

Navigating the 2026 Construction Act Updates: Understanding the Critical Implications of Bill 60 for Construction Companies and Stakeholders



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Presented by OCAA

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What We Will Cover....

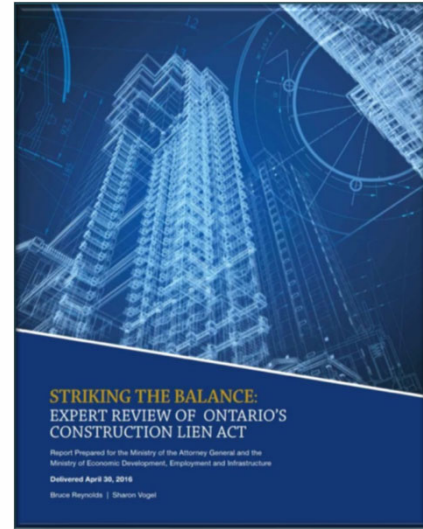
- Overview of Construction Act: review and amendments process
- Changes to lien and holdback regime
- Changes to Prompt Payment
- Changes to Adjudication
- Transition Rules
- Questions

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Time for a Review

- The Construction Lien Act was outdated in concepts (i.e., P3 projects and size of complexity of other projects)
- Timing of lien right deadlines reconsidered (shorter or longer)
- Amount of holdback to be retained
- Ensuring flow of payment
- How to keep projects moving



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Bruce Reynolds, Sharon Vogel, April 2016

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Time for a Review

- 45-day lien period extended to 60-day period
- new “termination of contract” provisions
- **mandatory** release of holdback (but subject to notice of non-payment of HB)
- **optional** annual/phased release of holdback

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Time for a Review

- provisions added for P3 projects
- mandatory 50% bonding on public projects over a certain “contract price”
- enhanced trust provisions

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Time for a Review

Recommendation

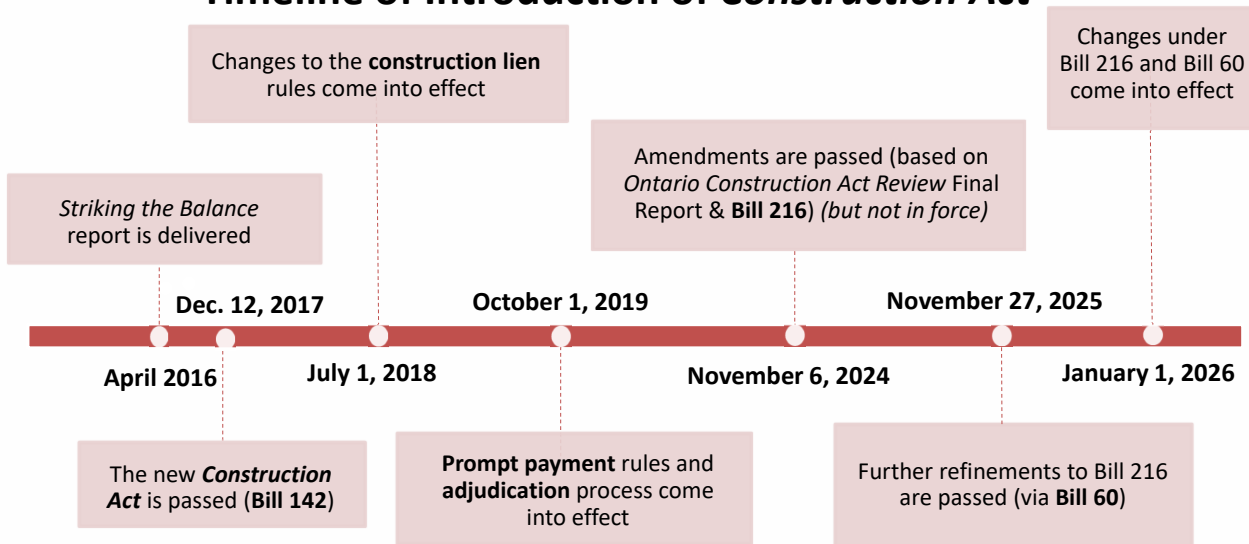
100. We recommend that an independent review of the *Act* to be conducted within 5 years of the enactment of the recommendations of this Report, and every 7 years thereafter (keeping in mind that the pilot project for project bank accounts will be subject to a much shorter review period, as described in Chapter 7 – [Construction Trusts](#)).

