

## Construction Industry Update: COVID-19 - What You Need to Know

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### We are here to help.

As the construction industry continues to learn of the business implications related to the COVID-19 pandemic, we are here to help you navigate this new environment. Below is some key information to assist you.

### List of Construction-Related Essential Workplaces Reduced

By Christine Kellowan

On April 3, 2020, the Government of Ontario released an updated list of "essential workplaces" that significantly reduces the type of construction work that may be performed. The updated list is available [here](#). For ease of reference, we have reproduced the explicitly construction-related workplaces below:

#### Construction

27. Construction projects and services associated with the healthcare sector, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space.

28. Construction projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance.

29. Critical industrial construction activities required for,

- i. the maintenance and operations of petrochemical plants and refineries,
- ii. significant industrial petrochemical projects where preliminary work has already commenced,
- iii. industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the COVID-19 pandemic.

30. Residential construction projects where,
- i. a footing permit has been granted for single family, semi-detached and townhomes
  - ii. an above grade structural permit has been granted for condominiums, mixed use and other buildings, or
  - iii. the project involves renovations to residential properties and construction work was started before April 4, 2020.

31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

Businesses that are not on the updated list must close their physical locations by Saturday, April 4, 2020 at 11:59 p.m. For affected construction businesses, the closure of physical locations includes head offices and construction sites.

#### **Take Another Look: You May be on the List**

Generally speaking, it would appear from these provisions that private commercial construction projects that do not relate to healthcare, critical provincial infrastructure, the production of Personal Productive Equipment or petrochemicals must close by the aforesaid deadline. **However, a closer review of the entire updated list indicates that construction operations omitted from items 27 to 31 may be included in other essential workplaces.** It may be necessary to determine whether the nature of the end user's business under construction is an essential workplace. If it is, it is likely that the related construction is also an essential workplace. For example, suppliers that provide for curb side pick up or delivery are an essential workplace. See Item 15:

15. Stores that sell any of the following items and provide them to the customer only through an alternative method of sale such as curb side pick-up or delivery, except in exceptional circumstances:
- i. Hardware products.

Businesses involved in the maintenance or repair of certain types of properties and buildings are considered essential workplaces. See item 20:

20. Maintenance, repair and property management services strictly necessary to manage and maintain the safety, security, sanitation and essential operation of institutional, commercial, industrial and residential properties and buildings.

Some construction-related manufacturers may fall under Item 23, which states:

23. Businesses that extract, manufacture, process and distribute goods, products, equipment and materials, including businesses that manufacture inputs to other manufacturers, (e.g. primary metal/ steel, blow molding, component manufacturers, chemicals, etc. that feed the end-product manufacturer), regardless of whether those other manufacturers are inside or outside of Ontario, together with businesses that support and facilitate the movement of goods within integrated North American and global supply chains.

Other construction businesses dealing with road repair and maintenance, disposal, environmental rehabilitation and others may fall under the Item 34. The relevant part of Item 34 reads:

#### Community Services

34. Businesses that deliver or support the delivery of services including:

- i. Sewage treatment and disposal.
- ii. Collecting, transporting, storing, processing, disposing or recycling of any type of waste.
- iii. Potable drinking water.
- iv. Critical infrastructure repair and maintenance including roads, dams, bridges etc.
- v. Environmental rehabilitation, management and monitoring, and spill clean up and response...

Accordingly, construction businesses should review the entire list of essential workplaces and consider whether their specific service is included on the list. If you are uncertain whether a particular construction business or project is still an essential service, there is a hotline (1-888-444-3659) you may contact.

If you operate a non-essential business, you can still continue to operate if your staff can work remotely from home.

Based on the last extension of the declaration of a provincial emergency, it would appear that the closure of non-essential workplaces will apply until April 13, 2020. We will update you if this date is extended.

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## Are Lien Rights Affected by COVID-19?

By Paul Hancock

On March 20, 2020 the Ontario government enacted a regulation pursuant to the Emergency Management and Civil Protection Act (the "**Regulation**"). Section 1 of the Regulation suspends any "limitation period" for the duration of the emergency, while section 2 of the Regulation suspends, subject to the discretion of the court, any period of time within which any step must be taken in any

proceeding in Ontario, including any intended proceeding. This Regulation may affect lien rights in Ontario, namely the timing of the preservation of a lien.

