AIRD BERLIS

Legal Update: COVID-19 & Construction

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As Ontarians emerge from the stricter quarantine phases of the COVID-19 pandemic, businesses and industries are taking stock of the new realities and their impacts on business practices and plans. While many construction professionals are engaged in the same process of evaluating changes and readjusting plans, the Ontario construction industry has, in these early days, followed a fairly unique path and may be further along the learning curve than other industries in Ontario.

Today, work continues on most projects that have been deemed "essential". The current trend has seen the provincial government add more categories of construction projects to the "essential" services list. As the quarantined parts of the construction industry bring themselves back online, we are all discovering what impact the pandemic has had on the contractual and legal obligations relating to construction contracts and construction projects. While there will undoubtedly be a host of legal issues that have yet to emerge, we have encountered some trends among our contacts, including owners, contractors and service providers.

This overview is the first in a series of updates that will explore legal issues that have arisen in the construction industry resulting from the COVID-19 pandemic. Subsequent updates will address the following topics in greater detail:

- project delays and force majeure claims
- the "essential" services list
- new workplace social distancing and hygiene requirements
- issues on the horizon

1. Managing Delays

In our anecdotal experience, delays in construction projects began to appear in February as a result of supply chain obstructions caused by quarantine measures in China. Even as construction projects were designated as essential services as part of the provincial government's initial mandatory workplace closure order (the "MWCO") in mid-March, the growing anxiety about COVID-19 transmission led increasing numbers of job sites to reduce or cease operations. As a result, delays in construction projects had already become widespread by the time the provincial government removed most construction projects from the "essential" services list in early April.

The *Daily Commercial News* reported results of a survey of 200 Ontario construction contractors conducted by the Ontario Construction Secretariat. The survey showed that nearly two-thirds of respondents (64 percent) had ceased working on their projects entirely, while similar numbers expected coming work delays (65 percent) and a medium-to-high impact on supply chains (63 percent).

In most Ontario construction contracts (i.e. the unmodified CCDC forms of contract), there are express provisions that deal with delays in the performance of contractual obligations. The delays we have seen in Ontario are the result of (i) supply chain/labour disruptions that have been experienced by most construction projects, whether or not they have been designated as "essential" services, and (ii) the MWCO, which has resulted in certain construction projects being forced to cease operations (i.e. for those projects that do not fall within the categories of "essential" services).

In general, for delays that are not caused by either the owner or the contractor, construction contracts provide for an extension in the contract time, but do not require monetary compensation to the contractor except in certain circumstances.

Specifically, delays caused by "unforeseen circumstances beyond the contractor's control" (commonly referred to as "force majeure") will result in an extension of the contract time equivalent to the period during which the contractor's performance of the work was prevented. However, the relevant contractual provisions expressly provide that, in the case of such delays, the contractor shall not be entitled to payment for costs incurred as a result of such delays unless such delays result from actions of the owner.

On the other hand, where the contractor has been delayed as a result of a "stop work order issued by a court or other public authority," the contractor is entitled to be compensated for its costs incurred as a result of such delays. We think it is likely that the MWCO is a "stop work order issued by a court or other public authority" for purposes of these provisions.

Over the coming months as remobilization accelerates, we expect to see owners and contractors engaged in negotiations (and disputes) relating to change orders to deal with the fallout from COVID-19-related delays.

2. Essential Services List

The provincial government's initial MWCO designated construction projects of all kinds as "essential" services. Subsequent iterations of the MWCO drastically reduced the list of categories of "essential" construction before ultimately re-expanding the list by adding specific subcategories of projects.

Following the first MWCO, we fielded many inquiries from clients wanting to know whether their projects were "essential" services for purposes of the MWCO. While many projects were capable of being clearly delineated as "essential" or "not essential", there were a number of projects and ancillary activities for which the answer was less than clear. Along with many other people involved in construction projects, we placed inquiries, both formal and off-the-record, to contacts in various governments to seek greater clarity. While some of these government offices were more forthright in their off-the-record conversations, the short answer is that all branches of the applicable governments consistently refused to provide definitive advice about the "essentialness" of any particular business.

Given that the various government offices have steadfastly refused to provide definitive advice, some of our clients engaged in attempts to create ad hoc "safe harbours" by demonstrating the efforts they had undertaken to clarify their legal status. In addition to seeking (and being denied) clarity from government officials, some of the other "safe harbour" measures we have seen included:

- Requiring a counterparty to provide a legal opinion that confirms the counterparty's interpretation that the project is "essential" within the meaning of the law;
- Requiring a counterparty to provide a statutory declaration certifying that the counterparty had made the appropriate investigations and analysis and determined that, to the best of their knowledge, information and belief, the project is "essential" within the meaning of the law.

While there can be no certainty that such a self-constructed safe-harbour would be an effective defence against a charge under the *Emergency Management and Civil Protection Act*, given the novelty of the present circumstances, we think a court would look favourably on a party that can demonstrate that it took all reasonably available efforts to establish the lawfulness of its conduct.

3. Workplace Social Distancing & Hygiene

As described above, all construction projects were designated as essential services through to the beginning of April. This coincided with the period during which the rate of the coronavirus' exponential spread was increasing. As a result, construction projects that did remain open became a focal point for public discussions about social distancing and hygiene in the workplace.

Rising to the challenge, various levels of government (see for example the Ontario government's resource page on "Construction site health and safety during COVID-19") and industry associations (see for

example the Canadian Construction Association's "COVID-19 – Standardized Protocols for All Canadian Construction Sites") have developed and implemented new protective instructions for best practices. Those measures will likely be adapted as the global medical community becomes better acquainted with the disease and its modes of transmission.

The MWCO references the fact that even "essential" businesses are required to operate in accordance with the *Occupational Health and Safety Act* and other applicable laws. The MWCO goes on to note that "essential" businesses are required to "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." This means that contractors will need to be mindful of any additional COVID-19-related instructions issued by local health authorities. When (if?) the MWCO expires, it will be interesting to see whether local health authorities' instructions and recommendations are given the same force of law as they have achieved under the MWCO.

4. On The Horizon

1. Does my business interruption insurance policy cover COVID-19 losses?
2. Who is responsible for the financial consequences of:
    - increased insurance premiums;
    - persistent delays due to supply chain issues; and
    - ·new workplace social distancing & hygiene measures?
3. How are the new prompt payment and interim dispute resolution mechanisms functioning under quarantine conditions?
4. What will subsequent quarantine periods look like for the construction industry?

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