



CBABC BRIEFING NOTE

Builders Liens, Payments on Construction Projects and Limitation Periods

March 26, 2020

PURPOSE

This briefing note summarizes the effect on payments on construction projects regarding builders liens in British Columbia in the event limitations periods are suspended or extended by the BC government as a result of the COVID-19 pandemic health emergency.

BACKGROUND

On March 20, 2020, the Government of Ontario made an Order by [Ontario Regulation 73/20](#) under section 7.1(2) of the [Emergency Management and Civil Protection Act, R.S.O. 1990 c. E.9](#) (the Order). The Order suspended any limitation period under any statute, rule, by-law or order of the Government of Ontario. The suspension of limitation periods is for the duration of the COVID-19 emergency. The Order is in force retroactive to March 16, 2020.

The Order does not expressly say that it applies to the time period within which to file claims of builders lien regarding construction projects. However, section 19 of the [Limitations Act, 2002, S.O. 2002, c. 24, Sch. B](#) provides that limitation periods are of no effect unless listed in the Schedule to that Act. The Schedule to that Act lists sections 31 and 36 of Ontario's [Construction Act, R.S.O. 1990, c. C.30](#), which set out the timeframes for filing and perfecting claims of builders lien. As a result of this chain provided for by these enactments, the deadline to file a claim of builders lien in Ontario is likely a limitation period that has been suspended by the Order.

Under Ontario's *Construction Act*, most owners and contractors must retain, or hold back, 10% of the value of work done from amounts payable. This holdback is to be retained until the time period for a lien holder filing a lien on title has expired.

As a result of the Order, there is concern in Ontario that the time for filing claims of lien will not expire and therefore 10% of the price of most construction contracts or subcontracts will be held back indefinitely. This is an obvious and unintended problem at a time when contractors and workers are already facing significant cash pressures due to COVID-19. A likely effect of the Order is to freeze the flow of funds on construction projects in Ontario. This is to the detriment of workers, subcontractors, and contractors who are expecting to be paid holdbacks, and to the detriment of owners whose projects are nearing completion.



Another unintended effect of the Order is to increase the risk of insolvencies, abandoned projects and unpaid workers. Two recent articles written by prominent Ontario law firms further highlight the problem.¹

In our view, this unintended negative consequence occurring in Ontario can and should be avoided in BC.

BUILDERS LIENS AND LIMITATION PERIODS IN BC.

Currently in BC, unlike Ontario, limitation periods are not suspended.

Section 20 of the [Builders Lien Act, S.B.C. 1997, c. 45](#) provides that a claim of builders lien must be filed with the Land Title and Survey Authority of British Columbia (LTSA) within 45 days of substantial completion.² The BC [Limitation Act, S.B.C. 2012, c. 13](#) does not expressly provide that builders lien filing periods are limitation periods, but the point is not free from doubt.

Like Ontario, BC has a similar 10% holdback process for construction projects. Section 4 of the *Builders Lien Act* governs the holdback process in BC.

Under the *Builders Lien Act*, a suspension on the time limit to file claims of lien might not have the same effect as in Ontario. This is because in BC the holdback period runs from the time of substantial completion and expires 55 days thereafter. After expiry of the holdback period, under section 8(4) of the *Builders Lien Act*, holdback may be paid out and all liens against the holdback are discharged. Therefore, in BC, a suspension on the time limit to file claims of lien might or might not prevent owners from paying out holdbacks, or it might leave lienholders (who believe their deadlines to be suspended) without a remedy if they do not file liens before the expiry of the holdback period as they are ordinarily required to do.

THE POTENTIAL PROBLEM IN BC

If the BC government follows Ontario and suspends or extends the time for filing claims of builders lien, it would likely have similar unintended negative effects in BC as in Ontario and freeze the flow of funds on construction projects in BC.

¹ See <https://mcmillan.ca/Can-I-Safely-Release-Holdback-in-Ontario-After-March-16-2020> and <https://bit.ly/2JnpBjn>.

² Where no certificate of completion has been issued, the 45-day period runs from 45 days of completion, abandonment, or termination of the head contract, or alternatively the improvement.



THE SOLUTION FOR BC

To avoid the problem in Ontario regarding construction projects occurring in BC, we recommend a two-fold solution for BC.

First, in the event the BC government intends to enact legislation or make an order for a suspension or an extension of limitation periods or other deadlines imposed by statute, we recommend that claims of builders lien be specifically excluded. Builders lien claims are filed with the LTSA. Currently, the LTSA remains open for online filings,³ or filings by unrepresented persons by mail.⁴ As a result, there is no practical need to extend the time limits to file claims of lien. Indeed, it facilitates the completion of what construction work may still be done during the present COVID-19 emergency, and prompt payment for that work, if the normal time limits for liens and holdback release remain in place.

Second, we urge the BC government to allocate funds and technological resources to ensure that the Supreme Court of BC and Supreme Court Registry Services remain open to urgent applications regarding builders liens. Where claims of lien have been filed, the Supreme Court issues orders to ensure the flow of funds. Owners and contractors must apply to the Supreme Court for an order under the *Builders Lien Act* under section 24, permitting security for claims of lien, or under section 23, permitting holdback monies to be paid into court for the benefit of lien claimants in order to permit payments to resume. That security or money must be physically deposited with the Supreme Court; it cannot be e-filed. Access to the Supreme Court is therefore also necessary to ensure that payments are not interrupted. As of March 25, 2020, we are pleased to see that a secure drop box is available at Supreme Court registries for physical filing of items such as cheques or bonds.⁵

However, we are very concerned about the closure of the Supreme Court and Supreme Court Registry Services to regular business. Urgent orders under the *Builders Lien Act* are not presently listed as matters that may proceed.⁶ We urge the Government to allocate funds and technological resources to ensure that the Supreme Court and Supreme Court Registry Services remain open to urgent applications regarding builders liens. Reasonable investments in technology now may well lead to significant future benefits for many, if not all, British Columbians.

³ See <https://ltsa.ca/news/service-notice-restricted-access-land-title-offices-starting-march-19-2020>.

⁴ See <https://ltsa.ca/property-info/file-claim-builders-lien>.

⁵ See https://www.bccourts.ca/supreme_court/documents/Registries_document_filing_options.pdf.

⁶ See <https://bit.ly/3dvNF7>.



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CONCLUSION

For further information or to provide any clarification or additional information that may be of assistance, please contact:

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