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# Responses to Select Questions from the "The Impact of COVID-19 on the Construction Industry: McMillan Answers Your Questions" Webinar (Prepared: April 3, 2020)

On Tuesday, March 31, 2020, we hosted a webinar entitled "The Impact of COVID-19 on the Construction Industry: McMillan Answers Your Questions". We sincerely thank the webinar attendees for their participation and informed questions. Due to time constraints, we were not able to answer all of the questions that were raised during the webinar.

We have reproduced some of the recurring questions that were raised during and after the webinar, and we have provided written responses in this document. Please note that the following responses provide only an overview and do not constitute legal advice. The responses are not to be relied upon for any purposes outside the webinar. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained. In this latter regard, we would invite you to contact Jason J. Annibale (jason.annibale@mcmillan.ca) or Glenn Grenier (glenn.grenier@mcmillan.ca).

If you would like to view the webinar, a recording of the webinar, as well as a copy of the presentation slide deck, may be accessed here: The Impact of COVID-19 on the Construction Industry: McMillan Answers Your Questions.

## Topics:

1. **Frustration, Force Majeure, Delay, Notice**
2. **Liens & Holdbacks**
3. **Limitation Periods**
4. **Site Safety**
5. **Miscellaneous**

| | QUESTION | RESPONSE |
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| **FRUSTRATION, FORCE MAJEURE, DELAY, NOTICE** | | |
| 1. | I am a Trade Contractor who was forced to shut down all forming operations on a high rise project with 2 buildings under construction. The developer decided to close down all of the sites in Canada, although construction was considered an essential service. Is my firm entitled to make a claim for monetary compensation for the delay with respect to rented equipment on the site including tower cranes? | The answer to this question turns on the wording of your contract. Some contracts include clauses that permit developers/owners to suspend or terminate work on terms. Often such terms, afford trade contractors reimbursement for de-mobilization and re-mobilization costs. In the absence of an applicable suspension or termination clause, a shut down by the developer/owner could be considered an event that delays the trade contractor's completion of the work. There are often contractual terms affording trade contractors compensation for time and reasonable costs arising from such shut downs. Even in the absence of clauses dealing with compensation for trade contractors, trade contractors may be entitled to extensions of time and compensation at law. Regardless of the availability of compensation, parties are required to take reasonable steps to mitigate their losses. |
| 2. | Since the Pandemic is a new phenomenon and the situation is still fluid, what is the benchmark to ascertain if a notice of delay that is submitted by a contractor meets the CCDC contract requirements for a notice of delay. What minimum information should be included and if not submitted, the notice should be rejected due to lack of details, while being sympathetic to the unprecedented circumstances we are in? | A notice of delay should meet all requirements of the contract to the fullest extent possible. Typically, this will include the following:<br>• Identification of the specific contractual clause pursuant to which notice is being provided (e.g. Notice of delay pursuant to paragraph 6.5.3.4 of the CCDC 2)<br>• A description of the basis for the claim (e.g., description of the pandemic event and its direct impacts to scheduled performance of the Work). Some contracts may require more detail, such as a clear description of how the delay event has impacted the critical path (e.g., specifying critical path work impacted by the pandemic).<br>• The notice should be sent to the correct person (e.g., the Owner or the Consultant or the Construction Manager, as specified in the applicable contractual clause).<br>• The notice should be sent in the specified form (e.g., my mail or email) and to the address(es) specified in the notice provisions of the contract.<br>As the pandemic is on-going, however, we expect parties will not yet be in a position to fully quantify cost or |

