

April 10, 2020

Show Me the Money: Government of Ontario to Amend Emergency Order to Allow Release of Holdbacks

Effective April 16, 2020, all procedural time periods and limitation periods under the *Construction Act* will be restored. This has two major implications for the industry: (i) lien periods are back; and (ii) owners can once again release holdbacks safely.

What's Happening?

The Ontario Government announced on April 9, 2020 that it is exempting the *Construction Act* from its emergency order O. Reg. 73/20 that took effect March 16, 2020 and suspended all statutory limitation and procedural time periods. The Government is exempting the *Construction Act* to address a number of problems the order caused to the construction industry, most notably preventing the release of holdback to contractors and suppliers. This amended order will take effect April 16, 2020.

The implications for those in the construction industry are as follows:

1. *The Return of Strict Time Periods for Liens*

Under the emergency order, construction liens did not, arguably, expire. Starting April 16, 2020 the strict time periods for preserving and perfecting liens will be reinstated. The text of the amending regulation has not yet been released. However, the announcement by the Office of the Attorney General's indicated that:

“Once [the suspension] is lifted, parties will have the same amount of time to meet a deadline that had been remaining before the suspension began on March 16, 2020.”

If the wording of the amendment reflects this intention, then pursuant to this amended order parties whose lien clock started prior to March 16, 2020 will be granted a 31 day extension (March 16 - April 16) to their applicable lien period. For example, if publication of the certificate of substantial performance was achieved on March 6, 2020, the general contractor will have until June 5, 2020 (10 days to March 16 + 50 days following April 16) to preserve its lien (assuming the *Construction Act* applies, and not the timeline for preservation in the prior *Construction Lien Act*).¹

2. Owners can Release Holdback

Owners can only payout holdbacks safely “where all liens that may be claimed against that holdback have expired” (for more detail on this issue please see our prior bulletin²). Given that liens did not expire under the emergency order, owners could not safely release holdback. This was clearly an unintended consequence of the emergency order, but one that caused significant cash flow problems for the industry.

Further to its announcement, the Office of the Attorney General recognized this was problem and that the amendment is specifically targeted to cure this problem:

“The emergency order has been amended to lift the suspension of limitation periods and procedural time periods under the *Construction Act*. This will allow for the release of holdback payments to contractors and subcontractors in the normal course, helping to resolve a potentially significant cash flow problem as a result of the order for the construction industry.”

¹ [Winter is coming and so is Ontario's new *Construction-Act*](#)

² [Can I Safely Release Holdback in Ontario After March 16, 2020](#)

More specifically, holdback can only be released further to sections 25 and 26 of the *Construction Act* when the underlying liens against that holdback have expired. The restoration of lien expiry periods means payors can again safely release holdback.

Releasing holdback is typically done when owners find no registered liens on title on day 61 following the publication of the certificate of substantial performance. To use the above example, if an owner found no registered liens on title as of June 6, 2020, it could safely release the holdback to the general contractor (again, assuming the *Construction Act* applies, and not the timeline for preservation in the prior *Construction Lien Act*).

3. Parties must meet Procedural Deadlines under the Act

Parties involved in construction lien actions or adjudications must now make sure they are meeting procedural deadlines outlined in the *Construction Act*, including, among others:

- i) the two-year deadline within which to set an action down for trial; and
- ii) all deadlines in the prompt payment and adjudication regime (for which it was unclear whether the emergency order applied, see sections 6 and 13 of the *Construction Act*).

Moving Forward – Significant Improvement, but Problems may Still Remain

By allowing for release of holdbacks, the amended emergency order will certainly alleviate cash flow problems felt throughout the industry. The Government should be commended for listening to the many pleas from the construction industry to do just that.

But we are not quite out of the woods just yet. Cash flow problems may still remain where an owner finds a lien on title. In that circumstance, an owner can only safely release holdback once the lien is “satisfied, discharged or otherwise provided for”, which typically requires owners or contractors to vacate the lien by posting security with the court.

But vacating a lien requires a motion, and right now the court is generally only hearing urgent motions where “immediate and significant financial repercussions may result” or that are otherwise deemed necessary and appropriate to be heard. Parties will accordingly have to convince a “triage” judge that their vacating motion should be heard.

Parties looking to vacate a lien should speak with their counsel about how best to demonstrate the urgency of their motion. Given the Government’s now demonstrated intention to allow money to flow down to contractors and suppliers alike, it is hoped that courts will also agree to hear motions to vacate liens to help do just that.

by Glenn Grenier, Jason J. Annibale, Jeremy Rankin

For more information on this topic, please contact:

Toronto	Glenn Grenier	416.307.4005	glenn.grenier@mcmillan.ca
Toronto	Jason J. Annibale	416.865.7912	jason.annibale@mcmillan.ca
Toronto	Jeremy Rankin	647.943.8059	jeremy.rankin@mcmillan.ca

a cautionary note

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