreement
- Binding decision unless/until same matter is determined in court or by arbitration
- Limited judicial review, appeal with leave
- Payment within 10 days or contractor can suspend work with costs

## Recommendations

- Update your precedent construction contracts and lease templates to address the new requirements
- The transitional rules are tricky: assume the most conservative dates/deadlines if unsure which regime applies
- Establish a "proper invoice" for your organization
- Train staff to understand the new legislation and the new forms
- Ensure internal approvals and processes are in place to respond and meet these deadlines
- Ensure your records and documents are accurate, complete, and readily-available in event of adjudication
- Encourage your professional consultants and advisors to apply to be adjudicators
- Landlords:
  - 10% holdback on tenant allowances and other payments
  - "capital repairs" are now subject to liens
  - be prepared to respond to s. 39 inquiries

For more information on the new *Construction Act*, for help modifying your construction and lease documents, or any other questions related to your construction law issues, our Construction Law Group can help. Contact lawyer Marta O. Lewycky at [mlewycky@mindengross.com](mailto:mlewycky@mindengross.com).