

April 6, 2020

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Dear Ministers:

Re: Pandemic Response In the Construction Industry

The Council of Ontario Construction Associations (“COCA”) is a federation of 29 construction associations representing approximately 10,000 general and trade contractors that perform work in the industrial, commercial institutional (ICI) and heavy civil construction sector in all regions of Ontario. COCA is mandated to serve as the voice of the ICI and heavy civil construction sectors at Queen’s Park.

Fixing the Unintended Consequence of Ont. Reg. 73/20

Ontario Regulation 73/20 made pursuant to the *Emergency Management and Civil Protection Act* suspended the running of limitation periods for the duration of the state of emergency. An unintended consequence of Ontario Regulation 73/20 is that it is delaying the payment of the holdback on completed construction contracts.

In the normal course, the 10% holdback maintained by an owner is released when all liens that may attach to the holdback have expired. For example, all construction liens on a project would usually expire 60 days after the publication of a certificate of substantial performance. Once all lien rights have expired, the owner would typically release the holdback.

As a result of Ont. Reg. 73/20, the liens of contractors and subcontractors are not expiring in the ordinary course. An owner that releases a holdback now runs the risk of having to pay the holdback twice if a contractor or subcontractor preserves a claim for lien that would otherwise have expired after 60 days. Wise owners are refusing to release holdback at all.

We suspect that the Province did not intend Ontario Regulation 73/20 to extend the deadline to preserve a construction lien because an extension was unnecessary. Lawyers are on the list of essential services. Contractors and subcontractors who want to exercise their lien rights are able to do so.

Cash flow is the lifeblood of the construction industry at the best of times. It is all that more important as the economic consequences for the pandemic take hold.

Therefore, we suggest that limitation periods pursuant to the *Construction Act* be exempted from the scope of Ontario Regulation 73/20.

Liability for Project Delays

Furthermore, we need legislation or a regulation that exempts contractors and subcontractors from liability for project delays to the extent that they are caused by the pandemic.

Non-essential construction projects have now shut down entirely by the government causing delays. Even essential construction projects will be delayed because supply chains have been disrupted, workforces have

been depleted, and productivity has been reduced as workers observe social distancing and other required health protocols.

Financing costs, insurance costs, bonding costs, and equipment rental costs are just a few of the expenses that will continue to accrue even as projects sit idle or are delayed. None of these costs were anticipated when the projects were bid and there will have to be a further discussion on how they will be addressed so that bankruptcies do not skyrocket.

Many contracts and subcontracts do not include force majeure clauses that exempt the contractor or subcontractor from liabilities resulting from delays caused by the pandemic. Without remedial action by the Province to insulate contractors and subcontractors from liability for delays caused by the pandemic, these contractors and subcontractors will likely be bankrupt by the time work is ready to resume.

Furthermore, the industry needs certainty. The industry cannot recover from this emergency if it has to spend the next five years in court fighting about who will bear these losses.

Therefore, the first part of the solution is legislation or a regulation that exempts contractors and subcontractors from liability for delays caused by the pandemic.

The second part of the solution is giving relief to construction owners. Owners are our customers. We will need construction owners to be in good economic health so construction can bounce back after the crisis has passed. Therefore, we encourage the Province to work with the federal government to grant construction owners relief from financing and other costs resulting from the pandemic.

COCA applauds the performance of the government in this crisis so far. The decisive measures taken by your government at the early stages of this crisis will save lives in the weeks and months to come. I suggest that your government needs to act with similar foresight to lay the groundwork now for a vigorous economic recovery once the public health crisis has eased.

We also support the decision of the Workplace Safety and Insurance Board (WSIB) to allocate the costs of approved COVID19 claims for Schedule 1 employers across all Schedule 1 employers and the same for Schedule 2. Employers of workers in essential businesses who go to work every day and risk infection and their lives for the benefit of the broader society truly deserve this treatment. The infections these workers suffer will have been acquired in the line of their duties ensuring that vital services are available in order to keep Ontario functioning. These workers and their employers are the heroes of this crisis

Respectfully,



Ian Cunningham President
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