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Timeline of Introduction of *Construction Act*



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PART I – Lien Modernization

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Definition of “Contract Price”

Original Change:

- ▶ Certain thresholds like mandatory bonding are determined by “contract price”

Problem:

- ▶ Definition of “contract price” doesn’t work for CM contracts, cost plus contracts, integrated project delivery contracts, *with no initial fixed price*

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Definition of “Contract Price”

Recommendation (#1):

- ▶ Add new additional definition of “contract price” based on reasonable estimate of anticipated costs

Solution:

- ▶ a new additional definition of “contract price” will be added in the regulations (i.e. still to be done)

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Design Professionals and the Improvement

Original Wording (from Construction Lien Act)

- ▶ When the making of the *planned improvement* is *not commenced*, the supply of a design, plan, drawing or specification that *in itself enhances the value of the owner's interest in the land* is “the supply of services”

Problem:

- ▶ What are the legal rights under the Act (e.g. construction liens, prompt payment, holdback etc.) of anyone working during “pre-construction” before “commencement of the making of the improvement”?

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Design Professionals and the Improvement

Recommendation (#2-4):

- ▶ Clarify wording with new concept of “pre-improvement services”

Solution:

- ▶ New: If an owner *retains holdback* prior to start of planned construction from designer, then design work is *presumed* to enhance value, and designer has lien rights, unless the owner proves otherwise

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Notice of Termination

Original Change (s.31(6)):

- ▶ New “Notice of Termination” (Form 8) must be published when contract is terminated
- ▶ Date of termination specified in notice starts expiry of lien period

Problem:

- ▶ **Act did not say *when* notice is to be published**

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Notice of Termination

Recommendation (#10):

- ▶ Specify time period to publish notice after termination of contract (e.g. 14 days)

Solution:

- ▶ Notice of Termination must be published 7 days after termination of contract
- ▶ Lien periods for everyone start on date of publication of notice

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Mandatory Release of Holdback

Original Change (ss.26 and 27):

- ▶ Holdback *shall* (not “may”) be paid when lien rights expire downstream

Problems:

- ▶ Act did not say *when* holdback payment is to be made following 60-day lien expiry
- ▶ Act did not say *how* holdback is to be paid (i.e. from owner to contractor to subs, etc.)

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Mandatory Release of Holdback

Recommendation (#23):

- ▶ Create payment cascade for release of holdback monies like prompt payment (e.g. 14/7/7 days...)

Solution:

- ▶ Payments of holdback must be made by owner to contractor within 14 days after expiry of lien period (*or liens cleared*)
- ▶ Payments must be made by contractor to sub-contractors within 14 days after receipt from owner... (and so on)

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Annual and Phased Release of Holdback

Original Changes (ss.26.1 and 26.2):

- ▶ Holdback could be released on an annual or phased basis *if owner and contractor agree in contract*

Problems:

- ▶ **Act did not specify mechanism for notice of pending release**
- ▶ **Act did not allow subcontractors the right to information about contract terms**

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Annual and Phased Release of Holdback

Recommendations (#23,37):

- ▶ Mandatory annual release on contracts of 2+ years
- ▶ Notice of intention to release HB should be published

