



**MCLENNAN ROSS**

*Prompt Payment and  
Construction Lien  
Act and its Impact on  
Environmental  
Consultants’  
Business*

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# Outline

- Introduction
- Primer on liens and holdbacks
- What the law was
- What the law is
- Practical considerations

# Introduction

- New legislation came into force on August 29, 2022:
  - *Prompt Payment and Construction Lien Act, RSA 2000, c P-26.4*
  - *Prompt Payment and Adjudication Regulation, Alta Reg 23/2022*



# Introduction



- Engineers and other professionals already had common law builder's lien rights, so why the new legislation?
  - It has been a practice or convention to exempt consultants from holdbacks, even when not legally exempt
  - Effort to clarify, or to change the law?



# Primer on Liens and Holdbacks

- Two sides of the same coin:
  - Lien rights = subject to holdback
- Liens and holdbacks may arise for work or materials furnished *"in respect of an improvement"*
  - sections 6 and 18 of the *Act*

# Primer on Liens and Holdbacks (cont'd)

- Section 1(d) of the *Act*:
  - “improvement” means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;
  - Unchanged from previous legislation

# What the Law Was

- Creation of lien rights and holdbacks for a “*person*” who provided work or materials
- Term “*person*” was not defined, broad application



# What the Law Was (cont'd)

- *Badger Daylighting Inc v Sunoma Energy Corp*, 2003 ABQB 523
  - Construction to improve land = lien/holdback
  - Subsequent maintenance = no lien/holdback
  - “remediation” as part of construction



# What the Law Was (cont'd)

- *Young EnergyServe Inc v LR Ltd, LR Processing Partnership, 2021 ABQB 101*
  - Subsequent maintenance = no lien/holdback
  - Lien/holdback for “remediation”? – unclear use of term
  - Definition of “improvement”, in Alberta and other jurisdictions

# What the Law Was (cont'd)

- *JK Engineering Ltd v Red Quest Developments Ltd*, 2017 ABQB 75
  - Potential lien/holdback for planning or development work if directly related to construction or intended construction
  - Application related work for an AEP approval for a water and wastewater system gave rise to a valid lien, not “mere development work”

# What the Law Is



- New *Act* expressly applies to:
  - “regulated professional engineer”
  - “regulated professional architect”
    - *Regulation* section 35
  - What about another “person”?
    - *Act* section 6
    - Professional chemists, agrologists, geoscientists?

# What the Law Is (cont'd)



- No change in definition of “improvement”
  - General basis for lien rights remain
  - Basis for holdbacks unchanged
- Prior case law should apply?

# Practical Consideration

- Does remediation = an “improvement”?
  - Improve the land?
  - Timing of the work – i.e. during vs after construction
  - Judicial use of term “remediation”
  - Any drilling, digging or installing wells or other things?
- Does other work = an “improvement”?
  - E.g. Preparing an RMP, regular monitoring?

# Practical Consideration (cont'd)

- Structure of the contract
  - Promote lien rights vs holdback exposure
  - Split planning/development work from construction related work
  - Separate contracts, PO numbers, communications with client, etc.





# Practical Consideration (cont'd)

- Transitional provisions
  - Contracts after August 29, 2022 must follow new legislation
  - Contracts predating August 29, 2022 follow the “old” *Builders’ Lien Act*
  - Contracts lasting beyond August 29, 2024 must be amended to comply with the new legislation
  - Some confusion with respect to subcontractors retained during transitional period
  - Public works excluded from transitional provisions, old legislation applies

# Questions?

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# Contact Me



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**Thank you.**

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