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| | | schedule impacts. Subject to any contractual clauses to the contrary, generally these details should be provided within a reasonable time of their becoming available.<br><br>As discussed during the Webinar, we encourage parties to maintain frequent and open communication during this time of uncertainty. The issuance of formal notice of delay or claim under a contract should be seen as only the beginning of this dialogue. Parties such as Owners receiving notice should also recognize that the provision of notice is typically mandated by the contract and a step that the contractor/trade must take to protect their rights. In the context of this pandemic, the provision of written notice should generally not be perceived as confrontational or uncooperative. |
| 3. | In a situation where Covid-19 restrictions result in say a 3-month delay but this 3-month delay means that the work is delayed for 12-months (for example Work is required to be carried out in a particular season or is dependent on a power outage at a hydro plant which can only happen annually) would the full 12-month be considered as a force majeure issue or would it be considered a 3-month force majeure and 9-month Owner delay? | It should first be noted that calculating and establishing delay is a complicated matter. The assessment almost always requires the support of an expert. Reasonable expert minds often disagree on the extent of delay. Such disagreement often arises from the method of delay analysis that is applied. Often contracts require that for there to be any recovery for delays, there must be an impact to the critical path of the construction project. There are often provisions requiring contractors to re-sequence work and take other measures to limit or eliminate impacts to the critical path where delay events arise (whether force majeure or otherwise). The foregoing being said, and even with re-sequencing, it is theoretically conceivable that COVID-19 could impact critical path activities such that the delay of more immediate events has a cascading effect through the critical path and delaying later scheduled events, thereby expanding the total length of time required to complete the project. The force majeure event itself may have drawn to a close earlier, but the resulting delay impact could extend thereafter. In such a circumstance the delay impact would be considered with reference to the applicable force majeure clause. |
| 4. | We've issued our Notice of Delay letter due to COVID-19. The Owner (and Architect for that matter) are remaining silent and have not acknowledged the impact. What should we do? | First, look to your contract. There may be provisions stipulating what is to occur in the event the owner does not respond to your delay notice. Absent such a provision, call the owner to determine whether the owner intends to respond. The owner (or architect) may be waiting to determine what (if any) impact COVID-19 will have on the project. Open two-way communication on the |

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| | | construction site is vital during these challenging times, and there may be several reasons why the owner has yet to respond.<br><br>Second, ensure that you are issuing your delay notices in accordance with the construction contract both in terms of detail and timing. For many construction contracts, it will not be sufficient to baldly allege that the pandemic has caused delay. Many contracts require details of the delayed activity(ies), the cause of the delay, and any associated impact. COVID-19 itself probably did not cause the delay. Rather, COVID-19 and associated public health orders may have necessitated labour reductions on site or re-sequencing of activities. This means that new delays may be occurring on a daily basis, and some construction contracts require separate notices for every discrete delay. Issuing delay notices on a daily basis will, of course, quickly become unwieldly. If it becomes unwieldly, contact the owner to discuss a solution to deal with ongoing delay notices. If a solution is developed in collaboration with the owner, make sure you document it in writing. Again, open two-way communication on the construction site will be vital for the success of projects during this period. |
| 5. | Is the contractor entitled for extension of time and delay cost due to building inspector refuse to be on site to allow and accept occupancy even via photograph and letters by the prime consultant. The site remains a construction zone until the building inspection is conducted and resolved. | The contractor's entitlement to an extension of the Contract Time and/or increase to the Contract Price in the event of delay will be governed by the contract terms.<br><br>For example, in the standard form CCDC 2-2008, the Contractor is entitled to an extension of the Contract Time, but not to an increase to the Contract Price where performance of the Work is delayed by "any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor" (paragraph 6.5.3.4). Delay caused by inability to obtain an occupancy permit due to the pandemic arguably falls within a "cause beyond the Contractor's control". Therefore, under an un-amended CCDC 2-2008, the Contractor would only be entitled to an extension of the Contract Time as a result of such delay.<br><br>The CCDC 2-2008 does not otherwise speak to delay in performance of the Work caused by public authorities except where such authorities issue a stop work order (paragraph 6.5.2). To date in Ontario, no order equivalent to a stop work order has been issued by a public authority. Should this happen, however, pursuant to paragraph 6.5.2 |

