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Construction Lien Act Amendments, Part 1 - Prompt Payment Rules

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In September 2017, the Ontario legislature is debating [legislation](#) which, if passed, will have a significant impact on the construction industry. The bill makes numerous amendments to the *Construction Lien Act* (which would simply be called the “*Construction Act*”) in response to an in-depth [report](#) prepared by the government. What follows is a brief summary of the proposed rules for prompt payment.

Late payments in construction are a common and growing problem. Trade contractors often wait several months before they are paid for work that is certified as complete. Between 2002 and 2013, the average collection period went up from approximately [57 days to 71 days](#).

A few of the consequences of late payments include:

- Increased construction costs, as contractors/subcontractors have to factor in delinquent payments when they bid on jobs;
- Strained cash flows or insolvency for small trade contractors who struggle to pay their bills, employees, and other expenses; and
- Reduced investment in apprenticeship training which causes a decrease in job creation.

The net effect is the transfer of risk from owner-developers to trade contractors. Although the existing *Construction Lien Act* was made to lessen these risks, many companies see it as costly and inaccessible. For example, the lien rights of many trade contractors expire long before they realize they will not get paid.

The amendments attempt to level the playing field by creating cascading payment timelines that tighten as money flows down the construction pyramid.

Once the owner receives a “proper invoice” from the contractor, the owner must pay the invoice within 28 days. Once the contractor receives payment, it must pay its subcontractors within 7 days. Subcontractors would then be required to pay their own subcontractors within 7 days of receiving payment, and so on.

Parties are not able to contract out of the payment timelines once a proper invoice is submitted. However, parties may agree on a timeline for the submission of proper invoices before payment timelines are triggered. For example, a contract may allow for the submission of invoices after the completion of certain project milestones or phases. These clauses will need to be worded carefully because a provision that makes the giving of a proper invoice conditional on a certificate of payment or the owner’s prior approval is of no force or effect. In the absence of an agreement, proper invoices must be submitted to the owner *monthly*.

A “proper invoice” means a written bill or request for payment for services or materials and must have certain information, including: the contractor’s name and address, date of the invoice, period when the materials/services were provided, information identifying the



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authority under which the services/materials were provided, description of the services/materials, amount payable, and name, title, telephone number, and address of the payee.

An owner may refuse to pay all or part of a proper invoice by delivering a “notice of non-payment” within 14 days. The notice must specify the amount not being paid and the reasons for non-payment. Successive payers may deliver a notice of non-payment within 7 days.

Undisputed amounts must be paid. For example, the contractor is obligated to pay its subcontractors any amounts they are owed under a proper invoice, even if the contractor has not been paid by the owner. The only way the contractor can avoid its obligation to pay a sub-contractor is to submit its own notice of non-payment within the prescribed time period.

If any amount is not paid by the applicable deadline, interest is payable at the statutory prejudgment interest rates set by the Ministry of the Attorney General, or at a contractual interest rate if it is higher than the statutory rate.

In light of these recent amendments, companies involved in construction clearly have evolving legal rights and obligations. The Litigation, Real Estate, and Corporate groups at Perley-Robertson, Hill & McDougall LLP/s.r.l. can assist companies navigate their rights and obligations throughout the entire lifecycle of a construction project.

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