



The New Construction Act

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The condominium industry has experienced its share of changes over the past few years, however, there is one more piece of legislation that the condominium industry needs to prepare itself for. As of July 1, 2018, the first wave of amendments to the *Construction Lien Act* (now called the *Construction Act*) came into force, which will affect all condominium corporations where a person supplies services or materials to an “improvement” to the common elements of a condominium corporation.

Under the *Construction Act*, a lien arises where a person supplies services

or materials to an improvement. The definition of “improvement” was curtailed under the new *Construction Act* to refer to “any alteration, addition or capital repair to the land.” The term “capital” was added to the existing definition of improvement which is now defined under the new legislation as: (i) any repair intended to extend the normal economic life of land or any building, structure or work on the land; or (ii) to improve the value or productivity of the land, buildings, structures or works. A capital repair, however, does not include maintenance work performed in order to prevent normal deterioration and therefore will not be lienable under the new *Construction Act*.

Under the new *Construction Act*, claimants seeking to preserve a lien with respect to an “improvement” to the common elements of a condo-

minium will have to follow a new set of notice obligations. Where a lien is registered after the condominium declaration and description have been registered pursuant to the *Condominium Act*, 1998, a lien claimant seeking to preserve their lien must give notice of the lien’s preservation in the prescribed form to the condominium corporation and to each person who is:

- (i) an owner of a unit in the corporation; and
- (ii) in the case of a common elements condominium corporation, an owner of a parcel of land to which a common interest is attached.

Once a lien is registered, owners of condominium units will no longer be able to discharge their “portion” of a construction lien registered against the common elements and all units. Instead, condominium unit owners, in order to remove the lien, will have to bring an

ex-parte motion to vacate the lien, by posting security in an amount equal to the total of: (i) the portion of the lien that is attributable to the owner's common interest as specified in the corporation's declaration; and (ii) the lesser of \$250,000 or 25% of the amount attributable to the owner's common interest, as security for costs.

The new *Construction Act* also includes other noteworthy changes which may have an impact on condominium corporations doing construction projects after July 1, 2018:

- The timeline to preserve a lien has been extended from 45 to 60 days and the timeline to perfect a lien has been extended from 45 days to 90 days, resulting in a combined preservation and perfection period from 90 days to 150 days under the new *Construction Act*;

- The financial thresholds for when a contract is substantially performed has been increased from 3% of the first \$500,000 of the contract price, to \$1,000,000; 2% of the next \$500,000 of the contract price to \$1,000,000; and 1% of the balance of the contract.

- Under the new amendments it will be harder to invalidate a certificate, declaration or a claim for lien for minor errors or irregularities to an owners' name, the legal description of premises or the address for service, unless a court finds that a person has been prejudiced by the minor error or irregularity;

- The new amendments also introduced new alternative forms of holdbacks such as letters of credit, demand-worded holdback repayment bonds, and any other form that may be prescribed by regulations; and

- A new prescribed form for a "written notice of lien" must be used for a lien to be valid and this form must be served in the same manner as an originating process.

Despite these amendments that came into force on July 1, 2018, the former *Construction Lien Act* continues to apply to the following improvements:

- a contract entered into before July 1, 2018, regardless of when any subcontract under the contract is entered into;

- a procurement process commenced before July 1, 2018 by the owner of the premises; and

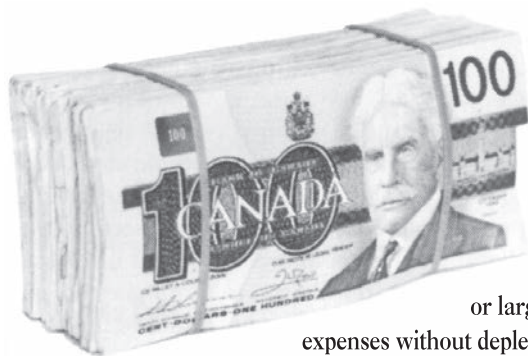
- for premises subject to a leasehold interest, where the lease was first entered into before July 1, 2018.

It is important for directors and condo managers to be aware of changes to other legislation, in this case, the *Construction Lien Act*, which although not as extensive as the recent changes to the *Condominium Act*, can still have an impact on construction projects after July 1, 2018. ■

Denise Lash is the founding lawyer of Lash Condo Law. Denise has been qualified as an expert in condominium law in the Ontario Courts.

As a second-year associate with Lash Condo Law, **Danielle Swartz** is building a practice in condominium development, corporate governance, and representing condo corporations in court proceedings and dispute resolution. Danielle has acquired a strong skill set in all forms of dispute resolution from litigation, mediations, arbitrations and negotiations.
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