

#### MCLENNAN ROSS

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

**BY SEAN PARKER** 

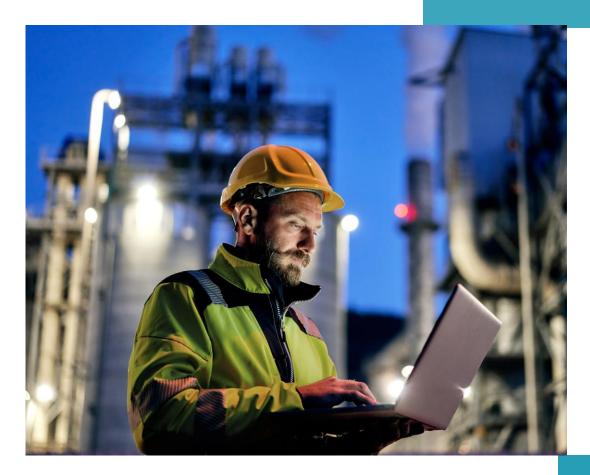
RemTech – October 14, 2022

## Outline

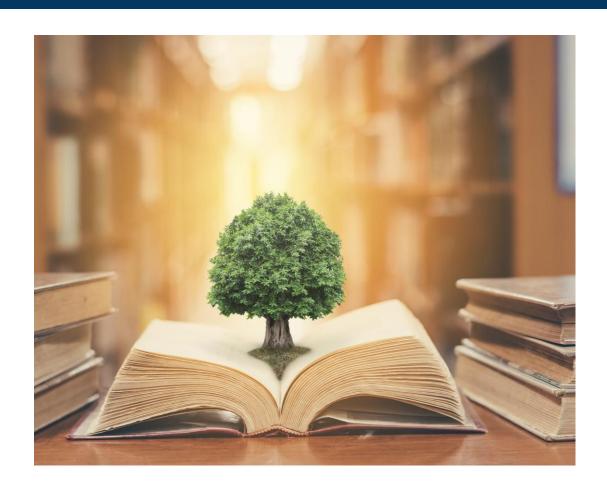
- Introduction
- Primer on liens and holdbacks
- What the law was
- What the law is
- Practical considerations

#### 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

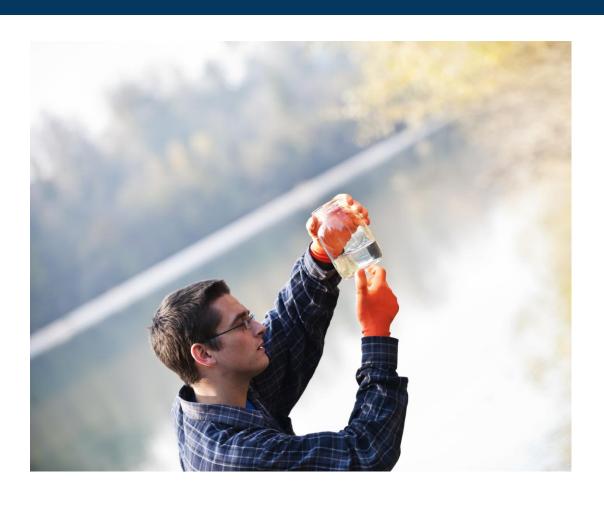
#### What the Law Was (cont'd)

- 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)

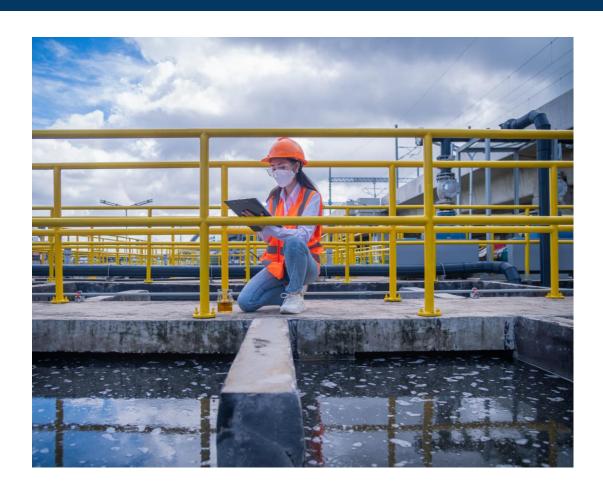
- JK Engineering Ltd v Red Quest Developments Ltd, 2017 ABQB
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  - Potential lien/holdback for planning or development work if directly related to construction or intended construction
  - Application related work for an AEP approval for a water and 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?

## **Contact Me**



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## Thank you.

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