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Morning Recess Webinar Series

Construction Law Update

Part 1

Dražen Bulat

March 21, 2018



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**Expertise with drafting tenders, RFPs, RFQs,
contracts, etc. for procurement of
construction and other services**

March 21, 2018

Outline

- 1. Construction Lien Amendment Act –
How did we get here?**
- 2. Amendments to the Construction Lien
Act**
 - a) December 2017 Amendments**
 - b) July 1, 2018 Amendments**
 - c) Looking ahead – October 1, 2019**
- 3. Case Law Update – Bonding**
- 5. Summary**

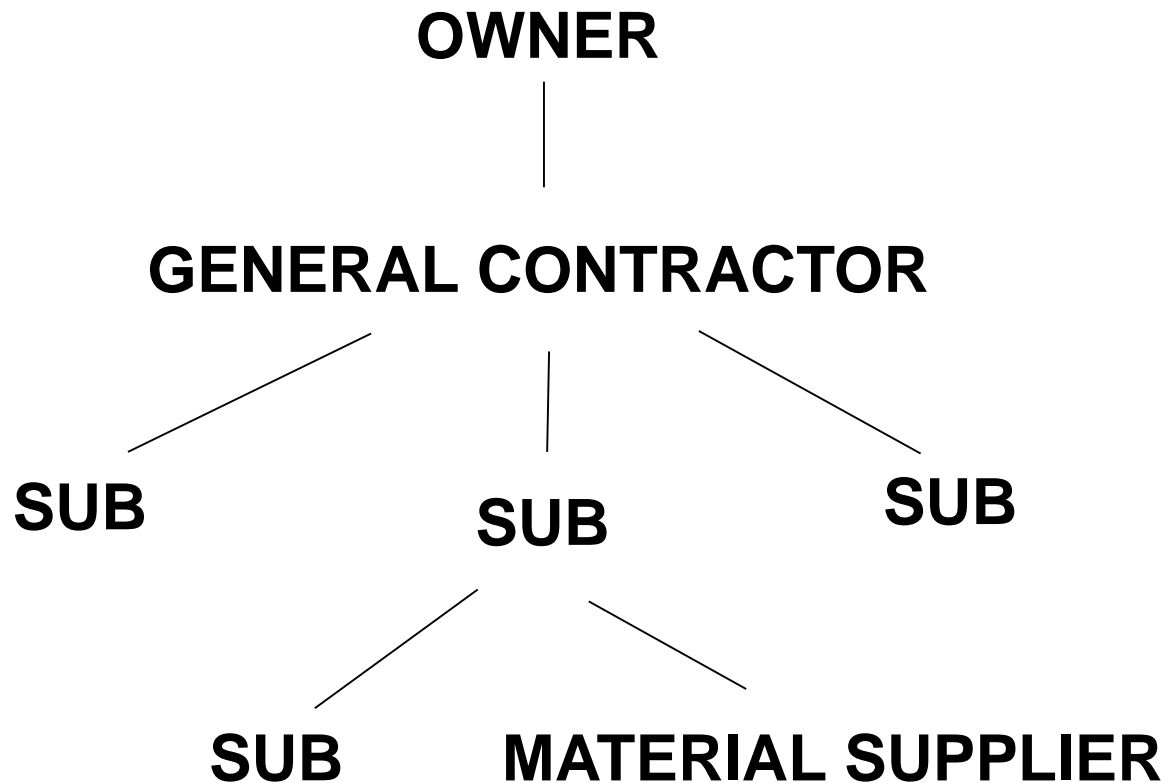


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A Brief History of the Construction Lien Act Or, How Did We Get Here?

March 21, 2018

CONSTRUCTION PYRAMID



The Past (pre-1873)

- **Subs have no right to claim vs Owner**
- **Only claim vs GC**
- **Risk: GC has no \$\$**
- **Owner benefits**
- ***Mechanics' Lien Act* enacted (1873)**
- **“mechanics’ lien” created – interest in land**

The Present – *Construction Lien Act*

- In force 1983
- Person who supplies services or materials to “improvement” has lien vs interest of the “owner”
- Must reg “Claim for Lien” within 45 days
- Must *perfect* – start lawsuit – within total 90 days
- Must be ready for trial within 2 years
- Complaint: long time to get paid

The Future – *Construction Act*

- **September 2016: Gov't releases report on recommended changes to the *Construction Lien Act***
- **May 2017: Bill 142 introduced**
- **December 12, 2017: Royal Assent**
- **Much more than amendment of the CLA**
- **Re-named: *Construction Act***
- **Numerous and extensive changes**

