

# Goodmans<sup>LLP</sup> Update

## COVID-19 – Ontario Construction Law Update

The COVID-19 pandemic has affected industries across the globe, and the construction industry is no exception. This update addresses recent events that have impacted the construction industry in Ontario.

After declaring an emergency under the *Emergency Management and Civil Protection Act*, the Ontario government made an Order retroactively (as at March 16, 2020) suspending limitation periods and procedural time periods in Ontario proceedings (the “**Suspension Order**”). The Suspension Order provides:

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.

As discussed below, the Suspension Order could impact key time periods under *Ontario’s Construction Act* (the “**Act**”), including time periods for liens and holdback release.

The Ontario government then made an **Order** requiring all but “essential businesses” to close for at least 14 days (this has been **extended** until at least April 13, 2020, with likely extensions to follow). Initially, the majority of construction projects were classified as “essential” businesses, and most worksites were allowed to remain open across Ontario.

However, on April 3, 2020, the Ontario government revised the Order to significantly narrow the list of “essential businesses” (the “**Closure Order**”). As at April 4, 2020 at 11:59pm, only the following construction projects are allowed to remain open in the province:

1. 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.
2. 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.
3. Critical industrial construction activities required for:
  - a. the maintenance and operations of petrochemical plants and refineries;
  - b. significant industrial petrochemical projects where preliminary work has already commenced; or
  - c. 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.

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4. Residential construction projects where:
  - a. a footing permit has been granted for single family, semi-detached and townhomes;
  - b. an above grade structural permit has been granted for condominiums, mixed use and other buildings; or
  - c. the project involves renovations to residential properties and construction work was started before April 4, 2020.
5. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

For any construction projects that do not fit into the list of “essential” businesses, the Closure Order permits temporary access to the project for the purposes of, among other things, security services, inspections/maintenance/repairs, and performing work to comply with any applicable law.

For any construction projects that fit into the list of “essential” businesses, the Closure Order requires the person responsible for a project to ensure that it operates in accordance with all applicable laws, including the *Occupational Health and Safety Act*. In addition, the person responsible for a project must operate in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

## Impact of the Suspension Order and Closure Order

Although there has been significant debate on this issue, there seems to be a general consensus in the legal community and construction industry that the Suspension Order suspends (as at March 16, 2020) the deadlines for the preservation and perfection of liens set out in sections 31 and 36 of the *Act*.<sup>1</sup>

The suspension of deadlines to preserve a lien also impacts the release of statutory holdback, as provided for in the *Act*, which could seriously impact the flow of funds through the construction pyramid.

With the ongoing effects of the Suspension Order and the recent changes to the list of “essential” businesses under the Closure Order, it is anticipated that parties will continue to preserve and perfect liens within the deadlines set out in the *Act*. It is also anticipated that until the COVID-19 emergency is resolved, the release of statutory holdback will continue to be impacted.

Goodmans understands that certain trade groups and legal associations are seeking direction from the Ontario government about the effect of the Suspension Order on construction projects, including whether modifications need to be made to the Suspension Order to allow timelines under the *Act* to be reinstated, in whole or in part.

Goodmans will continue to monitor developments, and will provide further updates as information becomes known. To discuss these developments, or other ways in which COVID-19 may affect your construction project, please contact any member of our [Construction and Infrastructure Group](#).

All Updates are available at [www.goodmans.ca](http://www.goodmans.ca). This Update is intended to provide general comment only and should not be relied upon as legal advice.  
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<sup>1</sup> The debate surrounds whether the Suspension Order effectively operates to suspend limitation periods (under paragraph 1) or time periods in an Ontario proceeding (under paragraph 2).