

April 3, 2020

The Impact of COVID-19 on the Construction Industry: A Reference Guide to the changed Landscape

In these unprecedented times, access to current information is crucial to ensuring your safety and making informed business decisions. This is particularly the case in relation to essential services, like construction, which continue to operate through the COVID-19 pandemic. In this bulletin we provide a reference guide to the changed construction landscape that COVID-19 has effected through consideration of the following six subjects:

- 1. Delay and Inability to Perform Obligations – Force Majeure and Frustration**
- 2. Other Key Contractual Clauses**
- 3. Building Permits, Occupancy Permits, Inspections and Tarion**
- 4. Employment, Labour and Site Safety Issues**
- 5. Litigation, Arbitration and Court Procedures**
- 6. Limitation Periods, Liens and Holdbacks**

1. Delay and Inability to Perform Obligations – Force Majeure and Frustration

The COVID-19 crisis may be characterized fairly as an unforeseeable intervening event, outside the control of contracting parties, and capable of delaying the delivery of services or materials on schedule, or at all. Many construction contracts manage the impact of such events through a force majeure clause.

Force majeure clauses may excuse parties from performance of their contractual obligations on schedule, or at all, where such events occur. Such clauses typically enumerate a number of specific circumstances and commonly include, fires, strikes, lockouts, and abnormally adverse weather conditions. Pandemics, epidemics, and disease are sometimes enumerated, but often not specifically referenced. In these latter circumstances, properly worded basket clauses may still capture such events within a larger force majeure clause.

For example, the standard CCDC 2 contract provides the following force majeure clause:

6.5.3 If the *Contractor* is delayed in the performance of the *Work* by:

1. labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound),
2. fire, unusual delay by common carriers or unavoidable casualties,
3. abnormally adverse weather conditions, or
4. any cause beyond the *Contractor's* control other than one resulting from a default or breach of *Contract* by the *Contractor*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly.

It would appear that item 4 in the clause above is capable of capturing other events like pandemics, epidemics, and disease.

This force majeure clause affords the contractor an extension of time for performance, but no additional costs resulting from a force majeure delay event. However, where owners have caused delay or a construction site has been shut down by way of court or public authority order, the standard CCDC contract affords the contractor both an extension of time and reasonable costs resulting from such delay events (see sections 6.5.1 and 6.5.2).

Complying with any prescribed notice provisions within the contract and establishing on the evidence that the force majeure event actually caused the delay in question are key elements to a force majeure claim. Through the COVID-19 crisis we have seen numerous parties across the country and in respect of many different projects deliver delay notices (or perhaps pre-delay notices) without identifying impacted activities, the extent of anticipated delay, how COVID-19 has caused delay, or even specifying whether the delay is a force majeure or other kind of delay event.

The lack of such details may, in part, be understandable given the never-before-seen and ever-changing impacts of COVID-19. Indeed, concerned that existing contractual arrangements may be insufficient, several construction associations (including the Council of Ontario Construction Associations) are lobbying government for a legislative solution for delays caused by COVID-19. In the absence of any such remedial legislation, however, parties will need to comply with stipulated timelines and provide requisite details in support of their force majeure and other delay claims, failing which relief for delay may be denied.

Also, force majeure clauses will not come to the aid of non-performing parties where their non-performance results from their own actions, where the subject event was foreseeable at the time the parties entered the contract, or where the contract specifically allocates risk for the occurrence of the subject event. Even where force majeure clauses are found to apply, parties will nevertheless be obliged to mitigate the extent of delay by taking reasonable measures (e.g., stockpiling certain materials, re-sequencing events, etc.). This obligation to mitigate exists at common law but is also often specifically prescribed within construction contracts.

The starting point as to whether a force majeure clause is applicable and what relief may be available is always the specific wording of the contract itself.

In the absence of a force majeure clause, the common law doctrine of frustration may come to the aid of a non-performing party. The doctrine may be found to apply in circumstances where a supervening event, outside the control of either party, has rendered further performance of the contract impossible or at least radically different from what was expected when the parties entered the contract. In such circumstances the contract is said to be “frustrated” and the parties are excused from further performance.

There is a high bar, however, to establishing frustration. Unforeseen circumstances that just render performance of the contractual obligations more onerous will generally fall short of justifying application of this doctrine. Whether COVID-19 may be a sufficient circumstance to establish frustration will turn very closely on the risks that parties assumed as expressed in the contract and the specific facts at issue.

2. Other Key Contractual Clauses

In addition to any contractual clauses dealing with force majeure and delay, parties will also want to consider the following provisions in their contracts:

- **Notice:** Documenting and communicating all issues encountered because of the pandemic is critical and all key correspondence should be sent by the methods prescribed and addressed to the persons and locations specified in the contract to ensure it is effective.
- **Suspension and Termination:** Suspension and termination clauses should be carefully reviewed to determine whether any may be triggered due to the pandemic. For example, owners may wish to make use of their suspension rights, but should understand how long the suspension may continue before giving rise to termination rights.

