Blaney McMurtry LLP

PUBLICATION

Subcontractors' Lien Timelines Under the *Construction Act*

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Author: Chad Kopach

The first tranche of revisions to the *Construction Act* (the "Act") came into force on July 1, 2018. Some of the most anticipated changes were the extensions of the lien timelines. For subcontractors, the time to preserve the lien by registering a claim for lien was increased from 45 days to 60 days, and the time to perfect by commencing an action was increased from 45 days to 90 days.

But there is a significant catch in the form of the three transition provisions in the Act.

The transition provisions say that in certain circumstances, the old timelines will apply, even if a subcontract was entered into after July 1, 2018.

Two of the transition provisions are based on the circumstances surrounding the contract between the owner and the contractor (the "contract" in the Act). The third transition provision is based on whether the premises is subject to a leasehold interest. If any one of the three circumstances exist, then the old timelines apply.

First Transition Provision – Contract Date Pre-July 1, 2018

Under the first transition provision, if the contract (i.e. between owner and GC) was entered into prior to July 1, 2018, then the old timelines apply, regardless of when any subcontract was entered into.

Second Transition Provision – Procurement Process Commenced Pre-July 1, 2018

Under the second transition provision, if the procurement process for the improvement was commenced prior to July 1, 2018, then the old timelines apply. The Act has recently been further amended to include language clarifying that a procurement process is started on the earliest of making: a) a request for qualifications, b) a request for quotation, c) a request for proposals, or (d) a call for tenders.

Third Transition Provision – Pre-July 1, 2018 Premises Lease

Under the third transition provision, as the new Act was originally drafted, the old timelines applied if the premises was subject to a lease that pre-dated July 1, 2018, regardless of when the contract or any subcontracts are entered into.

This transition provision meant that the old timeline could continue to apply to improvements for years in the future, and had been criticized as creating too much uncertainty for too long a period about which timeline applies.

Accordingly, on December 6, 2018, the Province passed further amendments to the Act to, among other things, put a time limit on the leasehold exception. The effect of this change is that the old timeline applies to pre-July 1, 2018 leases, but only if the contract was entered into prior to December 6, 2018, or if the procurement process was commenced prior to December 6, 2018.

The Pitfalls

The obvious concern is that subcontractors with lien claims will ignore the transition provisions altogether. There are already reports of subcontractors assuming they are under the new 60/90 timeline, when in fact the old 45/45 timeline applies. Predictably, this has resulted in expired liens that cannot be preserved, as well as preserved liens not being perfected in time, with the risk of being discharged. Counsel should be cautioning their subcontractor clients that they should assume their liens are governed by the old timelines, and that they are required to preserve and perfect within the old 45/45 timeline.

The reference to “procurement” as a marker date will also prove problematic. While most in the construction industry have an idea about what constitutes “procurement”, we will not really know what the word means until it has been judicially interpreted.

Also, the subcontractor is not typically privy to the details of the contract, and it is not unusual for the subcontractor to not be part of the procurement process at the beginning, only being asked to participate towards the end. This means that the subcontractor will likely not have information about the date the contract was entered into, or the date the procurement process was commenced.

To address this information deficiency, the recent further revisions to the Act have added to the information that a subcontractor can obtain from the parties up the chain under section 39, which now includes the date the contract was entered into, and “the date on which any applicable procurement process was commenced.” Of course, the obvious problem with this is that the Act allows a party who receives a s.39 request for information to wait up to 21 days before responding. Depending on when the request is made, this could mean that the response comes after the lien period has elapsed.

Finally, the first transition provision refers to the date a contract is “entered into”. One would hope this would be the date of the contract, but what if the contract was signed on dates that are other than the date of the contract? What if the parties start performing under the contract

before it is signed? Again, this is a term that the industry will not be able to define with any confidence until it has been judicially interpreted.

The Take Away

When it was first announced, the revision to the Act providing additional time to preserve and perfect lien claims was celebrated as giving subcontractors breathing room before they had to engage legal counsel to help collect on their unpaid accounts. The transition provisions have created a dual system, with some liens being subject to the old timelines, and others subject to the new timelines. Given the uncertainty about which timeline applies, and the inability of most subcontractors to obtain timely information to know with certainty that the new timelines apply, subcontractors and their lawyers should assume that they are subject to the old limits, and should preserve and perfect within based on the old 45/45 period. Incorrectly assuming that the new timeline applies could be catastrophic, and resulting in claims for lien not being preserved in time, or missing the deadline for perfection.