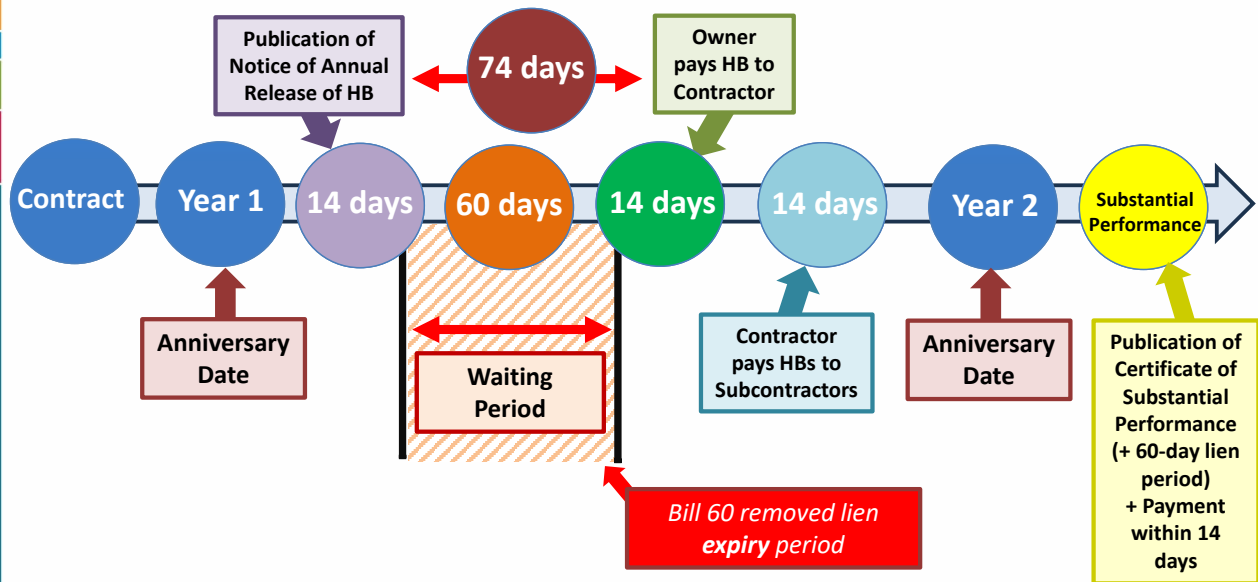
Solution:

- ▶ Mandatory annual release of holdback on all contracts based on anniversary date of contract (i.e. no more phased release allowed after 2027)
- ▶ Publication of notice of annual release required within 14 days of anniversary date

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Mandatory Annual Release of Holdback



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Notice of Non-Payment of Holdback

Original Change (s.27.1):

- Owner could avoid paying holdback by publishing a notice of non-payment of holdback (**Form 6**)

Problems:

- Owner did not have to give reasons for non-payment on Form 6
- Ability to avoid payment defeated mandatory holdback release

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Notice of Non-Payment of Holdback

Recommendations (#24-26):

- ▶ Require reasons be given for non-payment
- ▶ Clarify requirements to commence adjudication

Solution:

- ▶ Section 27.1 is repealed

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Use of Holdback after Termination

Original Wording (s.30):

- ▶ Payers can't use holdback in case of contractor/ subcontractor *default* for completion costs until lien period expires

Problems:

- ▶ "Default" is not a defined term
- ▶ Provision seems contrary to "mandatory" holdback release

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Use of Holdback after Termination

Recommendations:

- ▶ Change wording to reflect *termination* regime

Solution:

- ▶ Section 30 reworded to refer to termination or abandonment of contract/subcontract
- ▶ Trust obligations expressly refer to holdback monies, so s.12 (set-off) will become relevant

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PART II – Prompt Payment

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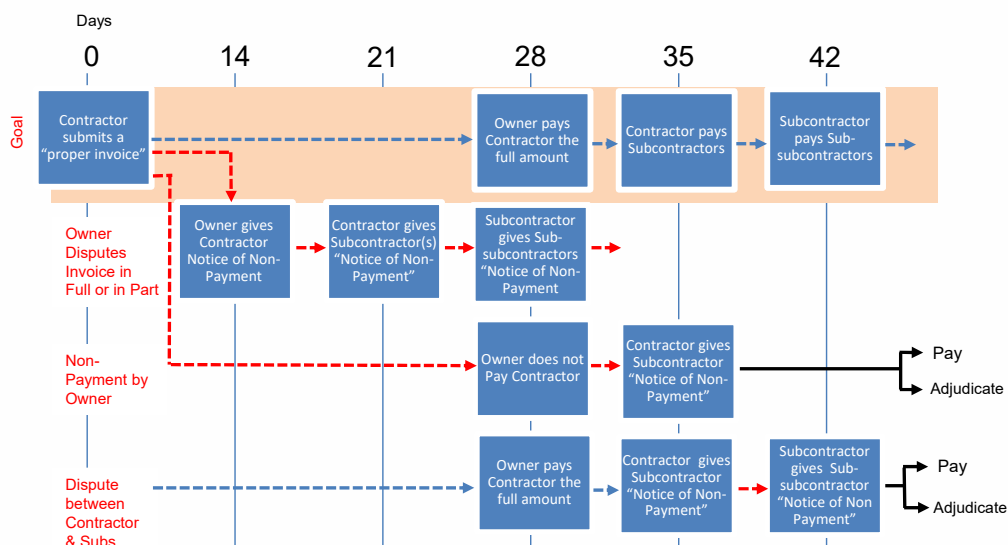
Key Changes (October 1, 2019):

