

Province Reimposes Limitation Periods and Lien Timelines under the *Construction Act*

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On March 17, 2020, in response to the COVID-19 pandemic, the Government of Ontario declared an emergency under the *Emergency Management and Civil Protection Act*. On March 20, 2020, Ontario passed a regulation under that Act (the “**Limitation Suspension Regulation**”) to, among other things, temporarily suspend limitation periods in the Province, retroactive to March 16, 2020. The Limitation Suspension Regulation applies to “[a]ny provision of any statute, regulation, rule, by-law or order of the Government of Ontario that establishes any period of time within which any step must be taken in any proceeding in Ontario...”.^[1]

Over the last three weeks, many contractors have received notices from owners or owners’ agents taking the position that they are prohibited from paying out holdback upon the completion of contracts given the Limitation Suspension Regulation. The owners’ position is that paragraph 2 of the Limitation Suspension Regulation suspends the time within which contractors and subcontractors have to register a claim for lien. The owners’ position is that this deadline, whether it is the 45-day period under the former version of the *Construction Act*, or the 60-day period under the current version, is suspended indefinitely. Release of holdback under the *Construction Act* is tied to the lien deadlines by s.26 of the *Construction Act*. Specifically, the payer upon a contract or a subcontract can only pay the holdback once all liens that may be claimed against the holdback have been “satisfied, discharged or otherwise provided for”.

Many owners have been taking the position that because the time to lien is indefinitely suspended under the Limitation Suspension Regulation, the ability (or obligation) to pay the holdback is similarly suspended. This has caused significant cashflow issues for contractors who had been expecting a timely release of holdback, and for their subcontractors similarly expecting a cascading flow of these funds.

There has been intensive lobbying of the Province on this issue by several industry participants over the last several weeks, including by the Construction and Infrastructure Law section of the Ontario Bar Association (chaired by our partner Lea Nebel). On April 9, 2020, the Attorney

General for the Province of Ontario released a memo advising, among other things, that as of April 16, 2020, the regulation that temporarily suspends limitation periods would be amended to lift those limitation periods and procedural time periods under the *Construction Act*.

Although not expressly stated in the Attorney General's memo, this more than likely also means that the strict timelines to preserve and perfect construction liens start running again as of April 16, 2020. Those with potential liens ought to err on the side of caution and register their liens (or Certificates of Action) within the prescribed time periods under the *Construction Act*.

As stated in the Attorney General's memo, lifting the suspension in this limited fashion will allow for the release of holdback payments to contractors and subcontractors in the normal course, which will resolve the significant cash flow issues caused by the original suspension of limitation periods.

If, notwithstanding the amendment to the Limitation Suspension Regulation, contractors are still having difficulty in obtaining a release of holdback, they should consider whether they are able to use online adjudication to obtain a quick determination of the issue.^[2]

A copy of the Attorney General's memo can be found [here](#).

^[1] Our office has written more on the Limitation Suspension Regulation [here](#).

^[2] Our update on the availability of online adjudication during the COVID-19 pandemic can be found [here](#).

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