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| | | of the CCDC 2, the Contractor would be entitled to an extension of the Contract Time and to reimbursement by the Owner for all reasonable costs incurred as a result of the delay. |
| 6. | Where an owner (due to taking reasonable Covid-19 precautions to maintain distancing) requests that a contractor work amended shift patterns, reduce crew sizes or even cease work in areas due to competing priorities this may cause the contractor to incur additional costs due to inefficiencies. Clearly the contractor will be entitled to the additional time as a result of these measures but in such instances would the owner expose themselves to additional cost or still be protected under Force Majeure provisions as the reason for the amended work patterns can be traced back to Covid-19? | To understand how the contract treats the payment of the contractor's costs due to "force majeure" events, a careful consideration of the contract is required. For the purposes of responding to this question we will assume that CCDC 2 is the applicable contract (i.e., a stipulated price model contract).<br><br>The first step is to determine the cause of the delay. Many construction contracts, including CCDC 2, do not use the term "force majeure", but they do include events that are commonly described as force majeure events. That is, delays that are caused by events beyond the contractor's control. This would obviously include a pandemic.<br><br>The next step is to determine which clause applies to the delay. In this case, 6.5.3 of CCDC 2 applies. 6.5.3.4 provides, in part, as follows:<br><br>*If the Contractor is delayed in the performance of the Work by … 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…. [and] … 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.*<br><br>That is, the contractor is entitled to extra time but no additional costs and the owner is required to give the contractor additional time but no additional compensation.<br><br>The burden of a force majeure risk of a delay is accordingly shared between the parties, which is the usual treatment of such risk in fixed price contracts.<br><br>Notably, in CCDC contracts that use the cost-plus model (e.g., CCDC 3), the owner pays all of the costs resultant from delay (except for those costs caused by the contractor's own failure to exercise reasonable care and diligence in performing its work). The entire cost risk is assumed by the owner – and this includes the risk of additional costs due to a force majeure event.<br><br>Lastly, it is important to ensure that the delay was in fact caused by the alleged force majeure event. As explained |

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| | | during the presentation, the pandemic itself probably is not enough to allege "force majeure" in most construction contracts. Rather, the delay must be caused by pandemic plus something else such as following directions of the public health organization regarding social distancing. The cause of the delay determines which contract provision applies, and what relieve the owner/contractor is entitled. |
| 7. | What do we tell Owners? Are additional COVID safety measures and potentially due to lack of productivity by maintaining social distancing on site, a valid cost claim per the current CCDC contracts? | To be answered in a bulletin to be released next week. |
| **LIEN & HOLDBACKS** | | |
| 8. | What are the implications to owners where the release of holdback monies become due during this period if the limitations are extended? While I understand the need to maintain monies if the lien period is extended, the effect will be that trades will be unable to receive monies due even if the project was complete prior to the onset of this issue. The effect might be a cycle of liens or other forms of claims related to additional financing of holdback that arise from non-payment at the end of the normal lien period. | If the project was finished before March 16, 2020 but the 60 day lien period did not run out before March 16, 2020, then you potentially have live lien rights. Releasing the holdback exposes the owner to paying that holdback over again if those with live lien rights subsequently register their liens and claim the holdback was prematurely released and should be paid over again (to the extent of their liens). That is the issue.<br><br>I agree you may face a round of trades registering liens because they did not get their holdback. The emergency measure unintentionally created a real problem and a real dilemma.<br><br>It may be possible, with the help of the general, to identify all significant subtrades, get them to acknowledge they are fully paid, except for holdback, and confirm they have no other claims. You could get them to execute a release in exchange for a holdback cheque. This may not totally eliminate the exposure, but if you have all the major trades involved in the arrangement, the potential exposure may be minimal and worth the risk. |
| 9. | In the event an owner releases HB in the face of the limitations issue, what is the responsibility of a GC with respect to those funds? | Firstly, the GC holds those funds in trust, as always, further to Part II of the Construction Act and has a statutory trust responsibility to distribue those funds. That is an obligation enforceable by the GC's immediate payees, but not enforceable as a trust right by the owner (but see "Thirdly" below). |