- **Indemnification:** Parties will want to review any indemnities provided or received under their contract to determine whether losses suffered as a result of the pandemic may be covered. For example, where a broad indemnity provides for losses resultant from a party's "performance of or failure to perform its obligations under the contract", this could be interpreted to cover circumstances where the party's performance is inhibited or prevented altogether due to the pandemic.
- **Limitations of Liability:** Parties will want to determine whether any party to the contract is the beneficiary of a limitation of liability. Where a party may have liability under the contract for pandemic-related losses, this will inform the party's level of exposure, including the extent of liability and the types of losses for which they may be liable.
- **Insurance:** Confirming insurance coverages held by the parties, such as business interruption insurance, will be important. Parties should also consult directly with their insurance advisors to understand the extent of available coverage and whether any exclusions apply.

3. Building Permits, Occupancy Permits, Inspections and Tarion

Can I still apply for a building permit or occupancy permit?

The ability to file permit applications varies on a municipality-by-municipality basis. For example, the City of Toronto is not receiving new building permit applications and is only issuing building permits that were ready to be issued prior to March 16, 2020. Other municipalities are allowing electronic filing of new building permit applications (e.g., City of Markham, City of Mississauga and City of Hamilton) while still others are accepting new applications by courier or mail (e.g., City of Vaughan).

Unlike building permits, the issuance of occupancy permits is also typically dependent upon completion of inspection by a building inspector. Therefore, while applications for occupancy permits may still be submitted in certain municipalities, we expect the issuance of such permits to be closely tied to the municipality's restrictions on

building inspections. Where a municipality is only permitting the conduct of emergency building inspections, it is unclear whether this would include occupancy permit inspections. On the other hand, where inspections continue to be conducted (e.g., remotely by video or subject to restrictions to protect health and safety), then occupancy permit inspections are more likely to proceed.

See the update included at the end of this document for specific information relating to the status of building permits, occupancy permits, and inspections in key municipalities in the Greater Toronto Area.

Are building inspection services still being performed?

The conduct of inspections by building inspectors also varies on a municipality-by-municipality basis, with some municipalities restricting such services to essential or emergency services only (e.g., City of Toronto). Other municipalities are placing restrictions on the locations where such inspections may occur. For example, in the City of Ottawa building inspection staff will not enter personal dwellings, long-term care facilities, retirement homes, hospitals or daycares in performing their duties. See the municipalities update below for municipality-specific information. Virtual inspections are also being considered by some municipalities (e.g., the City of Hamilton).

What is happening with Tarion?

With respect to Tarion, warranty claims and other deadlines have been suspended by virtue of O. Reg. 73/20 (see Section 6 below for more detail). This means, for example, that the deadlines for a homeowner to request conciliation or make a warranty claim have all been suspended. Inspections are postponed and all repair timelines for builders are suspended (except in the case of emergencies or health and safety issues). The "[Advisory from Tarion to Homeowners and Builders on Provincial COVID-19 Pandemic Emergency Orders](#)" should be consulted for additional information.

Where a builder can demonstrate that the pandemic has caused delay that would impact critical dates, such as for delivery of the units, the builder may be able to extend critical dates due to an "Unavoidable Delay". For example, where occupancy permits cannot be obtained, this would likely be a legitimate reason to invoke such force majeure clause. "Unavoidable Delay" may also include delay in remobilization following the end of the pandemic. When seeking to extend critical dates due to Unavoidable Delay, notices must be given to purchasers both during and after the pandemic. More particulars regarding "Unavoidable Delay" and associated notices may be found in the ["Advisory from Tarion to Homeowners and Builders on COVID-19 Pandemic: Pre-Delivery Inspections and Delayed Closings"](#).

For units that are ready for turnover to purchasers, Tarion has advised that pre-delivery inspections ("**PDI**") do not need to occur in the presence of both the builder and homeowner and recommendations have been provided on how a builder can conduct the PDI on behalf of the homeowner. Additional information regarding measures being taken by Tarion to address the Pandemic can be found on their website, including in the advisories referenced above. Tarion's Customer Service team also remains available by phone or email.

4. Employment, Labour and Site Safety Issues

What are my site and construction safety obligations as a "constructor", "employer" or "owner"?

Legal Obligations: In Ontario, worker and site safety are governed by the [Occupational Health & Safety Act](#), R.S.O. 1990, c. O.1 (the "**OHSA**"), which creates a general duty on all constructors, employers, and owners to take all reasonable precautions to provide a safe work environment in respect of a project (see ss. 23, 25, 29 & 30). For example, under the OHSA, a "constructor" is required to ensure that, in respect of a project, all prescribed measures and procedures are carried out, that every employer and worker complies with such measures and procedures, and that the "health and safety of workers" is protected (s.23(1)).

