

BILL 57 - CLARITY ON WHEN THE NEW OR OLD CONSTRUCTION ACT APPLIES

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On July 1, 2018, the first portions of the new *Construction Act* (the "CA")^[1] came into effect. Section 87.3 of the CA contains transition provisions that state when the new or old version of the CA applies. However, in our June 2018 bulletin,^[2] we noted that some of the transition provisions were ambiguous or challenging to apply. The absence of a definition for when the procurement process commences or a right under section 39 to request the prime contract date were particularly concerning.

The Ontario government has now remedied these and other transition issues through the *Restoring Trust, Transparency and Accountability Act, 2018* (the "*Restoring Trust Act*").^[3] The *Restoring Trust Act* received royal assent on December 6, 2018 such that it is now law. As described below, it contains several key amendments to clarify the transition provisions in the CA. It also adds detail to the adjudication and holdback sections in the CA.

When Does the Procurement Process Commence?

Section 87.3 of the CA provides that the old CA continues to apply to projects where the owner commenced the procurement process before July 1, 2018. However, as described in our June 2018 bulletin, it was unclear when the procurement process was commenced. For example, a procurement process could commence with the internal drafting of bidding rules, external informal communications with potential contractors, or it may not begin until a formal request for proposals or similar document is issued. As such, there was uncertainty about the date to be used when applying the transition provisions. The date of commencement was also problematic because it could have depended on the owner's internal documents, which contractors and others could not easily access.

The *Restoring Trust Act* amends the CA so that the procurement process only commences on the issuance of the earliest of the following documents:

- a request for qualifications;
- a request for quotation;
- a request for proposals; or

- a call for tenders.

As such, the date when the procurement process commences has been significantly clarified.

Do the Procurement and Adjudication Provisions Apply To Pre-October 2019 Contracts?

The new CA includes certain sections (such as new lien expiration rules) that came into effect on July 1, 2018 and other sections (such as adjudication and prompt payment) that do not come into effect until October 1, 2019. However, the transition provisions did not take into account the different timing of these sections, which could lead to absurd results. For example, the transition rules apparently provided that a contract that was entered into on July 2, 2018 would be subject to adjudication and prompt payment, even though neither of those sections of the CA were yet in force.

The *Restoring Trust Act* amends the CA so that the adjudication and prompt payment sections of the new CA now only apply to contracts made after October 1, 2019, which is the day that those sections come into force.

New Section 39 Right To Information

Another issue with the transition rules was that subcontractors did not have a right under the CA to demand that the contractor supply the prime contract date. As a result, subcontractors may be unable to apply the transition rules that were based on the date the prime contract was entered into. The *Restoring Trust Act* has removed this obstacle by amending section 39(1) of the CA to add the date that the prime contract was entered into to the list of existing information that a contractor must supply upon demand.

Other Changes

In addition to modifying the transition provisions, the *Restoring Trust Act* adds detail to the adjudication sections. Parties may now agree at the outset of a project to a particular adjudication process by setting out the process in their contract or subcontract. However, the process set by the parties only applies to the extent that it does not conflict with the process set out in the CA. Further, the party seeking adjudication must now provide a copy of the notice of adjudication and the documents it intends to rely on within five days of the appointment of the adjudicator.

The holdback provisions have also been revised. Section 27.1 of the CA as amended now provides that a contractor may refuse to pay holdback to subcontractors if the owner has similarly refused to pay the contractor under section 27.1. Contractors who wish to take advantage of this new provision must publish a notice in a prescribed form.

by Laura Brazil

[1] *Construction Act*, R.S.O. 1990, c. C.30.

[2] “Minimizing Risks Arising from the New Construction Lien Amendments” by Laura Brazil and Glenn Grenier, *McMillan Construction Bulletin*, June 2018: [Click Here](#).

[3] *Restoring Trust and Accountability Act*, 2018, S.O. 2018 c. 17 (Schedule 8).

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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