

# COVID-19: PROTECTING ONTARIO LIEN RIGHTS WITH SUSPENDED LIMITATION PERIODS AND LIMITED COURT ACCESS

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30 March 2020

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## NOTICE TO READER:

Please be advised that, subsequent to this article being published on March 30, 2020, the Province of Ontario has issued additional orders that impact the construction industry - including lifting the suspension of limitation periods. The impact of the suspended limitation periods set out in this article is no longer current, and we refer you to our article titled: "[COVID-19: Construction Updates on Ontario's Response](#)". Other elements of this article, including perfecting liens with limited court access and COVID-19's impact on interim adjudication, may still be relevant to the reader.

For ongoing updates relating to COVID-19 and responses from government, please visit our [COVID-19 Resource Centre](#).

On March 11, 2020, the World Health Organization declared Coronavirus Disease 2019 ("COVID-19") a pandemic. Increasing restrictions are being put in place on mass gatherings or meetings both by governments and private entities. Out of fear of infection, some workers are refusing to attend work. As the spread of the virus begins to have a ripple effect on global industry and markets, and ever-increasing travel restrictions put in place, supply chain disruptions are beginning to impact businesses, developments and consumers worldwide.

It has now become clear that the Coronavirus and our response to mitigating its impact will have a major effect on every aspect of the Canadian economy, including the

construction industry. As the economy becomes less stable, parties to a construction contract are more likely to experience financial difficulties. In light of these changing economic realities, it is now imperative to understand how to protect payment rights and investments made to construction projects.

On Tuesday March 17, 2020, the Ontario Superior Court of Justice hearings were suspended until further notice. Only urgent public health and safety matters as well as urgent civil, family and criminal matters will be heard. The relevant test for having a civil matter heard is "urgent motions and application where immediate and significant financial repercussions may result." This may have an impact on the ability of owners, contractors and other trades to protect their rights to payment.

On the same day, the Province of Ontario declared a state of emergency pursuant to Order in Council 518/2020 (Ontario Regulation 50/20 pursuant to section 7.0.1 of the Emergency Management and Civil Protection Act (the "Act")). On March 20, 2020, the Province of Ontario made an order under the Act suspending all limitation periods and procedural deadlines in Ontario proceedings for the duration of Ontario's COVID-19 based state of emergency (the "Order"). The suspension of limitation periods and procedural deadlines is retroactive to March 16, 2020, and does not appear to suspend timelines agreed upon between parties.

On March 24, 2020, Ontario ordered the mandatory closure of all non-essential workplaces starting on 11:59 p.m. on Tuesday March 24, 2020. The construction industry has been deemed an essential business by Ontario, meaning that it remains business as usual on Ontario's construction sites subject to the province's public health measures.

In this article, we discuss the impact of the suspension of limitation periods and limited access to the Ontario Superior Court of Justice on preserving and perfecting construction liens, payment holdbacks, adjudication and prompt payment.

## **A. Lien rights**

The Order has suspended the limitation periods for preserving and perfecting a claim for lien retroactively from March 16, 2020 for the duration of Ontario's COVID-19 emergency. Under the Construction Act, RSO 1990, c C.30 (the "Act"), the lien rights of a contractor and of a subcontractor must first be "preserved", and then "perfected".

A lien is preserved by, prior to the end of the lien period, either registering the lien on title to the premises of the construction site or, where the lien does not attach to the premises (for example, Crown or municipal lands), by serving the owner with a copy of the claim for

lien. The lien period for preserving the lien claim is 60 days from the earlier of: date on which a copy of the certificate or declaration of the substantial performance of the contract is published; the date the contract is completed; for subcontractors, the date of the last supply of services or materials; and the date the contract is abandoned or terminated. (Note that, if the contract between the owner and the contractor was entered into or procured prior to July 1, 2018, the lien period is only 45 days.)

The preserved lien must then be perfected by, prior to the end of the perfection period, commencing an action and, in the case where the lien attaches to the premises, also registering a certificate of action on title to the premises of the construction site. The period for perfecting the lien claim is 90 days from the last day of the lien period for preserving the lien claim. (If the contract between the owner and the contractor was entered into or procured prior to July 1, 2018, the lien perfection period is only 45 days.)

To perfect a lien claim by commencing an action to enforce the lien, the action must be brought in the Ontario Superior Court of Justice which, as noted above, has suspended hearings until further notice.

## **B. Preserving a lien with limited court access**

Liens are one of the primary tools by which one can protect their rights to payment for labour and material investments to a construction project. While the Order and suspension of Ontario Superior Court of Justice operations will not prevent a party from protecting their lien rights – and the Order suspends the deadline for preserving or perfecting a lien for the duration of the COVID-19 emergency – one should still be vigilant with respect to the tight deadlines and strict timing associated with construction liens.