Practical Approaches: Where there is an increased risk, such as that resulting from COVID-19, constructors, employers and owners

(hereinafter all “**Constructors**” for ease of reference in this section) should ensure that precautions are heightened proportionately to meet the requisite standard of taking “reasonable precautions”, including with respect to:

- Communication: Communications should be clear and constant; use all tools available to ensure information is accessible to workers (e.g., through posting notices and using tool-box talks). Address rumours quickly, be patient, and emphasize open lines of communication with workers, as access to current information will be key.
- Protocol: In addition to reviewing general health and safety protocols, prepare and implement COVID-19 protocols for prevention and response. Protocols should be accessible by everyone. Such protocols may involve:
 - Distance in Time: stagger shifts; emphasize the importance of not rushing.
 - Distance in Space: maintain recommended distancing; designate physical areas for only certain teams; encourage use of stairs over elevators; reduce in-person meetings.
 - Personal Protective Equipment: use additional PPE such as gloves, masks, and eye protection, even for people or times where not normally required.
 - Site Cleaning: Clean all common areas and surfaces frequently.
 - Self Isolation: Require sick/recently-travelled workers to self-isolate.
 - Documentation: Ensure strict reporting and documentation protocols are in place, especially respecting sick day and illness reporting, cleaning and supplies, and personnel.
- Coordination and Cooperation: Cooperate and coordinate communications, resources, workers, and protocols in order to

set clear expectation for project sites (e.g., documenting employees currently on sites, broader circulation of daily site reports). It is a 2-way street: Constructors must meet their obligation by providing resources, etc., and workers are obligated to follow these protocols.

- Facilities: Be additionally vigilant about providing sufficient and clean hygiene facilities, frequently replenishing sanitizer stations, and ordering refills of supplies before they run out. As these items may be scarce, seek creative solutions.

Uncooperative Party: Health and safety is the responsibility of all parties. If a Constructor is non-compliant, fails to uphold their obligations or adhere to site protocols, try raising the issue directly with the site super, explaining the protocol, the reasons, and the request to ameliorate. Failing this, advise the non-performing party that the Ministry of Labour is actively enforcing health and safety rules, and that it is not unusual for the Ministry to receive and follow-up on reports of delinquent sites. Indeed, Monte McNaughton, Minister of Labour, Training and Skills Development, issued a [statement](#) on March 25th that the Ministry is “actively investigating jobsites...[and] prioritizing all COVID-19 related issues, as well as anything that may pose an imminent hazard to workers.” If the offending party is a worker, standard protocols will apply, as discussed in more detail below. Communication and record-keeping is particularly important, as such records will go to informing Ministry investigations and any resulting charges. Put it in writing: send an email to create a record of steps taken towards your duty of “reasonable precautions”.

Worker Contracts COVID-19: While COVID-19 is new, legal obligations respecting illnesses also remain standard. If a worker reports symptoms of or tests positive for COVID-19, immediately pull recent time sheets, work reports and supervisor notes to determine where the worker was working, and who they were in contact with. Alert and monitor those exposed, and others as necessary, and sanitize the affected areas and equipment. Document all steps taken.

Standardized Best Practices and Protocols: Many are taking the position that the only way to protect the health and safety of workers

at this time is to shut down all but the truly “essential” construction projects, and to put in place comprehensive safety protocols for job sites. For example, on March 27, the Canadian Construction Association (“**CCA**”) released its “[Standardized Protocols for All Canadian Construction Sites](#)”, along with a statement that “compliant sites should be open and those that cannot consistently comply with measures and guidelines of public health authorities should shut down”. Similarly, the Ontario General Contractors Association (“**OGCA**”) has released its COVID-19 [best practices](#), and on March 3, 2020, the World Health Organization released its policy for “[Getting your workplace ready for COVID-19](#)” (since endorsed by the WSIB). Finally, on March 29, the Province’s Chief Prevention Officer published its updated [guidance for maintaining health and safety](#) at construction sites during the pandemic. While these documents do not have effect of law, they are authoritative and may be used for establishing industry standards, including with respect to standards of care.

What if workers refuse a task or refuse to attend work?

As workers in the construction industry adjust to new COVID-19 health and safety protocols, there have been – and will continue to be – many questions about the risk of exposure to the virus from individual duties and tasks. Even a task as common as signing papers in a binder that may have been touched by others has become controversial, despite issuing workers gloves and their own pens.

