

Construction Lien Act

Procedures for the Release of Statutory Lien Holdbacks

Certificate of Substantial Performance of the Contract - Certificate of Completion of Subcontract – Statement of Contract Deemed Completed

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Summary

The *Construction Lien Act (CLA)* prescribes mandatory procedures for the release of lien holdbacks under various scenarios. Architects must take care when issuing documentation pertaining to certificates and statements so that they are correct and complete.

Note: Where the term “project” is used, it has the same meaning throughout as “improvement” in the *CLA*.

The *CLA*, as it read on June 29, 2018, continues to apply with respect to a project if,

- (a) a contract for the improvement was entered into before July 1, 2018;
 - (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
 - (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the Restoring Trust, Transparency and Accountability Act, 2018 came into force.^[*]
- (2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

For the purposes of this Act, a procurement process is commenced on the earliest of the making of,

- (a) a request for qualifications;
- (b) a request for quotation;
- (c) a request for proposals; or
- (d) a call for tenders.

^[*] The *Restoring Trust, Transparency and Accountability Act*, 2018, S.O. 2018, c. 17 - Bill 57 received Royal Assent on December 6, 2018. Confirm with your lawyer the date that subsection 19 (1) of Bill 57 came into force and that no further amendments to the *Construction Act* have been made.

Background

1. The *CLA* provides for the release of lien holdback to a “contractor” under three possible scenarios:
 - a) “Substantial performance” of the contract
 - b) “Total completion of a subcontract”
 - c) “Contract deemed completed”

While certification of substantial performance and total completion of a subcontract is optional, only contract deemed completed may normally occur.

2. There may not be a certificate of substantial performance on a particular project. Someone, usually the contractor, must request this. Sometimes, especially on smaller projects or when the difference in time between “substantial performance” and “deemed completed” is minor, the contractor may prefer not to apply for a release at substantial performance and wait instead for a release at “deemed completed.” Also, if the date of “deemed completed” occurs prior to the date of publication of “substantial performance”, the earlier governs the start of the lien period.
3. The *CLA* refers to two types of holdback (Refer to *CLA* for description):
 - a) Basic holdback, and
 - b) Separate holdback for finishing work (“finishing holdback”).
4. There is no further lien holdback retained after a contract is “deemed to have been completed.”
5. If “substantial performance” is certified, the release of lien holdback that follows is the “basic holdback.” The “separate holdback for finishing work” is then retained to be released following determination that the project is “deemed completed.” Procedures and waiting periods apply to all scenarios. In order to provide such certification, the holder must have been engaged to provide general review of the construction and as a payment certifier to the construction contract for the entire construction phase. The holder must be adequately familiar with the contract details and performance of the work under the contract.
6. The *CLA* provides for the release of holdback in respect of a subcontractor whose work is certified to be totally completed. This provision was created for the benefit of those trades which normally complete their work considerably in advance of the date of substantial performance on major projects, and typically includes trades such as excavation and foundation subcontractors. There is no provision in the *CLA* for substantial performance of a subcontract. Since the subcontract must be totally complete, certain documentation from the contractor and subcontractor is required to verify that a subcontractor’s work has been totally completed since the holder is not privy to the subcontract agreement and since it is unlikely that the subcontract agreement would be released in its entirety.
7. If there is no certificate of substantial performance published, then there is no release of lien holdback related to “substantial performance.” In this case, the full amount of lien holdback is released following the procedures and waiting period related to a contract “deemed to have been completed” or “abandoned.”
8. A contract is “deemed to have been completed” when the price of completion, correction of a known defect or last supply is not more than the lesser of,
 - a) one percent (1%) of the contract price, and
 - b) \$1,000.
9. Unlike “substantial performance” or “total completion of a subcontract”, there are no prescribed forms in the *CLA* to complete that attest to the fact that a contract is “deemed to be completed”. At the same time, it is important for the parties to the contract to understand when a contract is “deemed to be completed” as lien periods begin to run from that date and, subsequently, lien holdbacks should be released upon the expiry of those periods. Once the lien period expires, the *CLA* no longer applies with regard to the payment of the holdback.
10. There are printed forms for both “substantial performance” of the contract and “total completion of a subcontract” and it is mandatory that the procedures be followed as prescribed. In some instances, certificates of substantial performance were ruled invalid due to inaccuracies, and had to be corrected and re-issued, causing confusion as well as claims for interest on holdback monies withheld for a further period.
11. It is appropriate for a holder, who is also the payment certifier on a construction contract, to clearly identify to the parties of the contract, when a contract is “deemed to be completed.” In order to provide such a statement, the holder must have been engaged to provide general review of the construction and as a payment certifier to the construction contract for the entire construction phase. The holder must be

adequately familiar with the contract details and performance of the work under that contract. There is no requirement to publish in any newspaper a statement of contract deemed completed, as there is for a certificate of substantial performance.

