

Construction Liens and Construction Litigation

Does the COVID-19 Suspension Order Affect Construction Liens & Statutory Holdbacks?

On March 17, 2020, the Government of Ontario declared a state of emergency as a result of the COVID-19 global pandemic. Just the day before, the Ontario courts took the unprecedented step of suspending all non-urgent hearings and court-related matters until further notice.

On March 20, 2020, the Lieutenant Governor in Council made an Order under subsection 7.1(2) of the *Emergency Management and Civil Protection Act*, suspending limitation periods and procedural time periods, which applies retroactively to March 16, 2020 for the duration of the emergency (the “**Suspension Order**”).

The wording of the Suspension Order is important and states that:

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.

The Suspension Order has led to some unforeseen issues for the construction industry. The main question, which some lawyers currently disagree on, is whether the strict timelines for the preservation and perfection of liens imposed by Ontario’s *Construction Act* (“**lien expiry periods**”) are suspended. This is an important question as the Suspension Order could have unintended impacts on the industry, such as the release of statutory holdbacks.

Argument That Lien Expiry Periods Are Suspended

On a plain reading, the Suspension Order would appear to apply to the *Construction Act*, being a statute of Ontario. As such, lien expiry periods would be suspended if they fall within the meaning of a “limitation period” under paragraph 1 of the Suspension Order. In arguing the lien expiry periods are limitation periods, one can point to the Schedule to Ontario’s *Limitations Act*, which specifically references the

KOSKIE MINSKY

relevant *Construction Act* provisions as being a “limitation period set out in or under another Act”.

Even if the lien expiry periods do not fall under paragraph 1 of the Suspension Order, one can argue the lien expiry periods fall under paragraph 2 of the Suspension Order, being a “provision of any statute... establishing any period of time within which any step must be taken”. Under this argument, the registration of a lien is considered a “step” that “must be taken” in an “intended proceeding”, and the perfection of a lien is a step taken in a “proceeding” as this step requires the commencement a court action to take place.

Argument That Lien Expiry Periods Are Not Suspended

Although the wording of the *Limitations Act* is straightforward, and the above seems to be the end of the inquiry, note the *Limitations Act* applies to “claims” as defined in that Act, which are pursued in court proceedings. As such, even though the *Construction Act* provisions are referenced therein as being a “limitation period”, Ontario courts have found that a “lien” is not a “claim” for the purposes of the *Limitations Act* and that lien periods are distinct from “limitation periods”.

Further, while the perfection of a lien may fall under paragraph 2 of the Suspension Order, being a step that must be taken in a “proceeding” or “intended proceeding”, it is far from certain that registration of a lien is a step that must be taken in an “intended proceeding”. While the proper preservation of a lien is a pre-requisite for a lien action, it does not always result in one.

As a final point, there is a lack of clarity regarding whether the suspension of the lien expiry periods would be absolute. Under paragraph 2 of the Suspension Order, any potential suspension is “subject to the discretion of the court... or other decision-maker responsible for the proceeding.”

Our Suggested Course of Action

There is some merit to both arguments. However, given the uncertainty and potential consequences, the recommended course of action for parties at this time is to **continue preserving and perfecting liens in the ordinary course**. The lien expiry periods can still be easily fulfilled by electronic registration of liens and electronic issuance of Claims, certificates of action and the electronic registration of certificates of action. In addition, the Construction Lien Court has now employed an “interim process” to enable the hearing of urgent Motions to vacate liens remotely and more expeditiously.

On a practical and strategic note, the early and timely preservation of liens in the usual manner can serve to assist parties achieve an early resolution in today’s ever changing circumstances. Whether you are considering preserving a lien or need to vacate a lien, it is important you consult with your lawyer.

Release of Statutory Holdback

As mentioned, another current concern in the construction industry is whether the Suspension Order affects the release of statutory holdback amounts.

The concern is whether a party can safely release statutory holdback amounts at this time without fear or risk that a lien could be registered after the Suspension Order is withdrawn several months from now. For clarity, what is the impact of a party releasing statutory holdback amounts in the face of the Suspension Order if a lien is registered at a later time in reliance on the Suspension Order? Is the party who released the statutory holdback amounts then liable to the new lien claimant(s)?

KOSKIE MINSKY

While this issue has only just arisen, it is our current view a party could be liable to a lien claimant who liens after the Suspension Order is withdrawn if such a party releases statutory holdback amounts during the term of the Suspension Order. As a result, anyone in this situation should immediately seek legal advice and discuss whether or not the statutory holdback amounts can be safely released at this time.

For more information, please visit our website at kmlaw.ca/constructionlaw or contact any of our Construction Law Group members listed below.

Jeffrey J. Long
jlong@kmlaw.ca
416-595-2125

Jeffrey A. Armel
jarmel@kmlaw.ca
416-595-2069

Daniel Resnick
dresnick@kmlaw.ca
416-542-6299

Eitan Kadouri
ekadouri@kmlaw.ca
416-595-2095

Leona Kung
lkung@kmlaw.ca
416-595-2268