If a worker refuses to perform a task because of concern that he/she may be exposed to COVID-19, the responsible party (constructor, employer, and/or owner) should first ask “is there any other reasonable precaution we can implement to make this task safer?” Every situation is unique and may not be addressed in the model protocols or other advisory documents noted above. If a worker refuses to perform the task because it is believed to be unsafe, this refusal will likely trigger the constructor’s, employer’s and/or owner’s obligations under the OHS Act. An investigation should be performed immediately and, if a satisfactory resolution cannot be worked out, the Ministry of Labour must be notified. As noted above, the Ministry of Labour prioritizes COVID-19 related issues and an inspector is

likely to attend promptly. Unfortunately, this formal process may be necessary if a work refusal is being made in bad faith and must be addressed before it affects morale and workers' trust in the site health and safety program.

If a worker refuses to attend work and remains home, consider allowing the worker to use his/her vacation time, take an unpaid leave, or be laid off so the worker can apply for Employment Insurance and/or the Canada Emergency Response Benefit.

What is happening at the Ontario Labour Relations Board?

At this time, the Ontario Labour Relations Board (the "**Board**") continues to operate; it accepts applications/ responses/ interventions and other submissions and materials, and continues to hold mediations, Case Management Hearings, and hearings via teleconference or videoconference when possible and appropriate. However, all in-person hearings between March 25 and May 4, 2020, inclusive, are cancelled.

All filings must be made electronically through the Board's e-filing process or they will not be accepted. This includes authenticated electronic union membership cards and photocopies of paper membership cards for Applications for Certification. As of March 25, 2020 the Board will not accept applications, submissions, etc. via fax or mail / courier.

The Board has also amended the rule regarding service of certain applications. In particular, certification applications, termination applications, construction industry grievance referrals, and applications for interim orders may now be served via email, in addition to fax and courier.

The fact the Board continues to operate and has made it easier to serve and commence applications electronically is significant. Unlike Ontario's courts, the Board exercised its discretion under O. Reg. 73/20 and has not suspended the usual time periods and deadlines in its proceedings.

To enforce and apply the usual time periods and deadlines, an Applicant must file a declaration stating the "employer continues to

operate and carry on business". This is not an onerous or complex requirement; a declaration is not the same as an affidavit and does not need to be sworn or affirmed. Instead, the Board's application forms now contain a standardized declaration that need only be signed and dated by the Applicant.

Employers who continue to operate, particularly employers in the construction industry, must remain vigilant while administrative and other employees work from home. In particular, employers must ensure incoming faxes and email accounts, including general inquiry email accounts, are checked regularly and frequently to ensure timely responses within mandated timelines. For example, if an employer continues to operate, it still has only two days to respond to an Application for Certification that is served via fax or email.

5. Litigation, Arbitration and Court Procedures

Are the courts open?

No – the courts are not open to hear any matters. All matters scheduled for any type of hearing have been adjourned. However, the filing counters at some courts may still be open to receive physical filings. Lawyers and process servers have been advised to refrain from visiting the courts unless absolutely necessary. As a result, it is likely that filing counters will only receive filings for urgent matters. Urgent matters have been defined as matters:

- (i) relating to COVID-19/public health and safety;
- (ii) where, immediate and significant financial repercussions may result if there is no hearing; or
- (iii) the Court deems necessary and appropriate to hear on an urgent basis.

What is happening to my on-going or scheduled mediation, arbitration or court action?

Court Actions

Hearings and deadlines in court actions before the Superior Court of Justice and Court of Appeal have been suspended indefinitely

retroactive to March 16, 2020, unless the presiding judicial officer directs otherwise or, if before the Court of Appeal, the matter is being case managed.

As noted above, all civil matters scheduled for any type of hearing (including video or tele-conference) have been adjourned. Accordingly, any mediation scheduled by the parties with a judicial officer should have been adjourned. The only exception, as noted above, is if the presiding judicial officer directs otherwise.

All deadlines by which parties are required to take steps in a proceeding are also suspended indefinitely, unless the presiding judicial officer directs otherwise. For example, if a party was required to file a statement of defence, or respond to undertakings within a certain period of time, that time period has been extended indefinitely.

However, parties are still free to agree to deadlines to complete steps in the litigation process. Enforcing those deadlines may be difficult, though, as the courts are only hearing urgent matters, as described above. Accordingly, our expectation is that parties will generally not be able to compel one another to advance their proceeding until (i) litigation deadlines are re-instated, or (ii) the court expands the kinds of matters it is willing to hear on short notice.

With respect to (ii), the Chief Justice of Ontario has announced that, starting April 6, 2020, the scope of matters that will be heard by the Superior Court of Justice will be expanded. We suggest that you consult [this link](#) for further details regarding the kinds of matters that will be heard in your region starting April 6, 2020.