- Owner must pay Contractor within **28 days** after receiving “proper invoice” from Contractor
- Owner has **14 days** to give “notice of non-payment” (**Form 1.1**) for any disputed amount
- default invoicing period is *monthly*; could be milestone payments
- Contractor must pay Subcontractors within **7 days** of receipt of payment from the Owner and so on...down the subcontracting chain
- if payment not received, Contractor must either still pay Subcontractors or undertake to adjudicate with Owner

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Proper Invoices and (Non)payment



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The Proper Invoice

“**proper invoice**” means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2), meets any other requirements that the contract specifies:

1. The contractor’s name and address.
2. The date of the proper invoice and **the period during which the services or materials were supplied.**
3. **Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.**
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. **The name, title, telephone number and mailing address of the person to whom payment is to be sent.**
7. Any other information that may be prescribed.

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Proper Invoices

Original Change (s.6.1(1)):

- ▶ Requirements of what constitutes a “proper invoice” is very detailed and specific

Problem:

- ▶ **Contractors may not have submitted “compliant” invoices, which fails to trigger prompt payment**

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Proper Invoices

Recommendations (#48-50):

- ▶ The requirements for a “proper invoice” should be clarified to encourage greater compliance

Solution:

- ▶ “Proper invoice” requirements have been modified

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The Proper Invoice

“proper invoice”...

...

2. The date of the invoice and the period, milestone or other contractual payment entitlement to which the invoice relates.

3. Information identifying the contract or other authorization under which the services or materials were supplied, such as a contract number, contract line item number or purchase order number.

...

6. The name, title, mailing address and telephone number of the person to whom payment is to be sent or, if payment is to be sent to an office or department, its name, mailing address and telephone number.

6.1 Any other information that is necessary for the proper functioning of the owner's accounts payable system that the owner reasonably requests.

...

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“Improper” Invoices

Original Change (s.6.1(1)):

- ▶ A “proper invoice” must be paid by the Owner in 28 days under prompt payment

Problem:

- ▶ The Act had no requirement for the Owner to advise the Contractor if the invoice was “improper” or non-compliant with the Act

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“Improper” Invoices

Recommendation (#48-50):

- ▶ Owners should object to any improper invoice within a short timeframe (e.g. 3 days) or the invoice should be considered to be proper

Solution:

- ▶ Owners must object in writing within 7 days of receipt; or the invoice is *deemed to be proper*

