

## COVID-19 SPECIAL BULLETIN 10

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### **MATTERS DESERVING IMMEDIATE ATTENTION**

#### **General Review and Site Visits**

*Provincial government policy has allowed construction activity to continue at most construction sites during the COVID-19 pandemic. Some of the work has been deemed “essential” under government directives. Other projects have continued or commenced when provincial restrictions were relaxed.*

*This intermittent construction activity has impacted architects who are required to carry out their Contract Administration and Site Review roles in order to meet professional and contractual obligations.*

*This Bulletin updates and reinforces advice to architects originally included in Pro-Demnity [COVID-19 Special Bulletin 5](#), issued on April 7, 2020.*

### **WHERE ARE WE NOW?**

A great deal has happened since the onset of COVID-19 – including the institution of a variety of provincial directives related to construction activity in Ontario. Of particular significance to architects has been the designation “essential” applied to a number of projects, allowing them to continue through much of 2020 and into the first part of 2021.

As explained in [Pro-Demnity COVID-19 Special Bulletin 5](#), architects’ and engineers’ visits to construction sites – in order to carry out general review and reporting with respect to new and ongoing construction projects – may be considered essential within this context. This is true at least to the extent that such services cannot be delivered on a work-from-home basis, or via any other arrangement that satisfies the COVID-19 workplace safety objectives and requirements.

In a few recent cases, however, where construction sites were deemed essential, and safety measures were prescribed, significant transmission of the COVID-19 virus occurred within the work crews. [A December 10, 2020 CP24 article](#) reported 15 (or more) positive tests for the COVID-19 virus at a hospital project in Toronto. More recently, [a February 2, 2021 report in the Toronto Star](#)

advised that there had been 68 positive tests at a very large, multi-project, multi-developer site in downtown Toronto.

The CP24 report included a comment from the contractor, that despite the numerous outbreaks, they “had no intention of halting operations unless instructed otherwise by health authorities.” The more recent Toronto Star article, headlined “All COVID-19 workplace outbreaks will now be made public,” reflects an apparent change in policy intended to provide more transparency for those who might be interested. This report also indicated disagreement between the contractors/developers responsible for the construction site safety measures and the public health authority concerning the definition of “outbreak.” Do 68 positive tests at a single jobsite qualify? Toronto Public Health (the designated authority) strongly believed the answer is “yes.”

This is a very small sample of the ongoing Ontario construction projects – of all sizes and types – involving architects, but it is informative. The Toronto Star article goes on to say that, according to epidemiologist Patrick

Saunders-Hastings, “construction is a higher-risk sector for workplace outbreaks,” and that, as other research shows, “almost half of the workplace outbreaks were in the category that includes construction.”

Construction sites have always been recognized as “dangerous” workplaces, where access is restricted, and safety precautions are mandatory for visitors – including architects and their employees. However, the available information confirms that, despite the required measures to prevent the spread of the virus, architects and their consultants must recognize that attendance at any construction site is inherently risky, as a potential source of exposure to the COVID-19 virus. Recognizing the increasing warnings of more easily transmitted COVID-19 variants, concern should now be heightened.

Where work is underway at a construction site, architects need to take care to balance their professional and contractual obligations with their duty as a regulated profession to protect the public interest. This includes not just the health of the public, but their own health as well.

**Notwithstanding the public health requirements for social distancing, the mandatory closure of many businesses, and the adoption of work from home measures by others, there has been no change to the regulatory and contractual obligations of the architect respecting its general review and contract administration services applicable to its projects.**

## **ARCHITECTS' DUTY TO PROTECT THE PUBLIC NEED NOT BE WRITTEN DOWN**

As a general principle, architects providing professional consulting services will not be responsible for the means or methods of construction, including the provision and maintenance of health and safety provisions at a construction site. Those responsibilities belong to the contractor or, in some instances, the owner.

However, where construction continues and observations of progress at the site by the architect or other consultants continue to be required during COVID-19, architects, clients, consultants, contractors and every individual involved in the construction all have a duty to do their utmost to adhere to the recommended and mandated protocols. Architects, consultants and contractors must adapt their general review procedures in order not to threaten the public interest by contributing to the spread of the COVID-19 virus.