Mediations & Arbitrations

As noted above, any mediation scheduled by the parties with a judicial officer should have already been adjourned. However, parties are free to mediate or arbitrate their dispute with a non-judicial officer. Given current government recommendations with respect to social distancing and restricting non-essential travel and meetings, it is likely that any mediation or arbitration will need to take place virtually or by tele-conference. Parties should speak with

their counsel about whether they should proceed with a virtual mediation or arbitration given the nature of their case.

Can I still start an application or action or file an appeal?

Yes – you can still start an action or appeal by electronically filing a statement of claim, notice of action or the materials for your appeal. Unfortunately, the Rules do not permit the electronic filing of a notice of application (the form required to commence an application). As noted above, it appears at this time that filing counters at the courts may be open to receive a physical filing of a notice of application. However, it is very unlikely that the court will provide a return date for the application when filed given that all matters have been adjourned.

Can I still preserve, perfect or vacate a lien?

Yes – you can still preserve a lien. Parties are still able to register their liens on title through Teraview. Parties can also attend at their respective Land Registry Office to register a lien between 9am and 12pm.

Yes – you can still perfect a lien. Perfecting a lien involves two steps: (i) issuing a statement of claim and certificate of action; and (ii) registering that certificate of action on title to the property. Parties can have their statements of claim and certificates of action issued online. As noted above, parties can then register their certificate of action on title to the property in the normal course.

Whether you can vacate a lien will depend on how urgent the matter is. Vacating a lien requires a short motion. Given that the courts are closed, counsel must now send your motion materials to a trial coordinator, together with a statement regarding the urgency of the matter. The trial coordinator will forward that to a “triage” judge who will decide whether your motion is sufficiently urgent to be heard.

As noted above, the court is only hearing matters (in writing, virtually or by tele-conference): (i) relating to COVID-19/ public health and safety; (ii) that are urgent/time-sensitive where immediate and significant financial repercussions may result if there

is no hearing; or (iii) that it deems necessary and appropriate to be heard.

As a result, the kind and number of motions the court will likely agree to hear are limited. This comment is subject to the limited additional matters the court may hear starting April 6, 2020, as noted above.

6. Limitation Periods, Liens and Holdbacks

What has happened to the limitation periods for liens and for bringing claims? Can I still preserve and perfect my lien rights?

On March 20, 2020, the Province of Ontario, through the Lieutenant Governor in Council, passed [Ontario Regulation No. 73/20](#) further to s.7.1 of the *Emergency Management and Civil Protection Act* (in this section, the "**Regulation**"). The Regulation suspends any limitation period under any statute, rule, by-law or order of the Government of Ontario. In addition, the Regulation suspends any provision of any statute which provides for any period of time to take a step in a proceeding or intended proceeding. The suspension of limitation periods and time limits to take steps is "for the duration of the emergency" and is retroactive to March 16, 2020. While this appears, at first instance, to suspend the time limits to preserve and perfect liens as well as the two year time limit to set lien actions down for trial, we nevertheless strongly recommend that parties adhere to all deadlines under the lien legislation to the extent possible in order to preserve their lien rights. We make this recommendation for the reasons which follow.

Firstly, even if the deadlines to preserve and perfect liens have been suspended by the Regulation, this does mean the right or ability to do so has been suspended. Early preservation of lien rights should still be carried out for all the same reasons one would normally do so, which includes freezing the flow of funds until and unless the claim for lien is addressed, either by paying the lien or paying the claimed funds into court to vacate the lien. As noted above, electronic registration of liens is the predominant method of preservation and is still available. Preserved liens can still be perfected by the electronic issuance of Statements of Claim and Certificates of Action.

Secondly, there are a number of previous decisions by the Ontario Divisional Court to the effect that the expiry of a lien further to s.37 of the *Construction Act*, RSO 1990, c.C.30 (formerly the *Construction Lien Act*) was not considered a “limitation period”:

Section 37 extinguishes a lien. It is not a limitation period and cases such as *Basarsky v. Quinlan*, [1972] S.C.R. 380, 24 D.L.R. (3d) 720, giving the court power to grant relief from limitation periods, are not applicable.¹

Section 37 stipulates that a perfected lien expires unless the relevant lien action is set down for trial within two years of perfection. If s.37 is not a limitation period, then neither is s. 31, which provides that liens expire if not preserved within 60 days. If s.31 is not a limitation period, then the first section of the Regulation, which suspends “limitation periods”, has no effect on the 60 day deadline to preserve liens. Thus, it is safer to preserve the lien on time. The same holds true for s. 36 which provides that a preserved lien will expire if not perfected with specified periods. It is safer to perfect the lien on time.