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PART III – Adjudication

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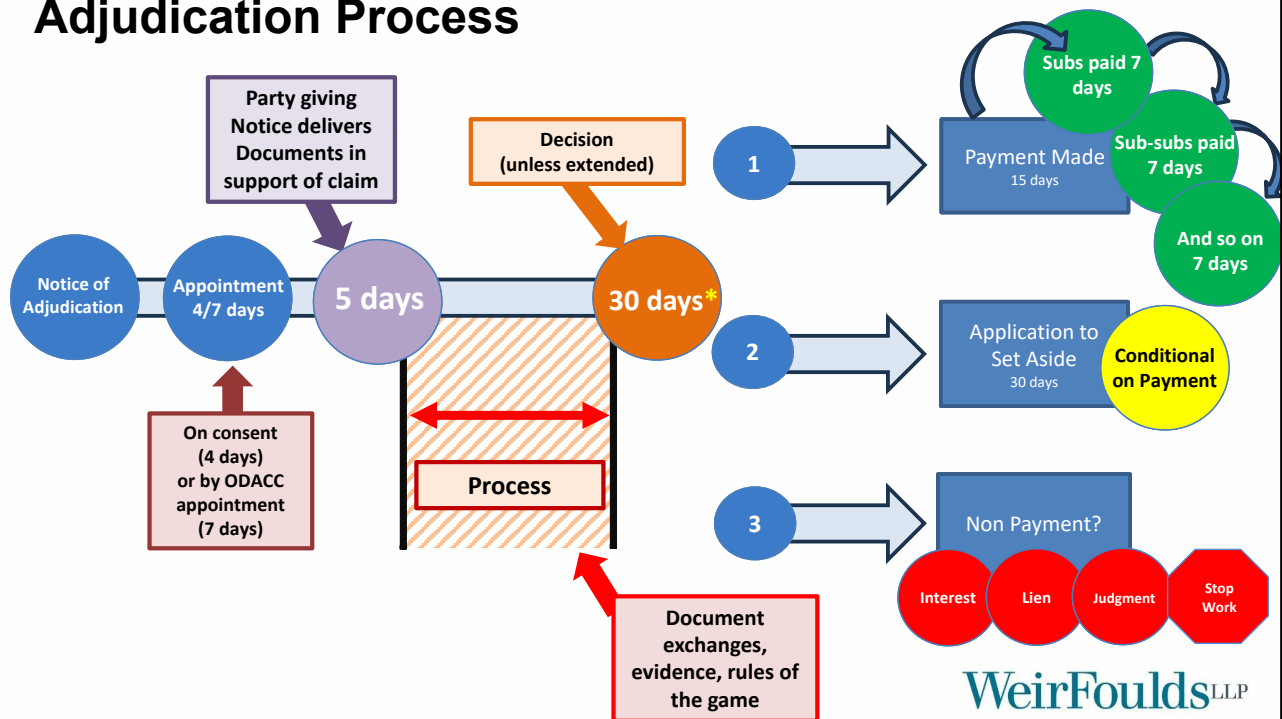
Key Changes (October 1, 2019):

- a new dispute process called “adjudication” to settle in-project disputes over payment, value of work, disputed change orders, holdback release
- adjudicators governed by ODACC in Ontario
- disputes decided by adjudicators quickly
- decisions (or “determinations”) are “interim binding” until changed by court or arbitration
- money flows much quicker than it would in traditional court disputes

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Adjudication Process



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Scope of Adjudication

Original Change (s.13.5(1)):

- Parties can refer six described categories of disputes to adjudication (plus anything parties agree to)

Problem:

- **The categories (or “matters”) were unclear**

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Scope of Adjudication

Recommendations (#58,59):

- ▶ Matters which can be adjudicated should be clearer, including whether more than one dispute of the same kind can be joined together (e.g. change orders)

Solution:

- ▶ **Scope of adjudication removed from Act and placed in Regulation with clarifications**

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Adjudication and Contract Completion

Original Change (s.13.5(3)):

- ▶ Adjudication is not available to deal with disputes after contract is “complete” (i.e. <\$5,000 left to perform)

Problems:

- ▶ **Most disputes about *changes orders* and *holdback release* occur at the end of the contract**
- ▶ **Act was *silent* about timing following *termination* or *abandonment* of contract**

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Adjudication and Contract Completion

Recommendations (#60,62):

- ▶ Adjudication should be available for contract disputes up to 90 days after *completion, termination and abandonment*

Solution:

- ▶ Adjudication is available for disputes under contracts 90 days after completion, termination or abandonment of contract

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Adjudication and Subcontract Completion

Original Change (s.13.5(3)):

- ▶ Adjudication is not available to deal with disputes after *subcontract* is “complete”

Problem:

- ▶ There is no definition of what “subcontract completion” means

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Adjudication and Subcontract Completion

Recommendation (#61):

- ▶ Adjudication should be available for disputes up to 90 days after *subcontract* is *certified complete*.