Suggested procedure

Substantial Performance of the Contract

1. Review and implement the procedures outlined in OAA/OGCA (Ontario General Contractors Association) Take-Over Procedures (Document No. 100, December 12, 2007 version and the updated July 1, 2018 version) and as prescribed in the *CLA*.
2. In determining if a project is substantially performed, prepare and retain the following backup calculations:
 - a) total value of known incomplete work and deficiencies (work to be completed or corrected) preferably including a list of specific items;
 - b) if applicable, the total value of incomplete work which cannot be completed expeditiously for reasons beyond the control of the contractor or where the owner and contractor agree and which shall be deducted from the construction price in determining substantial performance; and
 - c) the allowable cost of completing the work according to the formula in Article 2(1) of the *CLA* after reducing the contract price as noted in (b) when applicable.

The value of (a) must be less than the value of (c).

3. If the project is substantially performed:
 - a) obtain and use only the standard *CLA* Form 6 - Certificate of Substantial Performance (refer to link at the end of this document);
 - b) obtain and confirm all of the information required to properly complete the form well in advance of the date of substantial performance to avoid delays in issuance, including the legal names of the “owner” and “contractor” as defined by the *CLA* and the addresses for service; and
 - c) when completing “identification of premises for preservation of lien”, obtain from your client the registerable description of the entire property on which the improvement is being made, as verified by their legal counsel.

An example of Form 6 completed for a fictitious project follows.

Form 6

Construction Lien Act

CERTIFICATE OF SUBSTANTIAL PERFORMANCE OF THE CONTRACT UNDER SECTION 32 OF THE ACT

Regional Municipality of Niagara (County, District or Regional Municipality, City or Borough of Municipality of Metropolitan Toronto in which premises are situated)

91 Thorold Road, Niagara Falls, Ontario L2X 3X4 (Street address and city, town, etc., or, if there is no street address, the location of the premises)

This is to certify that the contract for the following improvement:

Addition and Alterations to offices of Alpha Owner (short description of the improvement)

to the above premises was substantially performed on July 1, 2018 (date substantially performed)

Date of certificate signed: July 4, 2018 (payment certifier, where there is one)

(owner and contractor, where there is no payment certifier)

Name of owner Alpha Owner (1985) Inc

Address for service 91 Thorold Road, Niagara Falls, Ontario L2X 3X4

Name of contractor Beta Contractor (1987) Ltd

Address for service 39 Facer Street, Niagara Falls, Ontario L2X 7X8

Name of payment certifier Charlie Architect Inc (where applicable)

Address 46 Long Road, Niagara Falls, Ontario L2X 7X8

(Use A or B whichever is appropriate)

A. Identification of premises for preservation of liens:

Part of Lots 7, 8, 15, 16, Reg'd Plan 96, Former TWP of Stamford, now City of Niagara Falls (where liens attach to premises, reference to lot and plan or instrument registration number)

B. Office to which claim for lien and affidavit must be given to preserve lien:

(where liens do not attach to premises)

R.R.O. 1990, Reg. 175, Form 6

Total Completion of a Subcontract

The recommended procedure for release of construction lien holdback on a completed subcontract is related to the Certificate of Completion of Subcontract (Form 7.) Section 33 of the *CLA* provides for the release of holdback funds after expiry of the 45-day period following the date the subcontract was certified complete.

It should be noted that certification of completion of a subcontract is not mandatory under the *CLA*. If the owner is not prepared to comply with this section, this should be clearly stated in the supplementary conditions to the construction contract.

1. The procedure for release of a subcontractor's construction lien holdback is initiated by the contractor's written request for review to determine the date of completion of the subcontract. Require that this request be complete with the following documentation:
 - a) description of the scope of work included in the subcontract.
 - b) Declaration of Last Supply by the subcontractor as prescribed in subsection 31(5) of the *CLA* (Form 5.)
 - c) Workplace Safety and Insurance Board interim release for the contractor;
 - d) contractor's written acknowledgement to the owner that the requirements of the contract documents will not be altered by the early release of the holdback of the completed subcontracts; and
 - e) confirmation that the bonding company has been notified of the intent to claim release of the subcontractor's holdback.
2. Upon a satisfactory receipt of all documentation required under Item 1 above, review the work along with appropriate consultants. If satisfied that all work under the particular subcontract has been properly completed, issue a certificate to the owner, contractor and subcontractor within twenty (20) calendar days of the satisfactory receipt of the documentation noted above.