Although architects may not be directly responsible for the provision and maintenance of required safety measures, they should make a point of assessing (and perhaps recording) the COVID-19 measures in place at any site they visit. Where they recognize oversights or lapses in application of the COVID-19 protection measures, they should meet any “duty to warn” about the potential dangers by bringing the situation to the attention of the contractor or the contractor’s site superintendent at the first opportunity, with a written record of the warning (See Document Everything!, Item 3, below).

## **IT IS NOT “BUSINESS AS USUAL” IN 2021**

The province of Ontario has issued a number of COVID-19 workplace safety directives and requirements for construction sites. The Ontario Ministry of Labour, Training and Skills Development, provides [a comprehensive explanation of the array of workplace measures](#) that are

considered necessary to address construction site health and safety during COVID-19.

The webpage includes numerous links to other related information sources to assist contractors, owners and architects in better understanding the rationale behind the requirements. These include a link to a “tip sheet” entitled [Construction: Guidance for Health and Safety](#).

This tip sheet represents a one-page summary, designed to be posted at a construction site, identifying Employer Responsibilities and Worker Rights. It makes clear that “workers have the right to refuse unsafe work” and can seek enforcement of the requirements by filing a complaint with the Ministry’s Health and Safety Contact Centre.

**COVID-19 construction-site protective measures include the following:**

- Wear a mask;
- Practice physical distancing and stay two metres from other people;
- Conduct meetings outdoors;
- Clean tools before and after use;
- Clean toilets frequently;
- Make hand washing or sanitizing stations easily available;
- Disinfect facepieces and other personal protective equipment;
- Stagger start and finish times;
- Bag clothes when taking home laundry

Architects and engineers are among those entitled to be kept safe at the construction site. Presumably architects and their consultants are also entitled to refuse to provide on-site services if the workplace does not meet the required standards identified by the Ministry. The application of these requirements and recommendations will not be uniformly applied throughout the construction industry. Architects may become aware of lapses in application – or worse, apparent non-compliance with some of the mandated safety procedures – and not unreasonably, consider the circumstances unacceptable.

***What can they do?***

In those instances where the contractor is not adhering to safety or other applicable regulations, and the architect’s contract is silent on the right to suspend its services, the architect should promptly notify the contractor and owner and review the situation with a lawyer.

Some architects’ (or engineering consultants’) agreements with their clients may have a provision

respecting the architect's (or consultant's) rights to suspend its services under specific conditions. OAA Document 600-2013 includes GC9.3 (2) that allows the Architect to suspend services related to general review in the event that "construction of the Work proceeds in the absence of a building permit and without the chief building official dispatching building officials to the site or, if the Architect becomes aware of an action taken by the Client which violates applicable building codes or regulations." However, legal advice in 2020 questioned whether this clause would apply to allow the architect to suspend its services if the absence of building officials was due to COVID-19.

In 2021, failure of a client or a contractor engaged by a client to adhere to the province's regulations, including its published COVID-19 workplace protection requirements, might trigger an architect's right to suspend its services until the contractor addresses the missing safety requirements. Any architect would be wise to consult a lawyer about the specific circumstances before suspending its general review services.

Going forward, to avoid any ambiguity, all architects would be wise to incorporate specific provisions in their Client-Architect Agreements, coordinated with similar provisions respecting the role of the Consultant in the Construction Contract, affirming the architect's (and its consultants') rights to suspend on-site services at a construction site where required or recommended COVID-19 protective measures are not being provided and enforced. An example is provided below:

"The Architect or its consultants may suspend the provision of any on-site services on the Project where COVID-19 protective measures are not observed or enforced in accordance with governmental directives, regulations or statute."

As always, the implementation of any contractual provisions should be done with the benefit of legal advice.

## **WHEN YOU TAKE CARE OF YOURSELF YOU TAKE CARE OF OTHERS**

Architects, like everyone else, have an obligation to support the public health objectives of reducing the spread of the COVID-19 virus: social distancing, self-isolation and working from home. This may mean changing the way they perform general review.

During 2020, the widely distributed advice from public health authorities encouraged all Canadians to assume responsibility for helping control the spread of the virus. It included the reminder, “When You Take Care of Yourself You Take Care of Others.” In 2021, the guidance from health authorities has been expanded to include more specific advice: Work from home wherever possible; wear a mask; and maintain two metres distance from others. These requirements are among those included in the Ministry of Labour, Training and Skills Development advisories noted above.