Ontario courts have held that the time periods to preserve and perfect construction liens are not "limitation periods". Accordingly, it is unlikely that the time periods to preserve and perfect construction liens have been extended by section 1 of the Regulation. However, it may be possible for a lien claimant to rely on section 2 of the Regulation to argue that the period to preserve and perfect liens has been extended. There is no case law or other legal guidance available at this time that would confirm this interpretation.

Until the Ontario government and/or the courts confirm that the time periods to preserve and perfect liens have been extended, trades should preserve and perfect liens in accordance with the applicable deadlines set out in the *Construction Act*.

A final word of caution: on April 3, 2020, the Government of Ontario has reduced the list of construction businesses that constitute "essential workplaces", which are permitted to remain open. Some construction businesses will be required to cease physical operations which may trigger the running of the clock on the lien preservation period. Given the uncertain applicability of the Regulation to lien rights, it is advisable to seek legal advice, and where appropriate, preserve lien rights during the pandemic.

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## **Delay Claims: Read Your Contract Carefully!**

By David Morawetz

A delay claim is made by one party to a contract, against another party to the contract, for the second party's failure to carry out the contract in a timely manner, or for otherwise holding up the contract. For example, a landlord could have a delay claim against a contractor for failing to complete a project on time, resulting in lost rents. On the other hand, the contractor may have its own delay claim against the landlord for a variety of delay events. For contractors, delay claims may arise out of stop work orders, shortages of labour, shortages of supplies or unforeseen events. With the current COVID-19 epidemic and the Government of Ontario's recent order that certain types of construction projects shutdown, there will undoubtedly be delay claims.

It is important to review the terms of the contract because there may be specific provisions dealing with delay claims. One type of provision is the requirement to provide timely notice of the delay. Construction contracts typically require an enumerated number of days of notice after the commencement of the delay event. Failure to adhere to the notice provisions may disqualify a delay claim. There may be provisions for the extension of

time to perform the contract with or without compensation, depending on the delay causing event, provided that the claimant gives proper notice.

Parties should carefully review the terms of contracts and, if appropriate, send out delay claim notices as soon as possible.

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### Changes to Release of Holdbacks?

By Walter Traub

Recent changes which may suspend the time periods for preserving and perfecting lien claims under the *Construction Act* (the "Act") and, under its predecessor legislation, the *Construction Lien Act* ("CLA"), have been implemented in response to the COVID-19 crisis, by virtue of the passing of the *Emergency Management and Civil Protection Act* (the "Regulation") in Ontario. These changes are retroactive to March 16, 2020, and although still subject to final judicial interpretation and until then somewhat controversial among construction lien experts, may suspend the existing requisite time periods for a maximum period of 90 days, subject to further extension in certain circumstances.

This suspension/extension of the current requisite time periods under the Act and CLA (as applicable), would have significant impact for owners of real properties currently under construction or renovation, as well as for their contractors and subcontractors. This would also inevitably have a major impact on mortgage lenders who are financing or refinancing construction projects.

Prior to the enactment of the Regulation, a lien automatically expired, unless within the period specified for same under the Act or the CLA (as applicable),

- i) the lien was preserved by registration of a lien claim against title to the real property, and
- ii) unless it was perfected within the period specified for same under the Act or the CLA (as applicable), by issuance of a Statement of Claim and registration of a Certificate of Action on title to the real property.

The Regulation may have, by design or unintentionally (yet to be determined), extended both such time periods by at least 90 days.

Given the pending controversy as to whether or not the Regulation extends the requisite timelines as mandated by the Act and/or CLA (as applicable), and so as to protect the respective rights of owners, contractors, subcontractors and mortgagees pending final adjudication of same, the parties may wish to follow the following suggested guidelines.

## Preservation and Perfection of Lien Claims

See article 'Are Lien Rights Affected by COVID-19?' above.

### Release of Holdback

Since, as a result of the Regulation, lien claims may now not expire for an additional 90 days or more, the party releasing a holdback should, prior to release of post March 16, 2020 holdbacks, out of an abundance of caution:

- i) presume that the requisite periods have been extended by the additional maximum 90-day suspension period mandated by the Regulation,
- ii) make sure no liens have been registered or notified to such party within such extended period, and
- iii) ascertain that the maximum suspension period mandated by the Regulation has not been further extended beyond the 90 days stipulated in the Regulation.

If you have any questions as to how this may impact your loan or your project, please do not hesitate to contact us.

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These comments are of a general nature and not intended to provide legal advice. If you have any questions/concerns or require legal advice please do not hesitate to contact the [GSNH Construction Group](#).

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