



Construction & Design Alliance of Ontario

Association of Registered
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www.arido.ca

Consulting Engineers
of Ontario
www.ceo.on.ca

Heavy Construction
Association of Toronto
www.hcat.ca

Mechanical Contractors
Association of Ontario
www.mcao.org

Ontario Association
of Architects
www.oaa.on.ca

Ontario Association
of Landscape Architects
www.oala.ca

Ontario Electrical League
www.oel.org

Ontario General
Contractors Association
www.ogca.ca

Ontario Home
Builders' Association
www.ohba.ca

Ontario Road
Builders' Association
www.orba.org

Ontario Sewer & Watermain
Construction Association
www.oswca.org

Ontario Society of Professional
Engineers
www.ospe.on.ca

Residential Construction
Council of Ontario
www.rescon.com

Residential and Civil
Construction Alliance
of Ontario
www.rccao.com

Surety Association of Canada
www.suretycanada.com

Briefing Note

Suspension of Limitations impact on Holdback Funds & Liens under the *Construction Act*

April 2, 2020

Situational Analysis:

The government's order of March 20, 2020 suspending limitation periods and procedural deadlines in Ontario proceedings, retroactive to March 16, 2020, under subsection 7.1(2) of the *Emergency Management and Civil Protection Act* has had the unintended consequence of creating a liquidity crisis for Ontario's professional and construction services industry. The order captures the treatment of holdback funds as Section 19 of the *Limitations Act* and Schedule B of the *Act* specifically make note of Sections 31 and 36 of the *Construction Act*.

Market Impact:

The suspension of limitations effectively "deactivate" lien "clocks" under Sections 31 and 36 of the *Construction Act*, enabling any party to a project to file a lien against a project at any time. In addition, the suspension means existing liens cannot expire. This puts project owners at risk should they release holdback funds. Therefore, many are receiving legal advice to not release these monies for the duration of the provincial order. Retention of these monies is already starting to have a profound negative impact on the professional services and construction sector.

Holdback funds represent the vast majority, if not the entirety, of many company's available operating capital. Losing access to these monies will result in many companies become illiquid very quickly. With fewer projects expected to come onto the market and with current broader economy stresses, this pool of readily available cash is literally keeping companies viable. This pool of ready available cash can only be expected to get smaller as the duration of the pandemic extends. Action is required to preserve and protect this precious commodity because without it the design and construction services economy will cease to properly function. For contractors and subcontractors these funds enable their ability to bid on future projects. For the design sector, these funds facilitate project design and project proposal submissions. The entire design and construction project pipeline is directly and negatively impacted by the current withholding of holdback funds arising from the current government order.

Recommendations:

As part of the province's economic maintenance and recovery strategy responding to the COVID-19 crisis, the Construction Design Alliance of Ontario makes the following recommendations:

1. **The government should amend Reg. 73/20 as detailed in the attached Appendix A prepared by McMillan LLP and provided by the Ontario General Contractors Association.**

This proposal will enable professional and construction services businesses to operate normally as it would restore conditions permitting liens to expire and enable payors to release holdback funds.

Alternatively, should it not be possible to amend the regulation as recommended, other potential workaround options have been suggested, but these are considered much less desirable and would not fully address the problem at hand.

- 2. The government should prescribe for the duration of the COVID-19 crisis that project owners, including provincial agencies and municipalities, take holdback funds through forms of security other than cash as defined in Part IV, Section 22, Subsection 4 of the Act, including demand-worded holdback bonds or letters of credit.**

The approach, while providing some relief in some circumstances, may not be available or applicable on all projects and to all parties working on projects, leaving potentially vulnerable businesses without access to the funds they need to continue operating. Furthermore, these options would also require parties to incur considerable additional expense at a time when the prime concern should be the preservation of much needed operating assets in the hands of businesses to keep the Ontario construction economy functioning.

These measures will maintain the required security for projects as prescribed by the Act while enabling Ontario's professional and construction services industry to remain viable until more normal economic conditions can return to the market.

The broader design, professional services and construction sector is committed to working through the current crisis with the provincial government and its agencies to ensure the continuation and completion of important infrastructure projects.

Should you have any questions or require further information, please contact Patrick McManus at 416.898.4744 / patrick.mcmanus@oswca.org or David Zurawel at 419.970.6833 / dzurawel@ceo.on.ca.

Appendix A

Recommended Amendment to Reg. 73/20 to Address the Issues Concerning the Release of Holdback under the *Construction Act*, R.S.O. 1990 c. C30, as amended.

The simplest and least complicated amendment would be to exempt the *Construction Act* from the provisions of Regulation 73/20 as follows (suggested amendment in italics):

Now Therefore, an Order is made pursuant to subsection 7.1 (2) of the Act, the terms of which Order are the following:

1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.
2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.
3. ***The provisions of the Construction Act, R.S.O. 1990 c. C30 and any regulations thereunder are excluded from the operation of paragraphs 1 and 2 above and the deadline for the expiry of any limitation period, right or the deadline for any step under the said Act or regulations that may have expired between March 16, 2020 and the date this paragraph 3 comes into force are hereby extended for a period of 30 days from the date such right or deadline would have normally expired.***

The duration of this Order is subject to any renewal required under subsection 7.1 (4) and, if applicable, subsection 7.1 (5) of the Act.

Explanation:

With this change, liens can clearly expire and thus, payors can safely release holdback further to section 26 (and 25) of the *Construction Act*. The issues raised in my article published at <https://mcmillan.ca/Can-I-Safely-Release-Holdback-in-Ontario-After-March-16-2020> are addressed.

The reasons for the 30 day extension is that many people may have refrained from preserving liens or taking necessary steps after March 16, 2020 reading the original version of the Regulation, mistakenly or otherwise. Assuming paragraph 3 is passed within the next week or so, parties who refrained from taking steps will be given an extra 30 days from the deadline they otherwise had to take such steps.

The *Construction Act* is complicated and many provisions are interdependent. It is not possible to quickly and easily suspend some provisions and not others. It is feared that attempting to do so will simply complicate the situation and lead to uncertainty. Uncertainty will cause parties to retain holdback and not release it. Certainty is needed so that lawyers have the confidence to tell payors they can safely release holdback, without rethinking whether a partial suspension of some parts of the *Construction Act* may have an impact on others and prevent the release of holdback. Thus, it is strongly suggested that simply getting back to the lien regime and deadlines lien lawyers are used to will allow them to confidently advise their clients to release holdback, as before the emergency.

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