The date of completion shall be noted and acknowledged in writing by all parties.
3. Require from the contractor, over the signature of one of the signing authorities, a statutory declaration to the owner, stating:
 - a) that no written notices of lien have been received by the contractor;
 - b) subcontractor has been paid in full, except for construction lien holdback;
 - c) the final net amount of the subcontract and the amount owing; and
 - d) that they have received the certificate issued by the holder pursuant to Section 33(1) of the *CLA* on _____ day of _____, 20____.
4. The subcontractor shall issue, simultaneously, and over the signature of one of their authorized signing officers, a statutory declaration to the contractor stating:
 - a) that they have not received any written notices of lien claim;
 - b) that their own sub- contractors and suppliers are listed completely in the declaration;
 - c) that they have received payment in full from the contractor except for construction lien holdback;
 - d) the final net amount of the subcontract and the amount owing; and
 - e) that they have received the certificate issued by the holder pursuant to Section 33(1) of the *CLA* on _____ day of _____, 20____.
5. The subcontractor must provide releases from the Workplace Safety and Insurance Board on their own behalf of his/her subcontractors and suppliers.

6. Advise the owner to have a construction lien search made at the expiry of forty-five (45) calendar days after the date of completion noted on the holder's certificate mentioned above.
7. Provided that:
 - a) no liens or certificates of action are preserved;
 - b) all documents noted herein have been received; and
 - c) no written or oral notices of lien claims or of unpaid subcontractors or suppliers have been received by the owner; the owner may then make payment to a contractor on the basis of the holder's certificate for payment. It is recommended that the owner retain legal counsel to carry out the lien search.

Note: The release of holdback to a subcontractor whose work has been certified as totally completed does not affect the commencement date and warranty requirements of the contract, i.e. the warranty period for the subcontract commences on the date of substantial performance of the prime contract.

Statement of Contract Deemed Completed

1. While there is no prescribed form in the *CLA* to attest to the fact that a construction project is "deemed completed", it is prudent for a holder who is the payment certifier to clearly document the fact. The contractor and the owner should be notified of the following information:
 - a) the date that the contract is "deemed completed" as per Section 2 (3) of the *CLA*, R.S.O. 1990;
 - b) when lien rights expire. At the conclusion of the forty-five (45) day period next following the date the contract was deemed completed; and
 - c) when outstanding lien holdback monies will be due to the contractor. (On the day following the conclusion of the forty-five (45) day period), provided no liens exist relative to this contract.
2. The above can take the form of a letter or a statement. It should be addressed to the owner and contractor or to the owner with a copy to the contractor. A statement can be formatted as a standard form. The letter or statement should be on the practice's letterhead and be signed by a holder or someone under the personal supervision and direction of a holder. Attached at the end of this document is an example of a standard format for a Statement of Contract "Deemed Completed" with sample wording, or refer to the sample form in OAA/OGCA Document No. 100.
3. As backup for the above, the certifying holder should retain:
 - a) a calculation of the total value of known incomplete work and deficiencies (work to be completed or corrected), preferably including a detailed list of each item; and
 - b) a calculation of the applicable maximum amount in determining "deemed completed" (lesser of \$1,000 and one percent (1%) of contract value.)

The value of 3 (a) must be less than the value of 3 (b). This information may accompany the letter or statement noted in item 2 above.

4. Follow procedures outlined in OAA/OGCA Take-Over Procedures, (Document No. 100), Stage 6 and Stage 7.

References

[Construction Lien Act \(CLA\)](#), R.S.O., 1990, chapter C.30, as amended (see versions prior to 2018 06 30).

[OAA/OGCA Take-Over Procedures, Document No. 100](#), December 12, 2007, updated July 1, 2018 (PDF).

[Ontario Court Forms – Construction Act \(obsolete\)](#), (These forms apply to the CLA.)

Canadian Handbook of Practice for Architects, (CHOP)

Attachments

Attachment 1 – OAA Statement of Deemed Completion of a Contract (Word)

The OAA does not provide legal, insurance, or accounting advice. Readers are advised to consult their own legal, accounting, or insurance representatives to obtain suitable professional advice in those regards.