## **SITE VISITS FOR GENERAL REVIEW: WHAT SHOULD ARCHITECTS DO?**

*The following draws on advice provided in April 2020 in [Pro-Demnity's COVID-19 Special Bulletin 5](#). Many of these suggestions have been successfully adopted by architects during the past year*

- 1.** Review your Client-Architect Agreements. It is important to determine the precise contractual wording with respect to the architect's general review obligations and suspension of architectural services. If suspension of architectural services is permissible under the contract, the architect may opt to suspend site visits, or use the provision to apply additional leverage to encourage a client or contractor to adhere to the architect's own conditions for visiting a site.
- 2.** Be aware that there will be situations where the architect declines or is unable to visit a construction site that could possibly result in the shut-down of construction with negative consequences for others. Architects should be prepared to consider alternative means of providing general review services for the project during COVID-19, even if the architect is not familiar with such alternatives (See Adopt Alternate Measures, starting with point 8, below).
- 3.** While architects and consultants are not responsible for the contractor's activities, including safety on the site, if the architect has concerns about inadequate COVID-19 safety precautions, it should write to the contractor (with copies to the client, the municipality, consultants, etc.) requesting the contractor's specific advice on what COVID-19 protocols and facilities it has in place to ensure safety and health at the construction site. Refer the contractor (and client) to the [Ministry of Labour, Training and Skills Development webpage](#) for specific expectations and requirements.
- 4.** Write to the client (with copies to the municipality, the contractor and consultants) advising the client of the responses (or lack thereof) received to date and whether you are satisfied that your general review responsibilities can be carried out safely.

## **Document Everything!**

**5.** If the architect is not satisfied that its general review obligations can be carried out safely, it will need to notify the client, contractor, municipality and consultants, in writing, regarding the time period that the architect will not be providing general review, giving reasons for the temporary suspension of these obligations, stating clearly that it continues to provide contract administration services remotely.

Obtaining legal advice for this step is recommended as clients may interpret the temporary suspension of general review services as a breach of contract. Additionally, suspending general review of the construction in circumstances in which the municipalities are not inspecting the work may cause delays and potential claims against the architect. This is where protective contractual provisions as suggested earlier could be helpful.

## **LOOK AFTER YOURSELF AND OTHERS**

**6.** If the architect is satisfied that it can perform its field review services safely, in accordance with the social distancing and other COVID-19 measures described by the contractor, it should do so. The architect may add its own conditions – perhaps scheduling visits at times when other activities and persons will be absent or well away from the work being reviewed. Alternatively, the contractor or subcontractors may provide date-stamped photographs or videos of work that the architect may not be able to see under safe conditions.

**7.** If the architect, any consultants, or key employees are subject to non-voluntary self-isolation measures, the architect should write to the client, contractor, other consultants and the building department explaining the reasons for not attending the site.

## **Adopt Alternate Measures that Work for You**

**8.** Consider use of available technologies as a means of viewing and recording the status of the work at the site. For instance, observations by the architect and other consultants required for general review, deficiency reviews, and reports required by a municipality for an Occupancy Permit may be achieved through photographs or videos taken by the contractor, or video conferencing between the contractor at the site and the architect at a remote location. If possible, confirm that the municipality will accept technological alternatives to the progress reports that the architect would normally provide.

**9.** Any reports or communications to the client or any authority, including the municipal building

department, should clearly describe the means and conditions under which the site observations that the architect (or consultant) is relying upon were carried out. It would be prudent to include date, time, location and a brief description on any video or photographs. It goes without saying that image quality should be sufficient to allow recipients to make an effective evaluation. Photographs and video recordings should be retained for reference if required by any authority at a later date.

**10.** Remind clients and contractors that, if they choose to proceed with construction in the absence of inspections by municipal building officials, they do so at their own risk. Upon returning to the site, a building inspector may require concealed work completed in its absence to be opened up so that it can be inspected.

**11.** In the event that a Client-Architect Agreement includes a force majeure provision, obtain legal advice to assess whether the COVID-19 circumstances are covered. To trigger a force majeure provision the architect must send out written notices that it is enacting the provision. Legal advice is essential.

