PPCLA transition periods: What this means for the construction industry

17 mai 2023

The Prompt Payment and Construction Lien Act (the PPCLA) is now law in Alberta. In addition to creating uncertainty around prompt payment, invoicing and adjudication, the PPCLA's transition provisions are likely to generate uncertainty in the construction industry.

The PPCLA and associated regulations contain rules that govern the transition from the former Builders' Lien Act (the BLA) to the PPCLA. Sections 74(1)(2) and (3) of the PPCLA provide that:

- The PPCLA applies to any contract or subcontract entered into on or after Aug. 29, 2022, which is the date when the PPCLA came into force in Alberta; and
- contracts that were executed before Aug. 29, 2022, must be amended to comply with the PPCLA within two years, if they are still in progress at that time. (the Transition Provisions).

Although the Transition Provisions appear to be straightforward, that may not actually be the case. On a plain reading of the PPCLA, the Transition Provisions appear to apply on a contract-by-contract basis, rather than on a project wide basis, meaning that there is a possibility that both the old BLA and the new PPCLA may apply on a project. A recent Ontario case highlights the risks associated with that likelihood.

In implementing amendments to its construction legislation, Ontario adopted a more comprehensive transition provision, requiring its new legislation to apply on a project wide basis instead of a contract-by-contract basis. Section 87.3 of the *Construction Act* directs that Ontario's former construction legislation applies if:

- a contract for the improvement was entered into before July 1, 2018;
- a procurement process for the improvement was commenced before July 1, 2018, by the owner of the premises; or
- in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018.

For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

Ontario's transition provisions have been judicially considered multiple times. For instance, In *Strada Aggregates Inc. v. YSL Residences Inc*. (*Strada*), the Ontario Superior Court found that the new *Construction Act* applied because there was no evidence that a prime contract or procurement process had begun before July 1, 2018.

Shortly after *Strada*, in *Crosslinx Transit Solutions Construction v. Form & Build Supply (Toronto) Inc.* (*Crosslinx*), a subcontractor's lien was invalidated due to the operation of Ontario's transition provisions. In *Crosslinx*, the contractor had entered into the prime contract with the owner on July 21, 2015, which meant it was governed by the 45 day lien period stipulated in Ontario's former *Construction Lien Act.* After July 1, 2018, major amendments to Ontario's *Construction Lien Act* took effect, including the extension of the lien period to 60 days. In July and February 2019, after the new *Construction Act* came into force, the contractor executed subcontracts with the subcontractor for work to be performed in respect of the prime contract.

After a dispute arose, the subcontractor registered a lien within 60 days of substantial performance of the work pursuant to the timelines set out in the *Construction Act*. The contractor argued that the lien was registered out of time on the basis that the former *Construction Lien Act* governed, and the subcontractor had failed to register a lien within 45 days as required. The Court agreed, finding that the effective date of the prime contract determined which lien period applied, irrespective of the fact that the subcontract was executed after the new *Construction Act* took effect. The Court reasoned that the legislative purpose of the transition provisions in the *Construction Act* were to ensure the consistent application of the same version of the act and regulations across an entire project.

Interestingly, the Court identified some potential concerns that could arise if the transition provisions were interpreted to allow more than one version of the construction legislation to apply to the same project or improvement. Some of the relevant concerns were described by the Court as follows:

- Given that the lien expiration period differs between the *Construction Lien Act* (45 days) and the *Construction Act* (60 days), how will a payor know when holdback is to be properly released if there are differing lien rights in the tiers below it in the construction pyramid?
- Given that there are no notice of non-payment requirements under the *Construction Lien Act*, but such requirements exist under the *Construction Act*, how will an owner, contractor or subcontractor know if a notice under s. 27.1 of the *Construction Act* is formally required before withholding payment?
- The uncertainty caused by imposing differing entitlements and obligations on various parties undertaking work on the same project would create an unreasonable administrative burden for all levels of the construction pyramid.

Ultimately, the Court concluded that the work performed by subcontractors is part of the work performed in accordance with a prime contract for any given improvement. That work is intrinsically connected with the prime contract and the overall improvement. It must, therefore, follow that all project participants need to be subject to the same legislative scheme governing their entitlements and obligations. The Court reasoned

that “any other interpretation would lead to uncertainty, confusion and inconsistency giving rise to potential or actual unfairness and inequity.”

Given the PPCLA’s transition regime appears to clearly state that the governing legislation is determined by the date of execution for each contract or subcontract (which could result in both the BLA and the PPCLA applying on the same project, to different contracts), the practical concerns noted by the Ontario Court are very real issues that may be realized in Alberta. While it is possible that the Alberta Courts will determine that the concerns identified by the Court in *Crosslinx* are challenges that ought to have been addressed in the Alberta legislation, the Alberta Courts may be handcuffed by the fact that the transition provisions in the PPCLA are not particularly ambiguous. Indeed, as the Court rightly concluded in *Crosslinx,* for there to be ambiguity, the words used in any given piece of legislation must be reasonably capable of more than one meaning. Only when that real ambiguity exists, will courts be permitted to rely upon external aids to assist in the interpretation of the words in the Act.

Key takeaways

- Until all construction contracts in Alberta are governed by the PPCLA, the Transition Provisions will continue to create material risk for the construction sector. Parties looking to mitigate the risks associated with transitioning to the PPCLA should take steps now to legally and practically prepare.
- Until further clarity of the Transition Provisions is provided through legislative amendments or the Alberta Courts, parties may be wise to assume the more conservative deadlines apply for the registration of liens and the release of holdback funds.
- The PPCLA will be automatically imposed on all construction projects in Alberta on Aug. 29, 2024. To prepare, parties to multi-year and/or multi-party construction projects should start considering the challenges noted by the Court in *Crosslinx* and further consider amendments to their contracts that will eventually need to be made to address compliance with the PPCLA.

For more information on understanding risks associated with the Transition Provisions of the PPCLA please reach out to any of the authors or the BLG Construction Lawyers listed below.

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