Thirdly, the second section of the Regulation suspends the time limit to take any step in a proceeding or contemplated proceeding. A claim for lien can only be enforced within a lien action commenced further to the *Construction Act*. An action is a proceeding. Thus it can be argued that the preservation of a claim for lien is a step in a contemplated proceeding and thus, the 60 day time limit for preservation is now suspended. But this will not be known until a court interprets this provision, which will likely not happen until after the emergency. Thus, it is safer to preserve the lien on time.

Accordingly, lien claimants should assume they still have the normal deadlines to take steps to preserve their lien rights. We also suggest perfecting preserved liens on time and setting lien actions down for trial within two years, as it is uncertain how the second provision of the Regulation will be interpreted. Lien claimants should only rely

¹ *Benjamin Schultz & Associates Ltd. v. Samet*, [1991] O.J. No. 1406 (Div. Ct.) at pg. 5. See also *Krypton Steel Inc. v. Maystar General Contractors Inc. et al.*, 2018 ONSC 3836 (Div. Ct.) and *Golden City Ceramic & Tile Co. v. Iona Corp.*, 1993 CanLII 9364 (ON SCDC).

upon the Regulation in the event they have inadvertently missed those deadlines and may be able to rely upon the Regulation to save otherwise expired lien rights.

Should/Will holdbacks still be released?

It should be noted that the Regulation was written in very broad language. The legislative intent will be interpreted by the courts in the context of the Legislature wishing to preserve parties' rights in the midst of a pandemic which makes normal steps to preserve those rights difficult. Notwithstanding the pre-pandemic caselaw which distinguished between "limitation periods" and statutory "time limits for the expiry of liens", it is entirely possible that the court will look at the broad language of the Regulation and rule it was intended to prevent lien rights from expiring during the emergency, period.

Surprisingly, the desire to preserve lien rights has a significant and unintended consequence of preventing the release of holdback. Quite simply, holdback can only be safely released by a payor if the underlying liens have expired. If liens cannot expire because of the new Regulation, then holdback cannot be safely released.

Parties rely upon s.26 of the Construction Act to allow for the proper release of holdback. Section 26 is as follows:

26 Subject to section 27.1, each payer upon the contract or a subcontract shall make payment of the holdback the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, **where all liens that may be claimed against that holdback have expired** or been satisfied, discharged or otherwise provided for under this Act. (emphasis added)

The typical practice of payors is to search title 61 days after the publication of certificate of substantial performance and release holdback if no liens are registered. This is no longer a safe practice. If the Regulation prevents liens from expiring, then payors cannot rely upon the highlighted language of s.26 to safely release holdback. The consequence of releasing holdback prior to liens expiring is to, potentially, pay that holdback over again. Understandably, payors

who are paying attention may be reluctant to release holdback if they know the underlying liens cannot expire because of the Regulation.

It should be noted that the same language appears in s.25, which allows for the release of holdback in the case of subcontracts which have been certified as complete.

The provisions of s.26 (and s.25) also allow for the release of holdback where the underlying liens have been "satisfied or otherwise provided for under the Act." Thus, if a contractor can convince (or provide a Statutory Declaration, Indemnity or such other enforceable assurance to) an owner that all subcontractors have been fully paid (including holdback) such that all underlying liens have been discharged by payment, then it would be safe to release holdback relying upon these alternative grounds. This will be more cumbersome and time consuming and may not, in some cases, be possible. As stated above, it is the expiry of liens based upon the passage of time that is relied upon by parties for the release of holdback in the vast majority of cases. If liens do not expire, holdback cannot be safely released.

In summary, the new Regulation will either catch payors of holdback unawares, or will require more careful payors to take additional steps to safely release holdback. For now, we recommend that no payor release holdback without taking this new regime into consideration and/or getting advice. For a more detailed analysis, see the following [Bulletin](#). We would also suggest that readers keep abreast of legislative amendments to the Regulation that may be forthcoming to correct the confusion caused respecting the expiry of liens and release of holdback.

[Concluding Remarks](#)

The foregoing addresses many of the most pressing of topics impacting our clients at this time. In addition to the content provided in this document, readers may also wish to visit the [McMillan COVID-19 Resource Centre](#) and, in particular, view the recent webinar provided by the authors, held on March 31, 2020, and accessible [here](#). In addition, please look for our bulletin due to be released next

week that will focus on best practices for construction projects through COVID-19.

McMillan’s team of construction lawyers continues to be fully available to answer your construction and project-related questions. If you have any questions or concerns you would like to discuss, please do not hesitate to contact Jason J. Annibale (jason.annibale@mcmillan.ca) or Glenn Grenier (glenn.grenier@mcmillan.ca).