**12.** Monitor the OAA website and advisories respecting COVID-19 regulatory and practice concerns raised by architects. The circumstances arising from COVID-19 are unprecedented, and a pandemic is not specifically anticipated in the Regulation to the Architects Act or in the Regulatory Notices and Practice Tips previously issued by the OAA. Questions from architects and answers available from the OAA respecting regulatory concerns and the delivery of architectural services during COVID-19 will continue to evolve.

## **ARCHITECTS CANNOT REPLACE BUILDING OFFICIALS**

**Architects should be reluctant to accept the unilateral transfer of risk from a municipality to the architect. That is not what the law requires and it is not what architects have contractually bargained for.**

As discussed in [Pro-Demnity COVID-19 Special Bulletin 4](#), taking on the statutory obligations of the municipality and its building officials is NOT among the “usual or customary” services of an architect covered by professional liability insurance.

At the time of writing, it appears that inspections are being conducted; however, the pandemic is unpredictable and municipalities may well take differing approaches. If the architect is unsure whether the municipal building officials are performing site inspections, it should write to the

municipality (with copies to the client, the contractor, consultants, etc.) requesting the municipality's specific advice on whether they intend to carry out their statutory obligations under the Building Code Act for each specific project.

In the event the municipality is not performing its independent inspections, the architect should expressly indicate by way of a disclaimer (in all correspondence and all site review reports) that the architect's site reviews:

- DO NOT relieve the contractor of its duty to perform its work in accordance with the plans and specifications pursuant to the Ontario Building Code and the requirements of all authorities having jurisdiction, and
- ARE NOT a substitute for and DO NOT replace the statutory duties of authorities having jurisdiction including the municipal building officials, to carry out their own independent inspections.

If an architect provides general review, in circumstances in which the authorities having jurisdiction including the municipal building officials have stopped performing progress inspections, it is strongly recommended that a disclaimer be included in any correspondence or reports directed to any clients, consultants, contractors and authorities, including municipal building departments.

***The recommended disclaimer from Bulletins 3 and 4 is repeated below.***

The recommended disclaimers that follow do not reduce the standard of care that the architect must meet. Evidence that the project was well managed with adequate quality

#### ***DISCLAIMER - Short Form***

***This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.***

*This disclaimer should be considered mandatory for any reports or correspondence that are submitted to a building department or any authority having jurisdiction.*

#### ***DISCLAIMER - Long Form***

*This report is issued and should be read together with all previously issued reports, including reports issued by any and all consultants. Nothing in this report relieves the contractor from performing its work in accordance with the plans and specifications, pursuant to the requirements*

of the Ontario Building Code and the requirements of all authorities having jurisdiction. The contractor shall ensure that its work is inspected by all authorities having jurisdiction. **This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.**

The full wording of the recommended Long Form of the disclaimer addresses a number of issues that may arise on construction projects during COVID-19. **The final sentence in bold should be considered mandatory** for any reports or correspondence that are submitted to any authority having jurisdiction including a municipal building department.

## THE FOUR “C”S COUNT!

### Consideration, Communication, Collaboration, Cooperation - Keys to a Win-Win

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During the COVID-19 crisis, architectural practices should continue to make special efforts to maintain open lines of communication with everyone involved in their projects – consultants, contractors, suppliers, building officials and clients – to share information, concerns and ideas as early and as often as possible.

For many architects this isn't a departure from normal behavior, but it is particularly important now, when uncertainty, confusion and a constantly shifting business environment are keeping us all on edge. No one will benefit from the fallout that can result from a simple misunderstanding, lack of clarity about a problem, or a missed opportunity to resolve an issue before it escalates. Contractors and clients may not always like what they hear, but they will appreciate and respect your efforts to be transparent and forthcoming.

Consideration and implementation of alternate means of achieving everyone's objectives requires a willingness to be creative problem solvers. Clarification of your professional role and limits may assist others recognize the importance of contributing to the problem solving, and help them make better decisions themselves.

Keeping the lines of communication open gives architects the opportunity to reaffirm the importance of adhering to their own professional duties of care, and the reasons why architects cannot accept the transfer of the municipality's role onto themselves.

But at some point, the municipal building inspectors will be back on the job and the quality of record keeping during their absence will speak to the quality assurance measures that were in place at the project.

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