Like with other limitation periods, parties should closely monitor the duration of the Order's suspension and its impact on the calculation of procedural deadlines. While claimants can presently still preserve or perfect a lien during the COVID-19 emergency, the situation may change and claimants may need to move quickly after the Order ends. As delays can be fatal to one's claim for lien, claimants should be extra sensitive to the Order, lien timelines, and missed payments. If payments are missed, one should be ready to quickly pull the trigger and escalate the matter to protect their rights.

The first step—preserving a lien—will likely not be adversely impacted by the suspension in operations of the courts. Claims for liens can be preserved electronically with the Land Registry Office unless the owner of the property is the Crown, a municipality, or the premises is a railway right-of-way, in which case the owner must be served with the claim

for lien. However, given the fact that many individuals in Ontario are now working remotely, we would urge all potential lien claimants to be vigilant of any potential claim in order to allow for sufficient lead time in preserving a lien, notwithstanding the relief offered by the Order. The challenges associated with transitioning to a remote workplace may lead to delays, and the duration of the Order is uncertain. It is, therefore, important to pay close attention to lien timelines, and to take action early on, especially since construction has been deemed an essential service by the Ontario.

For an owner who is the Crown or a municipality, or for a railway right-of-way, the lien is not preserved electronically with the Land Registry Office. This is because liens do not attach to Crown, municipal or railway properties, and cannot be used to sell Crown, municipal or railway lands. Instead, one must serve a copy of the claim for lien to the Ministry or Crown agency to whom the improvement is made, the clerk of the municipality, the manager or any person apparently in charge of any office of the railway in Ontario, or to a prescribed office.

With respect to the Crown, the prescribed offices are outlined in section 11 of O. Reg. 304/18: General. For example, if the contract is with a Crown Ministry, the claim for lien must be served on the office of the Director of Legal Services of that ministry.

Due to the present COVID-19 emergency, the provincial and federal governments are now allowing documents to be served by alternate methods, including by email. Claims for lien may be served against Provincial entities at the address: [cloc.reception@ontario.ca](mailto:cloc.reception@ontario.ca). Emails must include the sender's name, address, telephone number and email address. For federal entities, the Deputy Attorney General in Ottawa or the appropriate regional office of the Department of Justice Canada must be served in any manner permitted under the Rules of Civil Procedure, such as hand delivery or registered mail.

Pursuant to section 11.1 of O. Reg 304/18, a municipality can specify on its website an email address or web portal for accepting notice of a claim for lien. For example, the City of Hamilton accepts claims for lien by email at the following email address: [ConstructionLiens@hamilton.ca](mailto:ConstructionLiens@hamilton.ca). If a municipality has not published on its website a method for serving a claim for lien, then a copy may be served in any manner permitted under the Rules of Civil Procedure or it may be sent by certified or registered mail or delivered by hand.

If the COVID-19 emergency worsens and service on Crown/municipal offices is no longer possible, the Order has suspended all limitation periods, including the timelines for preserving liens. When the emergency ends, one will be able to proceed with preserving their lien, though the Order will not restart the limitation period if the time for preserving

the lien was running prior to the effective date of the Order.

However, it is hard to envision a situation where a lien claimant could not electronically serve the claim for lien, and one should demonstrate that they made an effort to protect their lien rights despite the present emergency. Where no electronic means of delivery has been established, and the Crown or municipal office has been shut down, a lien claimant could serve the claim for lien by faxing or emailing it to the relevant parties.

With respect to the second step—perfecting a lien—it is also expected that the process will not be adversely impacted by the suspension in Superior Court operations. As of March 23, 2020, litigants are able to issue Certificates of Action electronically, and to commence all claims electronically.

While the Order may provide relief for any missed timelines, it is again important for claimants to be vigilant of the applicable perfection timelines to avoid losing their lien rights. While in normal circumstances many may be willing to give their customers and trades more time, or to engage in lengthy negotiations, the uncertainty and risk of further COVID-19 related disruptions makes being proactive imperative. This risk can be mitigated by actively monitoring the behaviour of other trades, giving early notice of any claim for lien, keeping detailed records and engaging your legal counsel at an early stage. One can then be in a position to protect its lien rights during the COVID-19 emergency or promptly after the expiry of the Order.

## **C. Holdback**

One significant impact of the suspension of limitation periods in Ontario is that lien periods are also extended. This may have been an unintended consequence by the Province, but it has a significant impact on lien periods and the release of holdback.

The lien periods (for preservation and perfection of liens) under the Construction Act (Ontario) are treated as other limitation periods under Schedule 2 of the Limitations Act, 2002. As a result, the suspension of limitations periods has created a great deal of uncertainty in the construction sector since so much of the Act relies on the end of the lien period.