GTA MUNICIPALITIES

<u>Municipality</u>	<u>Status</u>
<p>City of Toronto</p>	<ul style="list-style-type: none"> • Declared a State of Emergency as of March 23, cancelled all non-essential services and all City buildings, including City Hall, Metro Hall and all civic centres are closed to public. • Building Permits & Inspections: <ul style="list-style-type: none"> ○ Still issuing building permits that were ready to be issued prior to March 16 ○ 24/7 emergency building inspections services will continue. ○ Building permit inspection reports can now be conducted by a qualified professional in lieu of a City inspector. Click here for more information. ○ Suspended services include: <ul style="list-style-type: none"> ▪ Building, Sign Permit and Zoning intake, review and issuance ▪ All building inspection services other than emergency inspections ▪ All information requests, complaints and reports ○ Toronto Building will not be able to accept or issue building permits. In addition, no preliminary project applications, zoning reviews, or property information letters can be applied for, processed or issued. ○ All progress inspections by City of Toronto are currently on hold. However, if a building permit has been issued (and not revoked), construction or demolition can proceed in accordance with the permit, provided the owner/agent submits a progress report at each mandatory inspection stage. ○ Click here for more information. • City Construction Projects: <ul style="list-style-type: none"> ○ City-led infrastructure construction has been deemed essential and will proceed for important City water and transportation infrastructure, as well as City facilities including parks and recreation facilities. This construction is essential to ensure the City’s infrastructure and

	<p>facilities remain safe, in a state of good repair and able to meet Toronto’s needs.</p> <ul style="list-style-type: none"> • Court Services: <ul style="list-style-type: none"> ○ Provincial Offences courtrooms, public counters, email and call centre services are closed. Applications and payments can be submitted by regular mail. All online services remain available to the public. ○ All Provincial Offences Act matters (e.g., traffic tickets and offences under provincial legislation) scheduled until May 29, 2020 will be rescheduled. Parties and witnesses do not need to attend court. Notice of a new court date will be sent to individuals by mail to the address on file with the court ○ All Provincial Offences Act (POA) matters scheduled from Monday, March 16, 2020 through to and including Friday, May 29, 2020 will be adjourned and rescheduled to a later date. If you have a matter scheduled during this time, are a witness or an interpreter, you do not need to attend court. This applies to all POA courts in Ontario. Notice of a new court date will be sent to individuals by mail to the address on file with the court. ○ All Provincial Offences courtrooms, public counters, email and call centre services are closed. City of Toronto POA intake services are closed. Urgent intake matters are directed to the Criminal Intake court located at Old City Hall, 60 Queen St. W. ○ Provincial Offences court applications and payments can be submitted by regular mail. All online services remain available to the public – access to court forms; making a payment and looking up your court case status. ○ City Tribunals (e.g. the Administrative Penalty Tribunal; Toronto Local Appeal Body; and Toronto Licensing Tribunal) have postponed in-person hearings beginning March 16, 2020 to a future date. All scheduled teleconference hearings will proceed as scheduled. ○ At this time, Toronto Court Services will not be responding to email or answering phone calls.
<p>City of Brampton</p>	<ul style="list-style-type: none"> • Declared a State of Emergency as of March 24 2020; • All City facilities closed until further notice, including City Hall. • Building Permits & Inspections <ul style="list-style-type: none"> ○ Buildings Division closed until April 5. No applications for permits or registrations will be accepted. ○ Buildings Division will only be accepting inspection requests via email (inspections.scheduling@brampton.ca) and/or fax (905.874.3763) for the period of March 17 to April 3, 2020. Inspection requests are to be submitted no later than 2 pm for the following working day. Inspections to be conducted of unoccupied buildings only. • Court Services

	<ul style="list-style-type: none"> ○ The Provincial Offences Court is closed March 16, 2020 through to Friday, April 3, 2020 inclusive. Matters scheduled until May 29, 2020 will be rescheduled. Applications and filings from Enforcement Agencies to be submitted through the City drop box, available at the main entrance to the facility. Payments can be submitted by regular mail, telephone or online (www.brampton.ca or www.paytickets.ca) ● City Procurement Projects <ul style="list-style-type: none"> ○ Bidding process proceeding as normal, including submitting questions and bid closings. Some procurement processes could take longer than usual due to City facilities closure. ○ For general inquiries, vendors may contact Purchasing at purchasing@brampton.ca.
<p>City of Markham</p>	<ul style="list-style-type: none"> ● All City facilities are closed to the public until further notice. ● Construction Investigation Requests: <ul style="list-style-type: none"> ○ Unsafe building reports will be investigated immediately. ● Building Permits: <ul style="list-style-type: none"> ○ Questions related to building permit applications and zoning inquiries can be emailed to: buildingstandards@markham.ca, and related to building permit inspections, email: bins@markham.ca ○ Applications: Building Permit applications can be submitted online. All on-line permit application functionality including payments of permit fees less than \$60K will continue to operate (contact buildingstandards@markham.ca for permit status); Plan review and permit processing and issuance will continue via ePLAN. Plan review staff will be available by email. Conditional permit processing will be evaluated on a case by case basis. ○ Inspections: Make inspection requests through ePLAN or by calling 905 475-4850. Inspections of all new construction, including occupancy permits for new and unoccupied buildings, will continue with enhanced procedures for inspector health and safety. Permit holders are required to book all required inspections as per the Ontario Building Code. Inspections for occupied buildings will be suspended until further notice. ● Engineering Department is closed to the public with staff working remotely to support City projects. <ul style="list-style-type: none"> ○ To submit engineering drawings or reports, upload the consultant’s FTP site/Dropbox and email the Development Services Front Counter at DSC@markham.ca and the project engineer. ○ To submit cheques, drop them off at the Markham Civic Centre drop box.

