

ONTARIO'S OLD CONSTRUCTION LIEN ACT IS STILL WITH US

– HERE'S WHAT TO DO ABOUT IT



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In construction law, a little knowledge is a dangerous thing.

Most members of the construction industry will recall that Ontario made significant changes to what was the *Construction Lien Act* (the “Old Act”) and is now the *Construction Act* (the “New Act”) as of July 1, 2018. We are now at the five-year anniversary of the New Act, and it would be reasonable to think that the New Act governs most ongoing construction projects. However, many industry members continue to encounter surprises when they go to court, where they find that their projects are governed by the Old Act.

In this bulletin, we review recent Court decisions on the transition provisions of the New Act to identify best practices that contractors and others providing construction services should adopt to avoid missing lien periods.

1. WHEN IN DOUBT, ASSUME YOU HAVE 45 DAYS TO LIEN, NOT 60

It seems reasonable that the New Act would govern a construction contract or subcontract entered into today, in 2023. However, assuming this could be a costly error. What matters is when the procurement process started, or when the first contract was entered into for the improvement.¹

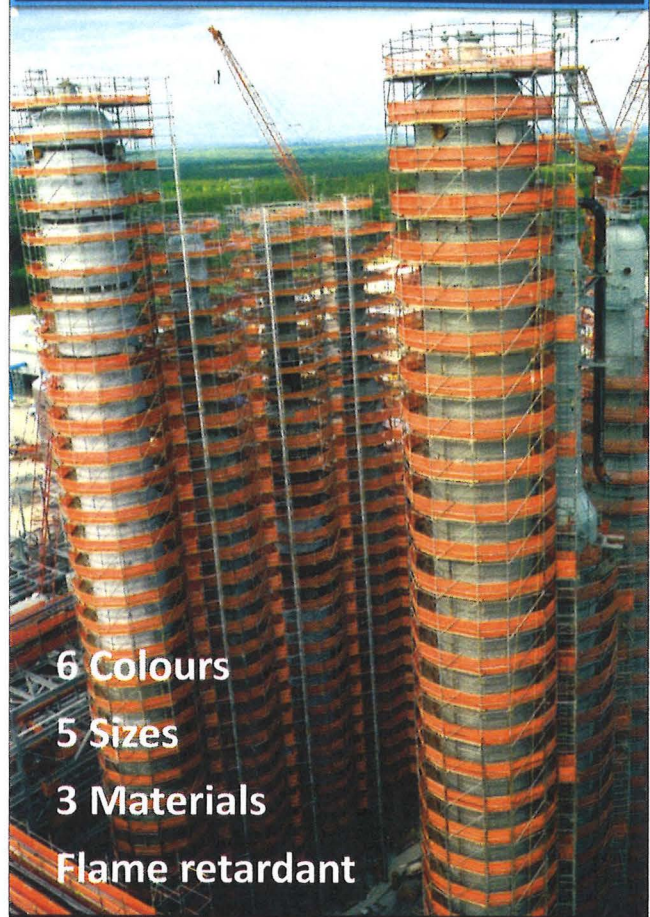
The date of a party’s contract is not conclusive evidence of whether the Old Act or the New Act applies. Moreover, the information necessary to determine which version applies may not be available to a lien claimant at the time of registering their lien. Accordingly, a cautious approach is needed.

This is particularly true because parties do not have a right to know whether the Old Act or the New Act applies when they place a lien.² In *Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.*, the lien claimant argued that the transition provisions of the New Act result in unfairness to trades lower down in the construction pyramid, who may not know when a prime contract was entered into. The Court rejected this argument and emphasized that public policy required that either the Old Act or the New Act apply to all parties working on an improvement.³

Whether the Old Act or the New Act applies depends on the timing of the first procurement process for an improvement. A procurement process starts with the earliest request for qualifications, quotations, proposals or calls for tender.⁴ However, the short window to place a lien may not provide enough time for a contractor to determine when the procurement process started.

In many cases, that information may not be available to the contractor until well after litigation is underway. We have

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A CAUTIOUS APPROACH IS WARRANTED, AS THE EXISTENCE AND TIMING OF PRE-EXISTING AGREEMENTS ARE UNLIKELY TO BE KNOWN BY SUBCONTRACTORS OR OTHER PARTIES ENGAGED AT A LATER STAGE OF THE PROJECT.

