

**ONTARIO'S CONSTRUCTION INDUSTRY – STILL OPEN FOR BUSINESS?**

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**Construction Law Update – Suspension Period Lifted for Construction Liens and the Release of Holdback**

*On March 20, 2020, the Province of Ontario filed an order in council under the Emergency Management and Civil Protection Act effectively suspending until further notice all statutory limitation periods, including the limitation periods to preserve and perfect construction liens retroactive to March 16, 2020. However, the inclusion of construction liens in the suspension order proved highly problematic. Under the Construction Act, statutory holdback cannot be released until the time to preserve liens has expired. Thus, construction industry stakeholders soon concluded that statutory holdbacks could not be paid out during the suspension period. This was a likely unintended consequence of the suspension order, one which threatened the survival of many businesses facing an indeterminate delay to the payment of earned holdback.*

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*Thankfully, the Province has made an about face on this issue. On April 9, 2020, the Ford government made a further order in council specifically providing that, on and after April 16, 2020, the suspension order no longer applies to the limitation periods under the Construction Act. What this means is that, where the lien "clock" begins to run on or after April 16, 2020, the ordinary Construction Act lien periods apply (being 45 days or 60 days, depending on whether the old act or the new act applies). However, where the lien period was set to expire between March 16 and April 15, one must add the number days of the suspension period to determine the expiry date to preserve or perfect a lien. By way of illustration, this means that if the time period to preserve liens ordinarily expired on March 23, 2020 (7 days after the beginning of the suspension period), lien claimants will have until April 22, 2020 to preserve their liens (being 7 days following the last day of the suspension period). As a result, while payment of holdback ordinarily due and owing between March 16 and April 15 has effectively been suspended by a month, the indeterminate suspension on the release of holdback has ended.*

**Still Open for Business?**

On Friday April 3, 2020, the Provincial government announced it would be reducing the list of businesses classified as essential and order more businesses to close. The government's announcement included a significant change to the construction sector. While most of the industry was deemed an "essential service" by the Province just a few weeks ago, this most recent announcement requires all construction activities to cease, subject to certain key exceptions.

Perhaps the most significant exception was the Province's decision to permit most ongoing residential developments to continue. The Ford government's rationale for doing so was to prevent hardship to the approximately 45,000 buyers in Ontario

waiting for their new homes to be completed. Other than these ongoing residential projects, permitted construction activities are now limited to infrastructure projects and industrial construction activities considered "critical" by the Province, and to activities necessary to safely close construction sites impacted by the order. The Ford government has also advised that ongoing projects will be subject to increased scrutiny from health and safety inspectors, and that the Province will not hesitate to shut down sites considered to be unsafe.

### **Who bears the cost for a project shutdown (or slowdown)?**

Among the key questions in construction is: who will bear the cost of a project shutdown? Or, for those projects still permitted to proceed, who will bear the cost of work slowdowns arising from COVID-19 related precautions, such as reduced workforces? There is, unfortunately no easy or universal answer. This will be fact dependent and will largely depend on the terms of the contract or subcontract, as the case may be.

Where parties have entered into a standard form unmodified CCDC-2 fixed price contract, it appears that a contractor will be entitled to be reimbursed by the owner for its "reasonable costs" in the event of a shutdown, as per GC 6.5.2. It is not as clear whether a contractor will be entitled to compensation for additional costs where the project has not been shut down, but productivity is hampered by the imposition of new health and safety protocols to guard against the spread of COVID-19.

At a minimum, those dealing with construction delays and seeking compensation should carefully review their contracts and ensure that written notice of claims have been asserted on a timely basis, in accordance with the terms of contract. In order to preserve the right to seek compensation, contractors should provide notice of a claim for increased costs as early as possible, even if the full impact of the delay is not yet known.

### **Extension of Lien Periods**

On March 20, 2020, an order in council was filed by the Province under the *Emergency Management and Civil Protection Act* which has had the effect, among other things, of suspending the limitation periods to preserve and perfect construction liens, retroactive to March 16, 2020.

What this means is that anyone having lien rights as of March 16 will not see those lien rights expire during the suspension period. As such, despite the fact that lien claimants still have the ability to preserve and perfect liens, they may choose to wait until the suspension period is over prior to taking further action to enforce their lien rights.

The benefit is that contractors, subcontractors and suppliers can take a "wait and see" approach and hold off on registering their liens while waiting (and hoping) that a return to normalcy will result in payment, without fear that their lien rights will expire while they are off the project. If trades proceed to register liens during the COVID-19 crisis for lack of payment, it may lead to greater difficulties in getting paid once an owner is in a position to do so.

### **Where's the Holdback?**

A key complication arising from the Province's emergency declaration and the extension of lien periods relates to the payment of statutory holdback. Under the *Construction Act*, holdback must be retained until the time to register liens has expired. Given that lien rights will not expire until the emergency declaration is lifted, this means that informed owners and construction lenders are unlikely to release holdback during this time.

This is an unfortunate (and likely unintended) consequence of the Province's decision to extend the limitation periods for filing liens. Given the financial difficulties the construction industry is sure to suffer as a result of work slowdowns and stoppages, forestalling the payment of earned holdbacks may bankrupt many businesses the government claims it is attempting to protect. Given the likelihood that the COVID crisis will last several more months, it is hoped that the Province will revisit this issue and provide an exception for the payment of holdback.

## Conclusion

Ontario's construction sector is facing unprecedented challenges as a result of COVID-19 crisis and the Province's response to it. Confusion and uncertainty remains as to what projects can stay open, who will bear the burden of costs as a result of construction delays and whether holdback funds will flow during this state of emergency. If you have questions or concerns as to how this may impact your specific construction business, please do not hesitate to contact the author.