While liens may still be preserved and perfected, as noted above, the effect of the suspension of limitation periods has suspended the applicable time periods, meaning, for the time being, standard 60-day lien periods (or 45-day lien periods if the pre-amendment Act applies) are extended. As a result, it is very unclear whether an owner may pay any

holdback to a contractor, or a contractor to a subcontractor, without jeopardy under the Construction Act. Many owners are deciding not to pay holdback until clearer protection can be provided.

This will also have a direct impact on loan advances of completion payments and holdback payments from lenders, or advances of tenant improvement allowances from landlords where they rely upon the expiration of a lien period as a condition of advance. It is very unclear that owners are even permitted to pay holdback at the end of the project right now.

## **D. Interim adjudication**

For contracts executed, and procurement processes commenced, in respect of an improvement on or after October 1, 2019, interim adjudication is available as a less expensive and quick method of construction contract dispute resolution for interim disputes. Any party to a construction contract is entitled to refer disputes which flow from a proper invoice to adjudication at any time during the life of the contract by issuing a Notice of Adjudication. Matters which can be adjudicated include, for example: the valuation of services or materials provided under the contract; payment of holdbacks; and, notices of non-payment.

While the Order has no immediate impact on the commencement of an adjudication – which must be started at the discretion of a party before the project is completed, or the delivery of a decision of a court or arbitration – the balance of the deadlines/timelines an adjudication follows are suspended retroactively to March 16, 2020 for the duration of the COVID-19 emergency.

Interim adjudication is managed by the ADR Chambers, who was selected to serve as the "Authorized Nominating Authority". In its new role, the ADR Chambers is operating as the "Ontario Dispute Adjudication for Construction Contracts", or "ODACC".

We reached out to the ODACC to determine how their operations have been impacted by COVID-19. ODACC advised that, as of March 25, 2020, it continues to support public health recommendations to reduce the spread of COVID-19. In this regard, ODACC has implemented a work-at-home plan for its employees. Despite this change in operations, ODACC advises that it remains fully available to assist the public, adjudicators, and to manage interim adjudications.

As public gatherings should be avoided wherever possible during the present COVID-19 outbreak, ODACC has advised that it has the capability to conduct video hearings for

interim adjudications. Video hearings will help to prevent any disruptions to the availability of interim adjudication.

Best practices for interim adjudication in light of COVID-19 again require claimants to be vigilant and prepared to act promptly to protect their rights. Payment and other issues should be tracked and documented wherever possible, and notice should be provided early on. The more lead time given, the less likely it is that there will be any delays in one protecting their lien rights.

## **E. Prompt payment**

For contracts executed, and procurement processes commenced, in respect of an improvement on or after October 1, 2019, the prompt payment regime is mandatory. Briefly, under the prompt payment regime, owners have 28 days to pay a contractor after delivery of a 'proper invoice', general contractors have 7 days to pay a sub-contractor after receiving payment from the owner, and subcontractors have 7 days to pay sub-subcontractors. Thus, ideally, all parties to the construction pyramid are paid within 42 days.

Timelines are also set out for disputing parts of an invoice or advising of non-payment. For example, an owner disputing all or parts of a proper invoice must deliver a notice of non-payment within 14 days of receiving a compliant invoice.

The Order has suspended the deadlines identified in the Construction Act, including those deadlines outlined above, retroactively from March 16, 2020 for the duration of the COVID-19 emergency in Ontario. While ideally, the prompt payment regime will still be followed during this emergency, one should be vigilant of any missed or delayed payments, and keep detailed records. One should also review the notice provisions in their contracts and consider immediately sending a notice of delay.

## **F. Going forward**

It is expected that COVID-19 will have lasting impacts on the construction industry, and the way that parties to a construction project interact and deal with one another. Supply chain interruptions may cause delays, the quarantine of people may adversely impact the availability of contractors/trades, and the possible global economic slowdown may have an effect the construction industry as a whole. The foregoing may lead to an increase in legal disputes and a greater need for security.

Participants in this industry should expect that the looming economic instability will likely lead to disputes regarding payment for work performed or materials furnished on current or future projects. Ascertaining the current state of accounts for all projects, and understanding and timely exercising lien and bond rights can help mitigate against the threat of nonpayment. Thus, being aware of the Order and the deadlines addressed above is very important.

During the COVID-19 emergency, it is important that members of the construction industry review the notice provisions in their contracts and consider immediately sending a notice of delay. Contractual timing provisions do not appear to be affected by the Order, including CCDC contracts.

Gowling WLG (Canada) LLP has extensive experience in dealing with lien claims, complex business losses, and real property disputes. Our professionals are available to meet with you or your organization to discuss any questions or concerns you may have regarding the impact of COVID-19 to your business, and the solutions which may be available.

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