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| | | Secondly, the GC is, like the owner, a payor under section 26 (and section 25). They too are relying upon the expiry of the underlying liens to release holdback and are exposed if they prematurely release holdback. That exposure is to those lower down in the construction pyramid.<br><br>Thirdly, there is normally a clause in the contract that requires the GC to vacate liens of subcontractors or those lower in the lien pyramid if they lien. The responsibility to vacate the lien is usually to do so within a fixed number of days (it varies typically between 5 and 15 days). So if a trade liens after the release, the owner should make demand on the GC that they vacate. If they do, problem solved. If they do not, then the owner can claim against the GC for indemnity in the ensuing litigation. |
| 10. | Any thoughts on use of Holdback Bonds? Proscribed form under CA, and relatively uncommon, before now... | Yes, that is one of the items lawyers are discussing to help address this issue. |
| 11. | How about bonding off a construction lien? | If there is a lien on title that is holding up the project, or the financing etc., you may be able to convince the court it is 'urgent' and get a date for a motion to vacate on an urgent basis. We have not had to try yet, but we expect to. |
| 12. | It seems reasonable to suggest that the implications for the release of HB is likely an inadvertent consequence of suspending the limitation periods. Is there alternate recommendations for holdback release or a work-a-round to address? Retaining the holdback seems contrary to any stimulus efforts. | Absolutely it is an unintended consequence and runs counter to the stimulus efforts. That is why we have brought it to the Government's attention right away and suggested ways to fix it. Some of the work-a-rounds would include satisfying yourself that the underlying liens have already been satisfied or otherwise dealt with under the section 26 of the *Construction Act*.<br><br>**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***.<br><br>It basically means that all the potential lien claimants (the trades) have been paid in full already, which is difficult given we are talking about release of holdback. As Geza suggested, parties may need to pick up the phone and talk cooperatively, exchange information and get the payments released in the manner discussed under the answer to Q. 8 |

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| | | above. Other ideas include lien bonds or indemnities (i.e. the GC gives the owner a written indemnity that in exchange for the release of holdback, the GC will indemnify the owner if any subtrade subsequently files a lien).<br><br>Remember, release of holdback is not prohibited if the liens have not expired. It is not against the law. It just exposes the payor to paying holdback funds twice. If that risk can be eliminated or reduced by having parties (or the major parties – GC and large subcontractors) agree to release their lien rights in exchange for a holdback payment, the risks can be reduced, probably to an acceptable level.<br><br>For more information on this issue, please see our bulletin. |
| **LIMITATION PERIODS** | | |
| 13. | Has the deadline for invoice payment been changed, due to suspension of the limitation periods? | Not specifically. However, that depends on whether an adjudication is considered a "proceeding" or an "intended proceeding" under section 2 of Reg. 73/20 and thus whether the delivery of a "proper invoice" is considered a step in such proceeding or intended proceeding. That may be a stretch, but the answer is we do not know and we will not know until a court rules on the issue.<br><br>The practical answer is to ask this question: how will enforcement for non-payment of a proper invoice (prompt payment, the failure of which lead to adjudication) take place under the current lock down emergency? How can documents be properly served? How can an adjudicator hold a hearing? Even if an adjudicator can hold a virtual hearing, how can the ruling be enforced because that requires a Court order which may require a hearing, which have been suspended. It appears, absent being able to convince a judge that the matter is urgent, that adjudicators' rulings will not be able to enforced until the shutdown is over.<br><br>These rulings, however, will eventually be enforceable, and interest will payable.<br><br>In summary, one should comply with the payment of proper invoices under the time limits under the Act, if possible. We expect consequences for those that do not in terms of orders for payment of interest and enforcement costs. |

