

April 13, 2020

COVID 19 UPDATE: ONTARIO CONSTRUCTION

Last week, our News ReLease concerned Force Majeure/Unavoidable Delay. As an extra tidbit, we closed the publication with a short paragraph about limitation periods having been suspended (due to the pandemic crisis affecting the manner by which judicial proceedings could be handled).

Construction Liens

On March 20, 2020, an Order was made under the *Emergency Management and Civil Protection Act* (Ontario), suspending limitation periods and procedural time periods for legal proceedings retroactively to March 16, 2020. Legal pundits across the Province had observed that there was no reason the Order would not apply to construction lien filings and proceedings. As a result, lien rights that would normally expire if not preserved and protected by the filing of a lien within the period set out in the *Construction Act*, would be maintained until the suspension Order was lifted.

We pointed out in our April 6, 2020 News ReLease that this Order affected the payment of tenant allowance holdbacks, as lien periods would be tolling pending the lifting of the Order.

Our new reality is that the law changes more rapidly than ever.

On April 9, 2020, the government of Ontario issued an Order in Council stipulating that the suspension Order will no longer apply to any limitation periods and procedural time periods under the *Construction Act*, as of April 16, 2020.

Therefore, as of April 16, 2020, all limitation periods and procedural time periods under the *Construction Act*, that were originally affected by the suspension Order, will have the same amount of time as had been remaining before the suspension Order took effect on March 16. For example, if on March 16, 2020 there were 10 days remaining in the lien period, then as of April 16, 2020, there would still be 10 days remaining in the lien period.

Therefore, owners and contractors can ignore previous warnings about delaying the release of holdbacks to comply with the suspension Order, and must re-set the clock on the periods affected, to run again from April 16, 2020.

Construction Projects that are considered “Essential Workplaces”

Provincial governments across Canada have struggled to define what they consider to be essential workplaces that allow workers to continue attending at the site of their place of employment (versus working from home).

In Ontario, two attempts were made to set a clear list. On March 24, 2020, the list of essential workplaces included numerous types of projects where construction activity was permitted to continue. Subsequently, to escalate the offensive against the virus, the government of Ontario amended the Order under the *Emergency Management and Civil Protection Act*, further restricting the list of essential services and businesses.

The following types of construction projects are permitted to continue under the Order (listed by relevant Section number):

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.

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.

Section 30 was particularly troublesome to many developers of commercial construction projects that form part of a mixed-use project with a residential component. For example, in the City of Toronto, a building permit issued in connection with such projects would stipulate “Mixed Use – Res w/non-Res”. Most such projects are integrated in a manner that it is not functionally practical to distinguish between the portions of the job that are non-residential and those that are residential. Many construction workers were unsure if they were breaking the law by continuing to work on mixed use projects, if the component of the site they were working on was intended to be used for commercial purposes.

On Good Friday, April 10, the Ontario government once again amended the list of essential businesses, by adding Section 29.1, which provides that the following is now deemed essential:

29.1. Construction projects that are due to be completed before October 4, 2020 and that would provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

Some construction projects are clearly permitted to continue, such as residential construction projects that started before April 4, 2020. The construction or modification of factories that will be producing, maintaining or enhancing personal protective equipment, medical devices, and other products directly related to combatting COVID-19 are also permitted. Likewise, the construction of grocery stores and supermarkets “provide additional capacity in the...distribution of food [or] beverages”.

However, there are some projects that may or may not fall under one of the enumerated types of construction projects that are deemed “essential”.

For example, what is included in projects “associated with the healthcare sector”? The obvious projects: constructing hospitals and clinical facilities directly providing healthcare to individuals, should not be in question. What about pharmacies/drug stores, or medical offices? Further down the chain of analysis, would construction of holistic health and wellness clinics, physiotherapy facilities, massage therapy centres and the like, be permitted? It would seem so, given that the meaning of “associated” can be rather loose.

We would only be guessing if we were to advise whether a certain construction project is deemed essential, beyond those that inarguably fall within the sections listed above.

Considering that the list of essential services has been so frequently refreshed, there may be further clarification provided by further amendments in the days and weeks to come.

If the law changes to provide meaningful clarification, we will provide another update.

Stay safe and healthy.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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