Solution:

- ▶ Adjudication is available for 90 days from the earliest of *date of last supply, completion certification, or completion, termination or abandonment of head contract*

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Challenging Jurisdiction

Original Change (O.Reg. 306/18):

- ▶ Adjudicator can choose to resign if problem with jurisdiction

Problem:

- ▶ The Act did not have a formal process of challenging whether adjudication is proper

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Challenging Jurisdiction

Recommendations (#63):

- ▶ Act should include right to challenge powers of adjudicator to carry out adjudication

Solution:

- ▶ New provision allows a party to challenge the adjudicator's jurisdiction at the earliest opportunity

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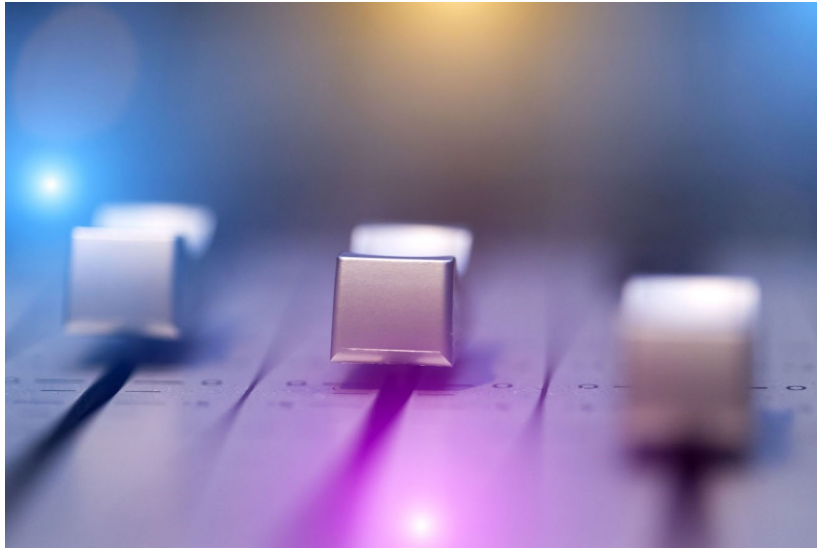
Other Changes

Other Enhancements:

- ▶ Grounds for judicial review revised to exclude “contract is invalid or has ceased to exist” (#66,67)
- ▶ Costs for “frivolous and vexatious” conduct includes conduct during adjudication process (#70)
- ▶ “Private” adjudication available (at \$1000/hr)
- ▶ Database of adjudication decisions to be created

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PART IV – Miscellaneous Changes and Transition Rules

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Key Changes (July 1, 2018):

- 50% bonding required on public projects
- curative provisions give examples of permitted errors
- new written notice of lien form
- electronic publication of notices allowed
- transition rules

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Written Notice of Lien

Original Change:

- ▶ A new form of Written Notice of Lien (Form 1) was introduced to standardize the notice

Problem:

- ▶ **Form 1 must be sent to recipient, even if a formal claim for lien form has been registered (or given) and is also sent to the recipient**

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Written Notice of Lien

Recommendation (#76):

- ▶ A claim for lien should also be able to serve as written notice of lien to avoid unnecessary duplication of steps

Solution:

- ▶ **The Act now allows for either Form 1 or a claim for lien to serve as “written notice of lien”**

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Other Changes:

- curative provisions give examples of permitted errors
 - corrected wording
- electronic publication of notices allowed
 - Three specific websites are approved for publication: DCN, Link2Build, and OCN

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Transition Rules

Original Change (s.87.3):

- ▶ Application of new regimes turns on date of procurement/contract “for the improvement”

Problem:

- ▶ **Uncertainty around which contract determines applicable legal regime, but “first contract” to do with improvement is latest judicial interpretation (e.g. initial design contract)**

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Transition Rules

Recommendation (#83):

- ▶ Ensure new rules apply in a much clearer way, i.e. without reaching back in time

Solutions:

- ▶ The changes apply *immediately* upon coming into force, for all new contracts and subcontracts
- ▶ Existing contracts are granted until the second anniversary date for holdback release changes

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Questions?

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