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| 14. | Does limitation period apply to projects that achieved substantial performance after March 16th. | Yes. If the deadline to register a lien has been suspended under the new Regulation, then publishing a certificate of substantial performance may do little good. The purpose of publishing is to start the 60 day lien clock under the Construction Act. The concern is the new Regulation has stopped that clock from ticking.<br><br>However, it is not certain that the new Regulation does suspend the expiry of liens. It is simply uncertain. Thus, it is suggested that if your project is substantially performed, publish, wait the 60 days and then assess the situation. It may very well be that between publication and the end of the 60 days, the Government may clarify or amend the Regulation to address release of holdback. If not, then at the end of the 60 day period, consider one of the alternatives described in answer to question 8 – 12 above. |
| 15. | If you have a general civil breach of contract claim against a supplier for which the statute of limitations would otherwise have expired soon, is there anything that should be done to ensure / memorialize the extension of the SOL (notice to court, notice to other party, etc.)? Like lien filings, should such claims/proceedings nevertheless be commenced? | There is no requirement to provide notice to the court or other party about the extension to the limitation period. The limitation on the claim has been suspended, so provided it was scheduled to run out after March 16, 2020, the limitation clock has stopped ticking and will not start again until the emergency is declared to be over.<br><br>Notwithstanding, it is still possible to issue a Statement of Claim electronically. So you should do so if possible. Remember, the suspension of limitation periods is not a prohibition against starting actions, it simply extends the time for doing so. If you can start an action, you should as soon as possible. You can even serve it (if you can find a process server still working), but the second section of the new Regulation suspends the deadline to file a Statement of Defence, but that suspension will no last forever. If will end at the end of the emergency or whenever the new Regulation has expired (for technical reasons beyond the scope of this answer, the emergency provisions only last 90 days, unless extended). If you issue your statement of claim during the shutdown, you will have the peace of mind that you have still acted within the limitation period. |
| 16. | Does the suspending of time-lines for the Lien Period also apply to the timelines for prompt payment under the construction act? | See answer above to question 13 above. Specifically no. Generally, maybe. Practically, they cannot be enforced during the emergency. After the emergency, the penalty will be interest. |

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| 17. | Does the indefinite extension of a lien expiry affect the security position of subsequent construction advances under a construction facility? | Excellent question. For regular draws no. This is because section 78 does not depend upon the expiry of construction lien rights to give regular draws priority (unlike the holdback release provisions of sections 25 and section 26 which expressly rely upon the expiry of lien rights). A financier only loses priority pursuant to section 78 if the advance is made in the face of a registered lien or if the financier has previously received a written notice of lien. If a financier, even now (after the passage of Regulation 73/20), does a search and finds no liens registered and has not received a written notice of lien, then the preconditions for priority of that ordinary advance over liens has been satisfied under the *Construction Act*.<br><br>As always, this does not apply to the draw for holdback. As always, the priority of the construction financier is always subject to any deficiencies in the holdback. |
| **SITE SAFETY** | | |
| 18. | If you have a staff member that might be particularly sensitive to COVID 19, such as a person with a heart condition or an older worker, is there a legal obligation to take special protective measures with them? | It is the policy and position of the Ontario Human Rights Tribunal that testing positive for, or becoming sick with, COVID-19 is a disability under the Human Rights Code (the "**Code**"). This policy states "employers have a duty to accommodate employees under the Code in relation to COVID-19, unless it would amount to undue hardship based on cost, or health and safety" and "should also be sensitive to other factors such as any particular vulnerability an employee may have (for example, if they have a compromised immune system)."<br><br>Risk of exposure to COVID-19 may also trigger an employer's obligations under the Occupational Health and Safety Act (the "**OHSA**") to "take every precaution reasonable in the circumstances" to protect the worker.<br><br>In this scenario, the employee should initiate the request an accommodation and identify the health and safety risk his/her condition poses in light of COVID-19. The employer may already have sufficient information about the employee's condition to assess the request and, if necessary and possible, accommodate the employee accordingly. If the employee is disclosing a medical condition for the first time, the employee may be required to provide medical evidence, such as a doctor's note, that indicates the employee's risk factor(s) and limitations (not necessarily a diagnosis or background medical information) that the employer is being asked to accommodate. |