The Future – *Construction Act*

- **Current status:**
 - “Housekeeping” and non-substantive amendments now in force
 - Rest of amendments:
 - Amendments to lien and holdback rules: in force July 1, 2018
 - Prompt payment and adjudication amendments: in force October 1, 2019
 - Regs to be developed



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December 12, 2017 Amendments (currently in force)

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December 12, 2017 Amendments

- **“Housekeeping” and non-substantive amendments in force**
 - **Technical corrections and clarifications**
- **Clarification – new s. 14(3):**
 - **Architects have lien rights – can lien**
 - **Architects are subject to the CLA – Os must retain holdbacks**



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July 1, 2018 Amendments

- **Lien Rights**
- **Holdback**
- **Bonding**
- **Miscellaneous**

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July 1, 2018 Amendments

- **Grandfathering clause:**
 - **Current Act governs an “improvement” if:**
 - **Contract for the “improvement” entered into before July 1, 2018**
 - **Procurement process for the “improvement” (incl RFQ, RFP, RFT) commenced before July 1, 2018**

July 1 Amendments – Lien Rights

- **Current Act: 45 days to *preserve* lien**
- **July 1: 60 days**
- **Current Act: total 90 days to *perfect* lien**
- **July 1: total 150 days**
- **Lien extended if issue subject to adjudication (new s. 34(10))****

July 1 Amendments – Holdback

- **New s. 22(4): h/b can be retained in form of L/C; bond; other form as per Regs**
- **New s. 26.1 and 26.2: Allow for holdback release on**
 - **Annual basis, OR**
 - **In phases (as identified in contract)**
- **Applies only where:**
 - **Contract price > amt prescribed by Regs (draft Reg = \$20 million);** AND**
 - **Contract provides for annual / phased release of holdback**

July 1 Amendments – Pmt of Holdback

- **O must pay holdback when due**
 - **Unless w/in 40 days of CSP publication**
O publishes notice of non-pmt; AND
 - **Within 3 days gives notice to GC (draft Reg)**

July 1 Amendments – Liens

- **Can claim, as part of lien:**
 - “any direct costs incurred as a result of an extension of the duration of the supply of services or materials ... for which the contractor or subcontractor ... is not responsible”
- **“Direct costs” defined:**
 - “reasonable cost of performing the contract or subcontract during the extended period of time ... but do not include indirect damages ... such as loss of profit, productivity or opportunity, or any head office overhead costs”

July 1 Amendments – Subst Performance (aka the “3%+2%+1% formula”)

- **Current Act:**
 - 3% of 1st \$500,000 = \$15,000 plus
 - 2% of next \$500,000 = \$10,000 plus
 - 1% of remainder of contract price
- **July 1:**
 - 3% of 1st \$1.0 million = \$30,000 plus
 - 2% of next \$1.0 million = \$20,000 plus
 - 1% of remainder of contract price
- **Means will attain Subst Perf sooner**

July 1 Amendments – Vacating Liens by Paying Security into Court

- **Current Act: Security amt =**
 - Full amt of lien, plus
 - Lesser of \$50,000 or 25% of the lien for costs
- **Means if lien > \$200,000, the max security for costs = \$50,000**
- **July 1: Security amt =**
 - Full amt of lien, plus
 - Lesser of \$250,000 or 25% of the lien for costs
- **More expensive to vacate liens > \$200,000**
- **Means more security available for large liens**

July 1 Amendments – Set Off Rights

- **Current Act: Can set off amts from any other project or matter**
- **July 1: Right of set off only available with respect to claims related to the same improvement**

July 1 Amendments – Lien Actions

- **Current Act: Lien action must be tried in Ontario Superior Court of Justice**
 - **Can be referred to Construction Lien Master (practically only in Toronto)**
- **July 1: If lien amt is < \$25,000 action can also be referred to Small Claims Court Judge**
- **July 1: No appeal if claim < \$10,000**

July 1 Amendments – Bonding

- **Applies to GC's (excl Arch's; Eng's) working on projects for:**
 - **BPS orgs (Hospitals, School Bds, Universities)**
 - **Crown**
 - **Municipalities**
- **If contract price > amt specified in Regs (draft Reg = \$250,000), GC must provide L&M and Performance bonds**



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Future Amendments (in force October 1, 2019)

- **Prompt Payment Amendments**
 - **Mandatory Interim Adjudication**
- Covered in Part 2 – April 5, 2018**

