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Construction statutes and COVID-19

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For further information on the changes below or other construction matters, please contact one of the authors above or any member of our National Construction and Infrastructure Group.

In this Update, we answer the following practical questions relating to selected Ontario construction statutes and COVID-19:

- What is the impact on the construction industry of the Ontario government’s March 24 regulations requiring the closure of all non-essential workplaces?
- Are the Construction Act lien periods and payment deadlines extended due to the March 20, 2020 Ontario government Order suspending limitation periods?
- Does the Occupational Health and Safety Act (Ontario) provide any particular guidelines to a “constructor” in light of COVID-19?
- What statutory compensation is being lobbied for by the construction industry?

ONTARIO’S MARCH 24 MANDATORY CLOSURE OF NON-ESSENTIAL WORKPLACES

The Ontario construction industry was largely exempted from the Ontario government’s March 24, 2020 mandatory closure regulation made under the Emergency Management And Civil Protection Act (Ontario) of all workplaces, such that construction work continues across the province. However, the list of essential businesses contains some subtle nuances depending on the sector for which the construction is being undertaken. As one example, while the order allows work to continue on construction “projects and services” relating to the healthcare sector and critical provincial infrastructure (which is not defined but includes the transit, transportation, energy and justice sectors), for all other sectors (namely
industrial, commercial, institutional and residential) the exemption is limited to construction “work and services.” No reasons were given for distinguishing between construction “projects and services” and what appears to be a narrower reference to construction “work and services.”

As a result, those involved in the construction of a project in sectors other than healthcare and critical provincial infrastructure, or those concerned about what other sectors may constitute critical provincial infrastructure, should exercise caution while working through mediums other than telephone and internet and should seek legal counsel on a case-by-case basis in light of possible fines and penalties.

**CONSTRUCTION ACT – LIEN PERIODS AND PAYMENT DEADLINES**

On March 20, 2020, the Ontario government issued an Order under the *Emergency Management and Civil Protection Act* suspending limitation periods and laws which establish a period of time in which a step must be taken in any proceeding in Ontario, for the duration of the COVID-19 emergency (the Suspension Order). The question arises whether the Suspension Order extends the relevant deadlines under the *Construction Act* relating to lien periods and actions. In our view, having reviewed limitations legislation and case law, there is an argument that the preservation, perfection, and enforcement of construction liens may be considered to be limitation periods, whether the old or the new lien regime applies, and are thereby suspended by the Suspension Order. Even if they are not considered to be limitation periods, in our view, there is also an argument that these are steps taken in a proceeding or intended proceeding, which are similarly suspended by the Suspension Order, though this suspension is subject to the discretion of the Court.

However, until clarification is obtained on this point, we would recommend that all industry participants take the cautious approach, such that lien claimants preserve, perfect and enforce lien rights without reliance on any potential extension due to the Suspension Order, but that conversely, owners consider maintaining holdback assuming extension of lien periods due to the Suspension Order. We further note that the Suspension Order is not indefinite. The *Emergency Management and Civil Protection Act* sets out that the period of any temporary suspension under an order shall not exceed 90 days, however, the Suspension Order may be renewed or a new order may be issued.

The *Construction Act* includes provisions dealing with prompt payment. For those agreements governed by these new prompt payment provisions, the Suspension Order will have no impact on the 28-day payment deadline in respect of undisputed amounts in a proper invoice.

**OCCUPATIONAL HEALTH AND SAFETY ACT**

The constructor of a project under the *Occupational Health and Safety Act* is responsible for the health and safety of all workers. In respect of COVID-19, the role of the constructor to ensure adequate site and working conditions is in the spotlight, with Ontario Premier Doug Ford calling for increased diligence on contractors, along with calls for increased enforcement by the Ministry of Labour, Training and Skills Development of construction sites as part of its *Safe At Work Ontario* strategy.

Industry participants should be aware that the Ministry has published a number of detailed resources in relation to infectious diseases (such as norovirus, Clostridium difficile, and influenza), specifically identified *Occupational Hygiene* “as a hazard in the construction sector and published a guidance note entitled *Preventing Infectious Diseases on Construction Projects*.”

These and other similar resources contain a number of safe work practices relating to sanitation,
including the provision and maintenance of toilets and clean-up facilities. For example, the British Columbia Construction Association has also issued a health and safety update, which includes guidelines for construction sites with a number of best practice suggestions including non-sharing of personal protective equipment or tools, cleaning out jobsite trailers daily, and introducing extra handwashing stations.

POTENTIAL STATUTORY COMPENSATION

To address worries regarding the ramifications of the COVID-19 pandemic under construction contracts, the Canadian Construction Association (CCA), in an open letter to the Prime Minister [PDF], has urged the Government of Canada to issue a clear statement and commit to passing future legislation which addresses how the Government of Canada will treat delays, project disruptions and other COVID-19 related costs under federal contracts. “In the interests of legislative alignment, the CCA has urged the federal government to discuss those issues with the provincial authorities as well.

It will be interesting to see the Government of Canada’s response to the CCA and its approach to balancing freedom of contract between contracting parties in the construction industry with legislative intervention during these unprecedented times.

STAY INFORMED AND COMMUNICATE

As the response to COVID-19 is evolving rapidly, from a business continuity perspective, we encourage everyone to continue to stay informed as new developments arise and communicate to your employees, contractors, suppliers, subcontractors and other stakeholders. We have centralized relevant content on our “Coronavirus: Navigating legal implications and business impacts” client communication page.
In this Update, we answer the following practical questions relating to selected Ontario construction statutes and COVID-19:

- What statutory compensation is being lobbied for by the construction industry?
- Are the regulations requiring the closure of all non-essential workplaces?
- What is the impact on the construction industry of the Ontario government's March 24 mandatory closure of non-essential workplaces?
- What is the impact on the construction industry of the federal government's March 27 suspension of all non-essential services provided by governments?
- What steps have been taken by the construction industry to protect workers and workplaces?

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