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| | | If the employee has a genuine medical condition and cannot be accommodated in the workplace because it would cause an undue hardship, consider allowing the employee to work from home (if possible), use vacation time, consider and apply for disability benefits (if applicable), or take a leave / temporary layoff and apply for Employment Insurance or the Canada Emergency Response Benefit.<br><br>Each accommodation situation is unique; whether an employer has reached the point of "undue hardship" in its accommodation efforts should be discussed with counsel before taking alternative action. |
| 19. | As the "owner" in construction would it be prudent of me to ask all GCs performing work on my site submit their protocols / plans in regards to COVID-19 to protect all contractors, subcontractors, and all visitors to their project site? | Yes. The person acting as the "constructor" or "prime contractor" under applicable health and safety legislation (e.g., the OHSA or the BC Workers' Compensation Act) (hereinafter the "constructor") is responsible for establishing health and safety protocols and ensuring compliance with their requirements at the site. Often, this role is taken on by the owner's contractor or construction manager. As the owner you should request information from your "constructor" regarding the health and safety protocols established to address COVID-19 at the site. To the extent that you have your own health and safety policies, we recommend cooperating with the "constructor" to ensure consistency and effective implementation of all such policies at the site. Communicate the health and safety protocol to all contractors and trades working at the site and, where applicable, request that they provide updated versions of their own health and safety protocols to confirm consistency and compliance. Engaging in dialogue with all contractors and trades at the site regarding any questions or comments on health and safety protocols is also recommended – this will help obtain their buy-in to the protocols being implemented which in turn may help minimize the number of workers not coming to work. Confirm that the "constructor" and all other contractors and trades at site have, or can obtain, all resources required to fulfil the health and safety protocols (e.g. sanitizer and/or handwashing stations). Where the owner is not the "constructor", be careful not to inadvertently assume this role through your communications. Be clear |

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| | | that this responsibility remains with the person or entity that has been appointed and allow them to take the lead in implementing the health and safety protocols. |
| 20. | As an owner representative we recommend transferring as much risk to the constructor, especially when it comes to site health and safety. So, should we require or request that all PPE be provided by the constructor and not have the owner take the liability of supplying the proper or adequate amount of PPE and cleaning supplies. It is still the constructor's site and their responsibility for H&S? And, if the owner does provide PPE do they take on the role of constructor? | Where the contractor has taken on the role of "constructor" or "prime contractor" (e.g., under the Occupational Health and Safety Act (ON) or Workers Compensation Act (BC)), then they are responsible for health and safety at the site. This has not changed.<br><br>The contractor's responsibility to pay for the PPE required for compliance with health and safety legislation, however, will depend on the terms of the contract.<br><br>For example, in a cost-plus contract such as a CCDC 3, the cost of all PPE, including extra PPE required to address COVID-19, would be borne by the owner as part of the cost of the Work.<br><br>Under the CCDC 2, however, these costs are typically included in the Contract Price. In order to claim an increase to the Contract Price for extra PPE required to address COVID-19, the contractor must identify the basis for such a claim either in the contract or at law. For example, in the CCDC 2 there may be opportunity for the contractor to recover the costs of PPE required to address COVID-19 pursuant to paragraph 10.2.7 which allows for a claim for increase to the Contract Price where there has been a change to applicable laws, ordinances, rules, regulations or codes subsequent to the time of bid closing which affects the cost of the Work.<br><br>Payment for or provision of PPE and supplies by the owner alone will not make the owner "constructor" or "prime contractor" for the purposes of the applicable health and safety legislation. Where the owner chooses to provide PPE, it should ensure such PPE meets a minimum standard of care (i.e., take reasonable steps to ensure that the PPE is reliable and functional) to prevent claims of negligence where contractors rely on such resources. We also conservatively recommend that any time the owner makes a specific request or provides direction or resources to the "constructor" relating to its health and safety obligations, the owner confirm in writing that it is not assuming the role or responsibilities of the "constructor" and that such |

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| | | actions by the owner do not relieve the constructor of its responsibilities as such. Consider also making a statement that provision of PPE is done in goodwill only. At the end of the day, it's in everyone's interest to have the work continue safely. |
| 21. | How do we (as an Owner or their representative) respond if upon site inspection, we believe contractor's site conditions are not appropriate, but the contractor believes it meets their COVID safety requirements or if they simply don't want to implement measures due to additional costs to them. Is there an OH&SA or MOL clause that we can refer to? | Often, construction contracts will provide the owner with the right to remove from site any personnel that the owner deems to be a hazard or cause a danger to the health and safety of others. Additionally, the contractor will often have construction safety obligations (e.g., CCDC 2, GC 9.4.1) and have a contractual obligation to "maintain the Work in a safe and tidy condition" (e.g., CCDC 2, GC 3.13.1). Therefore, if the owner is of the opinion that certain personnel should be removed site or that the contractor is in breach of its health and safety obligations, notice to this effect may be issued by the owner in accordance with the applicable contract terms. Where the contractor fails to remove the personnel or correct the default as required by the contract, often this gives rise to rights of termination which may then be exercised by the owner in its discretion.<br><br>As detailed in Question 20 above, the contract terms will govern who is responsible to pay for the cost of implementing health and safety requirements. Where the contract provides for these costs to be borne by the contractor, failure to comply with their contractual obligations due to the associated costs would constitute breach of contract which can be addressed as described above.<br><br>Where the Ministry of Labour determines that appropriate health and safety measures have not been implemented at the site, it has the authority to stop work. |
| 22. | I believe the Provincial (Ontario) Government has limited the number of people (gathering) to 5. How does that apply to a construction site? Would that be 5 people for the entire site? or 5 people per work area? | The Province has amended O. Reg. 52/20 to prohibit (a) organized public events, (b) social gatherings, or (c) religious gatherings, of more than 5 people. Arguably, private/commercial enterprise is not captured within this prohibition. This conclusion is additionally supported by the inclusion of construction services as an "Essential Service" under Sched. 2 of O. Reg. 82/20, though this may soon change. |

