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The Transition Provision – Know Which Act Applies

Knowing whether the old *Construction Lien Act* (“old Act”) or the new *Construction Act* (“new Act”) applies is critical in determining the expiry of a lien. Under the old Act, the lien had to be preserved within 45 days of the applicable trigger date. Under the new Act, the lien must be preserved within 60 days. Whether the old Act continues to apply is determined by the transition provision, section 87.3.

The transition provision provides, in part, that the old Act continues to apply with respect to an “improvement” (a) if a contract for the improvement was entered into before July 1, 2018, or (b) if a procurement process for the improvement was commenced before July 1, 2018 (s. 87.3(1)). The transition provision also clarifies that (a) and (b) apply regardless of when any subcontract under the contract was entered into (s. 87.3(2)).

The *Form & Build Supply*¹ case is the first time the court considered the application of the transition provision where the contract is entered into before July 1, 2018 and the subcontract is entered into after July 1, 2018. Crosslinx subcontracted with Harbels and Harbels in turn sub-subcontracted with Form & Build. The two sub-subcontracts between Harbels and Form & Build are dated July and February 2019. However, the contract for the construction of the Eglinton Crosstown is dated July 21, 2015. Form & Build claimed it was owed amounts by Harbels and registered two claims for lien for work performed at two of the stations. The liens of Form & Build were registered 56 days after the date of last supply. The court found that the old Act applied and therefore the liens of Form & Build had expired.

The court reasoned that the section refers to the date that the contract is entered into and that by the clarification in s. 87.3(2), the date of the subcontract is immaterial when assessing whether the old Act or the new Act applies.

The *Form & Build Supply* case highlights the necessity to know when the first contract was entered into or when the procurement process was commenced. This is of particular importance to subcontractors as their subcontract may be entered into well after the date of the first contract or the procurement process. To help determine when the procurement process was commenced, parties should review project and government websites that will often provide information such as tender opening dates, bid awards and general project information which may assist in determining whether the procurement process was commenced before or

¹ [Crosslinx Transit Solutions Constructors v. Form & Build Supply \(Toronto\) Inc.](#), 2021 ONSC 3396 (Master)

after the new Act came into effect. Parties should also use section 39 demands to obtain information from the owner and contactor regarding the date the contract was entered into and the date the applicable procurement process was commenced. However, when in doubt, always use the 45- day period under the old Act.



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