<p>City of Mississauga</p>	<ul style="list-style-type: none"> • Declared a State of Emergency as of March 23, 2020 • All facilities and public counters closed until further notice, including City Hall and the Provincial Offences Courthouse; • Planning and Building Services counter suspended until further notice. All general inquiries can be processed via 3-1-1 Contact Centre (905-615-4311 outside city limits). • Building Permits & Inspections: All online application functionality will continue at this time. Can apply, update and complete application-related tasks via ePLAN. Services at the Inspection Services counter suspended until further notice. Inspections can be scheduled online at Building Permit Inspections; however, inspection requests will be prioritized and/or deferred where possible. • Only electronic payments will be accepted. Please utilize our existing online portal. If you require the ability to use another form, please contact 3-1-1.
<p>City of Vaughan</p>	<ul style="list-style-type: none"> • Public closures until further notice, including Vaughan City Hall • Council, committee and task force meetings cancelled until further notice, except for Council and Committee of the Whole. • Accepting building/permit submissions, however processes may change without notice. Contact Building Standards Department at buildingstandards@vaughan.ca • For building inspections, email buildinginspections@vaughan.ca
<p>City of Hamilton</p>	<ul style="list-style-type: none"> • City facilities closed until at least April 6, including municipal service centres, public counters and City Hall. • Provincial Offences courtrooms closed; appearances scheduled until May 29, 2020 will be adjourned and rescheduled. • Building Permit applications may be made online using ePLANS; questions can be sent to eplans@hamilton.ca; for inspections, call: 905-546-2424 ext. 7777 • Building Inspections: City is still completing the following inspections: (i) Construction without a permit (proactive/reactive) visible from the street (but not interior at this time), (ii) unsafe conditions, (iii) new houses/semis/towns, (iv) new small Part 3 and 9 buildings, (v) Interior Part 3 reno. work (case-by-case basis), (vi) sign, septic, and solar collector permits, (vii) pools – new and unsafe. City Building Inspection team has final say, and may refuse an inspection. The City is contemplating use of virtual inspections.
<p>City of Ottawa</p>	<ul style="list-style-type: none"> • Declared State of Emergency on March 25, 2020. • Facilities and services closed or cancelled until further notice, including City Hall and Building Code Services Counters • Provincial Offences Courthouse closed until May 29, 2020. • Building Code Services (“BCS”) building permit delivery service: via courier (with cheque) to City of Ottawa – Building Code Services, 100 Constellation Drive, Ottawa, ON K2G 6J8; smaller residential applications can be submitted online email (buildingpermits@ottawa.ca) • BCS Inspections staff will <u>not</u> enter occupied areas of the certain building types for the purposes of carrying out their duties

	(personal dwellings, long-term care facilities, seniors’ residences and retirement homes, hospitals, and daycare facilities)
Region of Peel	<ul style="list-style-type: none"> • Development Services staff are available to participate in one-on-one phone calls, conference calls, or virtual meetings. • Applications: Building Permits are administered at the local municipality; Region provides Servicing Approval for Water and Waste/Storm Water connection approval. Servicing staff are still reviewing applications and taking them to the approval stage. Submissions via courier or mail will not be accepted as counters are currently closed to the public. • Approvals, clearances or correspondence will be issued electronically via e-mail. • Payments cannot be processed by cheque, visa or debit at this time. Region is working with accounts receivable to receive payments in the form of Electronic Fund Transfers so that they can provide their final Site Servicing clearance to the applicant. Meanwhile, Region is working with the local municipalities on alternative payment options. • Issuing for Construction (IFC) process is being evaluated case-by-case based on criticality of the site and availability of Water Operators (this is under review as resources are very limited, therefore field services may be temporarily delayed or deferred).
Region of York	<ul style="list-style-type: none"> • Declared State of Emergency on March 23, 2020. • York Region facilities are currently closed to the public. • Applications: Building Permits are administered at the local municipality;

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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