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| 23. | There is a challenge that exists where some trade activities may not be able to be safely performed if workers are at minimum 6 feet apart, or the actual task required may not be possible to be completed if maintaining 6 feet of separation. Does the use of a mask by worker(s) allow them to work together in a space less than the recommended 6 feet of social distancing? | "Social distancing" of 2 metres is a recommended best practice, not a rule. Consider and review the applicable health & safety policy. For example, the Canadian Construction Association Standardized Protocols state "Workers at sites avoid working less than two meters from others for prolonged periods unless their role requires closer proximity. In such cases, appropriate face masks and other PPE must be worn."<br><br>Activities that require two people working less than 2 metres apart to be performed safely, and cannot be performed safely in any other way, are the exceptions contemplated in the CCA policy and other model policies. When performing 2-worker activities, try to schedule and perform the activity safely and efficiently, and then separate by 2 metres as soon as reasonably possible. |
| 24. | Would taking extra preventive measures for H&S and operation by GC crew entitle them for extra cost under the COVID situation? | The contractor's responsibility to pay for the cost of PPE and other extra preventative measures required for compliance with health and safety legislation in the context of COVID-19 will depend on the terms of the contract. See response to Question 20 above for more detail in this regard. |
| **MISCELLANEOUS** | | |
| 25. | Can you offer any advice in regards to the role of the Consultant during this crisis. The advice largely provided by our professional body (Ontario Association of Architects) has been not to comment/offer advice related to COVID-19. | The Consultant's contractual obligations remain unchanged. For example, where the Consultant's services include payment certification and review and response to requests for information, change notices and/or delay notices, the Consultant remains obligated to perform these services. This would include consideration and response to claims for schedule extension or increase to contract price as a result of COVID-19. On the other hand, for example, the Consultant is not typically responsible for ensuring or advising in respect of health site and safety. Therefore, in this regard, we would not expect the Consultant to provide advice regarding the implementation of health and safety measures to address COVID-19. |
| 26. | A remote Indigenous community has imposed a lockdown and has prevented access to the community. Where does the site security and safety reside? Is the Owner | The answer to this question is informed by the subject contract and the identity of the constructor under the Occupational Health and Safety Act. The contractor is typically the constructor and accordingly responsible for safety at the site. There are often contractual provisions |

| | QUESTION | RESPONSE |
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| | now responsible or is it retained by the Contractor? | that this responsibility remains with the contractor in the event of a shut down. However, if the owner of the site has prevented the contractor from accessing the site, such an action would expose the owner to having to assume the responsibilities for safety of the site as a constructor. A contractor who is registered as the constructor on a Notice of Project with the Ministry of Labour, and has been barred from accessing a site by the owner, should consider informing the Ministry of Labour that the contractor cannot carry out its duties as constructor while barred from the site. |
| 27. | The majority of the discussion has focused on projects currently under contract. What are the groups thoughts on projects under tender or about to tender? What language / clauses should be included to appropriate protect all parties in the uncertain environment going forward? I assume Force Majeure clauses no longer apply because the pandemic is known and issues are arguably avoidable. | To be answered in a bulletin to be released next week. |