DNR is also notable because it takes a broad interpretation of the concept of a “contract for the improvement.” Before *DNR*, there was uncertainty about when a construction manager’s services would qualify for lien rights.⁹ By finding that the services of a “pure construction manager” qualified for lien rights in *DNR*, the Court has shown a clear desire to cast a wide net with its interpretation of what is a qualifying “contract for the improvement.” This consideration impacts whether the Old Act or the New Act applies, because an expansive definition of “contract for the improvement” could cause the Old Act to apply by capturing early-stage agreements that pre-date July 1, 2018 (e.g. contracts for planning, architectural designs or site clearing).

The statutory definition of “improvement” is often broader than the conventional definition of a construction project. An improvement comprises any alteration, addition or repair to the land, or any construction, erection or installation on the land or any building structure or works on the land.¹⁰ A party would be taking on significant risk by assuming that any contracts pre-dating July 1, 2018, were unrelated to the project that the party was hired to complete. The Court may well find that the pre-existing contracts and the project were all part of one improvement. And if they were all related to one improvement, then the Old Act likely applies.

A cautious approach is warranted, as the existence and timing of pre-existing agreements are unlikely to be known by subcontractors or other parties engaged at a later stage of the project. Parties should not assume their agreement – or even their general contractor’s agreement – is the first one for the improvement.

3. DON'T TRUST THE WORDING OF THE CONTRACT ALONE

The provisions of both the Old Act and the New Act are mandatory. That includes the transition provisions that determine whether the Old Act or the New Act applies. Sections 4 and 5 of the New Act are clear that non-compliant provisions of contracts are void, and

seen several cases where the procurement process began with private email exchanges between an owner and another party. No lien claimant could have known about them when placing their lien. The takeaway is that the procurement process likely started earlier than one may think, and so, when in doubt, it is prudent to assume there are only 45 days to lien.

2. WHEN IN DOUBT, ASSUME YOU ARE NOT THE FIRST CONTRACT FOR THE IMPROVEMENT

Even if there is no procurement process and a party entered into their contract in 2023, the Old Act may apply if there is another contract for the same improvement which came earlier.

Parties have learned this lesson the hard way. In *DNR Restoration Inc. v. Trac Developments Inc.* (“*DNR*”)⁵, the lien claimant contracted with Trac Developments on November 1, 2019 – after the New Act came into effect.⁶ To *DNR*’s surprise, the Old Act applied. Their contract was not the first contract for the improvement. The owner had contracted with a construction manager prior to July 1, 2018,⁷ and that contract counted as lienable services, which brought the improvement under the Old Act.⁸

Courts will amend and interpret contracts to conform to the New Act.¹¹ As a result, a party cannot choose which version applies by simply stating in the contract that the New Act applies, rather than the Old Act.

Allowing parties to bargain for which version applies risks uncertainty, inconsistency and variances in rights for different parties on one improvement. As the Court held in *Crosslinx*, the transition provisions require that one legislative scheme apply to the entirety of an improvement.¹²

Since the wording of the contract cannot offer parties comfort about which version applies, lien claimants should act cautiously and assume that the Old Act applies until they learn otherwise.

CONCLUSION

The change from the Old Act to the New Act is gradual and remains ongoing. The transition period has been punctuated by surprises for parties when disputes have gone before the Courts. Lien claimants can protect themselves by assuming they have the rights afforded by the Old Act, rather than risking a missed lien period by hoping that the New Act applies.

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.

If you have any questions, please contact Jason J. Annibale (Jason.Annibale@mcmillan.ca) or Connor Campbell (Connor.Campbell@mcmillan.ca).

[1] *Construction Act*, s. 87.3(1).

[2] *Crosslinx Transit Solutions Constructors v Form & Build Supply (Toronto) Inc.*, 2021 ONSC 3396 at para 32 (“*Crosslinx*”).

[3] *Crosslinx* at para 33.

[4] *Construction Act*, s. 1(4).

[5] 2023 ONSC 1849 (“*DNR*”).

[6] *DNR* at para 6.

[7] *DNR* at para 26.

[8] *DNR* at paras 28-29.

[9] David Bristow et al., *Construction Builders’ and Mechanics Liens in Canada*, 8th ed, § 3:45 (Westlaw).

[10] *Construction Act*, s. 1 “improvement”.

[11] *Construction Act*, RSO 1990, c C.30, s 5, as amended.

[12] *Crosslinx*, at paras 23, 25-33.

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