

# Recent Changes to the *Construction Lien Act* and the Importance of Bonding for Condominium Corporations



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**W**hether it's an aesthetic upgrade or major repairs and replacements due to defects or an aging building, almost every condo, at some point in its life, will experience a major construction project. Generally the project will involve engineers, sometimes architects, a general contractor and subcontractors to work or provide materials on parts of the project. As the work progresses, the Condominium Corporation makes periodic payments to the general contractor who then makes payments to the subcontractors.

In most cases, the job is completed, the suppliers and subcontractors are paid, and the condominium moves forward to consider its next project.

Unfortunately, this is not always the case! What happens if the general contractor suddenly abandons the project? The project is incomplete! Suppliers and subcontractors are unpaid! Winter is approaching!

This is where the *Construction Lien Act* and bonding come into play.

## BONDING

Bonding is a very important factor to consider each and every time a construction project is being contemplated because it protects the corporation from exactly the type of situation described above.

Generally, the two types of bonds available to Condominium Corporations for standard construction projects are: (a) Labour and Material bonds and (b) Performance bonds.

Bonds function where a surety (typically an insurance company) promises to ensure performance of a contractor's obligations if the general contractor defaults on them. Having said that, not every failure to perform will allow a condominium to exercise on the

bond. There are very specific circumstances in which a bond can be exercised, for example an abandonment of the project such as set out above. These circumstances will be clearly disclosed in the bond documents.

The way in which the surety would ensure performance of the general contractor's obligations depends on the nature and wording of the Bond.

The purpose of a performance bond is to guarantee satisfactory completion of the contract. In a typical performance bond, the Surety would generally have the following options if the condominium exercises on the bond:

- a** Completing the work as required under the construction contract itself;
- b** Arranging for another contractor to complete the work under the construction contract; or
- c** Compensate the owner with an amount of money equal to the cost the owner must incur to complete the work stipulated in the construction contract.

In a typical labour and material bond, the surety provides security for specific circumstances where the general contractor fails to pay the subcontractors or suppliers. The primary purpose of this bond is to ensure that the owner's property is free of construction liens.

It is important that Condominium Corporations pay close attention to the provisions of the bond documents. These provisions will stipulate the nature and circumstances which would qualify for a general contractor to be considered in default.

It is also crucial to consider the value of the bonds. In many cases, the value of the bond may not constitute the full value of the contract. [Remember to think about HST.]

The bond documents will also confirm the obligations of the condominium, including any reporting and notice requirements that the Condominium Corporation will need to fulfill in order to exercise on the bond.

## **CONSTRUCTION LIEN ACT**

For most Condominium Corporations, the *Construction Lien Act* really only comes into play, on a regular basis, in relation to the 10% holdback: when can it be released and when can it be held back in standard circumstances.

The reason for this holdback is, of course, really for the benefit of subcontractors and suppliers. Under the *Construction Lien Act* (the “Act”), contractors who provided services or materials in a project, but have not been paid by the general contractor, can register a construction lien as against the property of the owner. In the condominium context, this could result in a lien being registered on the title of every unit in the condominium.

While this is an important security in the construction industry, for unit owners who are trying to sell their unit, the construction lien (or in some cases, liens) registered on their unit can cause challenges in the sale of their unit. For these unit owners it becomes critical that the lien(s) registered on title to their units become discharged as soon as possible.

Generally construction lien(s) are discharged when the Condominium Corporation (as the owner) pays the lien holder with money retained in its holdback (portion of money retained by the corporation).

However, in situations where there is not enough money to pay out the lien holders or there are competing claims and the rights of the bonding company to consider, the registered liens on title can often remain for an extended period of time as the claims are worked out. This is when it is possible for the liens to become a problem for certain owners.

Fortunately, an amendment to the *Construction Lien Act* will allow unit owners (after July 1, 2018) to discharge/vacate the lien(s) registered to their specific unit. Under s. 44(2.1) of the Act, individual unit owners will be able, on a motion to the court, to obtain an order vacating the lien(s) attached to their specific unit by paying the portion of the lien amount(s) that is attributable to the owner’s common interest as outlined in the corporation’s declaration. This will provide unit owners who are selling their property a fast method of clearing such encumbrances to their unit.

Some of the other new amendments that will be helpful to Condominium Corporations include:

- A new dispute resolution mechanism that allows construction projects to continue without disruption while disputes such as payment, changes in services, and some other matters are resolved;
- Allowing the small claims court to have jurisdiction in matters under \$25,000;
- Requiring a party who preserves a lien to provide notice to the condominium corporation *and* every unit owner in the corporation;
- New thresholds for substantial performance and timelines for preserving and perfecting liens; and
- New prescribed forms (such as the Notice of non-payment).

Portions of the amendments (such as the new prescribed forms) come into force on July 1, 2018 while other amendments (such as the new dispute resolution mechanism) come into effect October 1, 2019.

It is also important to note that the amendments contain grandfathering provisions. This means that the current *Construction Lien Act* continues to apply for contracts, procurement processes, and leases that were in effect prior to July 1, 2018.

Overall, a Condominium Corporation should consider using bonds to protect itself from the possibility of a general contractor defaulting from its obligations. Working in conjunction with the new amendments to the Act, this would best ensure that the challenges associated with such a default is ameliorated while also providing a way for the eventual completion of the project. ■

*Nancy Houle is a founding partner at Davidson Houle Allen LLP. She has practiced exclusively in the area of condominium and joint-property ownership law since being called to the Bar in 2002. Her practice includes general corporate advice to condominium corporations, financing and secured transactions, building deficiency litigation, and proceedings involving disputes between condominium corporations and residents.*

## **ALL CONDOMINIUMS ARE LEGALLY REQUIRED TO FILE CONDO RETURNS**

Under the Condominium Act, 1998 (the Act) and Ontario Regulation 377/17, all condominium corporations are legally required to file condominium returns with the Condominium Authority of Ontario (CAO).

Any condominium corporations that have not yet filed their returns with the CAO and paid their annual assessments, must act immediately to avoid legal consequences for not complying with the Act, including late penalties.

**PLEASE CONTACT THE CAO AT:  
416-901-9356 or toll-free: 1-(800) 854-9014**