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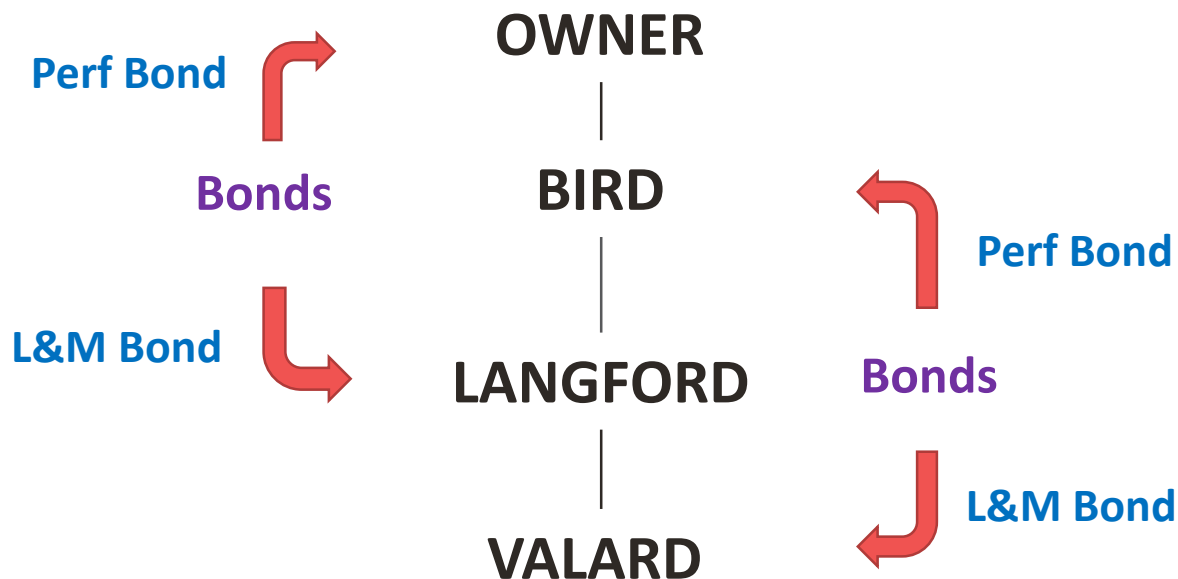
Case Law Update – Bonding

Valard Construction v. Bird Construction
SCC, February 15, 2018

March 21, 2018

Valard v. Bird Construction (SCC 2018)

- Bird = GC; electrical sub = Langford
- Valard = sub to Langford
- B required L to provide L&M Bond



Valard v. Bird Construction (SCC 2018)

- **L delivers L&M Bond to B**
- **B pays L, but L ≠ pay V**
- **V sues L; default judgment for \$660,000**
- **But: L insolvent, so V recovers \$0**
- **Later: V finds out L posted L&M Bond w B**
- **V files claim against L&M Bond**
- **Claim denied: out of time**
- **V sues B**

***Valard v. Bird Construction* (SCC 2018)**

- **Trial Judge:**
 - **No duty on B to tell V abt L&M Bond**
 - **Purpose of Bond = to protect B**
 - **V's action dismissed**
- **Alta CA: V's appeal dismissed (2:1)**
- **SCC:**
 - **B had duty to disclose Bond's existence to V**
 - **B is liable to V**

Valard v. Bird Construction (SCC 2018)

- SCC:

“[T]he proper inquiry is what steps, in the particular circumstances of the case ... an honest and reasonably skillful and prudent trustee would have taken in order to notify potential beneficiaries of the existence of the [bond].”

“The question is not what Bird *could* have done in this case, but what Bird should reasonably have done in the circumstances of this case to notify beneficiaries such as Valard of the existence of the bond.”

Valard v. Bird Construction (SCC 2018)

- **SCC:**
 - **B could have satisfied duty by posting notice of the bond in its on-site trailer**
 - **Other method of giving notice may be reasonable in other circumstances**

Summary: *Valard v. Bird Construction*

- L&M Bond in *Valard* = standard CCDC form
- Same as bonds used by GCs in Ont
- ***Construction Lien Act: s. 39***
 - Any person having lien can request copy of L&M Bond
 - Likely not enough to differentiate *Valard* – likely will apply in Ontario
- **RECOMMEND:** Os take reasonable steps to notify potential beneficiaries (subs) where GC posts L&M Bond



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NOTE:

Construction Lien Act Amendments in force October 1, 2019

- **Prompt Payment Amendments**
- **Mandatory Interim Adjudication**

Covered in Part 2 – April 5, 2018

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